STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2011-193567

THE STATE,

Respondent,

vs.

SAMUEL DINGLE,

Petitioner.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General
S.C. Bar No: 1871

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit

140 N. Main Street, Suite 102
Summerville, South Carolina 29483
(843) 871-2640

ATTORNEYS FOR RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

IN LIGHT OF STATE V. MILLER, 398 S.C. 47, 727 S.E.2D 32 (CT. APP. 2012), DID THE TRIAL COURT ERR IN DENYING DINGLE'S MOTION TO EXCUSE JUROR SMOAK WHERE APPELLANT NEVER OBJECTED TO THE METHOD THE TRIAL JUDGE USED TO EXAMINE JUROR SMOAK; THE TRIAL COURT MERELY FOLLOWED APPELLANT'S SUGGESTION FOR HOW TO CONDUCT THE INQUIRY; THE TRIAL COURT ENSURED THAT APPELLANT HAD AN OPPORTUNITY TO EXERCISE HIS SIXTH AMENDMENT RIGHT TO CHALLENGE SMOAK FOR CAUSE; APPELLANT NEVER ASKED THE TRIAL COURT TO CONDUCT AN ANALYSIS PURSUANT TO STATE V WOODS; NEVERTHELESS, SMOAK DID NOT INTENTIONALLY CONCEAL THE FACT THAT SHE WAS BROWN'S DISTANT STEP-RELATIVE BECAUSE THE QUESTION WAS AMBIGUOUS; THE OMISSION OF THE DISTANT STEP-RELATIONSHIP DID NOT SUPPORT A CHALLENGE FOR CAUSE; APPELLANT NEVER INDICATED HE WISHED TO USE A PEREMPTORY STRIKE ON SMOAK; AND THE OMISSION OF THE DISTANT STEP-RELATIONSHIP WAS NOT MATERIAL TO THE USE OF A PEREMPTORY STRIKE?

STATEMENT OF THE CASE

On June 16, 2010, Appellant was indicted in Orangeburg County for criminal sexual conduct with a minor, second-degree. (2010-GS-38-0912). (R. 320). On May 31, 2011, Appellant proceeded to trial before the Honorable Edgar W. Dickson, and a jury. (R. 1). He was found guilty as charged and was sentenced to twenty years imprisonment. (R. 317).

Appellant filed and served notice of appeal. On July 2, 2012, counsel for Appellant filed a brief pursuant to Anders v. California, 386 U.S. 738 (1967), and moved to be relieved as counsel. By order filed on August 8, 2013, this Court denied the motion, and directed the parties to brief the following issue: "In light of State v. Miller, 398 S.C. 47, 727 S.E.2d 32 (Ct. App. 2012), did the trial court err in denying Dingle's motion to excuse juror Smoak?" Appellant submitted his Brief of Appellant. This Brief of Respondent follows.

STATEMENT OF FACTS

The victim testified that Appellant had sexual intercourse with her over one hundred times between 2000 and 2002, beginning when she was thirteen years of age. (R. 130; 132 - 141). She also testified that he used a condom once. (R. 135). The victim further testified that Appellant was driving her down the road, when he inserted his finger inside her vagina and told her she was pregnant. (R. 136 – 37). A few days later, the hospital confirmed the diagnosis. R. 137. During this time, Appellant continued to have sexual intercourse with the victim. (R. 138). Appellant told the victim that it would assist her with delivery of the baby. (R. 138). The victim had the child, but was too ashamed to go to the police until 2009. (R. 139).

When the victim came forward, the investigator took a DNA sample from both the victim and the child. (R. 151). The DNA samples were compared to a sample taken from Appellant. (R. 7). The sample comparison revealed that Appellant was the father of the victim's child.[1] (R. 231-232). When confronted with the evidence, Appellant exclaimed "That's not possible." Appellant blamed his son, speculating that the two have the same DNA, and testifying that it must have been his son who committed the crime. [2] (R. 165-66).

The State charged Appellant under S.C. Code Ann. § 16-3-655(2) (Supp. 2009). During pretrial motions, the prosecutor expressed doubt about whether Samantha Brown, a potential witness, would testify. (R. 11). Nevertheless, Brown was included on the witness list provided to the judge. (R. 10; 38).

