

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

---

**RECEIVED**

DEC - 5 2013

**S.C. Supreme Court**

THE STATE,

RESPONDENT,

V.

DAVID JAKES,

APPELLANT

APPELLATE CASE NO. 2011-198747

---

APPENDIX

---

LANELLE CANTEY DURANT  
Appellate Defender

ALAN WILSON  
Attorney General

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589

JULIE KATE KEENEY  
Assistant Attorney General

P. O. Box 11549  
Columbia, SC 29211

ATTORNEY FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....i

COURT OF APPEALS OPINION NO. 5158 (filed on July 10, 2013)..... 1

PETITION FOR REHEARING ..... 13

RETURN TO PETITION FOR REHEARING .....22

COURT OF APPEALS OPINION NO. 5158 (Withdrawn, Substituted and Refiled on September 25, 2013) ..... 28

COURT OF APPEALS ORDER AND OPINION NO. 2013-UP-360 (filed on October 2, 2013)..33

SECOND PETITION FOR REHEARING.....39

COURT OF APPEALS ORDER (filed on November 12, 2013) .....49

**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  
Heard April 3, 2013 – Filed July 10, 2013

---

**AFFIRMED**

---

Appellate Defender LaNelle Cantey DuRant, of  
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant  
Attorney General Julie Kate Keeney, both of Columbia,  
for Respondent.

---

**GEATHERS, J.:** David Jakes appeals his convictions for assault and battery, attempted armed robbery, and possession of a weapon while committing a violent crime, arguing the trial court erred in refusing to excuse Juror 102 and to replace this juror with an alternate. Finding no error, we affirm.

## FACTS/PROCEDURAL HISTORY

On the evening of June 3, 2010, a Husband and Wife drove through Colleton County on I-95, as the family moved to Florida; Wife's mother (Mother-in-law) accompanied the couple, but drove behind them in another vehicle pulling a U-Haul trailer. When Mother-in-law's truck overheated, both vehicles exited the interstate and stopped where the off-ramp intersected a country road. Once alongside that road's shoulder and in anticipation of the tow truck's arrival, Husband relocated the trailer to his operable vehicle. While Husband was reconnecting the trailer, he was somewhat out-of-view; Wife and Mother-in-law, however, stood and were more visible to passing traffic.

While the family waited for the tow truck, Antwan McMillan, who was driving by in another vehicle, as well as his passenger, Appellant David Jakes, noticed the stranded motorists. McMillan said the family was an "easy lick" and thereafter stopped his vehicle near the two standing women. Jakes, whose face was largely concealed, jumped out of the backseat of McMillan's vehicle, brandished a stolen firearm, and yelled at the women to "Get up, pretty lady." Husband, who was carrying a handgun pursuant to a concealed weapons permit, appeared from behind his vehicle, drew his firearm, and ordered Jakes multiple times to "[g]et back in your car and leave us alone." When Jakes did not retreat and instead aimed his weapon, Husband discharged his compact pistol, striking Jakes multiple times; a weapon was also indiscriminately discharged by McMillan from his car. The injured Jakes crawled back to McMillan's waiting vehicle, which then sped away. Husband, Wife, and Mother-in-law were physically uninjured.

A Colleton County grand jury indicted Jakes for three counts of attempted murder, three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime, for his conduct toward the stranded motorists.<sup>1</sup> During the subsequent trial's *voir dire*, the trial judge asked, *inter alia*, whether any potential juror: (1) was a member of a law enforcement agency; (2) was related to, or had a close relationship with, any of the named witnesses; or (3) was biased, prejudiced, or otherwise unable to give either party a fair trial. Based upon the responses to these questions, the trial judge excused a few panel members and the parties next selected a jury from the remaining panel members. Jakes

---

<sup>1</sup> The State tried Jakes and McMillan together. McMillan was indicted for three counts of attempted murder, three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime.

utilized three of his five allocated strikes and his co-defendant, McMillan, utilized four of his five allocated strikes. Among the seated jurors was Juror 102 (Juror).

The trial judge subsequently called in the empaneled jury, gave initial instructions, and allowed trial to begin. After three witnesses testified, however, the trial judge informed counsel for both parties, *in camera*, about a note he received from Juror expressing concern about her own qualification due to her husband's status as a Colleton County reserve deputy. The trial judge then called in Juror and confirmed Juror's husband was a reserve deputy and that Juror had not discussed the case with her husband. The trial judge also asked Juror if her husband's status affected her ability to give either party a fair and impartial trial. Juror responded, "No, it wouldn't" and the trial judge allowed Juror to return to the jury room.

Subsequently, the trial judge continued to discuss the course of events with counsel. While defense counsel made no objections to the trial judge's questioning of Juror or to making Juror's note an exhibit, defense counsel objected to Juror's continued service. Defense counsel also noted that the juror information sheet, which the Clerk's Office prepared, listed Juror's husband's occupation as "Environmental Health Management, but never said anything about any reserve deputy status." Defense counsel argued that had Juror's husband's full employment status been known, he would have utilized Jakes' strikes differently.

An off-the-record conference then followed, during which a key realization developed. Specifically, Juror did fully disclose her husband's employment on her *juror questionnaire* as including both "Environmental Health Management" and "reserve deputy." However, "the Clerk's Office didn't transmit everything" that Juror filled out on her *juror questionnaire* when the Clerk's Office provided counsel with the *juror information sheet*. Thus, the pertinent information existed within the compiled *juror questionnaires* that defense counsel could have obtained from the Clerk's Office upon request, but this information did not exist within "the typed[-]up list which the lawyers" received from the Clerk's Office (*juror information sheet*).

The trial judge subsequently declined to excuse Juror due to this "Scri[ve]ner's error," despite defense counsel's prior unawareness of the juror information sheet's deficiencies. The trial judge also referenced the fact that defense counsel did not request any *voir dire* question about spousal employment and that a compilation of information from the completed juror questionnaires was available, upon request, from the Clerk's Office.

Thereafter, trial resumed and the jury ultimately found Jakes guilty of three counts of assault and battery in the first degree (a lesser-included offense of attempted murder), three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime. Based upon these convictions, the trial judge sentenced Jakes to thirty-five years' incarceration. This appeal followed.

### ISSUE ON APPEAL

Did the trial court err by not excusing Juror where: Juror's husband was a reserve deputy; Juror disclosed her husband's status on her *juror questionnaire*; the *juror information list* provided to counsel by the Clerk's Office did not list husband's status as a law enforcement officer; neither party requested the court to ask during *voir dire* whether any juror's spouse was in law enforcement; Juror disclosed her husband's status after trial began; Juror confirmed she could be fair and impartial; Defense counsel requested seating an alternate juror; and Defense counsel could have, through the exercise of due diligence, learned of Juror's husband's employment status?

### STANDARD OF REVIEW

"A decision on whether to dismiss a juror and replace her 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). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

### LAW/ANALYSIS

The trial judge's refusal to excuse Juror and to substitute her with an alternate was not an abuse of discretion because: (A) Juror was impartial, despite her husband's reserve deputy status; (B) Juror did not conceal her spouse's employment; and (C) Jakes' counsel, through the exercise of due diligence, could have learned of Juror's husband's employment status.

**A. The Trial Judge Did Not Err in Finding that Juror Appeared Impartial.**

Section 14-7-1020 of the South Carolina Code (Supp. 2012) requires a trial judge, upon motion of either party, to determine whether a juror is indifferent:

The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein . . . If it appears to the court that the juror is not indifferent in the cause, he must be placed aside . . . and another must be called.

S.C. Code Ann. § 14-7-1020; *accord State v. Cochran*, 369 S.C. 308, 321, 631 S.E.2d 294, 301 (2006) (citing section 14-7-1020). While such determinations are within the sound discretion of the trial judge, "[t]here is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree." *State v. Burgess*, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) (quoting *State v. Hilton*, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1911)); *accord State v. Mercer*, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009).

Accordingly, the mere fact that a juror's spouse is a law enforcement officer, who is not involved in the case, does not, in and of itself, render a juror biased and, thus, unable to serve on a jury; rather, the crux of that determination is whether it "appears to the court that the juror is not indifferent in the cause." *See* § 14-7-1020 (stating the trial judge must determine whether a proposed juror is related to either party or is otherwise interested in, formed an opinion about, or is biased or prejudiced toward a party); *id.* (requiring the trial judge to set aside jurors who do not appear "indifferent in the cause"). Moreover, even jurors related by affinity or consanguinity to an actual testifying witness or those who closely knew the putative victim of a crime are not, absent an inability to maintain impartiality, unqualified. *See State v. Wells*, 249 S.C. 249, 259-60, 153 S.E.2d 904, 909-10 (1967) (finding a juror, who directly employed victim, qualified); *Burgess*, 391 S.C. at 18, 703 S.E.2d at 514 (holding a trial court need not excuse a juror simply because the juror has some relationship to the victim); *id.* ("There is no rule of the common law, nor is there a statute disqualifying a juror on account of his

relationship to a witness, either by affinity or consanguinity, within any degree." (quoting *Hilton*, 87 S.C. at 439, 69 S.E.2d at 1078)).

