STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JABRIEL L. SINGLETON,

APPELLANT

APPELLATE CASE NO. 2013-000543

ANDERS BRIEF OF APPELLANT

DAVID ALEXANDER
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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in refusing to remove a juror who concealed a relationship with a State's witness after removing another juror earlier in the trial for a nearly identical relationship when the trial judge's decision was likely influenced by the fact that no alternates were available to replace the juror and, under South Carolina law that should be overturned, he had no ability to allow the defendant to proceed with a jury of less than twelve members, leaving the trial judge with the stark choice of declaring a mistrial or keeping a possibly biased juror?

STATEMENT OF THE CASE

On July 18, 2012, a Richland County grand jury indicted appellant for murder and attempted murder. R. 1175. On March 4, 2013, the trial court heard pretrial motions and selected the jury. R. 1036. On March 5, 2013, appellant was tried before the Honorable R. Knox McMahon and a jury. R. 1. Kathryn Cavanaugh, Nicole Simpson, and John Steadman represented the State. R. 1. Tivis Sutherland represented appellant. R. 1. The jury convicted appellant. R. 1019, ll. 4 – 12. This appeal follows.

ARGUMENT

Whether the trial court erred in refusing to remove a juror who concealed a relationship with a State's witness after removing another juror earlier in the trial for a nearly identical connection when the trial judge's decision was likely influenced by the fact that no alternates were available to replace the juror and, under South Carolina law that should be overturned, he had no ability to allow the defendant to proceed with a jury of less than twelve members, leaving the trial judge with the stark choice of declaring a mistrial or keeping a possibly biased juror?

Relevant Facts

The State claimed this was a case of "coldblooded" and premeditated murder. R. 964, ll. 12 – 13. R. 970, ll. 8 – 24. The evidence showed little, if any, planning. The State's theory was that appellant—who was alone—concocted a plan to rob two men (nicknamed "King Breeze" and "Crash") who appellant well, who numerous people saw him with that day, who were larger than him, in the driveway of someone he did not know located in a remote part of Richland County, in the two men's car, without any escape plan other than running through the woods, and in broad daylight. R. 83, l. 9 – 127, l. 14. R. 963, l. 23 – 992, l. 7.

Appellant testified that he acted in self-defense. Appellant testified that King Breeze and Crash wanted to purchase marijuana from him, drove him to this remote location, and then tried to rob him inside the car. R. 857, l. 15 – 871, l. 24. Appellant was seated in the backseat of the car. R. 868, ll. 10 – 21. Fearing for his life because he earlier saw King Breeze with a gun, appellant pulled his own pistol and fired into the front seats until it was empty. R. 873, l. 6 – 876, l. 15. Appellant got out of the driver's

side backseat door. R. 876, ll. 16 – 18. He saw the two men still in the front seat and feared they would attempt another attack. R. 876, ll. 16 – 877, l. 5. Appellant dumped the shells out of his gun and reloaded. R. 876, l. 19 – 877, l. 19. Appellant saw Crash reaching under the driver's seat where he believed their gun was located. R. 877, ll. 11 – 19. Appellant's leg was stuck in the car and by the time he freed it, Crash had a gun and was out of the car coming toward him. R. 878, ll. 3 – 16. Appellant fired. R. 878, ll. 3 – 16. Crash fell to the ground. R. 878, ll. 3 – 16. Appellant ran into the woods. R. 878, ll. 3 – 16. He dropped his gun, but did not stop to grab it and just ran. R. 878, ll. 3 – 16.

Even though Crash was shot in the neck and hand, bleeding, and having trouble breathing he walked past several houses where he could have asked for help in favor of a route to a more distant house that took him by a heavily wooded area. R. 104, ll. 2 – 23. R. 54, l. 18 – 55, l. 1. Crash claimed that no one other than appellant had a gun. R. 105, ll. 18 – 20. No gun was ever found in the case. R. 638, ll. 5 – 7. The police used a dog to search for a gun, but only searched near the house where Crash asked the owner to call 911. R. 263, l. 1 – 265, l. 17. The police did not take the dog near the crime scene. R. 265, ll. 15 – 17.

