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S.C. Supreme Court

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Colleton County
Honorable Perry M. Buckner, Circuit Court Judge
Appellate Case No. 2013-002571

THE STATE,

Respondent,

vs.

DAVID JAKES,

Petitioner.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The Court of Appeals correctly affirmed the trial judge's decision not to remove a seated juror during trial after the juror revealed her husband was a reserve deputy with the Colleton County Sheriff's Office because the juror did not intentionally conceal that information during voir dire, was not prejudiced or biased by the fact her husband was a reserve deputy, and assured the trial judge she could be fair and impartial in deciding Jakes' case. However, even if the trial judge somehow abused his discretion by failing to remove the juror during trial, any error was entirely harmless and resulted in no prejudice to Jakes because he nonetheless received a fair trial by a fair and impartial jury, which was all he was entitled to under the law.

STATEMENT OF THE CASE

In June of 2010, Petitioner David Jakes was arrested following an investigation into a shooting and attempted robbery. In October of 2010, the Colleton County Grand Jury indicted Jakes for three counts of attempted armed robbery, three counts of attempted murder, and one count of possession of a weapon during the commission of a violent crime. In August of 2011, the Colleton County Grand Jury indicted Jakes for one count of possession of a stolen pistol and issued amended indictments for the three previous counts of attempted murder. On August 29, 2011, a jury trial was commenced in the Colleton County Court of General Sessions with the Honorable Perry M. Buckner, circuit court judge, presiding. During trial, the trial judge granted a directed verdict as to the possession of a stolen pistol charge. Thereafter, at the conclusion of trial, the jury convicted Jakes of three counts of attempted armed robbery, three counts of first-degree assault and battery, and one count of possession of a weapon during the commission of a violent crime. Following the verdict, the trial judge sentenced Jakes to consecutive terms of imprisonment of twenty years for one count of attempted armed robbery, ten years for one count of first-degree assault and battery, and five years for possession of a weapon during the commission of a violent crime along with concurrent terms of imprisonment of twenty years for each of the remaining counts of attempted armed robbery and ten year for each of the remaining counts of first-degree assault and battery. Jakes then timely appealed his convictions.

On appeal, the Court of Appeals affirmed Jakes' convictions in a published decision. State v. Jakes, Op. No. 5158 (S.C. Ct. App. filed July 10, 2013). Jakes then petitioned the Court of Appeals for rehearing, and the Court of Appeals granted Jakes' petition, withdrew its previous opinion, and filed a substituted unpublished opinion again

affirming Jakes' convictions. State v. Jakes, Op. No. 2013-UP-360 (S.C. Ct. App. re-filed Oct. 2, 2013). Jakes then petitioned the Court of Appeals for rehearing for a second time, and the petition was denied. Subsequently, Jakes filed a petition for a writ of certiorari in the Supreme Court, and the petition was granted on August 6, 2014.

STATEMENT OF FACTS

Shortly before midnight on the night of June 3, 2010, Jesse King, an explosive disposal specialist in the United States Army, was driving along I-95 in Colleton County with his wife, Amanda Metzfield, on the way to a military base in Pensacola, Florida, while his mother-in-law, Jeanine Metzfield, followed behind them towing a U-Haul trailer with her truck. (R. pp. 143-144; p. 148; pp. 162-163; pp. 171-173). As they passed through Colleton County, King's mother-in-law began to experience mechanical problems with her truck, and they all pulled off at an exit and stopped on a deserted road next to the highway. (R. pp. 148-149; p. 162; p. 173-174). A few moments later, a concerned passerby saw their vehicles and stopped to speak with them. (R. pp. 162-163; p. 174). During their conversation with the passerby, he provided them with a phone number for a tow truck operator that could assist them and warned them they had stopped in a dangerous area. (R. pp. 162-163; p. 174).