In the instant matter, Juror was unrelated to the defendants and the potential witnesses, and she did not know the victims; she was merely related to a non-testifying law enforcement officer. Furthermore, once the trial judge learned Juror's husband was a reserve deputy, he asked Juror whether her husband's employment would "in any way affect [her] ability to give the [State] or [Jakes] . . . a fair and an impartial trial." Juror confirmed "it wouldn't." Because Juror appeared neither biased nor partial, the trial court was not only within its discretion in finding Juror qualified, the court would have erred had it made a contrary finding.

#### **B. Juror Did Not Conceal Her Husband's Reserve Deputy Status.**

We find that *voir dire* does not, absent an appropriate motion, require a trial judge to inquire into the employment status of any potential juror's spouse. Moreover, we hold Juror did not conceal any information that would have required the trial judge to replace her with an alternate.

*Voir dire* serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges. *State v. Wise*, 359 S.C. 14, 23, 596 S.E.2d 475, 479 (2004). Accordingly, a trial judge must ascertain the qualifications of the jurors and, on motion, examine any potential juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein. See S.C. Code Ann. § 14-7-1010 (Supp. 2012) (requiring the trial judge to determine juror qualification); § 14-7-1020 (requiring the trial judge to determine, upon motion, whether a juror is related to either party or is otherwise not impartial); *Wise*, 359 S.C. at 22-23, 596 S.E.2d at 479 (discussing a trial judge's responsibility to determine juror qualifications in view of sections 14-7-1010 to -1020). While the parties may submit areas for inquiry, the manner of such *voir dire* examinations is left to the sound discretion of the trial judge. *Wise*, 359 S.C. at 23, 596 S.E.2d at 479. Thus, the law does not, absent an appropriate motion, require a trial court to determine whether any potential jurors are related to law enforcement officers.

It may be inferred that a juror who *intentionally* conceals information inquired into is not impartial. *State v. Stone*, 350 S.C. 442, 448, 567 S.E.2d 244, 247 (2002) (quoting *State v. Woods*, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001)).

"[I]ntentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Woods*, 345 S.C. at 588, 550 S.E.2d at 284. Thus, a *Woods* analysis applies "when a juror conceals information"; in conducting this analysis the first factor for determination is whether the identified concealment was intentional or unintentional. *Id.* at 587, 550 S.E.2d at 284; *accord Stone*, 350 S.C. at 448, 567 S.E.2d at 247 (quoting *Woods*, 345 S.C. at 587, 550 S.E.2d at 284).

At the outset, Juror fully disclosed her husband's status as a law enforcement officer on her submitted *juror questionnaire*, which specifically inquired into the topic. Thus, Juror unquestionably revealed her husband's status at this early phase of the jury selection process.

Further, Juror did not conceal her husband's employment status at *voir dire*. During *voir dire*, the trial judge asked no question requiring Juror to respond that her husband was a law enforcement officer. While the trial judge did ask whether any potential juror was a member of law enforcement and whether any potential juror was related to or a close personal friend of the named potential witnesses, which did include some law enforcement officers, neither inquiry required Juror to disclose the employment status of her non-testifying husband. Additionally, while Jakes could have requested the trial judge to ask whether any panel members were related to law enforcement officers, Jakes concedes he made no such request. Thus, no *voir dire* questions required Juror to respond with her husband's employment status and, as a result, no concealment occurred.<sup>2</sup>

Despite the absence of any concealment, much less intentional concealment that would satisfy the first requirement for relief under *Woods*, Jakes nonetheless argues he is entitled to relief because the omitted information satisfied the second requirement under *Woods*, *i.e.*, it would have been a material factor in the use of his peremptory challenges. *See Woods*, 345 S.C. at 587, 550 S.E.2d at 284 (requiring a new trial when an identified concealment of information (a) was intentional and (b) would have supported a challenge for cause or would have been

---

<sup>2</sup> Both parties conceded in their briefs that juror concealment, a precondition necessary to trigger analysis under *Woods*, did not exist. *See* 345 S.C. at 587, 550 S.E.2d at 284 (holding "[w]hen a juror conceals information", the court must determine whether two factors exist, and if they do, afford relief) (emphasis added).

a material factor in the use of peremptory challenges). However, because Juror did not conceal her husband's employment status, intentionally or otherwise, no juror concealment occurred and, thus, no further analysis under *Woods* is warranted. *Id.* (holding the analysis applies "[w]hen a juror conceals information").

Consequently, Jakes' contention, that he would have used his peremptory strikes differently if he had known of Juror's husband's employment status, is unavailing. *Cf. State v. Guillebeaux*, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004) ("[A] determination that a juror did not intentionally conceal the information ends the court's inquiry."); *id.* at 276, 607 S.E.2d at 102 ("As we find no intentional concealment on Juror's part, we need not further determine whether the information would have been a material factor in the exercise of . . . peremptory strikes.").

While we fully recognize that *Woods* and *Stone* are the controlling authorities for determining whether *juror concealment* requires juror removal, the issue before this court does not even approach potential juror concealment, intentional or unintentional; as a result, a *Woods* analysis does not resolve this non-concealment matter. *See Woods*, 345 S.C. at 587, 550 S.E.2d at 284 (stating the analysis applies "[w]hen a juror conceals information inquired into"); *Stone*, 350 S.C. at 448, 567 S.E.2d at 247 (quoting *Woods*, 345 S.C. at 587, 550 S.E.2d at 284). Rather, the issue involves the trial judge's refusal to excuse a juror where the Clerk's Office omitted potentially objectionable juror information from the juror information sheet and where defense counsel could have discovered the omitted juror data through the exercise of due diligence. Thus, *Woods* does not determine the merits of Jakes' non-concealment-based appeal that but for the omission within the juror information sheet provided by the clerk of court, Jakes would have used his peremptory strikes differently. *Wilson v. Childs*, however, is instructive in this regard and, therefore, pertinent to a fair appraisal of Jakes' allegation of prejudicial error. *See* 315 S.C. 431, 436, 434 S.E.2d 286, 289-90 (Ct. App. 1993) (finding no error where an omission within a juror information sheet could have been discovered through the exercise of due diligence and where no prejudice was demonstrated).<sup>3</sup>

---

<sup>3</sup> Both *Woods* and *Wilson* cite to *Thompson v. O'Rourke* as support for each case's key holding. *See Woods*, 345 S.C. at 587, 550 S.E.2d at 284 (citing *Thompson*, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986)); *Wilson*, 315 S.C. at 436, 434 S.E.2d at 431 (citing *Thompson*, 288 S.C. at 14, 339 S.E.2d at 506). Although *Thompson* involved an issue of juror concealment and *Woods* later refined *Thompson* in

### C. The Absence of Due Diligence and Demonstrated Prejudice.

We find the trial judge did not err in refusing to replace Juror; Jakes' counsel could have learned of Juror's Husband's employment status through the exercise of due diligence and Jakes did not demonstrate Juror's service prejudiced him. It should be stated from the outset, our analysis does not consider whether the clerk of court committed a "legal error." Rather, the focus of this section is whether the trial court erred in not replacing the Juror, where the clerk of court's mistake allegedly resulted in prejudice.

Restrictions upon a party's right to object to a particular juror's seating exist. Objections "not made prior to [e]mpanelment are waived," unless the objecting party "demonstrate[s] he could not have discovered the ground for the objection *through due diligence*" and also *shows resulting prejudice*. *Wilson*, 315 S.C. at 436, 434 S.E.2d at 289-90 (applying S.C. Code Ann. §§ 14-7-1030 (1976) and 14-7-1140 (1976), as amended) (emphasis added); *see* § 14-7-1140 (Supp. 2012) ("No irregularity . . . in the drawing, summoning, returning, or *impaneling* of jurors is sufficient to set aside the verdict, unless the objecting party is injured by the irregularity or unless the objection is made before their returning of the verdict.") (emphasis added). Accordingly, where a party did not submit a *voir dire* question that would have revealed the objectionable information and where that party could have obtained juror questionnaire data upon request to the clerk of court through the exercise of due diligence, but instead elected not to make such requests, that party cannot make a post-empanelment objection to a particular juror's service, despite the fact that the provided juror information sheet omitted potentially objectionable juror questionnaire data and was relied upon by counsel. *Wilson*, 315 S.C. at 436, 434 S.E.2d at 289-90.