---

[1] The State's DNA expert testified that when performing paternity tests, it is possible that up to two of the fifteen "locations" shared in both the father and child might not match Here, all fifteen matched perfectly (R 231-234). The expert testified that the odds of a random person from the population possessing the same DNA in the same locations was 1 in 96,000 R. 221.

[2] As the expert testified, children get half of their DNA from their father, and half from their mother. R. 234. Half of the older son's DNA is different from his father's DNA Id In view of this testimony, it is practically impossible that Appellant's older son could have provided the DNA because his older son's DNA is a combination of his parent's DNA

During *voir dire*, the court asked the jury panel whether any member was related by blood or marriage to potential witnesses, including Samantha Brown. (R. 78; 82). Juror Sharon Smoak did not stand. (R. 83). The court also twice asked whether there was any reason a member of the jury panel could not give the parties a fair and impartial trial by listening to all of the evidence and rendering a fair and impartial judgment. (R. 83; 96). Later, Smoak was seated without objection from either party and after Appellant exercised eight of his peremptory challenges. (R. 99 – 103). After Smoak was seated and the second alternate was chosen but before the jury was impaneled, counsel for Appellant requested a bench conference which was followed by the selection of a third alternate juror. (R. 106).

It was thereafter disclosed on the record that counsel for Appellant was advised by Appellant that Appellant believed Sharon Smoak to be the cousin of potential witness, Samantha Brown. (R. 109). The trial court noted that the State was not calling Samantha Brown as a witness, which was confirmed by the prosecutor. (R. 109). Appellant expressed concern that Juror Smoak did not acknowledge the relationship when asked. (R. 110). When asked how he would like for the trial court to proceed, Appellant asked the court to question the juror and, if the juror was a relative of the potential witness, to excuse her. (R. 110). Both sides agreed that if Smoak was related to Brown, she would be replaced by the first alternate. (R. 110). The following exchange then occurred:

> COURT: Okay. Do you want me to do it at the end of the day, since everybody is going to be sitting here watching, or do you want me to go ahead and try to do it right now?
>
> MR. MELLARD (defense counsel): I would just get this issue out of the way and just do it right now.
>
> COURT: Okay.

MELLARD: **And like I say, it really doesn't have to be anything formal, you can just talk to her.**
COURT: All right. Okay. What—Okay. Yes, would you ask Ms. Smoak to come in here please? Okay. And what I'm going to do is, I'm going to ask her to – could you get her to just come back in chambers?

(Recess)

COURT: Alright gentlemen, I met—the cause of the concern expressed, I met with juror number one sixty-three, Sharon Smoak. Ms. Smoak advised me that Samantha Brown would have been her step father's niece's children (sic). So, she did not, you know, she knows who they are, **doesn't have any real connection with them**. She again reiterated she thought **she could be a fair and impartial juror**. So, I'm going to allow her to stay on the jury. If you have any objections to that –

MELLARD: I do have an objection, your Honor.

COURT: Okay.

MELLARD: And the objection is simply that you asked was she related by blood or marriage to any of these, the potential witnesses in this case, and she answered no, and in fact, she is. And so, it is our position she should be excused because of that.

COURT: Okay. All right, thank you sir.

(R. 111-112) (emphasis added). Immediately afterwards, the prosecutor again confirmed that Samantha Brown would not be called as a witness at trial, and that she was in the courtroom, unlike the other witnesses, who were sequestered.[3] (R. 112). After Appellant's objection, the jury, including Smoak, was impaneled and sworn. (R. 113). The jury included Michael Cocke who acknowledged a friendship with the family of a member of the prosecutor's office but who, like juror Smoak, stated that he could be fair and impartial. (R. 79; 98; 102). The issue respecting juror Smoak was not mentioned again at trial.