After the passerby left, King called the tow truck operator, arranged for him to come to their location, and began transferring the U-Haul trailer from his mother-in-law's truck to his own. (R. p. 149; p. 162; p. 174). While he was crouched down behind his truck connecting the trailer, a light-colored sedan screeched to a halt at a nearby intersection, and a man with something wrapped around his face jumped out of the back of the sedan, pointed a large pistol at King's mother-in-law, and yelled for her to put "em" up. (R. pp. 150-153; p. 164; pp. 174-176). In response, King sprang up, drew his own firearm, pointed it at the man, and ordered him to get back into his car and drive away. (R. p. 152; p. 159; p. 164; p. 175). However, the man turned his gun in King's direction, so King shot at the man until the man fell to the ground. (R. p. 152; p. 175). At that moment, the man's confederates inside of the sedan began yelling, and one of the

men fired several shots from inside of the vehicle at King and the others, striking both of their trucks with bullets. (R. pp. 152-153; p. 166; pp. 182-183). The man who had been shot by King then dropped his gun and crawled into the sedan, and the sedan rapidly sped away from the scene. (R. pp. 153-154; pp. 175-176).

Once the would-be robbers were gone, King and the others called 911 to report the shooting and attempted robbery, and law enforcement officers were quickly dispatched to their location. (R. pp. 142-144; p. 164; p. 176). Shortly thereafter, Detective Jeff Scott of the Colleton County Sheriff's office arrived at the scene, interviewed the victims, and began searching for evidence. (R. pp. 357-358). During his search, he located blood stains, a .50-caliber pistol that had been stolen from a California police department in 2002, and several spent shell casings fired from both a nine-millimeter pistol and a .357-caliber weapon. (R. pp. 368-370). He then collected that evidence and took swabs of the blood stains, and the evidence was subsequently submitted to S.L.E.D. for analysis. (R. pp. 389-390).

Meanwhile, Petitioner David Jakes was brought to the emergency room at the Colleton Medical Center suffering from multiple gunshots wounds, and staff members at the hospital reported his arrival to law enforcement officers. (R. p. 145; pp. 293-298). In response, Sergeant Jackie Lawson of the Colleton County Sheriff's Office went to the hospital and spoke with the individuals who brought Jakes to the hospital, including Shaquita Bryant. (R. pp. 471-475). However, those individuals were all uncooperative and provided Sergeant Lawson with inconsistent stories about Jakes.¹ (R. pp. 475-477).

¹ On the day after the incident, Bryant spoke with another investigator and provided more information about how Jakes ended up at the hospital. (R. pp. 286-287). Specifically, she told the investigator she saw "Chippy," "Dinky," and "Rat" together, "Chippy" helped load Jakes into her vehicle, and she and her friends brought Jakes to the hospital. (R. p. 282; p. 287). Notably, James Davis' nickname was "Chippy," Jakes' nickname was "Dinky," and Antwan McMillan's nickname was "Rat." (R. pp. 211-213).

Shortly thereafter, law enforcement officers located the sedan involved in the incident at Jakes' grandmother's home. (R. p. 239; p. 320; p. 339). The officers then secured the sedan, and a subsequent search of the vehicle led to the discovery and collection of fingerprints, palm prints, bloods stains, nine-millimeter shell casings, gloves, various items of clothing, and an open bottle of gin.² (R. pp. 320-322; p. 342; p. 347; p. 349; pp. 389-390; p. 407; p. 493). Upon further investigation, the officers discovered the sedan was registered to someone named David Jenkins while the license plate affixed to the vehicle was actually associated with a different vehicle registered to Brenda McMillan, who was the mother of Antwan McMillan. (R. p. 422; p. 424; p. 454).

Later that day, James Davis and his family contacted officers with the Colleton County Sheriff's Office to discuss Davis' role in the shooting and attempted robbery. (R. pp. 304-307). During Davis' conversation with the officers, he initially denied any involvement in the crimes. (R. p. 307). However, after he spoke with his family, Davis told the officers the truth about what happened and was placed under arrest.³ (R. pp. 243-

² Upon analysis, a forensic D.N.A. expert determined the blood found both at the crime scene and in the sedan involved in the incident belonged to Jakes. (R. p. 488; pp. 495-496). Furthermore, the expert determined Jakes' D.N.A., Davis' D.N.A., and D.N.A. similar to McMillan were present on several of the items recovered from the sedan. (R. pp. 498-499; p. 504). Likewise, an expert in latent fingerprint examination conducted testing of the prints recovered from the sedan involved in the incident and determined many of the prints were left by both Davis and McMillan. (R. pp. 535-541).