In *Wilson*, this court previously considered the implications of the Clerk's Office providing an irregular juror information sheet. *See generally* 315 S.C. at 431, 434

---

fashioning the current juror concealment test, *Woods* does not negate the applicability of the general due diligence standard expressed in *Thompson* to non-concealment-based challenges, such as an omission by the clerk of court within a juror information sheet. *See Thompson*, 288 S.C. at 14, 339 S.E.2d at 506 (considering whether "the moving party was not negligent in failing" to learn of the potentially objectionable, omitted information). In fact, the *Wilson* court specifically relied upon *Thompson's* due diligence standard in resolving an issue stemming from an omission by the clerk of court. 315 S.C. at 436, 434 S.E.2d at 431 (citing *Thompson*, 288 S.C. at 14, 339 S.E.2d at 506).

S.E.2d at 286. In that case, a juror completed his pre-trial *juror questionnaire* and returned it to the court; the juror "stated his place of birth was 'Aleppo, Syria.'" *Id.* at 436, 434 S.E.2d at 289. The *juror information sheet*, however, which was prepared by the Clerk's Office and made available to both parties, did not indicate the juror's race or nationality, despite the fact that the *juror questionnaire* contained this pertinent information. Notably, because both parties relied upon the *juror information sheet* provided by the Clerk's Office, neither party was aware, during *voir dire*, that the juror was a noncitizen and, thus, unqualified. In finding the juror's service, and indirectly, that the omission by the Clerk's Office (*i.e.*, the irregular juror information sheet) did not constitute reversible error, the court noted the following key findings: (1) the complete juror questionnaire responses were available to the parties; (2) the appellant did not submit to the trial judge any *voir dire* question regarding the omitted information; (3) the appellant could have discovered the omitted information through the exercise of due diligence; (4) the challenged juror stated he could give both parties an impartial trial; and (5) the appellant did not demonstrate any resulting prejudice. Although the omission by the Clerk's Office in *Wilson* related to a *per se* disqualification (non-citizenship), *Wilson* is equally instructive when an omission involves a matter that is not alone dispositive as to juror qualification.

Remarkably, the record in the case at bar supports findings analogous to each of the key findings in *Wilson*. First, the complete juror questionnaire data, which showed Juror's husband was employed in both environmental health management and law enforcement, were available to both parties prior to *voir dire* upon request to the Clerk's Office. Therefore, just as in *Wilson*, the omitted information was available to the parties. Second, Jakes, like *Wilson*, did not submit any *voir dire* questions regarding the disputed juror's qualification (*i.e.*, in Jakes' case, whether any potential juror's spouse was a law enforcement officer). Third, Jakes similarly could have discovered the occupation of Juror's husband (the disputed status), *through the exercise of due diligence, by requesting a copy of the available compiled juror questionnaire data*. Fourth, Juror assured the trial court she could give both parties a fair and impartial trial. Finally, Jakes has not shown Juror's empanelment prejudiced him. Thus, evidence to support findings analogous to each of the key findings in *Wilson* exists in the present case.

Accordingly, we hold the trial court did not err by allowing Juror to continue to serve on the jury. *See Wilson*, 315 S.C. at 436, 434 S.E.2d at 289-90 (finding no error where an omission within a juror information sheet could have been

discovered through the exercise of due diligence and where no prejudice was demonstrated).

## CONCLUSION

Based on the foregoing, the decision of the circuit court is

**AFFIRMED.**

**LOCKEMY, J., concurs.**

**FEW, C.J., concurring:** I agree with the majority's analysis in sections A and B of the opinion, except (1) I would hold the *Woods* test alone resolves the merits of Jakes' concealment argument, and (2) I believe *Wilson v. Childs* is inapplicable to the resolution of this appeal. I would restrict our analysis to whether the trial court's rulings that the juror could be fair and impartial and did not conceal any information during voir dire are supported by the evidence. I agree with the majority that the evidence does support those two rulings. See *State v. Burgess*, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) (finding "no error in the judge's decision not to remove the juror" where "the juror did not conceal any information requested during voir dire" and "the judge acted within his discretion in finding the juror could be fair and impartial"). The majority's analysis of these two issues resolves this appeal and we need go no further.

I believe the majority's analysis in section C of its opinion is incorrect. In *Wilson*, this court analyzed whether the trial court should have granted a new trial after the parties discovered a Syrian national had served on the jury. 315 S.C. 431, 434, 434 S.E.2d 286, 288 (Ct. App. 1993). Section 14-7-130 of the South Carolina Code (Supp. 2012) requires that only United States citizens be placed on the list of potential jurors for a term of court. Thus, placing a Syrian national on a jury list is an "irregularity . . . in the drawing, summoning, returning, or impaneling of jurors," S.C. Code Ann. § 14-7-1140 (Supp. 2012), and we correctly relied on section 14-7-1140 to determine whether the trial court properly refused to grant a new trial. This appeal is significantly different from *Wilson* because here we do not face a statutory disqualification for jury service. Thus, in my opinion, *Wilson* and the section upon which it relies—14-7-1140—are inapplicable.

By analyzing the omission of the juror's husband's job as an "irregularity" in the empanelling of a jury, the majority has essentially cast the issue in this appeal as whether the clerk of court committed legal error. In my opinion, however, whether the clerk of court made a mistake in summarizing the jurors' answers on their questionnaires is irrelevant. A trial lawyer who relies on a clerk of court to accurately summarize the information provided by jurors, rather than looking directly at the jurors' answers, does so at the risk the lawyer may miss key information that might affect the lawyer's use of peremptory challenges. In my opinion, the clerk of court's mistake in this case could never be legal error on which a trial court may base a decision to remove a juror, or on which we could grant a new trial for the trial court's refusal to do so. The trial court properly analyzed Jakes' request to remove the juror by considering whether the juror could be fair and impartial, and by applying the *Woods* test.

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. 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 the trial judge's refusal to excuse the Juror and to substitute her with an alternate was not an abuse of discretion because: (A) Juror was impartial, despite her husband's reserve deputy status; (B) Juror did not conceal her spouse's employment; and (C) Jakes' counsel, through the exercise of due diligence, could have learned of Juror's husband's employment status.

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 (9<sup>th</sup> 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 preemptory 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 preemptory 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 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 preemptory strikes was not lessened just because the Juror did not intentionally conceal the information. Regardless of where the blame was, the prejudice still existed.

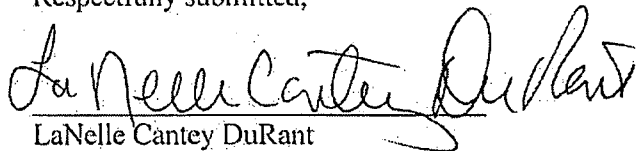
The Court also held that Jake's counsel, through due diligence, could have learned of the Juror's husband's employment status. This was in error because an employment status was listed for the husband. on the document provided by clerk. If no employment status was listed, then counsel

would have had reason to obtain more information. However, because one employment was listed for the Juror's spouse, counsel had no reason to look for any other employment.

The Court relied on Wilson v. Childs, 315 S.C. 431, 436, 434 S.E.2d 286, 289-90 (Ct. App. 1993) for authority. However, as Judge Few wrote in his concurring opinion, Wilson involved a statutory disqualification regarding United States citizenship which was a requirement for jury duty. Judge Few's opinion was that Wilson was inapplicable to the resolution of this appeal. Wilson v. Childs is also distinguished from Jakes' case as Wilson is a civil case and the Sixth Amendment right does not apply to civil cases. Jakes is distinguished from Wilson too in that the race or nationality was not indicated on the juror questionnaire. In Jakes's case, there was an employment listed for the husband but it was not the reserve deputy one.

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

Respectfully submitted,



LaNelle Cantey DuRant  
Appellate Defender

This 25th day of July, 2013.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

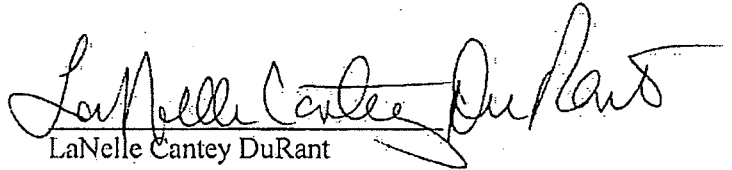
DAVID JAKES,

APPELLANT

APPELLATE CASE NO. 2011-198747

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 July, 2013.



LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

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

Heather Lee (L.S.)

Notary Public for South Carolina

My Commission Expires: July 3, 2023.