[3] It had been previously agreed that all witnesses would be sequestered. (R 13)

ARGUMENT

IN LIGHT OF STATE V. MILLER, 398 S.C. 47, 727 S.E.2D 32 (CT. APP. 2012), THE TRIAL COURT DID NOT ERR IN DENYING DINGLE'S MOTION TO EXCUSE JUROR SMOAK BECAUSE APPELLANT NEVER OBJECTED TO THE METHOD THE TRIAL JUDGE USED TO EXAMINE JUROR SMOAK; THE TRIAL COURT MERELY FOLLOWED APPELLANT'S SUGGESTION FOR HOW TO CONDUCT THE INQUIRY; THE TRIAL COURT ENSURED THAT APPELLANT HAD AN OPPORTUNITY TO EXERCISE HIS SIXTH AMENDMENT RIGHT TO CHALLENGE SMOAK FOR CAUSE; APPELLANT NEVER ASKED THE TRIAL COURT TO CONDUCT AN ANALYSIS PURSUANT TO STATE V WOODS; NEVERTHELESS, SMOAK DID NOT INTENTIONALLY CONCEAL THE FACT THAT SHE WAS BROWN'S DISTANT STEP-RELATIVE BECAUSE THE QUESTION WAS AMBIGUOUS; THE OMISSION OF THE DISTANT STEP-RELATIONSHIP DID NOT SUPPORT A CHALLENGE FOR CAUSE; APPELLANT NEVER INDICATED HE WISHED TO USE A PEREMPTORY STRIKE ON SMOAK; AND THE OMISSION OF THE DISTANT STEP-RELATIONSHIP WAS NOT MATERIAL TO THE USE OF A PEREMPTORY STRIKE?

This Court directed the parties to address the issue whether, in light of State v. Miller, 398 S.C. 47, 727 S.E.2d 32 (Ct. App. 2012), the trial court erred in denying Appellant's motion to excuse juror Smoak. Appellant asserts on appeal that the trial court erred in denying his motion to excuse juror Smoak without examining her on the record about specific circumstances of her relationship with the potential witness and motives compelling her to remain silent. Respondent submits that the issue presented by Appellant respecting the adequacy of the trial court's inquiry of juror Smoak cannot be considered by this Court on appeal because it was not raised to the trial court and was induced by Appellant. Nevertheless, Respondent asserts that Appellant was not denied his right to challenge Smoak for cause and at no point did Appellant argue below that the omission was material to the use of his peremptory strikes. Even if Appellant had objected, Smoak's understandable omission of her distant step-relationship when asked whether she was "related by blood or marriage" was not intentionally concealed, the omission does not support a challenge for cause, nor was it material to the use of his peremptory

strikes. Also, unlike in Miller, the juror in question was examined by the trial court and the record discloses her responses and the trial court's findings.

A. Applicable Law

It is fundamental that a defendant is entitled to a trial by an impartial jury. U.S. Const., amends. VI and XIV; S.C. Const., art. 1, §§ 3 & 14. "A 'defendant has a constitutional right to be tried by competent jurors,' which 'implies a tribunal both impartial and mentally competent to afford a hearing.'" State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007) (quoting State v. Hurd, 325 S.C. 384, 389, 480 S.E.2d 94, 97 (Ct. App. 1996) and Tanner v. U. S., 483 U.S. 107, 134 (1987)). 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 in favor of or 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 rights of peremptory challenge." State v. Gulledge, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1992). Mere relationship by blood or marriage does not automatically disqualify a juror from taking part in the case, but the juror might be excused by the trial court because of possible bias based on that relationship. State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982); Smith v. Quattlebaum, 223 S.C. 384, 76 S.E.2d 154 (1953).

The trial court's decision whether to disqualify or dismiss a juror for cause and replace the juror with an alternate is a matter committed to the discretion of trial court which will not be disturbed on appeal absent an abuse of discretion. State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (2010); State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct.App. 2007); State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001). A potential juror should be excused for cause only where the

juror's opinions would prevent or substantially impair the juror's ability to perform the duties of juror. State v. Lindsey, 372 S.C. 185, 642 S.E.2d 557 (2007). "It is not by reason of consanguinity or affinity that a juror becomes disqualified but, in the exercise of the discretion of the trial judge, he is subject to disqualification because of possible interest in the cause." Smith v. Quattlebaum, 223 S.C. 384, 389, 76 S.E.2d 154, 156 (1953); State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct.App. 1991); State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1911). The entire *voir dire* must be considered when determining juror qualification and not just isolated portions. State v. Truesdale, 285 S.C. 13, 328 S.E.2d 53 (1984). When a juror discloses a relationship that could result in disqualification but states his or her ability to be fair and impartial, sufficient evidence exists to support a refusal to excuse the juror for cause. Wilson v. Childs, 315 S.C. 431, 434 S.E.2d 286 (Ct.App. 1993).