³ During his trial testimony, Davis recounted the details of the incident. (R. pp. 215-216). Specifically, he stated he headed to Walterboro, South Carolina, in a gray sedan with Jakes and McMillan on the night of June 3, 2010. (R. 215-224). As McMillan drove them towards their destination, Davis indicated they passed three people on the side of the road who appeared to be having car trouble. (R. pp. 223-225). When they saw those people, Davis stated McMillan and Jakes decided to rob them because it would be an "easy lick." (R. pp. 225-227). Davis testified they then turned around, drove back towards the stranded motorists, and stopped their vehicle in a manner that blocked a nearby exit ramp. (R. p. 227). After that, Davis stated Jakes jumped out, ran towards the people, and demanded they "give it up" at gunpoint. (R. pp. 227-228). Davis testified he then heard gunshots, McMillan began firing at the motorists, and he helped Jakes – who had been "shot all over" – back into the sedan. (R. pp. 228-231). Once Jakes was back in the sedan, Davis indicated they sped back towards their homes despite Jakes' requests to be taken to a hospital until they passed a car driven by Bryant. (R. p. 232). However, Davis stated they then passed a vehicle driven by Bryant, got Bryant to stop, and convinced her and her companions to take Jakes to the hospital.

244; pp. 266-268; p. 310). Then, on the following day, McMillan surrendered to authorities and was arrested for his role in the incident, and Jakes was also placed under arrest.⁴ (R. p. 454; p. 569). Subsequently, Davis, Jakes, and McMillan were all indicted for numerous offenses, and Jakes and McMillan proceeded to trial together. (R. p. 38; p. 251; pp. 724-737).

At the outset of trial, the trial judge conducted voir dire of the prospective jurors. (R. pp. 39-40). During voir dire, the trial judge asked the prospective jurors if any of them: (1) were related by blood or marriage or close personal friends with Jakes, McMillan, the solicitor, the defense attorneys, or any of the witnesses that would be testifying during trial; (2) had ever been represented by any of the attorneys involved in the case in the past; (3) were aware of the allegations against either Jakes or McMillan; (4) had formed opinions about the facts of the case or about the guilt or innocence of either Jakes or McMillan; (5) were members of or employed by a law enforcement agency; (6) were members of the grand jury that issued the indictments involved in the case; (7) were members of or contributors to groups affiliated with law enforcement or victims' rights; (8) had been victims of a violent crime; or (9) knew of any reasons why they might be biased, might be prejudiced, or could not give either the State or the defendants a fair trial. (R. p. 44; pp. 48-52; p. 56; p. 60; p. 66; p. 70; pp. 73-74). At the conclusion of voir dire, the trial judge asked the solicitor and defense counsel whether they wished him to ask any additional questions of the prospective jurors, and defense counsel for both Jakes and McMillan asserted they did not. (R. pp. 73-74).

(R. pp. 232-238). After that, Davis indicated he and McMillan went back to their homes, and he remained there until he decided to turn himself in to the authorities. (R. pp. 239-240; pp. 243-244).

⁴ Shortly after McMillan was arrested, officers discovered numerous .50-caliber shell casings on a parcel of property located directly across the street from McMillan's home. (R. p. 460; pp. 465-466; p. 468).

Thereafter, the trial judge began the jury selection process, and the parties selected a jury for trial. (R. pp. 74-84). During the selection process, defense counsel for Jakes exercised three peremptory strikes, defense counsel for McMillan exercised four peremptory strikes, and Juror # 102 was seated on the jury without objection. (R. pp. 77-81). After a jury was selected, the trial judge asked the parties whether there were any issues with the jury selection process, and neither the solicitor nor defense counsel raised any objections. (R. pp. 83-84). The jury was then sworn, and the trial proceeded into the evidentiary phase. (R. p. 110; p. 140).

Subsequently, after several witnesses – including the three victims – testified during the State’s case, the trial judge informed the parties there was a matter that needed to be placed on the record. (R. pp. 196-197). Specifically, the trial judge stated Juror # 102 sent him a note indicating she needed to make sure she was a suitable juror for the trial in light of her husband’s employment status as a reserve deputy with the Colleton County Sheriff’s Office. (R. pp. 197-198). Based on the note, the trial judge informed the parties he intended to question Juror # 102 to determine if her husband’s job status would impact her ability to be fair and impartial while noting the prospective jurors were not questioned about their spouses during voir dire. (R. p. 198). The trial judge then brought Juror # 102 into the courtroom and questioned her about her note. (R. pp. 200-202). During the questioning, Juror # 102 confirmed her husband was a reserve deputy with the Colleton County Sheriff’s Office at that time, had been a reserve deputy for approximately two-and-a-half years, and had previously worked as a full-time deputy in Colleton County. (R. pp. 201-202). She further confirmed she had not had any discussions with her husband about the case and her husband’s employment status would

not impact her ability to be fair and impartial in any way. (R. pp. 201-202). The trial judge then excused Juror # 102 from the courtroom. (R. p. 202).