## STATE OF SOUTH CAROLINA

## IN THE COURT OF APPEALS

---

Appeal from Colleton County  
Honorable Perry M. Buckner, Circuit Court Judge  
Appellate Case No. 2011-198747

---

THE STATE,

Respondent,

vs.

DAVID JAKES,

Appellant.

---

**RETURN TO PETITION FOR REHEARING**

---

On July 10, 2013 this Court issued published opinion in which it affirmed Appellant's convictions and sentences. State v. Jakes, Op. No. 5158 (S.C. Ct. App. filed July 10, 2013). Pursuant to Rule 221(a), SCACR, Appellant petitioned this Court for rehearing. This Court requested a return. The State ("Respondent") respectfully submits that this Court correctly affirmed Appellant's convictions and sentences. Appellant has failed to demonstrate any argument overlooked or disregarded by the Court. Accordingly, Appellant's petition for rehearing should be denied.

**Standard of Review**

"A decision on whether to dismiss a juror and replace her 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 (2007). "An abuse of discretion occurs when the conclusions of the trial court either

lack evidentiary support or are controlled by an error of law.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)

**A. The trial judge properly found that the juror could be fair and impartial.**

The State maintains that the ultimate test in cases such as this is whether the juror can be fair and impartial. See U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”); S.C. Const. art. I, § 14 (“The right of trial by jury shall be preserved inviolate. Any person charged with an offense shall enjoy the right to a speedy and public trial by an impartial jury . . . .”).<sup>1</sup>

One of the ways our courts determine if a juror can be fair and impartial is by applying the State v. Woods<sup>2</sup> test. In Woods, our Supreme Court held: “When a juror conceals information inquired into during *voir dire*, a new trial is required only 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.” Woods, 345 S.C. at 587, 550 S.E.2d at 284 (emphasis added).

Appellant conceded in its brief and during oral argument that the juror did not intentionally conceal any information; therefore, the inquiry is over. State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004) (“[A] determination that a juror did not intentionally conceal the information **ends** the court’s inquiry.”) (emphasis

---

<sup>1</sup> Notably, the fact the juror’s husband was a reserved deputy did not automatically disqualify that juror from serving on the jury. See generally State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2011) (“[T]he fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror.”); State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1910) (“There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness . . .”). Furthermore, Appellant admits that the fact that the juror was married to a reserve deputy sheriff did not disqualify her from serving as a juror. (App. Br. 11.)

<sup>2</sup> 345 S.C. 583, 550 S.E.2d 282 (2001).

added); Smith v. State, 3775 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) (“Where a juror, without justification, fails to disclose a relationship, it may be inferred . . . that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn.” (quoting Woods, 345 S.C. at 587-88, 550 S.E.2d at 284)).

Further, the trial judge acted within his discretion in finding the juror could be fair and impartial. See State v. Mercer, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009) (describing the trial judge’s broad discretion to determine whether a juror is qualified). The juror in this case voluntarily gave the information regarding the status of her husband’s employment even though she was never asked for the information during voir dire. Moreover, the juror told the trial judge that she could be fair and impartial despite the fact that her husband was a reserve deputy and former active deputy.

Thus, the only test this Court needed to apply in this case was the Woods test, which is essentially a test to determine whether or not a juror can be fair and impartial. The State agrees with the concurrence in this case and believes that the Woods test resolves this matter on appeal.<sup>3</sup>

**B. The test Appellant advocates on appeal has never been approved by our Supreme Court.**

Appellant argues that this Court should focus on the fact the omitted information would have been a material factor in the use of Appellant’s preemptory strikes. But the test Appellant sets forth is not a test recognized by our appellate courts. Rather, Appellant

---

<sup>3</sup> Notably, this Court and our Supreme Court have applied the Woods test in cases involving no concealment on behalf of the juror. See State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 107 (1998) (holding that the juror did not intentionally conceal any information because he was never asked if he had ever participated in death penalty activities in the past); Burgess, 391 S.C. at 19, 703 S.E.2d at 514-15 (finding “no error in the judge’s decision not to remove the juror” where “the juror did not conceal any information requested during voir dire” and “the judge acted within his discretion in finding the juror could be fair and impartial”); State v. Bell, 374 S.C. 136, 148, 646 S.E.2d 888, 894-95 (Ct. App. 2007) (finding that the trial court did not abuse its discretion in refusing to remove the juror because there was no concealment on behalf of the juror).

is picking the favorable part of the Woods test and ignoring the unfavorable part. Although our Supreme Court provided our trial courts with the two part test mentioned above, Appellant wants this Court to only apply the second part of the two part test, which deals with whether or not the information concealed would have been a material factor in the use of the party's peremptory challenges. Appellant blatantly ignores the first part of the Woods test, which deals with whether or not the juror intentionally concealed the information. As a matter of policy, a juror who does not conceal any information whatsoever should not be subject to stricter rules than a juror who intentionally conceals information. Accordingly, Appellant's argument on appeal is without merit.

**C. The Clerk's omission of the information is irrelevant.**

The State maintains that the Clerk's omission of the juror information is irrelevant. Appellant was not entitled to the juror information in the first place. See State v. Childs, 299 S.C. 471, 474, 385 S.E.2d 839, 841 (1989) (holding that there is no right to discovery in criminal cases absent a statute or court rule and there is no statute or court rule requiring the state to provide defense counsel with prospective juror information). The clerk of court's office provided the juror information out of the convenience to the parties, and the fact the clerk provided the information out of convenience does not give the parties the right to rely solely on the jury summary sheet.

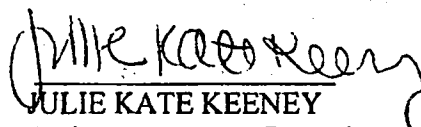
**CONCLUSION**

Based on the foregoing coupled with the arguments raised in the Final Brief of Respondent and arguments raised during oral argument, the State respectfully requests that Appellant's petition for rehearing be denied.

Respectfully submitted,

ALAN WILSON  
Attorney General

JULIE KATE KEENEY  
Assistant Attorney General

  
JULIE KATE KEENEY  
Assistant Attorney General  
Bar No. 100145

August 26, 2013

## STATE OF SOUTH CAROLINA

## IN THE COURT OF APPEALS

---

Appeal from Colleton County  
Honorable Perry M. Buckner, Circuit Court Judge  
Appellate Case No. 2011-198747

---

THE STATE,

Respondent,

vs.

DAVID JAKES,

Appellant.

---

**PROOF OF SERVICE**

---

I, Ellen DuBois, certify that I have served the within Return to Petition for Rehearing on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire  
South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589

I further certify that all parties required by the rules to be served have been served. This 26th day of August, 2013.



Ellen DUBOIS  
Legal Assistant

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**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  
Heard April 3, 2013 – Filed July 10, 2013  
Withdrawn, Substituted and Refiled September 25, 2013

---

**AFFIRMED**

---

Appellate Defender LaNelle Cantey DuRant, of  
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant  
Attorney General Julie Kate Keeney, both of Columbia,  
for Respondent.

---

**PER CURIAM:** A grand jury indicted Appellant David Jakes for three counts of attempted murder, three counts of attempted armed robbery, and one count of

possession of a weapon during the commission of a violent crime.<sup>1</sup> During the subsequent trial's *voir dire*, the trial judge asked, *inter alia*, whether any potential juror: (1) was a member of a law enforcement agency; (2) was related to, or had a close relationship with, any of the named witnesses; or (3) was biased, prejudiced, or otherwise unable to give either party a fair trial. Based upon the responses, the trial judge excused a few panel members and, thereafter, Jakes utilized three of his five allocated strikes. Among the seated jurors was Juror 102 (Juror).

After three witnesses testified, the trial judge informed counsel, *in camera*, about a note he received from Juror expressing concern about her qualification, in light of her husband's employment as a reserve deputy. The trial judge called in Juror; Juror confirmed her husband was a reserve deputy and that she had not discussed the case with him. The trial judge then asked Juror if her husband's employment affected her ability to give either party a fair and impartial trial. Juror responded, "No, it wouldn't," and was allowed to return to the jury room.

Defense counsel then objected to Juror's continued service, noting the juror information sheet, which the Clerk's Office prepared, listed the occupation of Juror's spouse as only "Environmental Health Management." Defense counsel further contended that he would have utilized Jakes' strikes differently had he known Juror's husband was a reserve deputy. Shortly thereafter, the trial judge verified that Juror did fully disclose her husband's employment on the *juror questionnaire* as including both "Environmental Health Management" and "reserve deputy," but "the Clerk's Office didn't transmit everything" that Juror filled out on her *juror questionnaire* when the Clerk's Office provided counsel with the *juror information sheet*. The trial judge then declined to excuse Juror due to this "Scri[ve]ner's error," noting that defense counsel did not request any *voir dire* question about spousal employment and that a compilation of information from the juror questionnaires was available, upon request, from the Clerk's Office.

