THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DAVID JAKES,

APPELLANT

APPELLATE CASE NO. 2011-198747

Appeal from Colleton County
Perry M. Buckner, Circuit Court Judge

Opinion No. 5158

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on July 10, 2013. The Court granted appellant's petition for rehearing and issued a revised opinion on October 2, 2013 affirming appellant's conviction and sentence. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Jakes argued on appeal that trial court erred in not excusing Juror 102 and allowing her to remain seated on the jury when she disclosed, after the jury was seated and sworn, that her husband had been a full time deputy with the Colleton County Sheriff's Department until two and one/half years ago and was currently a reserve deputy.

The Court of Appeals affirmed the trial court's ruling. The Court of Appeals held that Jakes cited no authority for his specific proposition that a trial court abuses its discretion in not removing a juror when a defendant contends he would have exercised his peremptory challenges differently had he known "material" but previously omitted facts about any particular juror, regardless of that juror's professed impartiality. Therefore, the court proceeded to determine solely whether the juror was impartial. The Court held that the trial judge's refusal to excuse the Juror and to substitute her with an alternate was not an abuse of discretion because the juror was impartial.

The Court of Appeals misapprehended the issue.

ISSUE: On June 3, 2010, Jeanine Metzfield was following her daughter, Amanda Metzfield and Amanda's husband, Jesse King, with a U- Haul trailer as they were moving to Florida. As they were passing through Colleton County, engine troubles with her truck forced them to stop and transfer the U-Haul to the other vehicle. R. 147, ll.15 – 25; R. 148, ll. 1 – 25.

They stopped on the exit ramp around midnight. As Jesse knelt down to work on the truck, a car stopped in the middle of the intersection. A male jumped out of the back seat with a large pistol in his hand and a black t-shirt over most of his head. R. 149, ll. 1 – 25; R. 150, ll. 1 – 25; R. 151, ll. 1 – 25. The man said to Jeanine to either "put'em up, pretty lady" or "get'em up, pretty lady." R. 152, ll. 1 – 25.

At that point, Jesse, who was an explosives disposal specialist with the Army, jumped up, pulled his gun, and ordered the man to get back in his car and leave. The man then pointed his gun at Jesse. Jesse shot at the man several times until the man fell. Then the people in the car started firing at Jesse. The injured man dropped his gun and crawled into the car, and the car drove away. R. 171, ll. 1 – 25; R. 172, ll. 1 – 25; R. 174, ll. 1 – 25; R. 175, ll. 1 – 25. Jesse called 911. R. 176, ll. 1 – 24.

According to the testimony of the third co-defendant, James Davis, Jakes came and picked him up from his house on June 3, 2010 to go out and "look for girls." They picked up McMillan, and then returned to Jakes' grandmother's house for him to get his gun. Although the Cadillac Jakes was driving belonged to his grandmother, McMillan started driving. R. 210, ll. 14 – 25; R. 213, ll. 1 – 25; R. 216, ll. 1 – 25; R. 217, ll. 1 – 25; R. 218, ll. 1 – 25; R. 219, ll. 25; R. 220, ll. 1 – 25; R. 221, ll. 1 – 25; R. 222, ll. 1 – 25; R. 223, ll. 1 – 25.

On the way to Walterboro, they saw the three victims on the side of the road at I-95. McMillan then had the idea to rob them as he said it would be easy. Davis said he did not want any part of it, but Jakes said he would do it. R. 225, ll. 1 – 25; R. 226, ll. 1 – 25.

When the car stopped, Jakes jumped out pointing his gun at the people telling them to "Give it up." Then Davis heard gunshots, and McMillan allegedly started shooting through the car window. Then he realized Jakes was shot, and he opened the car door for Jakes to get in the car. R. 227, ll. 1 – 25; R. 228, ll. 1 – 25; R. 229, ll. 1 – 25; R. 230, ll. 1 – 25; R. 231, ll. 1 – 25.

Jakes was screaming for them to take him to the hospital, but they were going home. They passed some friends, including LaToya Bryant, who transported Jakes to the hospital. R. 232, ll. 1 – 25; R. 233, ll. 1 – 25; R. 236, ll. 1 – 25; R. 237, ll. 1 – 8; R. 273, ll. 8 – 25; R. 283, ll. 1 – 25; R. 284, ll. 1 – 25; R. 285, ll.1 – 24.