After Juror # 102 retired to the jury room, the trial judge noted he received several voir dire requests from the parties and asked questions in regard to whether the jurors were employed by a law enforcement agency. (R. p. 203). However, he further noted he did not ask any questions related to whether any of the jurors had spouses involved in law enforcement and Juror # 102 voluntarily elected to disclose that information on her own. (R. p. 203). He then asked the parties whether they were ready to proceed with trial, and defense counsel for both Jakes and McMillan indicated they were not. (R. pp. 204-205). Specifically, defense counsel for McMillan stated he might object to Juror # 102 remaining on the jury because he “may” have used his peremptory strikes differently had he been aware of her husband’s employment status, and defense counsel for Jakes asserted he objected to Juror # 102 remaining on the jury because she allegedly only disclosed her husband worked in environmental health management on the clerk of court’s juror questionnaire form. (R. pp. 204-206).

In response to defense counsel’s contentions, the trial judge reviewed the original juror questionnaire form filled out by Juror # 102 and verified she stated her husband worked both in environmental health management and as a reserve deputy on that form. (R. p. 205). He then reviewed the list of information compiled by the clerk of court from the juror questionnaire forms and determined the clerk of court mistakenly failed to include Juror # 102’s response about her husband’s work as a reserve deputy on that list. (R. pp. 206-207). After the trial judge discovered the scrivener’s error, defense counsel for Jakes reasserted he wanted Juror # 102 to be excused based on her husband’s status as a reserve deputy. (R. p. 206). However, the trial judge declined to do so since the juror

disclosed her husband's employment status on the juror questionnaire form and the information was only not discovered prior to her being seated on the jury due to a scrivener's error coupled with defense counsel's failure to ask him to question the jurors about their spouses' employment.⁵ (R. pp. 207-208).

Thereafter, the trial judge proceeded forward with the trial, and, at the conclusion of trial, the jury convicted Jakes and McMillan of three counts each of attempted armed robbery, three counts each of first-degree assault and battery, and one count each of possession of a weapon during the commission of a violent crime. (R. p. 209; pp. 698-701). Following the verdict, the trial judge sentenced Jakes to an aggregate term of imprisonment of thirty-five years and McMillan to an aggregate term of imprisonment of thirty years. (R. pp. 717-720).

Subsequently, Jakes appealed his convictions, arguing the trial judge erred in refusing to excuse Juror # 102 and replace her with an alternate after he learned the juror's husband was a reserve deputy and alleged he would have exercised his peremptory strikes differently had he known that information during the jury selection process. (App'x p. 36). On appeal, the Court of Appeals affirmed. (App'x p. 34). In affirming, the Court of Appeals determined the trial judge committed no error in finding Juror # 102 was impartial in light of the fact the juror confirmed she could be fair and impartial upon questioning from the trial judge, was not related to the defendants or any of the potential witnesses, and had not concealed any information from the parties or the trial judge. (App'x pp. 36-37). Because the juror did not conceal any information and did not appear to be impartial, the Court of Appeals concluded the trial judge did not err in refusing to dismiss Juror # 102 and replace her with an alternate. (App'x pp. 37-38).

⁵ Defense counsel for McMillan subsequently joined in Jakes' defense counsel's objection. (R. p. 208).

ARGUMENT

The Court of Appeals correctly affirmed the trial judge's decision not to remove a seated juror during trial after the juror revealed her husband was a reserve deputy with the Colleton County Sheriff's Office because the juror did not intentionally conceal that information during voir dire, was not prejudiced or biased by the fact her husband was a reserve deputy, and assured the trial judge she could be fair and impartial in deciding Jakes' case. However, even if the trial judge somehow abused his discretion by failing to remove the juror during trial, any error was entirely harmless and resulted in no prejudice to Jakes because he nonetheless received a fair trial by a fair and impartial jury, which was all he was entitled to under the law.