The jury subsequently convicted Jakes on three counts of assault and battery in the first degree (a lesser-included offense), three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime. Jakes was sentenced to thirty-five years' incarceration. This appeal followed.

---

<sup>1</sup> The State tried Jakes and Antwan McMillan together. McMillan was indicted for three counts of attempted murder, three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime.

### LAW/ANALYSIS

Jakes alleges the trial judge erred in refusing to excuse Juror and replace her with an alternate because, had Jakes known Juror's husband was a reserve deputy, Jakes would have exercised his peremptory challenges differently. Thus, Jakes essentially argues that because he would have been permitted to exercise a peremptory strike against Juror, even if she was impartial, based solely upon the occupation of Juror's husband, the omission of such alleged material information constituted prejudice that required replacing Juror with an alternate when the information later came to light.

Notably, Jakes cites no authority for the 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. Because Jakes cites no authoritative support for his specific contention, we proceed to determine solely whether Juror was impartial. *See State v. Porter*, 389 S.C. 27, 35, 698 S.E.2d 237, 241 (Ct. App. 2010) (requiring an appellant to cite authority in "specific support of his assertion"). Thus, to the extent Juror was impartial, the trial court did not err in refusing to excuse Juror.

Section 14-7-1020 of the South Carolina Code (Supp. 2012) requires a trial judge, upon motion of either party, to determine whether a juror is impartial:

The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein . . . If it appears to the court that the juror is not indifferent in the cause, he must be placed aside . . . and another must be called.

*Accord State v. Cochran*, 369 S.C. 308, 321, 631 S.E.2d 294, 301 (2006) (citing section 14-7-1020). While such determinations are within the sound discretion of the trial judge, "[t]here is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree." *State v. Burgess*, 391 S.C. 15, 18, 703

S.E.2d 512, 514 (Ct. App. 2010) (citation omitted); *accord State v. Mercer*, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009).

Accordingly, the mere fact that a juror's spouse is a law enforcement officer, who is not involved in the case, does not, in and of itself, render a juror biased and, thus, unable to serve on a jury; rather, the crux of that determination is whether it "appears to the court that the juror is not indifferent in the cause." *See* § 14-7-1020 (stating the trial judge must determine whether a proposed juror is related to either party or is otherwise interested in, formed an opinion about, or is biased or prejudiced toward a party). Moreover, even jurors related by affinity or consanguinity to a testifying witness or those who closely knew the putative victim of a crime are not, absent an inability to maintain impartiality, unqualified. *See State v. Wells*, 249 S.C. 249, 259-60, 153 S.E.2d 904, 909-10 (1967) (finding a juror who directly employed victim qualified); *Burgess*, 391 S.C. at 18, 703 S.E.2d at 514 ("There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree." (citation omitted)).

In the instant matter, Juror was unrelated to the defendants and the potential witnesses, and she did not know the victims; she was merely related to a non-testifying law enforcement officer. Furthermore, once the trial judge learned Juror's husband was a reserve deputy, he asked Juror whether her husband's employment would "in any way affect [her] ability to give the [State] or [Jakes] . . . a fair and an impartial trial." Juror confirmed "it wouldn't." Because Juror appeared neither biased nor partial, the trial court did not err in finding Juror appeared impartial, despite her husband's status as a reserve deputy.

Additionally, because Juror did not conceal any information, partiality cannot be imputed to her on such a basis. *State v. Woods*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001) (recognizing that a court may infer that a juror who intentionally *conceals* information inquired into is not impartial). "[I]ntentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Id.*

At the outset, Juror disclosed her husband's status as a law enforcement officer on her self-completed *juror questionnaire*. Thus, Juror unquestionably did not conceal her husband's occupation at this phase of the jury selection process. Additionally, the trial judge asked no question during *voir dire* that required Juror

to respond with her husband's occupation. While the trial judge did ask whether any potential juror was a member of law enforcement or was related to or a close personal friend of the named potential witnesses, which did include some law enforcement officers, neither inquiry required Juror to disclose the employment status of her non-testifying husband. Moreover, while Jakes could have requested the trial judge to ask whether any panel members were related to law enforcement officers, Jakes concedes he made no such request. Because no *voir dire* question required Juror to respond with her husband's occupation, no concealment occurred and, thus, it cannot be inferred that juror was not impartial.<sup>2</sup> *See id.* at 587, 550 S.E.2d at 284 (requiring a new trial when an identified *concealment* of information (a) was intentional and (b) would have supported a challenge for cause or would have been a material factor in the use of peremptory challenges). "As we find no intentional concealment on Juror's part, we need not further determine whether the information would have been a material factor in the exercise of . . . peremptory strikes." *State v. Guillebeaux*, 362 S.C. 270, 276, 607 S.E.2d 99, 102 (Ct. App. 2004). Hence, the trial court did not err in refusing to dismiss Juror and to replace her with an alternate.

#### CONCLUSION

Based on the foregoing, the decision of the circuit court is

**AFFIRMED.**

**FEW C.J., and GEATHERS and LOCKEMY, JJ., concur.**

---

<sup>2</sup> Both parties conceded in their briefs that juror concealment did not exist.

# The South Carolina Court of Appeals

The State, Respondent,

v.

David Jakes, Appellant.

Appellate Case No. 2011-198747

RECEIVED

OCT -3

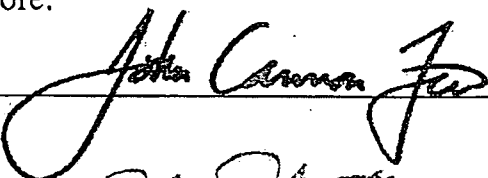
SC OFFICE OF  
APPELLATE CLERK

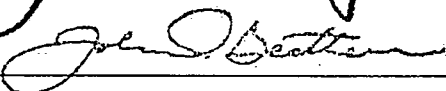
---

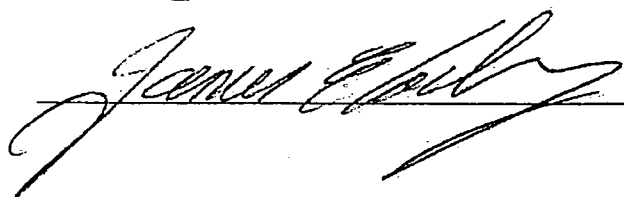
## ORDER

---

After careful consideration of the Petition for Rehearing, the Court grants Appellant's Petition for Rehearing, denies oral argument pursuant to Rule 225, SCACR and orders Opinion Number 5158, filed July 10, 2013, be withdrawn and the attached opinion substituted therefore.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:  
LaNelle Cantey DuRant  
Julie Kate Keeney

FILED

2 October 2013

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**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

---

Unpublished Opinion No. 2013-UP-360  
Heard April 10, 2013 – Filed October 2, 2013

---

**AFFIRMED**

---

Appellate Defender LaNelle Cantey DuRant, of  
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant  
Attorney General Julie Kate Keeney, both of Columbia,  
for Respondent.

---

**PER CURIAM:** A grand jury indicted Appellant David Jakes for three counts of attempted murder, three counts of attempted armed robbery, and one count of

possession of a weapon during the commission of a violent crime.<sup>1</sup> During the subsequent trial's *voir dire*, the trial judge asked, *inter alia*, whether any potential juror: (1) was a member of a law enforcement agency; (2) was related to, or had a close relationship with, any of the named witnesses; or (3) was biased, prejudiced, or otherwise unable to give either party a fair trial. Based upon the responses, the trial judge excused a few panel members and, thereafter, Jakes utilized three of his five allocated strikes. Among the seated jurors was Juror 102 (Juror).

After three witnesses testified, the trial judge informed counsel, *in camera*, about a note he received from Juror expressing concern about her qualification, in light of her husband's employment as a reserve deputy. The trial judge called in Juror, Juror confirmed her husband was a reserve deputy and that she had not discussed the case with him. The trial judge then asked Juror if her husband's employment affected her ability to give either party a fair and impartial trial. Juror responded, "No, it wouldn't," and was allowed to return to the jury room.

