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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Greenville County

Honorable G.D. Morgan, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KEOKI KENTA HARRIS,

APPELLANT

APPELLATE CASE NO. 2024-001742

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in removing a juror over defense counsel's objection where there was no legal cause or necessity to remove the juror and where upon questioning the juror affirmed that he could be fair and impartial to both sides?

STATEMENT OF THE CASE

Appellant was indicted by a Greenville County grand jury for murder, attempted murder and possession of a weapon during the commission of a violent crime during the October 2023 term. An amended indictment for murder was obtained during the August 2024 grand jury term. R. (indictments). The state, represented by Andrew Miller and Meghan Gasser, called the case to trial on September 23, 2024, before the Honorable G.D. Morgan, Jr., and a jury. Appellant was represented by Sara Gorski and Rachel Kepley. Tr. 1. On September 25, 2024, Appellant was found guilty as indicted. Tr. 404-405. He was sentenced to forty-five years of incarceration for the murder, thirty years for the attempted murder, and five years for the weapons charge, all sentences to run concurrently. Appellant timely filed a notice of appeal. Tr. 410.

This brief of appellant follows.

STANDARD OF REVIEW

A decision on whether to dismiss a juror and replace [them] with an alternate is within the sound discretion of the trial court, and such decision will not be reversed on appeal absent an abuse of discretion. State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007) *citing* State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 265 (Ct.App.1999).

ARGUMENT

The trial court erred in removing a juror over defense counsel's objection where there was no legal cause or necessity to remove the juror and where upon questioning the juror affirmed that he could be fair and impartial to both sides.

Relevant Facts

Both parties submitted proposed *voir dire* questions. Tr. 35, l. 25 – 36, l. 2. The trial court declined to ask some of the questions proposed by defense counsel. Defense counsel had no objection to the state's proposed questions. Tr. 36, l. 3 – 41, l. 8. During *voir dire*, the trial court asked numerous questions of the jury venire to determine possible relationships and biases. Regarding the parties to the case and potential relationships with the parties, the court asked the following questions of the panel.

> Is there any member of the jury panel that has ever been related by blood or marriage to either *the defendant* in this case or either of the *two victims*? Tr. 43, ll. 18-22 (emphasis added).
>
> Is there any member of the jury panel who's ever had any close personal or social relationship with either *the defendant* or the *two victims*? Tr. 43, l. 23 – 44, l. 1 (emphasis added).
>
> The Following is a list of potential witnesses in this case: Christopher Pustizzi, Daniel Bellamy, Nathan Stanton, Payton Loyd, Dr. Micahel Ward, Toni Godfrey, Darbi Harriman, Susan Malloy, Kara Bennick, Patrick Clement, Treva Young and Michael Young. Now has anyone ever been related by blood or marriage or have any personal or social relationship with any of the *witnesses*? Tr. 44, ll. 2-10 (emphasis added).
>
> Has any member of the jury panel ever been represented by any of *these lawyers* or related by blood or marriage to any of *these lawyers* or have a close personal or social relationship or know any of *these lawyers*? Tr. 44, l. 11 – 45, l. 7 (emphasis added).
>
> Is there any member of the jury panel related by blood or marriage or a close personal friend of *anyone* that's *employed by*

> the *Thirteenth Circuit Solicitor's Office* or *anyone* in the *Attorney General's office*? Tr. 45, ll. 18-22 (emphasis added).
>
> Is there any member of the jury panel related by blood or marriage or a close personal friend of *anyone* that's *employed* by any *state, local, federal, or military law enforcement agency*. Tr. 46, ll. 7-10 (emphasis added).
>
> Has any member of the jury panel ever been *employed* by any *state, local, federal, or military law enforcement agency*? Tr. 48, ll. 14-16 (emphasis added).