Lieutenant Fred Inabinett with the Colleton County Sheriff's Office testified for Co-Defendant McMillan that he took a statement from Jakes after Jakes requested to see him about fourteen months after the incident. According to the testimony, Jakes admitted being at the scene but said McMillan was not there. He said the third person was J-Sneez. R. 569, ll. 1 – 25; R. 570, ll. 1 – 25; R. 571, ll. 1 – 25; R. 575, ll. 1 - 5.

Jakes allegedly told him they were drinking heavily that day. When they saw the victims on the side of the road, Jakes remembered seeing only the two women. R. 574, ll.1 – 25; R. 575, ll. 5 – 25; R. 576, ll. 1 – 25; R. 577, ll. 1 – 25; R. 578, ll. 1 – 25; R. 579, ll. 1 – 25. Jakes said they stopped to check a donut tire they were using when he saw the two women. Jakes said he did not have his gun in his hand when he got out of the car. He did yell to the women; "Hey pretty lady!" R. 579, ll. 1 – 25; R. 580, ll. 1 – 25. When the male victim stood up and Jakes saw he had a gun, then Jakes retrieved his gun. Then the male victim started shooting at him, and Jakes was injured. R. 580, ll. 1 – 25; R. 581 ll. 1 – 25. Jakes' gun was not fired. R. 447, ll. 2 – 25; R. 448, ll. 1 – 25; R. 449, ll. 1 – 25.

After the testimony of the three state's witnesses, the trial judge *in camera* told the attorneys that he received a note from Juror 102, Yvonne Lightsey, signed by the jury Foreperson. R. 197, ll. 1 – 24. The note read:

> I need to make sure that I'm a suitable juror for this trial due to the status of my husband.

R. 197, ll. 15 – 17.

The judge, with the agreement of the attorneys, called the juror into the court room and discussed the issue after he confirmed there was a Deputy Lightsey on reserve status with the Colleton County Sheriff's Office. Juror Lightsey revealed that her husband for the first few years was a full time deputy with the Colleton County Sheriff's Office. For the past two and one/half years, he was a Reserve Deputy. When the judge asked her if that would affect her ability to give a fair and impartial trial, she replied no. R. 198, ll. 1 – 25; R. 199, ll. 1 – 25: R. 200, ll. 1 – 25; R. 201, ll. 1 – 25; R. 202, ll. 1 – 25. The judge said he did not ask a question about spouses during *voir dire*. R. 203, ll. 1 – 25.

Jakes' attorney, to which McMillan's attorney joined in, then objected to Juror 102 continuing on the jury. The judge told them that they did not present a question for *voir dire* related to this issue. R. 204, ll. 1 – 25; R. 208, ll. 7 – 13. Jakes' attorney argued that Juror 102's responses to the questionnaire from the Clerk of Court's office lists her husband as Environmental Health Management, but had nothing about his being a reserve deputy. The judge then reviewed the form from the Clerk's Office which indicated the husband was Environmental health Management and reserve deputy. R. 205, ll. 1 – 25.

After reviewing the attorney's form from the Clerk's Office, the judge said that the Clerk's Office did not transmit everything the juror filled out on the Clerk's form to the form the attorneys received. The judge said it was a scrivener's error. Defense counsel argued that the juror did not indicate during *voir dire* that she had knowledge of any of the Sheriff's Department witnesses. R. 206, ll. 1 – 25; R. 207, ll. 1 – 25. Counsel argued that they may have used their strikes differently if they had known the husband was a deputy. The judge refused to excuse the juror. R. 204, ll. 8 – 25; R. 208, ll. 1 – 13.

At the time Juror 102 was seated during jury selection, Jakes had exercised three of his five strikes. R. 77, ll. 1 – 25; R. 78, ll. 1 – 25; R. 80, ll. 1 -25. The trial judge had granted each defendant five strikes. R. 75, ll. 1 – 8.

In State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007), the Court of Appeals held that the decision on whether to dismiss a juror and replace her with an alternate was within the sound discretion of the trial court, and such decision would not be reversed on appeal absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); U.S. Const. Amend. 14.

In State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001), the Supreme Court held:

> All criminal defendants have the right to a trial by an impartial jury. U.S. CONST. amends. VI and XIV; S.C. CONST. art. I, § 14. To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). "Through the judge, parties have a right to question jurors on their *voir dire* examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge." Gulledge, 277 S.C. at 370, 287 S.E.2d at 490.

In State v. Woods, *supra,* the Supreme Court held that when the court finds that the juror intentionally concealed the information, and that the information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges, the trial court must grant a motion for a new trial. Material means "of such a nature that knowledge of the item would affect a person's decision-making." Black's Law Dictionary 1066 (9th ed. 2009).