Defense counsel then objected to Juror's continued service, noting the juror information sheet, which the Clerk's Office prepared, listed the occupation of Juror's spouse as only "Environmental Health Management." Defense counsel further contended that he would have utilized Jakes' strikes differently had he known Juror's husband was a reserve deputy. Shortly thereafter, the trial judge verified that Juror did fully disclose her husband's employment on the *juror questionnaire* as including both "Environmental Health Management" and "reserve deputy," but "the Clerk's Office didn't transmit everything" that Juror filled out on her *juror questionnaire* when the Clerk's Office provided counsel with the *juror information sheet*. The trial judge then declined to excuse Juror due to this "Scri[ve]ner's error," noting that defense counsel did not request any *voir dire* question about spousal employment and that a compilation of information from the juror questionnaires was available, upon request, from the Clerk's Office.

The jury subsequently convicted Jakes on three counts of assault and battery in the first degree (a lesser-included offense), three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime. Jakes was sentenced to thirty-five years' incarceration. This appeal followed.

---

<sup>1</sup> The State tried Jakes and Antwan McMillan together. McMillan was indicted for three counts of attempted murder, three counts of attempted armed robbery, and one count of possession of a weapon during the commission of a violent crime.

## LAW/ANALYSIS

Jakes alleges the trial judge erred in refusing to excuse Juror and replace her with an alternate because, had Jakes known Juror's husband was a reserve deputy, Jakes would have exercised his peremptory challenges differently. Thus, Jakes essentially argues that because he would have been permitted to exercise a peremptory strike against Juror, even if she was impartial, based solely upon the occupation of Juror's husband, the omission of such alleged material information constituted prejudice that required replacing Juror with an alternate when the information later came to light.

Notably, Jakes cites no authority for the 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. Because Jakes cites no authoritative support for his specific contention, we proceed to determine solely whether Juror was impartial. *See State v. Porter*, 389 S.C. 27, 35, 698 S.E.2d 237, 241 (Ct. App. 2010) (requiring an appellant to cite authority in "specific support of his assertion"). Thus, to the extent Juror was impartial, the trial court did not err in refusing to excuse Juror.

Section 14-7-1020 of the South Carolina Code (Supp. 2012) requires a trial judge, upon motion of either party, to determine whether a juror is impartial:

The court shall, on motion of either party in the suit, examine on oath any person who is called as a juror to know whether he is related to either party, has any interest in the cause, has expressed or formed any opinion, or is sensible of any bias or prejudice therein . . . . If it appears to the court that the juror is not indifferent in the cause, he must be placed aside . . . and another must be called.

*Accord State v. Cochran*, 369 S.C. 308, 321, 631 S.E.2d 294, 301 (2006) (citing section 14-7-1020). While such determinations are within the sound discretion of the trial judge, "[t]here is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree." *State v. Burgess*, 391 S.C. 15, 18, 703

S.E.2d 512, 514 (Ct. App. 2010) (citation omitted); *accord State v. Mercer*, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009).

Accordingly, the mere fact that a juror's spouse is a law enforcement officer, who is not involved in the case, does not, in and of itself, render a juror biased and, thus, unable to serve on a jury; rather, the crux of that determination is whether it "appears to the court that the juror is not indifferent in the cause." *See* § 14-7-1020 (stating the trial judge must determine whether a proposed juror is related to either party or is otherwise interested in, formed an opinion about, or is biased or prejudiced toward a party). Moreover, even jurors related by affinity or consanguinity to a testifying witness or those who closely knew the putative victim of a crime are not, absent an inability to maintain impartiality, unqualified. *See State v. Wells*, 249 S.C. 249, 259-60, 153 S.E.2d 904, 909-10 (1967) (finding a juror who directly employed victim qualified); *Burgess*, 391 S.C. at 18, 703 S.E.2d at 514 ("There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness, either by affinity or consanguinity, within any degree." (citation omitted)).

In the instant matter, Juror was unrelated to the defendants and the potential witnesses, and she did not know the victims; she was merely related to a non-testifying law enforcement officer. Furthermore, once the trial judge learned Juror's husband was a reserve deputy, he asked Juror whether her husband's employment would "in any way affect [her] ability to give the [State] or [Jakes] . . . a fair and an impartial trial." Juror confirmed "it wouldn't." Because Juror appeared neither biased nor partial, the trial court did not err in finding Juror appeared impartial, despite her husband's status as a reserve deputy.

Additionally, because Juror did not conceal any information, partiality cannot be imputed to her on such a basis. *State v. Woods*, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001) (recognizing that a court may infer that a juror who intentionally *conceals* information inquired into is not impartial). "[I]ntentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." *Id.*

At the outset, Juror disclosed her husband's status as a law enforcement officer on her self-completed *juror questionnaire*. Thus, Juror unquestionably did not conceal her husband's occupation at this phase of the jury selection process. Additionally, the trial judge asked no question during *voir dire* that required Juror

to respond with her husband's occupation. While the trial judge did ask whether any potential juror was a member of law enforcement or was related to or a close personal friend of the named potential witnesses, which did include some law enforcement officers, neither inquiry required Juror to disclose the employment status of her non-testifying husband. Moreover, while Jakes could have requested the trial judge to ask whether any panel members were related to law enforcement officers, Jakes concedes he made no such request. Because no *voir dire* question required Juror to respond with her husband's occupation, no concealment occurred and, thus, it cannot be inferred that juror was not impartial.<sup>2</sup> *See id.* at 587, 550 S.E.2d at 284 (requiring a new trial when an identified *concealment* of information (a) was intentional and (b) would have supported a challenge for cause or would have been a material factor in the use of peremptory challenges). "As we find no intentional concealment on Juror's part, we need not further determine whether the information would have been a material factor in the exercise of . . . peremptory strikes." *State v. Guillebeaux*, 362 S.C. 270, 276, 607 S.E.2d 99, 102 (Ct. App. 2004). Hence, the trial court did not err in refusing to dismiss Juror and to replace her with an alternate.

### CONCLUSION

Based on the foregoing, the decision of the circuit court is

**AFFIRMED.**

**FEW C.J., and GEATHERS and LOCKEMY, JJ., concur.**

---

<sup>2</sup> Both parties conceded in their briefs that juror concealment did not exist.

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 (9<sup>th</sup> 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.

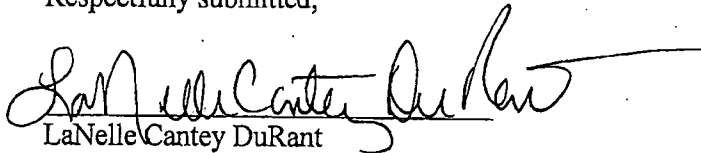
The Court misapprehended the issue when they wrote that because they found no intentional concealment, they did not need to determine whether the information would have been a material factor in the exercise of peremptory strikes. In State v. Bryant, 373 S.C. 305, 642 S.E.2d 582 (2007), the Supreme Court 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.

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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

THE STATE,

RESPONDENT,

V.

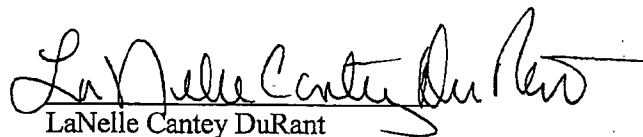
DAVID JAKES,

APPELLANT

APPELLATE CASE NO. 2011-198747

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.

# The South Carolina Court of Appeals

The State, Respondent,

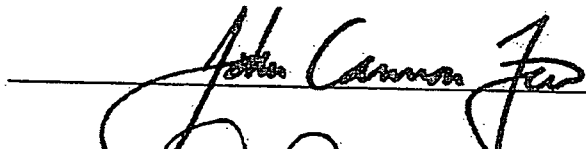
v.

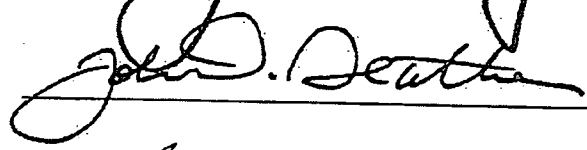
David Jakes, Appellant.

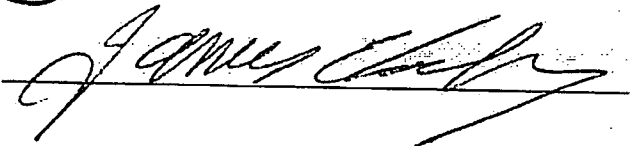
Appellate Case No. 2011-198747

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and, hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:  
LaNelle Cantey DuRant  
Julie Kate Keeney

**FILED**

12 November 2013

CETV

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

---

THE STATE,

RESPONDENT,

V.