In State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001), our supreme court considered whether the post-verdict discovery that a juror failed to disclose information during *voir dire* warranted a new trial. Our supreme court determined that a new trial is only necessary when the court finds the juror intentionally concealed information and the information concealed would have supported a challenge for cause or would have been a material factor in the use of a peremptory challenge by one of the parties. See also State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99,106- 07 (1998). "The inquiry must focus on the character of the concealed information, not the mere fact of that concealment occurred." Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986).

Our supreme court explained that "intentional 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."

State v. Woods, 345 S.C. at 588, 550 S.E.2d at 284. Unintentional concealment "occurs when the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." Id. The analysis whether a juror's failure to respond is intentional is fact intensive made on a case by case basis. Id. In the context of the post-verdict discovery as presented in Woods, our supreme court determined that "where a juror's response to *voir dire* amounts to an intentional concealment, **the movant need** only **show** 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 589, 550 S.E.2d at 285 (emphasis added); see also State v. Miller, 398 S.C. 47, 50, 727 S.E.2d 32, 34 (Ct. App. 2012); State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002). A party fails to establish that the concealed information would have been a factor in the exercise of peremptory challenges when the party does not so state at trial. State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (1991).

When presented with a post-verdict motion for new trial based upon a juror's failure to respond to a *voir dire* question in State v. Miller, 398 S.C. 47, 50, 727 S.E.2d 32, 34 (Ct. App. 2012), the trial court determined that information concealed by a juror would not have been a material factor in the use of the defendant's peremptory challenges but failed to address the first prong of the Woods' test respecting intentional concealment of the information. This Court reversed the finding of the trial court concerning the use of peremptory challenges but determined that remand was necessary for the trial court to consider whether concealment of the information was intentional. This Court opined that because the juror was not presented to the trial court for inquiry, the record lacked the information respecting this prong of the analysis. This Court also opined that remand was necessary to allow the trial court to make the factual

determination respecting the juror's motivation in not revealing the information. This Court determined that the question whether intentional concealment occurs consists of a subjective analysis in addition to an objective one in which the juror's testimony should be considered. State v. Woods, 398 S.C. at 52, 727 S.E.2d at 35.

B. The issue presented on appeal is not preserved for appellate review because Appellant created the error, and he now argues a different ground on appeal than he did at trial

Appellant contends in his brief that the trial court erred in denying his motion to excuse juror Smoak because the trial court failed to adequately examine her on the record about specific circumstances of her relationship with the potential witness and the motives compelling her to remain silent. Two serious error preservation issues preclude consideration of Appellant's argument on appeal. First, if there is any error in this case, Appellant created it. When asked by the trial court how to proceed, Appellant's counsel stated "And like I said, it really doesn't have to be anything formal, you can just talk to her." (R. 111). The court followed his suggestion and conducted an informal examination in chambers. "A party cannot complain of an error which his own conduct has induced." State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (2005) (citing State v. Stroman, 281 S.C. 508, 513, 316 S.E.2d 395, 399 (1984)). Counsel, rather than the trial court, is the cause of alleged error. The trial court announced its intention to question the juror in chambers before proceeding and Appellant did not object or suggest that the matter be explored on the record with the juror. Appellant also did not object to the sufficiency of the inquiry of or the information provided by the trial court after its discussion in chambers with the juror.

Second, the argument Appellant now makes on appeal is different than the one presented to the trial court. The argument made to the trial court was as follows:

> MELLARD: I do have an objection, your Honor.
>
> COURT: Okay.
>
> MELLARD: And the objection is simply that you asked was she related by blood or marriage to any of these, the potential witnesses in this case, and she answered no, and in fact, she is. And so, it is our position she should be excused because of that.
>
> COURT: Okay. All right, thank you sir.

