

 ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar W. Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

SAMUEL DINGLE,

APPELLANT

APPELLATE CASE NO. 2011-193567

INITIAL BRIEF OF APPELLANT

BENJAMIN JOHN TRIPP
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Appellant's motion to excuse juror Smoak?

STATEMENT OF THE CASE

The Orangeburg Country Grand Jury indicted Appellant Samuel Dingle on June 16, 2010 for second degree criminal sexual conduct with a minor. R.*. Appellant's case proceeded to trial on May 31, 2011 before the Honorable Edgar W. Dickson and a jury. Ash Chisolm and Douglas Mellard represented Appellant, and by Glenn Justice and Harrison Bell represented the State. Tr. 1.

At the conclusion of the trial the jury found Appellant guilty as charged. Tr. 304, ll. 10-12. The trial court sentenced Appellant to twenty years imprisonment. Tr. 317, ll. 7-10.

ARGUMENT

The trial court erred in denying Appellant's motion to excuse juror Smoak because the court did not adequately examine her to determine why she did not admit she was related to the State's potential witness and because the court's failure to properly examine Juror Smoak was an abuse of discretion.

STATEMENT OF FACTS

At Appellant's trial the State alleged that between 2000 and 2002, Appellant engaged in sexual intercourse with his stepdaughter when she was thirteen and fourteen. Tr. 120, l. 13 – Tr. 140, l. 20.

During voir dire, the court asked the jury panel whether any member was related by blood or marriage or a close personal friend of, inter alia, Samantha Brown, a potential witness for the State. No one affirmatively indicated. Tr. 82, ll. 16-21. After voir dire, the court asked the panel whether any member would have any problem sitting as an impartial juror and being able to reach a verdict. The court excused one member from the panel on those grounds. Tr. 96, l. 16 – Tr. 17.

During jury selection, Appellant struck nine potential jurors, and the seated jurors included Ms. Sharon Smoak. After her seating, Appellant informed his counsel that juror Smoak was a cousin of Samantha Brown. Counsel raised the issue to the court, and the State interjected that it would not call Samantha Brown as a witness. Counsel asked the court to question juror Smoak and excuse her if they were related. The State consented to the proposed remedy. Tr. 99, l. 14 – Tr. 111, l. 1.

After an off-the record conversation of juror Smoak, the court explained it would not excuse her:

Ms. Smoak advised me that Samantha Brown would have been her step father's niece's children. So, she did not, you know, she knows who they are, doesn't have any real connection with them. She again reiterated she thought she could be a fair and impartial juror. So, I'm going to allow her to stay on the jury.

Tr. 111, ll. 17-25. Appellant's counsel objected on grounds that the court asked Juror Smoak whether she was related by blood or marriage to Samantha Brown, and she did not respond truthfully. Counsel again asked the court to excuse her, but the court refrained. Tr. 112, ll. 1-11.

DISCUSSION

The right to a fair trial by an impartial jury in a criminal prosecution is guaranteed by the Sixth Amendment to the U.S. Constitution and by Article I, § 14 of the South Carolina Constitution. *State v. Stewart*, 278 S.C. 296, 301, 295 S.E.2d 627, 630 (1982). "The trial judge has the duty to assure himself that every juror is unbiased, fair and impartial." *State v. Gulledge*, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982). Thus, "the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party." *State v. Woods*, 345 S.C. 583, 587, 550 S.E.2d. 282 (2001) (citing *State v. Kelly*, 331 S.C. 132, 502 S.E.2d 99 (1998)). Similarly, "[t]hrough 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." *Id.* (quoting *Gulledge*, 277 S.C. at 370, 287 S.E.2d at 490). *See also* S.C. Code Ann. § 14-7-1110 (1976) (prescribing peremptory challenges in criminal cases).

- a. **The court erred in failing to examine juror Smoak on the record about the specific circumstances of her relationship to the potential witness and any plausible motives compelling her to remain silent about it.**

The court erred in failing to examine juror Smoak on the record about the specific circumstances of her relationship to the potential witness and any plausible motives compelling her to remain silent about it. To support the right to a fair trial by an impartial jury in a criminal case, the jury cannot include a juror who fails to disclose information requested during voir dire ““when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party’s peremptory challenges.”” *State v. Miller*, 398 S.C. 47, 50, 727 S.E.2d 32, 34 (Ct. App. 2012) (quoting *Woods*, 345 S.C. at 587, 550 S.E.2d at 284). “Material” means that knowledge of the matter would affect a person’s decision-making. *Id.* at 51, 727 S.E.2d at 34. Whether a juror has intentionally concealed information involves two parts, one objective and one subjective. First, the question must be reasonably comprehensible to the average juror. *Id.* at 54, 727 at 35-35 (quoting *Woods*, 345 S.C. at 588, 550 S.E.2d at 284). Second, the subject of the inquiry must be of such significance that the juror’s failure to respond was unreasonable. *Id.* Because the second component is based on the juror’s subjective understanding, the trial court must consider the testimony of the juror if it is reasonably available. *Id.*

In this case, juror Smoak’s relationship with the State’s potential witness was plainly material because Appellant’s counsel asked the court to excuse her with his remaining peremptory strike if the court found that the two were in fact related.