Juror 35 did not respond to any of the questions regarding relationships. He did respond to a question about his familiarity with firearms by stating he had served in the Navy during Desert Storm in 1990. Tr. 50, ll. 13-18. He also responded to the questions regarding exposure to violent crime. Tr. 52, l. 19 – 53, l. 10. He informed the parties that his brother had been convicted of a violent crime approximately twenty years ago. When asked if he could remain fair and impartial despite his brother's prior conviction, he responded "Absolutely." Tr. 59, ll. 15-22. Juror 35 was the eighth juror chosen for Appellant's trial and one of two black males picked for the jury. R. (Strike Sheet). The state used two of its five pre-emptory strikes. Tr. 65, ll. 16-21; Tr. 66, l. 25 – 67, l. 5. Neither party lodged any objections or exceptions to the selected jury. Tr. 70, ll. 12-16.

The jury venire entered the courtroom at 2:17 p.m. for *voir dire* and selection. Tr. 42, ll. 5-6. At 2:58 p.m., the selected panel was sent to the jury room to elect a foreperson. Tr. 71, ll. 1-21. The jury returned to the courtroom at 3:21 p.m. to be sworn in, and opening statements were given. Tr. 74, ll. 4-11. The state requested to take up a matter of law following opening statements, and the jury was excused back to the jury room at 3:48 p.m. The state informed the court that a member of the victim's family "may have overheard one of the jurors talk about how they know the defendant from some previous encounter." Tr. 92, l. 16 – 93, l. 2. The state

alleged that Juror 35 spoke with and made a hand gesture to one of the defendant's family members in the hallway and that the state had "grave concern that that was not elicited or that that was not brought up earlier." Tr. 93, ll. 10-17; Tr. 94, ll. 2-3. Defense counsel informed the court that Appellant's family was not present during jury selection. The state then clarified that "*when they were walking in for selection* ...when the jury pool was being brought in that that's when that hand gesture – it was a fist bump" occurred. Tr. 94, ll. 4-17.

The court brought Juror 35 into the courtroom for further questioning. Juror 35 stated that he did fist bump an individual he knew from prior dealings and that he works third shift with the individual. Juror 35 had *never* seen Appellant before and did not know that the individual he knew had any connection to Appellant prior to seeing him in the courtroom. He *did not* have a *social or personal relationship* with the individual but just saw him at work *maybe* once a night as they worked in different departments. He had only met the individual in *April of that year* when he started working at the same company. He maintained that he did not know Appellant or Appellant's family. Tr. 95, l. 14 – 97, l. 25. Prior to excusing Juror 35 back to the jury room, the following occurred:

> THE COURT: Well, let me ask you this. Considering that you do know the gentleman, you met him in April and this member -- he's a member *potentially* of the defendant's family, could you still be fair and impartial to both sides in this case?
>
> JUROR NO. 35: *I could*, but I guess it's up against the prosecution, what they would decide, how they feel about it.
>
> THE COURT: Well, let me ask you. How do you -- could you set that all aside and still be fair and impartial to both the State and the defendant in the case?
>
> JUROR NO. 35: *I could be.*
>
> THE COURT: You could be. Okay. You could set aside, view the -- I mean, make a decision based solely on the evidence?

JUROR NO. 35: *I could.*

THE COURT: Okay. All right. Thank you, sir.

Tr. 98, ll. 7-25 (emphasis added).

The state asked that the juror be excused, despite the fact he stated he could be fair and impartial, because "that's an incredibly uncomfortable, awkward position to be put in when [sic] someone that he works with." The state asserted the juror and the audience member saw each daily and that Juror 35 said "it's up against the prosecution," so the state had a "wall to climb in his head in order to prove our case." Tr. 99, ll. 6-21. The state argued that the individual that Juror 35 knew would *probably* be present during trial sitting behind Appellant, and that would put Juror 35 in a difficult situation to remain impartial. The state maintained that if the individual was "close enough to the defendant" that he was going to sit through the trial it showed a degree of closeness that would not allow Juror 35 to be impartial. Tr. 100, l. 12 – 103, l. 14. It was the state's belief that it would have used a pre-emptory strike on Juror 35 had it known of the relationship. Tr. 105, ll. 22-24.