(R. 112). But this is what is argued in Appellant's brief:

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

Initial Brief of Appellant p. 5 (emphasis added). "A party may not argue one ground at trial and an alternate ground on appeal." State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). Issues not raised to and ruled upon in the trial court will not be considered on appeal. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). Appellant's trial argument was that juror Smoak should be excused for cause for failing to respond to the question about relationships with potential witnesses. (R. 110-111). Appellant's argument on appeal is now that the trial judge did not adequately examine her on the record. At no time during trial did Appellant object to the manner of the examination even after the trial court specifically proposed the examination it intended to use before speaking with the juror. Defense counsel during trial simply suggested that the trial judge speak to the juror in an informal manner, and the trial judge fully complied with that request. See State v. Brown, 389 S.C. 48, 95, 697 S.E.2d 622, 628 (Ct. App. 2010) ("Counsel got the relief asked for and cannot complain on appeal."). Appellant cannot complain on appeal about that which his own conduct induced. See

State v. Stroman, 281 S.C. 508, 316 S.E.2d 395 (1984). The arguments presented were not preserved by Appellant and should not be addressed by this Court.

C. At trial, Appellant never expressed any interest in using a peremptory strike against juror Smoak, and Smoak's omission did not deny Appellant his right to object to Smoak's impanelment for cause.

A critical threshold question is what type of challenge Appellant made at trial. The record reflects that Appellant wished to remove juror Smoak for cause. Appellant objected because juror Smoak failed to respond to the *voir dire* question respecting her relationship with Samantha Brown. Counsel for Appellant stated that "If she is a relative and she says she is a relative then I think she needs to be excused." (R. 110). Appellant confirmed to the trial judge that his concern was the fact that juror Smoak failed to acknowledge the relationship when asked. (R. 110). After the judge declined to remove juror Smoak, Appellant objected: "[a]nd the objection is simply that you asked was she related by blood or marriage to any of [the potential witnesses], and she answered no, and in fact, she is. And so, it is our position that she should be excused because of that." (R. 112).

A party seeking a new trial on the basis of "disqualification of a juror must show: (1) the fact of disqualification; (2) the grounds for the disqualification were unknown prior to verdict; and (3) the moving party was not negligent in failing to learn of the disqualification . . . ." Thompson v. O'Rourke, 288 S.C. 13,14, 506, 339 S.E.2d 505 (1986). S.C. Code Ann. § 14-7-1010 (Supp. 2003) states that "The presiding judge shall determine whether any juror is disqualified or exempted by law and only he shall disqualify or excuse any juror as may be provided by law." Also, on motion by a party, the court must examine a potential juror to know whether the juror is related to either party, has any interest in the cause, has expressed or formed any opinion, or is biased. S.C. Code Ann. § 14-7-1020 (Supp. 2012). The party objecting to the

juror may introduce evidence to support the request to excuse or disqualify the juror. Id. If it appears to the court that the juror is biased, the juror must be excused. Id.

Appellant's objection presumed bias based on the distant step-relationship between Brown and Smoak, since the mere existence of the relationship does not prove bias. See State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (2010); Smith v. Quattlebaum, 223 S.C. 384, 76 S.E.2d 154[4]. Thus, the objection falls. The trial judge further examined the juror for bias and found that juror Smoak acknowledged that potential witness Brown was her stepfather's niece's child, but determined that juror Smoak did not have any real connection with potential witness Brown. R. 111. The trial court noted that juror Smoak reaffirmed her ability to remain a fair and impartial, acted within its discretion in finding her fair and impartial and properly refused to disqualify her. Id.; see also State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (2007).

Appellant had an opportunity to present any evidence supporting his request and presented nothing to the contrary. Appellant made an objection to juror Smoak's qualification based upon the relationship. (R. 112). After noting the objection, the trial court asked "Anything else, Mr. Mellard?" (R. 113). Appellant's counsel answered "No, sir." Id. After the objection, the jury was impaneled and sworn. (R. 113). The trial court declined to find juror Smoak disqualified based upon the relationship and juror Smoak's statements that she could serve fairly and impartially.