King Breeze died at the scene. R. 54, ll. 4 – 17. R. 55, ll. 9 – 17. The police found him in the car behind the steering wheel unresponsive. R. 54, ll. 4 – 17. Crash survived his wounds and testified at trial. Crash stated that he and King Breeze wanted to buy "a couple of ounces of weed and an X-box" from appellant. R. 87, ll. 6 – 23. After hanging out with appellant and multiple other people at a recording studio, they drove to meet appellant at his girlfriend's house. R. 84, l. 15 - 88, l. 19. King Breeze and Crash drove appellant, appellant's girlfriend, and another girl to Zaxby's. R. 90, l. 15 – 91, l. 9.

The two girls were dropped off at Zaxby's. R. 91, ll. 2 – 7. Appellant got in the back seat. R. 91, ll. 8 – 9.

Crash claimed appellant directed them out into the country to Hopkins. Tr. 91, l. 23 – 92, l. 17. They sat in the car. R. 96, ll. 8 – 25. Even though the State claimed this was a cold-blooded case of premeditated murder, and appellant was in the back seat and could have simply shot both King Breeze and Crash in the head from behind, Crash testified that appellant got out of the car and offered to let Crash shoot his gun. R. 96, l. 24 – 97, l. 11. The three men laughed that Crash was "a punk" because he was scared to shoot appellant's gun. R. 96, l. 24 – 97, l. 6. Crash said then, "a few seconds later I just heard shots." R. 97, ll. 5 – 6.

According to Crash, appellant fired into the car through the passenger's side window. R. 97, l. 9 – 98, l. 15. Crash's "window was kind of down." R. 97, ll. 16 – 18. Appellant fired multiple shots through this window, hitting King Breeze and Crash and shattering the driver's side window. R. 98, ll. 1 – 10. R. 283, ll. 13 – 22. Somehow, the window on the passenger side closest to where appellant was supposedly firing suffered no damage. R. 283, ll. 13 – 22. No police witness testified there were any bullet holes on the outside of the vehicle. R. 227, ll. 16 – 20.

Crash blacked out, but remembered King Breeze throwing money at appellant during the shooting. R. 99, ll. 14 – 24. Crash blacked out again. R. 100, ll. 2 – 4. When Crash regained consciousness, he saw appellant on the driver's side reloading. R. 100, ll. 7 – 12. Crash "rushed him." R. 100, ll. 7 – 12. After a tussle, appellant pointed the gun at Crash and backed him into the car. R. 101, ll. 1 – 20. Appellant demanded Crash's phone. R. 101, l. 21 – 102, l. 8. After Crash gave him the phone, appellant fired

two more times with one of the shots hitting Crash's hand, and Crash passed out again. R. 102, l. 24 – 103, l. 11. When Crash awoke, King Breeze was dead and appellant was gone. R. 103, l. 12 – 104, l. 13.

While the State claimed that the forensic evidence overwhelmingly supported Crash's version of events, the forensic evidence was far from conclusive. Gunshot residue was found on King Breeze and on multiple places inside of the car. R. 512, l. 20 – 516, l. 18. The State's gunshot residue witness admitted that if a gun were fired inside of the vehicle, some residue could escape through the windows, "otherwise, it's contained in them – I mean, it's like shooting a gun inside the box. Everything is going to be inside the box." R. 520, ll. 17 – 24. When asked on cross-examination whether gunshot residue would be found inside a car if someone was standing outside of the vehicle shooting, the State's witness equivocated, "It can be; but depending on how far away and the position of the gun and all of that other stuff, it can be." R. 520, l. 25 – 521, l. 5.