Defense counsel objected to removal of Juror 35 arguing he did not know Appellant which is why he did not respond to any of the *voir dire* questions and that because Juror 35 affirmed he could be fair and impartial, he should remain on the jury. Counsel further pointed out the relationship at issue appeared to be, at most, "a very tenuous, nebulous … somewhat small working relationship" between Appellant's mother's boyfriend and Juror 35. Counsel stated the identified relationship did not give rise to any sort of bias. Tr. 99, l. 24 – 100, l. 9. Defense counsel maintained that the existence of the relationship did not automatically disqualify Juror 35. Juror 35 had no idea who Appellant was, and the individual that Juror 35 knew was not biologically related to Appellant. Defense counsel further argued that the relationship at issue

was not covered during *voir dire*, which was further evidence of how unconnected the "relationship" was to Appellant. Tr. 103, l. 15 – 105, l. 17.

Defense counsel contended that the state had the opportunity to ask questions to "suss out" that potential relationship and did not ask those questions during *voir dire*. The questions asked revealed that Juror 35 did not have a relationship with Appellant or the state or any witnesses in the case. While the state, in hindsight, was saying they would have used a strike, the reality that no questions asked during *voir dire* would have led to the disclosure of that relationship between Juror 35 and Appellant's mother's boyfriend belies that assertion. Tr. 107, l. 15 – 108, l. 4. Defense counsel further informed the court that the last name of the individual at issue was McKelvey, not Harris, then reiterated that McKelvey is not related by blood or marriage to Appellant. Counsel clarified that the "up against the prosecution" comment was, in her opinion, Juror 35 stating whether he remained on the jury was up to the prosecution, not that the prosecution had more of a burden. Tr. 110, l. 16 – 111, l. 9. The state reiterated that if it had known of the connection between Juror 35 and Mr. McKelvey it would have used a strike. Tr. 112, ll. 13-16.

The court noted that no question was put to the venire that would have revealed potential relationships with members of Appellant's family. Tr. 108, l. 23 – 109, l. 4. However, the trial court granted the state's request to remove Juror 35 and replace him with the first alternate because the state would have used a strike had it known of the relationship between the juror and Appellant's mother's boyfriend. Tr. 112, l. 17 – 113, l. 19.

Discussion

The state complained at trial that Juror 35 concealed information during *voir dire,* and had that information been disclosed, they would have used a strike on Juror 35. Based on this

argument the lower court removed Juror 35 and replaced him with the first alternate. This was error, as there were no questions posed to the venire that would have revealed the attenuated relationship between Juror 35 and McKelvey therefore Juror 35 did not withhold or conceal information. There was no misconduct. Additionally, because the state would have had no way of discovering the loose connection between Juror 35 and McKelvey during *voir dire* it was unreasonable for the trial court to believe the state would have used a strike to remove Juror 35. The removal of Juror 35 was arbitrary, without legal cause, and prejudicial to Appellant.

"Our state and federal constitutions guarantee a criminal defendant the right to an impartial jury, and *voir dire* can be an essential means of protecting this right." State v. Tucker, 423 S.C. 403, 410, 815 S.E.2d 467, 470–71 (Ct. App. 2018) (cleaned up). "The trial court has the solemn duty to ensure that every juror is unbiased, fair and impartial." State v. Rowell, 444 S.C. 109, 113, 906 S.E.2d 554, 556 (2024). While it is within the trial court's discretion to substitute an alternate juror where there is a legal necessity or there is disclosed during trial a disqualifying interest of a juror, Boland v. Greenville and Columbia R.R. Co., 46 S.C.L. (12 Rich.) 368 (1895), it has long been the law that once the jury is sworn, the trial court cannot discharge a qualified juror without legal cause absent the consent of both parties. Greer v. Norvill, 21 S.C.L. (3 Hill) 262 (Ct. App. L. 1837). Legal necessity or cause to remove a juror after they have been sworn has generally been held to include juror misconduct, an inability of the juror to perform their duties, failure of the juror to follow the courts instructions, and/or bias or lack of impartiality of the juror discovered during trial.