DAVID JAKES,

APPELLANT

APPELLATE CASE NO. 2011-198747

---

FINAL BRIEF OF APPELLANT

---

LANELLE CANTEY DURANT  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS ..... 1

TABLE OF AUTHORITIES.....2

STATEMENT OF ISSUE ON APPEAL.....3

STATEMENT OF THE CASE.....4

ARGUMENT.....5

CONCLUSION.....11

TABLE OF AUTHORITIES

**Cases**

Clark v. Cantrell, 339 S.C. 369, 529 S.E.2d 528 (2000) ..... 8

State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007)..... 8

State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010)..... 9, 10

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) ..... 9

State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998) ..... 9

State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001)..... 9

**Other Authorities**

Black’s Law Dictionary 1066 (9<sup>th</sup> ed. 2009)..... 9

**Constitutional Provisions**

South Carolina Constitution Article I, § 14 ..... 9

United States Constitution Amendment VI ..... 9

United States Constitution Amendment 14 ..... 9

STATEMENT OF ISSUE ON APPEAL

Did the trial court err 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?

## STATEMENT OF THE CASE

On October 28, 2010, the Colleton County grand Jury indicted Jakes on three counts of attempted armed robbery, and possession of a weapon during a crime of violence. On August 25, 2011, the Colleton County Grand jury indicted Jakes on three counts of attempted murder. On August 11, 2011, a pretrial hearing on a motion to quash the indictments was held for Jakes and one of his co-defendants, Antwan D. McMillan before the Honorable Perry M. Buckner, III. Jakes was represented by Harris S. Beach, and the state was represented by Amanda Haselden and Ben Shelton. On August 29 – September 1, 2011, Jakes and McMillan proceeded to trial jointly before Judge Buckner and a jury. Jakes again was represented by Harris Beach, and the state by Amanda Haselden and Ben Shelton. The jury found Jakes guilty of three counts of the lesser included offense of attempted assault and battery, and three counts of attempted armed robbery, and possession of a weapon during a crime of violence. Judge Buckner granted a directed verdict on another charge, possession of a stolen pistol. R. 566, ll. 2 -4. Judge Buckner sentenced Jakes to a total incarceration of thirty-five years. R. 718, ll. 1 – 21. Jakes' attorney filed a notice of appeal. This appeal follows.

## ARGUMENT

The 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.

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 Scribner's[sic] 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 (9<sup>th</sup> 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.

Although the issue in this case is not whether the juror intentionally or non-intentionally concealed information, the issue is whether the omitted information, that she was married to a reserve deputy, from the jury information sheet 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 peremptory strikes. It was material to the peremptory challenges as the attorneys said they would have used their strikes differently.

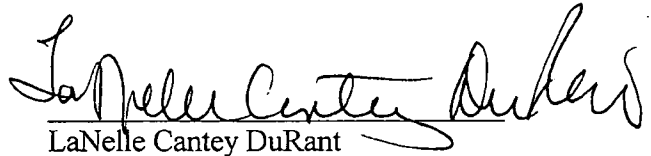
Another issue to be considered in this case is the fact that Jakes did not seek a mistrial but rather moved to replace the juror with one of the three alternate jurors. R. 206, ll. 1 – 25; R. 207, ll. 1 – 25; R. 208, ll. 1 – 5.

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.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,

  
LaNelle Cantey DuRant  
Appellate Defender

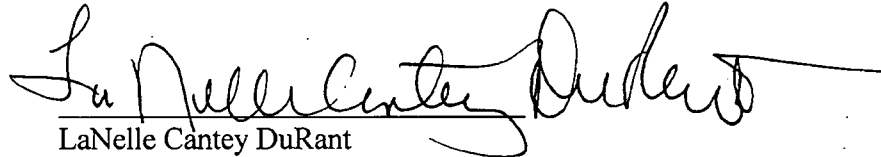
ATTORNEY FOR APPELLANT

This 12th day of December, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

December 12, 2012

A handwritten signature in cursive script, reading "LaNelle Cantey DuRant", written in black ink. The signature is fluid and extends across the width of the page.

LaNelle Cantey DuRant  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589  
(803) 734-1343

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

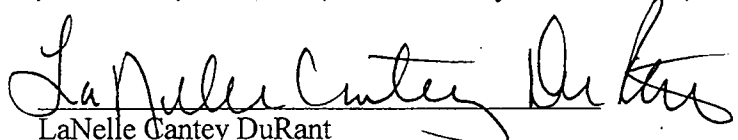
DAVID JAKES,

APPELLANT

APPELLATE CASE NO. 2011-198747

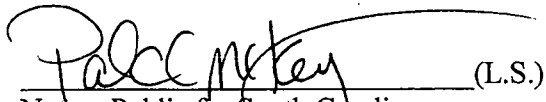
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of December, 2012.

  
LaNelle Cantey DuRant  
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me  
this 12th day of December, 2012.

  
\_\_\_\_\_(L.S.)  
Notary Public for South Carolina  
My Commission Expires: July 24, 2022



SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

December 12, 2012

Julie Kate Keeney, Esquire  
Assistant Attorney General  
Office of the Attorney General  
PO Box 11549  
Columbia, SC 29211

Re: The State v. David Jakes (Appellate Case No. 2011-198747)

Dear Julie:

Enclosed are two copies of the Final Brief of Appellant in the above-entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

LaNelle Cantey DuRant  
Appellate Defender

LCD/pcm

Enclosures

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Colleton County  
Honorable Perry M. Buckner, Circuit Court Judge  
Appellate Court No: 2011198747

---

THE STATE,

Respondent,

vs.

DAVID JAKES,

Appellant.

---

**FINAL BRIEF OF RESPONDENT**

---

ALAN WILSON  
Attorney General

JULIE KATE KEENEY  
Assistant Attorney General  
Bar # 100145  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUE ON APPEAL..... 1

STATEMENT OF THE CASE.....2

STATEMENT OF THE FACTS .....3

ARGUMENT .....4

**I. The trial judge did not err because the information the juror revealed did not automatically require the trial judge to remove the juror from the jury, the juror did not conceal any information requested during voir dire, and the trial judge acted within his broad discretion in finding the juror could be fair and impartial. Regardless, even if the trial judge did err, Appellant suffered no prejudice. ....4**

CONCLUSION.....9

## TABLE OF AUTHORITIES

### Cases

<u>Patton v. Yount</u> , 467 U.S. 1025 (1984).....	8
<u>Smith v. State</u> , 377 S.C. 507, 654 S.E.2d 523 (2007) .....	6
<u>State v. Bell</u> , 374 S.C. 136, 646 S.E.2d 888 (2007) .....	4
<u>State v. Burgess</u> , 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2011) .....	5, 6
<u>State v. Carlson</u> , 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005).....	7
<u>State v. Evins</u> , 373 S.C. 404, 645 S.E.2d 904 (2007).....	8
<u>State v. Guillebeaux</u> , 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004).....	6
<u>State v. Hilton</u> , 87 S.C. 434, 69 S.E. 1077 (1910).....	5
<u>State v. McWee</u> , 322 S.C. 387, 472 S.E.2d 235 (1996) .....	8
<u>State v. Mercer</u> , 381 S.C. 149, 672 S.E.2d 556 (2009) .....	7
<u>State v. Pagan</u> , 369 S.C. 201, 631 S.E.2d 262 (2006) .....	5
<u>State v. Stone</u> , 350 S.C. 442, 567 S.E.2d 244 (2002).....	7
<u>State v. Woods</u> , 345 S.C. 583, 550 S.E.2d 282 (2001).....	5, 6

## STATEMENT OF ISSUE ON APPEAL

### I.

The trial judge did not err because the information the juror revealed did not automatically require the trial judge to remove the juror from the jury, the juror did not conceal any information requested during voir dire, and the trial judge acted within his broad discretion in finding the juror could be fair and impartial. Regardless, even if the trial judge did err, Appellant suffered no prejudice.

## STATEMENT OF THE CASE

On October 28, 2010, a Colleton County Grand Jury indicted Appellant on three counts of attempted armed robbery and one count of possession of a weapon during the commission of a violent crime. On August 25, 2011, a Colleton County Grand Jury indicted Appellant on three counts of attempted murder.

On August 29, 2011, Appellant proceeded to trial. Attorney Harris S. Beech represented Appellant's, and Attorney David S. Matthews represented Appellant's co-defendant, Antwan McMillan. Assistant Solicitors Amanda Haselden and Ben Shelton represented the State.

On September 1, 2011, the jury returned with verdicts of not guilty on the three counts of attempted murder, guilty of three counts of first-degree assault and battery, guilty of the three counts of attempted armed robbery, and guilty of possession of a weapon during the commission of a violent crime.

The Honorable Perry M. Buckner, III sentenced Appellant to an aggregate term of 35 years. On September 6, 2011, Appellant served a timely notice of appeal. This appeal follows.