In his brief, Appellant states that "juror Smoak's relationship with the State's potential witness was plainly material because Appellant's counsel asked the court to excuse her with his remaining peremptory strike if the court found the two were in fact related." Initial Brief of

[4]Woods states that "When a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial " Woods, 345 S C at 587-588, 550 S.E.2d at 587. Smoak did not respond because her distant step-relationship did not fall into any of the categories of relationship the jury was asked about. (R 82) As the question was ambiguous, Smoak's omission was justified

Appellant p. 7. This statement is factually unfounded: at no point in the record does Appellant make a reference to peremptory strikes or indicate a desire to use one on Smoak. See R. 109-112. Unlike in State v. Woods, where the defendant stated to the trial court that the undisclosed information would have impacted his use of peremptory strikes, Appellant never made this argument or statement to the trial court in this case. Issues must be raised and ruled upon by the trial court. State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011). Our supreme court considered a similar claim unpreserved in Thompson v. O'Rourke where the appellant failed to assert to the trial court that disclosure of the information would have altered his use of peremptory strikes but then attempted to present the issue on appeal. 288 S.C. at 15, 339 S.E.2d at 506; see also State v. Savage, 306 S.C. 5, 409 S.E.2d 809.

Moreover, this issue is not preserved because Appellant was obviously aware of the relationship between juror Smoak and the potential witness at the time juror Smoak was seated but elected not to exercise a peremptory strike. Appellant waited until the entire jury was chosen, including two alternates, before addressing the matter with the trial court. Appellant cannot be permitted to reserve a vice and later challenge the jury because he was not satisfied with its ultimate composition. Appellant's remedy was to exercise a peremptory challenge at the time the juror was presented to him or to immediately bring the matter to the attention of the trial court when the question was asked. Instead, he reserved his peremptory challenge, seated the juror and later attempt to have her removed for cause. Contemporaneous action on Appellant's part was required to preserve the issue for appellate review. See State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999)(stating that appellant is procedurally barred from raising issue respecting alleged juror misconduct when he failed to bring matter to the trial court's attention at his first opportunity).

Nevertheless, Appellant never requested to use a peremptory challenge, never indicated he would have done so, and did not state that the juror's failure to respond was a material factor in the use of his peremptory strikes. Therefore, the trial judge never ruled on this issue because the only request was one to remove the juror for cause.

Since Appellant asked to have juror Smoak disqualified on the basis of her distant step-relationship with potential witness Brown, and never made any objection based on his peremptory strikes, the objection on record must be an objection for cause. Juror Smoak's omission did not deny Appellant his right to challenge juror Smoak for cause.

There is evidence in the record to support the trial court's findings that juror Smoak could be fair and impartial. Accordingly, the trial court properly declined to excuse the juror for cause.

D. The fact that potential witness Samantha Brown was juror Smoak's stepfather's niece's child was not intentionally concealed.

To the extent this Court might consider Appellant's objection to juror Smoak to be based upon intentional concealment of information at *voir dire* such that the analysis suggested by State v. Woods, was preserved for appellate review, Respondent submits that the record establishes that the information respecting Smoak's relationship to Brown was not intentionally concealed. During *voir dire*, the venire was asked "Is any member of the jury panel related by blood or marriage or a close personal friend of Samantha Brown? If so, please stand." (R. 82). No one stood. Id. Later, Appellant asserted that juror Smoak and Brown were "cousins" and asked the trial court to excuse juror Smoak based on the fact that she was a "cousin" and did not acknowledge the relationship when asked. (R. 109-110). The judge examined juror Smoak in chambers and found that potential witness Brown would have been Smoak's stepfather's niece's child. (R. 111). Smoak knew who Brown was, but did not have any relationship with or connection to her. Smoak reiterated that she could be a fair and impartial juror. Based on those

findings, the trial court refused to remove Smoak from the jury. (R. 111-112). Appellant objected based on the distant step-relationship between Smoak and Brown, and the court noted the objection. (R. 112).

"[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." State v. Woods, 345 S.C. 583, 588, 550 S.E.2d 282, 284. "Unintentional concealment, on the other hand, on the other hand, occurs where the question posed is ambiguous or incomprehensible to the average juror, or where the subject of the inquiry is insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances." Id. Whether a juror's failure to respond is intentional is a fact-intensive determination that is made on a case-by-case basis. Id.

The *voir dire* question posed by the trial court was ambiguous and not reasonably comprehensible to the average juror to apply to disclosure of the information Appellant asserts was concealed. The information was not based on blood, a close personal friendship, or juror Smoak's marriage. The only potential connection by marriage is through Smoak's stepfather. Normally the phrase "by marriage" is interpreted to mean through your husband or wife's family. It was reasonable for juror Smoak to interpret the phrase "by marriage" to mean through her own marriage, rather than through her mother's marriage to her stepfather.