After learning that juror Smoak was related by marriage to the State's potential witness, the trial court was required to determine whether she intentionally concealed the relationship. As an initial matter, the question posed to her was reasonably comprehensible. Thus, the court should have examined her on the record to determine the specific circumstances of the relationship and any plausible motives compelling her to remain silent about it. Only then could the court determine whether she was sufficiently forthright in failing to acknowledge the relationship. Accordingly, the court did not adequately examine Juror Smoak, and it erred in denying Appellant's motion to excuse.

b. The trial court's failure to properly examine juror Smoak as to why she did not admit she was related to the State's potential witness was an abuse of discretion.

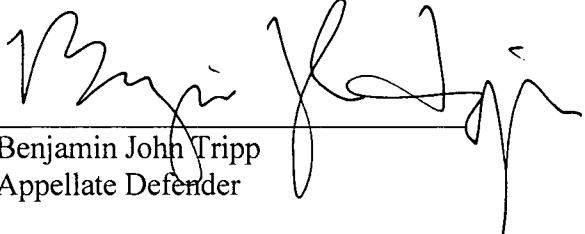
The trial court's failure to properly examine juror Smoak as to why she did not admit she was related to the State's potential witness was an abuse of discretion. "A juror should be disqualified by the court if it appears to the court the juror is not indifferent in the case. The decision to strike a juror for cause is within the sound discretion of the trial judge." *Woods*, 345 S.C. at 590, 550 S.E.2d at 285. An abuse of discretion occurs when a trial court fails to engage a juror in a prescribed inquiry to determine impartiality when it is required. *Cf. id.* ("Because Juror B did not respond . . . any potential biases she might have had . . . were not discovered until after the trial. No motion to disqualify Juror B was made, thus there is no discretionary ruling . . . for this Court to review.") and see *State v. Collins*, 398 S.C. 197, 213, 727 S.E.2d 751, 760 (Ct. App. 2012) (holding trial court's failure to perform prescribed analysis of photographs required under Rule 403, SCRE constitutes an abuse of discretion (quoting *State v. Mansfield*, 343 S.C. 66, 86, 538 S.E.2d 257, 267 (Ct. App. 2000) ("The failure to exercise discretion, however, is itself an abuse of discretion."))).

In this case, the trial court failed to engage Juror Smoak on the record in the prescribed inquiry to determine whether she intentionally concealed her relationship to a potential witness for the State. Furthermore, the court ignored the parties' agreement that Juror Smoak should be excused if she was in fact related to the potential witness by marriage. Accordingly, the court abused its discretion in denying Appellant's motion to excuse the juror.

CONCLUSION

For the foregoing reasons, Appellant Samuel Dingle respectfully requests reversal of his conviction and remand for a new trial.

Respectfully submitted,



Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of October, 2013.

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**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal

- (1) True-billed indictment(s);
- (2) Transcript May 31, 2011:
 - A. Tr. 1;
 - B. Tr. 82-112;
 - C. Tr. 120-140;
 - D. Tr. 304-317.

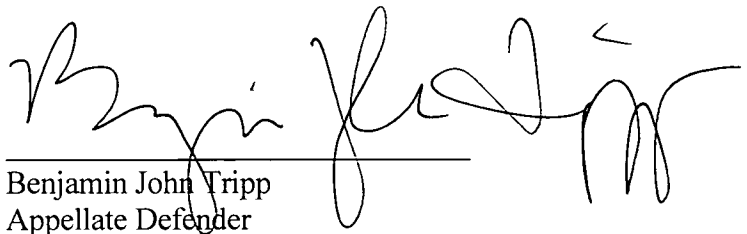
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I certify that this designation contains no matter which is irrelevant to this appeal.

October 31st, 2013


Benjamin John Tripp
Appellate Defender

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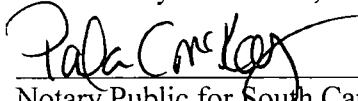
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 31st day of October, 2013.


Benjamin John Tripp
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 31st day of October, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.