One of King Breeze's gunshot wounds to his head had stippling, which indicated the gun was fired at very close range. R. 583, ll. 16 – 584, l. 8. This wound went from left to right and downwards, which would be consistent with a shot from the back seat, although the State argued this meant appellant had executed King Breeze after he reloaded from the driver's side. R. 585, ll. 1 – 7. R. 964, ll. 12 – 22. King Breeze's other gunshot wounds had a right-to-left trajectory. R. 585, l. 13 – 592, l. 25. The State's pathologist claimed these wounds would be consistent with someone twisting to shield themselves; however, it would also seem consistent with someone twisting away from the back seat to retrieve a firearm. R. 590, l. 24 – 591, l. 5. R. 591, ll. 16 – 24.

The pathologist admitted that he would have no way to know whether someone was turned or how someone was sitting from analyzing these wounds. R. 620, ll. 21 – 35. Shell casings were recovered from the driver's side of the vehicle which would be consistent with both appellant's and Crash's version of events. R. 181, ll. 4 – 6.

At voir dire, the court asked whether any member of the panel was employed by the Richland County Sheriff's Department. R. 1055, l. 25 – 1056, l. 5. During the trial, the solicitor's investigator recognized one of the jurors as a volunteer with the sheriff's department. R. 136, l. 22 – 137, l. 14. This juror did not reveal his relationship during voir dire. R. 137, l. 21 – 140, l. 12. The trial judge removed him and replaced him with one of the alternates. R. 144, l. 2 – 145, l. 24.

At voir dire, the trial judge asked whether any potential juror knew "Investigator Mat Ellis, South Carolina Attorney General's Office." R. 1072, ll. 14 – 15. There was no response. R. 38, l. 5. During the trial, Juror 151 revealed that he was a member of the same club as Mat Ellis and knew him through a mutual friend. R. 402, ll. 16 – 403, l. 19. They attended cookouts together. R. 403, ll. 21 – 22. The juror claimed he did not know during voir dire "whether it was the same Mr. Ellis." R. 484, ll. 17 – 22. The trial judge removed this juror and replaced him with an alternate. R. 406, ll. 1 – 19. Only two alternates were selected, so at this point in the trial, no alternates were remaining. R. 1085, ll. 5 – 24.

When David Collins ("Collins"), the State's firearms expert, arrived at trial, he immediately recognized Juror 219. R. 556, ll. 5 – 10. Collins and Juror 219 attended Cardinal Newman high school together and graduated in the same class. R. 556, ll. 4 – 16. R. 561, ll. 19 – 24. The solicitor originally told the court that Collins "doesn't have

any interaction with that juror." R. 556, ll. 12 – 13 (emphasis added). The attorneys and the trial court questioned Collins and he testified that he had seen Juror 219 "at a few social functions at a mutual friend's house, but we don't have any direct social interaction." R. 557, ll. 21 – 25. Collins stated the last time he saw Juror 219 was "approximately one-and-a-half to two years ago at the same mutual friend's house." R. 558, ll. 4 – 7.

When Juror 219 was brought before the court, he readily admitted that he knew Collins, graduated from high school with Collins, and saw Collins "maybe once every couple of years, one year or something." R. 560, ll. 6 – 563, l. 12. The juror admitted hearing the name "David Collins" during voir dire, but he did not bring this to the court's attention because he thought that the "David Collins" he knew worked for SLED, and during voir dire the trial judge stated that David Collins worked for Richland County. R. 562, ll. 12 – 18.

Appellant moved that Juror 219 be removed from the jury because of the relationship with Collins. R. 564, l. 9 – 566, l. 7. Appellant stated that he would have struck Juror 219 had he known about the relationship with Collins. R. 564, l. 9 – 565, l. 2. Juror 219 was the first juror seated. R. 566, ll. 2 – 4. The solicitor argued that Juror 219 should stay on the jury because the juror claimed he could be fair and impartial, the juror did nothing intentional, and excusing the juror "leaves us with no alternates as well." R. 565, ll. 11 – 23. The trial judge denied the motion to remove the juror, finding that Juror 219 "did not conceal any information requested during voir dire." R. 566, l. 8 – 568, l. 19.