Jakes contends the Court of Appeals erred in affirming the trial judge's decision not to remove Juror # 102 from the jury after she revealed during trial her husband was a reserve deputy with the Colleton County Sheriff's Office. In support of that contention, Jakes maintains he would have exercised a peremptory strike on the juror had he known her husband worked in law enforcement at the time the jury was selected. Importantly though, Juror # 102 did not intentionally conceal the information regarding her husband and was not prejudiced or biased by the fact her husband was a reserve deputy.

Moreover, the trial judge specifically determined Juror # 102 could be fair and impartial after questioning her both during voir dire and after the information about her husband was discovered during trial. Under those circumstances, the trial judge did not abuse his discretion in declining to remove the seated and sworn juror from the jury during the middle of trial. However, even assuming the trial judge's decision was somehow erroneous, any error was entirely harmless because Jakes received a fair trial by a jury comprised of fair and impartial jurors, which was all he was entitled to under the law.

Therefore, the trial judge's decision not to remove Juror # 102 does not warrant a reversal of Jakes' convictions, and the Court of Appeals correctly affirmed the trial judge's ruling. Jakes' convictions should be affirmed.

A. Propriety of the Trial Judge's Decision Not to Remove the Juror

In presiding over the trial, the trial judge is entrusted with the duty to ensure a jury comprised solely of fair, impartial, and unbiased jurors is impaneled. State v. Powers, 331 S.C. 37, 43, 501 S.E.2d 116, 119 (1998); see State v. Holland, 261 S.C. 488, 495, 201 S.E.2d 118, 122 (1973) (“It is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair, and impartial.”); see also S.C. Code Ann. § 14-7-1010 (“The presiding judge shall at each term of court ascertain the qualifications of the jurors.”). If information reflecting on a seated juror’s qualifications or partiality is discovered during trial, the trial judge has discretionary authority to address the situation in a number of different ways, including by proceeding forward with the trial without removing the juror, replacing the juror with an alternate, or declaring a mistrial. State v. Coaxum, Op. No. 27452 (S.C. Sup.Ct. filed Oct. 8, 2014) (Shearouse Adv. Sheet No. 40 at 25, 30); see generally State v. Lindsey, 372 S.C. 185, 194, 642 S.E.2d 557, 562 (2007) (finding a trial judge did not abuse his discretion in declining to remove a juror and replace the juror with an alternate and further noting such a decision rested within the trial judge’s discretion); State v. Simmons, 360 S.C. 33, 43, 599 S.E.2d 448, 452 (2004) (finding a trial judge did not abuse his discretion in removing a juror for communicating with his wife about the case in defiance of the trial judge’s express admonition not to do so).

When exercising discretion in such a situation, the trial judge should look to several factors to determine if the juror’s failure to disclose the discovered information could affect the impartiality of the jury. Coaxum, (S.C. Sup.Ct. filed Oct. 8, 2014) (Shearouse Adv. Sheet No. 40 at 25, 29-30); cf. State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) (“The Court developed a two-part test to determine whether a

juror's failure to disclose a potential bias warranted granting the defendant a new trial.”). Specifically, the trial judge should first determine whether the juror intentionally concealed the information, which is significant because a juror's unjustified concealment of material information supports an inference the juror is not impartial. Coaxum, (Shearouse Adv. Sheet No. 40 at 30); see State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001) (“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.”). Next, the trial judge should determine if the concealed information would have supported a challenge for cause or would have been a material factor in the use of a party's peremptory challenges. Coaxum, (Shearouse Adv. Sheet No. 40 at 30). Importantly though, a juror's unintentional failure to disclose information – including material information – does not support an inference of partiality or bias, and a party objecting to the juror bears the heightened burden of establishing the juror's concealment prejudicially prevented the party from exercising a strike based on a potential material source of bias. Id., (Shearouse Adv. Sheet No. 40 at 31); see Woods, 345 S.C. at 589, 550 S.E.2d at 282 (“[W]here the failure to disclose is innocent, no inference of bias can be drawn.”).