## STATEMENT OF FACTS

After the fourth witness testified for the State, the trial judge received a note from the foreman of the jury regarding Juror #102. (R. p. 197.) Juror #102 asked the court if she was a "suitable juror" due to the fact her husband was a reserve deputy with the Colleton County Sheriff's Department. (R. p. 198.) The trial judge asked Juror #102 the following question: "The fact that your husband previously, more than two and a half years ago, was a full time deputy, and been a reserve deputy for the past two and a half years, would that in any way affect your ability to give the State of South Carolina or the defendant McMillan or the defendant Jakes, in this case, a fair and impartial trial?" (R. p. 202.) The juror responded, "No, it would not."

During voir dire, the trial judge never asked the potential jurors if their spouses had ever been a member of law enforcement. (R. p. 203.) Moreover, Appellant never requested that the trial court ask that question during voir dire. (R. p. 204.)<sup>1</sup> Appellant objected to the juror sitting and stated that he might have used his strikes differently if he had the information from the beginning. (R. p. 204.)

Ultimately, the trial judge found that the juror was fair and impartial and refused to excuse the juror. (R. p. 207.)

---

<sup>1</sup> Apparently, the Clerk's Office did not transmit everything that the juror filled out on the clerk's sheet onto the sheet the lawyers used for voir dire. (R. p. 206.)

## ARGUMENT

### I.

The trial judge did not err because the information the juror revealed did not automatically require the trial judge to remove the juror from the jury, the juror did not conceal any information requested during voir dire, and the trial judge acted within his broad discretion in finding the juror could be fair and impartial. Regardless, even if the trial judge did err, Appellant suffered no prejudice.

Appellant contends the trial judge erred when he refused to excuse a juror when, after jury selection, the juror voluntarily revealed the fact that her husband was a reserve deputy for the Colleton County Sheriff's Department. Appellant argues that the information the juror revealed would have been a material factor in Appellant's preemptory strikes; therefore, the trial judge erred. However, the fact that the juror's husband was a reserve deputy for the Colleton County Sheriff's Department did not automatically disqualify her from jury service. Furthermore, the fact Appellant might have used his preemptory strikes differently if he had known the information during jury voir dire is irrelevant because the juror did not intentionally conceal the information. Moreover, the trial judge acted within his broad discretion in finding the juror could be fair and impartial. Regardless, even if the trial judge erred, Appellant failed to show any prejudice.

#### Standard of Review

"A decision on whether to dismiss a juror and replace her 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 (2007). "An abuse of discretion occurs when the conclusions of the trial court either

lack evidentiary support or are controlled by an error of law.” State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

**A. The trial judge did not err when he refused to excuse the juror.**

Despite Appellant’s contentions, the trial judge did not err in refusing to excuse the juror because the information the juror revealed did not automatically require the trial judge to remove her from the jury, the juror did not conceal any information requested during voir dire, and the trial judge acted within his broad discretion in finding the juror could be fair and impartial.

***i. The information did not automatically require the trial judge to remove the juror.***

First, the fact that a juror’s spouse has some relationship with one of the witnesses does not automatically require the trial judge to remove the juror. See generally State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2011) (“[T]he fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror.”); State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1910) (“There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness . . .”).

***ii. The juror did not conceal any information during voir dire.***

Second, Appellant concedes the juror did not conceal any information requested during voir dire.<sup>2</sup>

In State v. Woods, our Supreme Court held: “When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror

---

<sup>2</sup> During voir dire, the trial judge asked if any member of the jury was employed by any law enforcement agency. However, the trial judge never asked if any jury member’s spouse was ever employed by a law enforcement agency. (R. p. 203.)

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." 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (emphasis added).

Although our Supreme Court provided our trial courts with the two part test mentioned above, Appellant wants this Court to only apply the second part of the two part test, which deals with whether or not the information concealed would have been a material factor in the use of the party's peremptory challenges.<sup>3</sup> Appellant blatantly ignores the first part of the Woods test, which deals with whether or not the juror intentionally concealed the information.

Our case law is clear: This Court cannot reach the second part of the Woods test because the juror did not intentionally conceal the information during voir dire. See Burgess, 391 S.C. at 20, 703 S.E.2d at 514-15 (holding that a court may not remove a juror if either part of the two part test is not met; therefore, it would have been error for the trial judge to remove the juror because the juror's failure to disclose the information was innocent); State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004) ("[A] determination that a juror did not intentionally conceal the information **ends** the court's inquiry.") (emphasis added); Smith v. State, 3775 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) ("Where a juror, without justification, fails to disclose a relationship, it may be inferred . . . that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn." (quoting Woods, 345 S.C. at 587-88, 550 S.E.2d at 284)).

---

<sup>3</sup> (App. Br. 10.)

Moreover, the reason Appellant did not know the information regarding the juror beforehand was because he never asked for a voir dire question regarding whether or not any member of the jury had a spouse that was in law enforcement. See State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) (“A party cannot complain of an error which his own conduct induced.”). Thus, Appellant’s contention that he might have used his peremptory strikes differently if had known the information beforehand is without merit.

Furthermore, the fact that there were three alternate jurors available does not mean that the trial judge had to replace the juror with one of the alternates. In fact, in State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002), the trial judge decided to replace the juror with an alternate even though the juror said she could be fair and impartial. In Stone, our Supreme Court held the trial court abused its discretion in removing the juror because the juror’s failure to disclose her acquaintance with one of the witnesses was innocent. Id. at 448, 567 S.E.2d at 247-48. As in Stone, the juror in this case did not intentionally conceal any information. Thus, it would have been error for the trial judge in this case to replace the juror with one of the three alternates.

*iii. The juror stated that she could be fair and impartial even though her husband was a reserve deputy.*

Finally, the trial judge acted within his discretion in finding the juror could be fair and impartial. See State v. Mercer, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009) (describing the trial judge’s broad discretion to determine whether a juror is qualified). The juror in this case voluntarily gave the information regarding the status of her husband’s employment even though she was never asked for the information during voir

dire. Moreover, the juror told the trial judge that she could be fair and impartial despite the fact that her husband was a reserve deputy and former active deputy.

In summary, the trial judge did not err when he refused to excuse the juror.

**B. Appellant received a fair trial by twelve impartial jurors; therefore, Appellant suffered no prejudice.**

Even if this Court finds that the trial court erred in refusing to excuse the juror, any error was harmless because Appellant failed to show any prejudice. See State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996) (noting error without prejudice does not warrant reversal).

In the case at hand, the juror stated that she could be fair and impartial even though her husband was a reserve deputy and former active deputy. (R. p. 202.) The judge stated that he was not going to punish the juror by removing her from the jury because the juror was honest enough to tell the court about her husband's employment status even though it was not asked of her. (R. p. 207.) Because the trial court found the juror to be fair and impartial and there is no evidence of any prejudice, this Court should affirm the trial court's ruling. See State v. Evins, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007); see Patton v. Yount, 467 U.S. 1025, 1038 (1984) (instructing that a trial judge's determinations on the impartiality of a prospective juror are presumed to be correct and are entitled to special deference on appeal). Not only can Appellant not point to any prejudice but, in fact, Appellant was acquitted of three counts of attempted murder. Thus, Appellant received a fair trial.

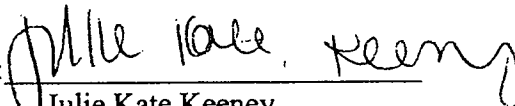
**CONCLUSION**

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

ALAN WILSON  
Attorney General

JULIE KATE KEENEY  
Assistant Attorney General

BY:   
Julie Kate Keene  
Bar # 100145

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 11, 2012

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

Appeal from Colleton County  
Honorable Perry M. Buckner, Circuit Court Judge  
Appellate Court No. 2011198747

---

THE STATE,

Respondent,

vs.

DAVID JAKES,

Appellant.

---

**CERTIFICATE OF COUNSEL**

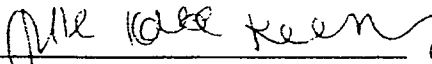
---

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

ALAN WILSON  
Attorney General

JULIE KATE KEENEY  
Assistant Attorney General  
Bar # 100145

BY:

  
Julie Kate Keeney  
Bar # 100145

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727

ATTORNEYS FOR RESPONDENT

December 11, 2012

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

---

Appeal from Colleton County  
Honorable Perry M. Buckner, Circuit Court Judge  
Appellate Court No. 2011198747

---

THE STATE,

Respondent,

vs.

DAVID JAKES,

Appellant.

---


**PROOF OF SERVICE**

---

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey Durant, Esquire  
S.C. Commission on Indigent Defense  
Division of Appellate Defense  
Post Office Box 11589  
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.  
This 11<sup>th</sup> day of December, 2012.

  
NORMA BIGBEE  
Legal Assistant

Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3727