The record also reflects that the subject of the inquiry was of such insignificance that juror Smoak's failure to respond was reasonable under the circumstances. Juror Smoak did not respond to the question because the potential witness was her stepfather's niece's child and was a person she had no connection with. This means that Brown is Smoak's first step cousin once

removed. By any reasonable measurement, the step relationship is a distant one.[5] The juror believed she did not personally have any relationship with Brown outside of being aware of her existence. The trial court concurred and ruled the juror would not be removed from the jury. See State v. Pitts, 256 S.C. 420, 182 S.E.2d 738 (1971). No inference or bias can be inferred. The inquiry must focus on the character of the information concealed and not purely on the fact of concealment. Thompson v. O'Rourke, 288 S.C. 13, 339 S.E.2d 505. Smoak's failure to respond did not constitute intentional concealment because the question was ambiguous, did not pertain to juror Smoak, was incomprehensible to the average juror to apply to Smoak, and was of such insignificance to Smoak that her failure to respond must be deemed unintentional. Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007); State v. Guillebeaux, 362 S.C. 270, 274 S.E.2d 99 (Ct.App. 2004); State v. Galbreath, 359 S.C. 398, 597 S.E.2d 845 (Ct.App. 2004); State v. Sparkman, 358 S.C. 491, 596 S.E.2d 375 (2004).

Moreover, remand pursuant to Miller is not necessary in this case. Unlike in Miller, the issue of the juror's failure to respond to the *voir dire* question was explored by the trial court with the juror in the manner suggested by Appellant and the juror's responses are reported on the record.

E. The information was not a material factor in the use of Appellant's peremptory challenges.

Further, Appellant did not argue and cannot show the information about juror Smoak's relationship to an individual who was not called as a witness at trial who was the child of the niece of the man who married her mother would have been a material factor in his use of peremptory challenges. Both the trial court and the State noted several times during pretrial

[5] For a graphical representation of the relationship between first cousins once removed, see Relational Logic· Removing the Confusion From the Naming of Cousins, Oxford Words Blog, http //blog oxforddictionaries com/2013/08/naming-of-cousins/ (last visited December 16, 2013) The fact that Brown and Smoak are related only by marriage only makes the relationship even more tangential

matters and jury selection that potential witness Samantha Brown would not be called as a witness. (R. 11, 109, 112). After questioning Smoak, The judge made the following finding on the record:

> COURT: Alright gentleman, I met—the cause of the concern expressed, I met with juror number one sixty-three, Sharon Smoak. Ms. Smoak advised me that Samantha Brown would have been her step father's niece's children. So, she did not, you know, she knows who they are, doesn't have any real connection with them. She again reiterated she thought she could be a fair and impartial juror.

(R. 111).

The word "material" is defined as "of such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Miller, 398 S.C. at 5, 727 S.E.2d at 34 (quoting Black's Law Dictionary 1066 (9th ed. 2009)). A material fact is one so closely connected to the point under consideration that it is indispensable to a proper assessment. Bryan Garner, Garner's Dictionary of Legal Usage relation of the words relevant and material at 766 (3rd ed. 2011).

Two factors make the relationship not material. First, the potential witness was never called. The State expressed doubt from the beginning as to whether Brown would testify. (R. 11). After the bench conference, the State indicated that it would not call Brown as a witness. (R. 109). The State reiterated that point again after Appellant's objection. (R. 112). Any bias that might occur would have to result from Brown actually participating in the trial. Because of the way the question was asked during *voir dire*, no juror even knew which party planned to call Brown as a witness. (R. 82). Therefore, any potential bias that occurred was ameliorated by the State's decision not to call Brown and the lack of knowledge the jury had of her testimony.

Second, the relationship is tangential. Brown was Smoak's stepfather's niece's child. This means that Brown is Smoak's first step cousin once removed. By any reasonable

measurement, the step relationship is a distant one and was of no significance to the juror.[6] The juror knew of Brown's existence but had no connection with her.