Significantly, a decision as to whether to dismiss a juror and replace the juror with an alternate falls within the sound discretion of the trial judge. State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007); see Simmons, 360 S.C. at 43, 599 S.E.2d at 452 (recognizing decisions regarding the removal of jurors rest in the sound discretion of the trial judge). On appeal, an appellate court will not reverse such a decision absent a prejudicial abuse of discretion. See State v. Rogers, 263 S.C. 373, 382, 210 S.E.2d 604, 609 (1974) (“[T]he general principle that error must be prejudicial in order to grounds for

reversal applied to rulings on excusing a juror.”); see also Coaxum, (Shearouse Adv. Sheet No. 40 at 32) (“[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion.”).

In the case sub judice, the trial judge and the parties learned during trial Juror # 102’s husband was employed as a reserve deputy with the Colleton County Sheriff’s Office, which was information that had not been revealed during voir dire. See generally BLACK’S LAW DICTIONARY 327 (9th ed. 2009) (defining “concealment” as “[t]he act of refraining from disclosure; esp., an act by which one prevents or hinders the discovery of something; a cover-up”). As a result, the trial judge had a duty to determine whether Juror # 102 could be a fair and impartial member of the jury despite her failure to reveal that information during voir dire, and the appropriate method in South Carolina for him to carry out that duty was to ascertain whether the juror intentionally concealed the information and whether the concealed information would have supported a challenge for cause or would have been a material factor in the use of a party’s peremptory challenges. Coaxum, (Shearouse Adv. Sheet No. 40 at 29-31).

Looking to the first factor in Jakes’ case, Juror # 102 clearly did not intentionally conceal the information regarding her husband’s employment status because she disclosed it on a juror questionnaire form prior to trial and only did not reveal it during voir dire due to the fact she was never asked any questions about her husband or his employment.⁶ See Woods, 345 S.C. at 588, 550 S.E.2d at 284 (“[I]ntentional

⁶ Notably, Jakes previously conceded Juror # 102 did not intentionally conceal her husband’s employment status, and the Court of Appeals acknowledged that concession in deciding Jakes’ case. (App’x p. 38; p. 48). In his Brief of Petitioner, Jakes does not directly allege Juror # 102 intentionally concealed the information about her husband but now asserts the juror should have revealed her husband’s employment status during voir dire when she was asked if she personally was a member of a law enforcement agency. To the extent such an assertion could be construed as an argument the juror intentionally concealed her husband’s employment status during voir dire, that assertion is wholly incorrect because a question as to

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."'). Critically, the fact Juror # 102 did not intentionally conceal information was highly significant as to whether she could be fair and impartial in deciding Jakes' case because an unintentional failure to disclose even material information does not support an inference of partiality or bias on the part of a juror. See id. at 589, 550 S.E.2d at 282 ("Where the juror's failure to disclose information is 'without justification,' i.e., intentional, the juror's bias will be inferred. Conversely, **where the failure to disclose is innocent, no inference of bias can be drawn.**" (emphasis added)). Therefore, under the circumstances of Jakes' case, the trial judge had no reason to infer Juror # 102 was not impartial or to believe she would jeopardize Jakes' right to a fair trial by an impartial jury, which was all he was entitled to under the law. See Rogers, 263 S.C. at 382, 210 S.E.2d at 609 ("[T]he defendant has no right to a trial by any particular jury or jurors and has the right only to a trial by a competent and impartial jury.").

whether a juror personally worked for a law enforcement agency would in no way necessitate a response in regard to the employment of the juror's spouse, children, or other family members. See State v. Galbreath, 359 S.C. 398, 403-404, 597 S.E.2d 845, 847-848 (Ct. App. 2004) (rejecting Galbreath's contention a juror intentionally failed to disclose information during voir dire where the trial judge did not ask any questions during voir dire that would have required the juror to disclose the information Galbreath alleged was concealed); see also Smith v. State, 375 S.C. 507, 519, 654 S.E.2d 523, 529-530 (2007) (finding it was reasonable for a juror to remain silent during voir dire even though he was asked if he was related by blood or marriage or was a close personal friend to Smith because the juror was not related to Smith and neither the juror nor Smith considered the juror to be close personal friends with Smith). As a result, Juror # 102's failure to disclose information that was not asked about during voir dire was entirely reasonable under the circumstances and could not constitute evidence of intentional concealment on her part. See Woods, 345 S.C. at 588, 550 S.E.2d at 284 ("We hold 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. Unintentional concealment, 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.").