In State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010), the Court of Appeals held that the trial court did not abuse its discretion in declining to remove a juror after the juror informed the court that the murder victim's estranged wife was the sister of someone he supervised, where the juror did not conceal any information requested during the voir dire.

Jakes' case is distinguished from Burgess in that the relationship of Juror 102 to her husband was closer than the relationship in Burgess which was more removed and involved an employee of the juror involved. Jakes' case is also distinguished from Burgess in that the juror in Burgess' case notified the court before opening statements of the relationship. In Jakes' case, the juror volunteered the information after voir dire, and after the testimony of the three victims.

The issue in this case is not whether the juror intentionally or non-intentionally concealed information, rather it is whether the omitted information, that the juror was married to a reserve deputy, would have been a material factor in the use of peremptory challenges. This information would have been used by defense counsel in the exercise of preemptory strikes. It was material to the peremptory challenges as the attorneys said they would have used their strikes differently.

Another issue to be considered in this case is the fact that Jakes did not seek a mistrial but rather moved to replace the juror with one of the three alternate jurors. R. 206, ll. 1 – 25; R. 207, ll. 1 – 25; R. 208, ll. 1 – 5.

The information that Juror 102 was married to a reserve deputy who had been a full deputy until two and one/half years ago would have been a material factor in the use of the peremptory strikes. The trial judge abused his discretion by not removing the juror. By finding that it was a Scrivener's error did not lessen the prejudicial impact to Jakes.

The Court of Appeals misapprehended the issue. The Court held that the Juror was impartial. There was a reasonable probability that the Juror was biased against people who commit crimes because her husband's employment in law enforcement meant that he was against criminals. Part of his job was to charge people with committing crimes, and to apprehend them. Because this was an intimate relationship, that of spouse, it would be only natural for her to have feeling supporting her husband's work whether she was aware of her feelings or not.

The Court cited the case of State v. Cochran, 369 S.C. 308, 321, 631 S.E.2d 294 (2006). However, the Supreme Court also held in that case that "perceived prejudice of a juror may serve as a basis for exercising a peremptory challenge." The fact that the juror's husband was a deputy sheriff in the same county was "perceived" prejudice.

The Court also held that the Juror did not conceal her spouse's employment. While it was true the Juror did not intentionally conceal this information, it was not known to Jake's counsel. The prejudice to Jakes in not being able to effectively use his peremptory strikes was not lessened just because the Juror did not intentionally conceal the information. Regardless of where the blame was, the prejudice still existed.

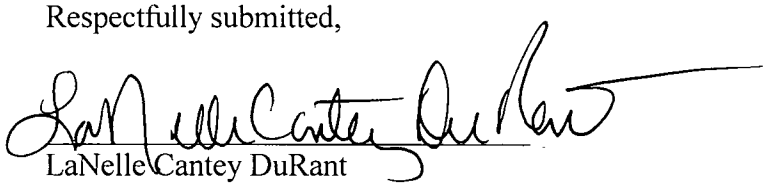
The Court misapprehended the issue when they wrote that because they found no intentional concealment, they did not need to determine whether the information would have been a material factor in the exercise of peremptory strikes. In State v. Bryant, 373 S.C. 305, 642 S.E.2d 582 (2007), the Supreme Court held that peremptory strikes are not constitutional rights; rather, they are creatures of statute and a means to achieve the end of an impartial jury. The Supreme Court wrote that a defendant seeking to overturn a guilty verdict based on the way in which peremptory challenges were exercised must show that the statute granting him peremptory was violated or that the jury which tried him was not impartial.

Although the juror claimed to not be biased, due to the fact that she was married to a deputy sheriff who was in the business of fighting crime, bias on her part in a criminal trial would be inevitable. The Sixth Amendment to the United States Constitution provides that the accused in all criminal prosecutions shall enjoy the right to a trial by an impartial jury.

It was prejudicial to Jakes for the juror, whom he would have struck if he had known of her husband's employment as a deputy, was allowed to remain on the jury. It was material because this information would have affected appellant's decision regarding the jury. Because the judge did ask during voir dire if any juror was a member of law enforcement, this should have prompted the juror to believe that marriage to law enforcement was a problem as any reasonable person would have believed. In fact, the juror did come to believe it could be a problem as she finally came forth.

THEREFORE, we respectfully the Court of Appeals to reconsider its ruling.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

This 25th day of October, 2013.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 25th day of October, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 25th day
of October, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: August 21, 2023.