Third, Appellant never stated that he would have exercised a peremptory challenge to remove Smoak from the jury had he known of the relationship. Therefore, the issue respecting the second prong of the Woods test was not preserved for appellate review. State v. Savage, 306 S.C. at 5, 409 S.E.2d at 809. Nevertheless, the record reflects Appellant was aware of relationship but elected not to exercise a peremptory challenge to exclude juror Smoak from the jury. He also seated juror Cocke who was a family friend of one of the prosecutors who also indicated he could be fair and impartial. He cannot now claim the information would have been material in his use of peremptory challenges.

Because Brown was never called as a witness, and the mere existence of such a distant relationship is tangential, the omission is barely connected to the question of Smoak's bias. As the omission was not essential to the question of bias and was known to Appellant when he accepted her as a juror, it was not material to the use of peremptory strikes.

Remand pursuant to Miller for a finding on this factor is not warranted in this case. First, the concealment was not intentional and the analysis stops with that finding. See State v. Guillebeaux, 362 S.C. 270, 274 S.E.2d 99 (Ct. App. 2004) (stating the determination of intentional concealment ends the inquiry); see also State v. Burgess, 391 S.C. at 20, 703 S.E.2d at 514 (stating that if either criteria is absent, the trial judge may not remove the juror). Second, the trial court conducted an inquiry of the juror in this case and reported the substance of the juror's responses on the record. Appellant simply failed to argue and request a ruling pertaining

[6] For a graphical representation of the relationship between first cousins once removed, see Relational Logic: Removing the Confusion From the Naming of Cousins, Oxford Words Blog, http //blog oxforddictionaries com/2013/08/naming-of-cousins/ (last visited December 16, 2013). The fact that Brown and Smoak are related only by marriage only makes the relationship even more tangential.

to the issue whether concealment of the information would have been a material factor in the use of his peremptory strikes. "The rules of issue preservation impose on counsel a duty to challenge a statement of law made by the trial judge which counsel believes to be erroneous." State v. Burgess, 391 S.C. at 20, 703 S.E.2d at 514.

The record indicates the relationship between the juror and potential witness was not a material factor in the use of peremptory strikes despite Appellant's assertion for the first time on appeal. The record reveals that, despite being aware of the relationship, Appellant did not strike juror Smoak and also specifically seated another juror who indicated a friendship with the family of a member of the Solicitor's Office. The juror also worked for the same company as Appellant and, upon further questioning, indicated he could be impartial and impartial. (R. 98; 102).

Ignoring all of the procedural bars that prohibit consideration of the argument Appellant presents to this Court, Respondent submits that juror Smoak's failure to disclose was innocent, the relationship did not support a challenge for cause nor would it have been a material factor in Appellant's exercise of peremptory challenges. Contrary to Appellant's claim, it would have been an abuse of discretion to remove juror Smoak. See State v. Stone, 350 S.C. at 442, 567 S.E.2d at 244. The conviction must be affirmed.

CONCLUSION

If any error exists, it is because Appellant caused it, and the issue is not preserved because Appellant presents it for the first time on appeal.

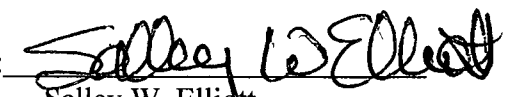
The trial court properly refused to exclude juror Smoak for cause upon finding that she could be fair and impartial. Moreover, it is clear juror Smoak's failure to reveal information during *voir dire* was innocent and would not have been a material factor in the use of Appellant's peremptory challenges or removal for cause. For all the reasons stated above, this Court should affirm.

Respectfully submitted,

ALAN WILSON
Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DAVID M. PASCOE, JR.
Solicitor, First Judicial Circuit

BY: 
Salley W. Elliott
S.C. Bar No: 1871

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

ATTORNEYS FOR RESPONDENT

April 4, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County
Honorable Edgar W. Dickson, Circuit Court Judge
Appellate Case No. 2011-193567

THE STATE,

Respondent,

vs.

SAMUEL DINGLE,

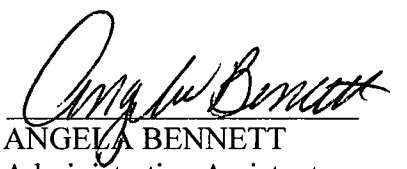
Petitioner.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Brief of Respondent to Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Benjamin John Tripp, Assistant Appellate Defender
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 Rule to be served have been served. This 4th day of April, 2014.



ANGELA BENNETT
Administrative Assistant

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