"The general test for evaluating alleged juror misconduct is *whether or not there in fact was misconduct* and, if so, whether any harm resulted to the [party alleging misconduct] as a consequence." State v. Bantan, 387 S.C. 412, 422, 692 S.E.2d 201, 206 (Ct. App. 2010) (citing

State v. Zeigler, 364 S.C. 94, 108, 610 S.E.2d 859, 866 (Ct.App.2005)). The party alleging misconduct bears the burden of proving the challenged juror was biased or otherwise lacked ability to follow their oath. State v. Tucker, 423 S.C. 403, 414, 815 S.E.2d 467, 472 (Ct. App. 2018). "Where a party claims a juror has withheld material information in response to a *voir dire* question, the trial court must determine, preferably after a hearing, whether the juror's withholding suggests bias." State v. Rowell, 444 S.C. 109, 115, 906 S.E.2d 554, 557 (2024). "This will typically turn on the nature of the information withheld, rather than the nature of the juror's state of mind in not disclosing it." Id. "It is the nature of the information concealed that drives the inquiry. The juror's intent may bear on the inquiry, but the ultimate question remains whether the juror was biased and whether the bias, in turn, caused prejudice." Id.

> When a juror untruthfully answers or fails to answer a material *voir dire* question, the juror's bias may not be presumed, and a new trial may be ordered only when prejudice is proven by showing the concealed information reveals a potential for bias *and* would have made an objectively material difference in the moving party's use of a peremptory strike or resulted in a successful challenge for cause.

Id. at 115–16, 906 S.E.2d at 557 (emphasis in original). Materiality is to be judged by an objective standard – whether a *reasonable party* would have exercised a strike had the requested information been disclosed. Id. at 117, 906 S.E.2d at 558 (emphasis added).

Most critically, there was no misconduct on the part of Juror 35 as he did not conceal any information during *voir dire*. As the trial court recognized, none of the questions submitted to the venire explored the relationship at issue. Juror 35 answered all the *voir dire* questions honestly and accurately. He did not commit misconduct by withholding information because the question of "whether any member of the venire had a relationship with anyone knowing or involved with family members of the Defendant" was not asked. Once the circuit court realized

that the purported "withheld" information was not addressed during *voir dire* the inquiry should have ended as the first part of the test, whether misconduct in fact occurred, had not been met. See State v. Bantan, 387 S.C. 412, 422, 692 S.E.2d 201, 206 (Ct. App. 2010) (Initially, the trial [court] must make a factual determination as to whether juror misconduct has occurred.). Because there was no misconduct, there could not have been prejudice to the state. Removing Juror 35 was an abuse of the court's discretion.

The state did not prove that Juror 35 was partial or had an inability to follow his oath. See State v. Tucker, 423 S.C. 403, 414, 815 S.E.2d 467, 472 (Ct. App. 2018). Juror 35 unequivocally stated three times that he could be fair and impartial to both sides and that clear invocation of impartiality was entitled to deference. See generally State v. Ivey, 331 S.C. 118, 502 S.E.2d 92 (1998) (finding no abuse of discretion because the juror unequivocally stated they could render an impartial verdict). He maintained that McKelvey was a causal work acquaintance, not a close personal or social friend. Juror 35 did not know the individuals last name (assuming at one point it was Harris), maybe saw him once a night at work, and had only known him since April.

Further, McKelvey was not a member of Appellant's family. McKelvey was Appellant's mother's boyfriend – a relationship so attenuated that Juror 35 had no idea who Appellant or his mother were. McKelvey was wholly uninvolved with the case. The state requested Juror 35 be removed on the assumption that he would not be able to remain impartial if he looked out and saw the audience member sitting behind Appellant. While it is standard to challenge a juror for potential bias, in order to remove them from the sworn jury, the evidence of that bias "must appear from higher evidence than the assertion or opinion of counsel." Greer v. Norvill, 21 S.C.L. at 263. The only "evidence" of Juror 35's purported bias was the states assumption that

the audience member would be present and that would create an awkward situation. Such a complaint, in the face of three repeated affirmations of impartiality, was not a sufficient basis for the trial court to determine that Juror 35 was unfit to serve.