Discussion

"All criminal defendants have the right to a trial by an impartial jury." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). The test for whether a new trial is required when a juror fails to disclose information is: (1) whether the concealment was intentional, and (2) whether the information would have been a material factor in the use of a peremptory challenge or would have supported a challenge for cause. Id. at 587-88, 550 S.E.2d at 284. "Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial." Id. If the concealment is intentional, a prejudice inquiry is not required because it is "clear 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." Id. at 588, 550 S.E.2d at 285. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002). McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013).

The trial judge erred in finding the juror's concealment was unintentional. The juror stated that he heard the name of his high school classmate and social companion during voir dire, but elected not to respond because he thought the "David Collins" he knew worked for another branch of law enforcement. Even if the concealment was unintentional, the failure to bring this to the attention of the court was certainly grossly negligent.

It also seems clear that the only reason the trial judge refused to remove Juror 219 was because he had no alternates remaining. Juror 151's relationship with Mat Ellis was nearly the same as Juror 219's relationship with Collins. The trial judge did not find any

intentional concealment with respect to Juror 151, yet removed him. The only real difference between the two situations is that the court had no alternates remaining and would have been forced to declare a mistrial. This consideration should play no role in the Woods analysis.

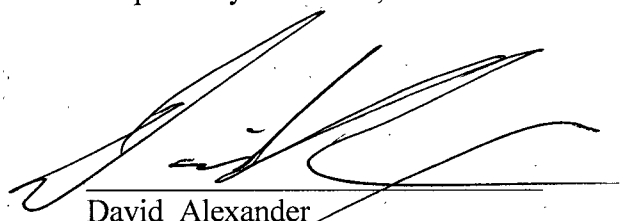
While appellant admits that trial counsel did not ask or proffer that he would have proceeded with a jury of less than twelve members, this Court should disregard any error preservation problems and address this issue. Raising the issue of proceeding with less than twelve jurors would have been futile, as binding precedent from our Supreme Court states that defendants cannot waive their right to proceed with less than twelve jurors. State v. Hall, 137 S.C. 261, 101 S.E. 662 (1919). In Hall, a juror became sick and the defendant agreed to proceed with eleven jurors. Id. The conviction was reversed on appeal, finding this right could not be waived. Id. Since Hall controls, even had appellant raised this issue, it would have been futile because the trial court would have been bound to follow precedent and only our Supreme Court may overturn Hall.

Hall should be overturned. Federal courts allow a defendant to waive his right to twelve jurors. United States v. Fisher, 912 F.2d 728, 731-33 (4th Cir. 1990). Overturning Hall would keep trial judges from facing the choice faced by Judge McMahon in this case: either dismiss Juror 219 and declare a mistrial or keep the problematic juror and impair the defendant's right to an impartial jury. Trial judges should have the discretion to accept a waiver from a defendant of the right to twelve jurors that would allow a jury free from any taint and prevent mistrials.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and the case remanded for a new trial.

Respectfully submitted,



David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of September, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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THE STATE,

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JABRIEL L. SINGLETON,

APPELLANT

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jabriel L. Singleton states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge R. Knox McMahon, which was held on March 8, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Jabriel L. Singleton.

Respectfully submitted,

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

This 19th day of September, 2014.

STATE OF SOUTH CAROLINA

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True–billed indictment(s);
(2) Trial Transcript
(3) Transcript dated March 4, 2013

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

September 19th, 2014

David Alexander
Appellate Defender

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Attorney for Appellant

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

September 19th, 2014

David Alexander
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APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter and a true copy of the Record on Appeal in the above referenced case have been served upon Donald J. Zelenka, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Mr. Jabriel L. Singleton, #331891 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 19th day of September, 2014.

David Alexander
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 19th day of September, 2014.

(L.S.)
Notary Public for South Carolina
My Commission Expires: July 3, 2023.