Juror 35's answers suggested that his relationship with the audience member was "a relationship confined to sporadic contact at work, and belies closeness." Tucker at 412, 815 S.E.2d at 472. His answers revealed the tenuous nature of the relationship between not only himself and McKelvey, but between himself and the actual parties to the case. Juror 35 had no connection to either of the parties, their counsel, or their witnesses. The attenuated nature of the relationship underscores how unlikely it would be for an *objectively reasonable party* to use a strike had the information somehow come to light. See Rowell, at 115–16, 906 S.E.2d at 557. Indeed, the relationship was so attenuated that it could not reasonably have been prejudicial to the state had Juror 35 remained on the jury. See State v. Stone, 350 S.C. 442, 448, 567 S.E.2d 244, 247-48 (finding that a juror's "scant acquaintance" with the defendant's family would not have prejudiced the state had the juror remained on the jury).

The state also offered no argument as to how it would have discovered the relationship at issue, nor did it specify how the relationship would have been a material factor in exercise of preemptory strikes. All the state argued was a bald statement that a strike would have been used if the existence of the relationship, which it did not inquire about during *voir dire*, was somehow made known to the state. The state's mere assertion that a strike would have been used was not a sufficient basis upon which to remove Juror 35 when there were no questions put to the venire that would have elicited the existence of a relationship between a juror and Appellant's mother's boyfriend. The trial court failed to make a thorough inquiry into the state's strategy in seating or

striking prospective jurors, further abusing its discretion in removing Juror 35. See State v. Coaxum, 410 S.C. 320, 330, 764 S.E.2d 242, 247 (2014).

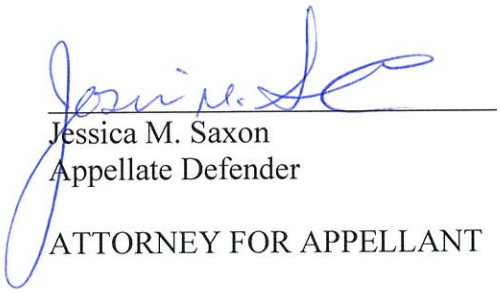
Appellant asserts that the removal of a sworn juror without any legal necessity or cause generally constitutes reversible error. Greer v. Norvill, *supra*, suggest that an arbitrary removal of a sworn juror requires a new trial because the removal was wholly improper and based on "vague and capricious objections that should not receive the countenance of the court." 21 S.C.L. at 265. While "either part has the right of challenge ... if the challenge is not sustained, the opposite party has *a right to the jury as it was empaneled.*" Id. at 264 (emphasis added). In this matter it was error for the trial court to sustain the challenge because Juror 35 did not withhold information during *voir dire* and there was no prejudice to the state. Appellant's right to the jury as empaneled was violated by the dismissal of Juror 35. Further, there was also no evidence that had the state somehow discovered the relationship prior to jury selection, that the incredibly tenuous relationship would have been a *material* factor in a *reasonable parties* use of preemptory strikes. See Rowell, *supra*.

Appellant was additionally prejudiced because the removal of Juror 35 altered the racial makeup of the jury. Appellant was a black male. Juror 35 was one of three black individuals that were originally on Appellant's jury. He was one of two black males on the panel. While Appellant had no right to any particular jury or jurors, he did have a right to be tried by his peers and have a jury that adequately reflects his community. Improperly removing Juror 35 shifted the makeup of the jury. The change in the racial makeup of the jury along with the infringement on Appellant's right to the empaneled jury prejudiced Appellant's right to a fair and impartial jury.

The state was not entitled to have Juror 35 removed from the sworn jury without legal necessity or cause. Juror 35 did not withhold information during *voir dire,* nor did he commit any other form of misconduct. There was no legal necessity or cause provided to the state, the trial court or in the record to support the removal of the sworn juror. The state did not establish that the existence of the extremely tenuous relationship would have been a material factor in the use of a preemptory strike. The trial court abused its discretion in arbitrarily removing Juror 35 and Appellant was sufficiently prejudiced to warrant a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court hold the trial court erred in removing Juror 35 and remand this matter back to the lower court for a new trial.



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This 6th day of March, 2026