Looking to the second factor relevant to the analysis, the information not revealed by Juror # 102 during voir dire did not establish she was either biased or potentially biased and was not significant to the manner in which the parties exercised their peremptory challenges. Critically, the fact Juror # 102 was married to a reserve deputy with the Colleton County Sheriff's Office did not automatically disqualify her from serving on the jury. See State v. Gullede, 277 S.C. 368, 370, 287 S.E.2d 488, 489 (1982) ("Solely because a juror is related by blood or marriage to a police officer or deputy sheriff does not automatically disqualify the juror[.]"). Moreover, by their own admission, neither defense counsel for Jakes nor defense counsel for McMillan attempted to have the trial judge question the prospective jurors about their spouses – or their spouses' employment status – during voir dire despite the fact they submitted requests to the trial judge for the jurors to be questioned on other subjects at that time, which demonstrated defense counsel did not consider information related to the jurors' spouses to be an important consideration in the exercise of their peremptory strikes.⁷ See State v. Rayfield, 232 S.C. 230, 236, 101 S.E.2d 505, 509 (1958) ("[O]bjections to jurors should be made before the jury is empaneled and charged with the trial of the case, unless there is unknown disqualification which due diligence would not disclose. . . . A simple request by him to the Court for interrogation of the jurors would have prevented the alleged error of which he now complains."); see also Lynch v. Carolina Self Storage

⁷ In his Brief of Petitioner, Jakes contends there was no reason for him to ask the trial judge to question the prospective jurors about their spouses' employment during voir dire because that information was supposed to be included on the list of juror information compiled by the clerk of court. Notably though, defense counsel for Jakes and McMillan still believed it was important for the prospective jurors to be asked during voir dire if they worked for a law enforcement agency despite the fact that information was also included on the juror questionnaire forms. For that reason, it is more plausible Jakes did not ask the trial judge to question the prospective jurors about their spouses' employment during voir dire because he did not consider such information to be particularly important in regard to the exercise of his peremptory challenges. See generally S.C. Code Ann. § 14-7-1020 (granting parties the right to have the trial judge question the prospective jurors during voir dire to determine if they can be fair and impartial).

Ctrs., Inc., 409 S.C. 146, 156, 760 S.E.2d 111, 117 (Ct. App. 2014) (“[T]he responsibility for obtaining such information falls on the attorneys to request precise voir dire questions that are reasonably comprehensible to the average juror.”). In fact, even after the information in regard to Juror # 102’s husband was revealed, defense counsel for McMillan only asserted to the trial judge he **may** have used his peremptory challenges differently had he known Juror # 102’s husband was a reserve deputy, and defense counsel for Jakes focused his objection to Juror # 102 on his mistaken belief she intentionally concealed the information while never specifically contending he would have exercised his peremptory strikes differently had he known about Juror # 102’s husband’s employment status earlier. Under those circumstances, the juror’s innocent non-disclosure of the information about her husband during voir dire did not necessitate her removal from the jury during the middle of trial.

Because Juror # 102 did not intentionally conceal the information about her husband and that information did not reflect adversely on her ability to be fair and impartial in deciding Jakes’ case, there was no reason for the trial judge to believe he needed to replace Juror # 102 in order for Jakes to receive a fair trial. See Coaxum, (Shearouse Adv. Sheet No. 40 at 32) (recognizing a trial judge likely would have been justified in **refusing** to excuse a juror where there was no allegation the juror intentionally failed to disclose a potential relationship to the defendant until the middle of trial); see also Sparkman, 358 S.C. at 497, 596 S.E.2d at 378 (“Because [the juror]’s concealment was unintentional our inquiry is over[.]”); State v. Kelly, 331 S.C. 132, 145-146, 502 S.E.2d 99, 103-107 (1998) (“Appellant maintained that had he been aware of Juror P’s activities, he would have exercised a preemptory strike to exclude Juror P from the juror. . . . Here, we find no abuse of discretion because Juror P did not intentional

conceal information during voir dire.”). As a result, the trial judge did not abuse his discretion in declining to remove Juror # 102 from the jury during the middle of trial, particularly where the juror expressly assured the trial judge she could be fair and impartial despite her husband’s employment as a reserve deputy, she did not know anything about Jakes’ case, she did not know any of the witnesses, and she had not talked about the case with her husband. See State v. Ivey, 331 S.C. 118, 122-123, 502 S.E.2d 92, 94 (1998) (“The trial judge properly inquired into the effect Juror Young’s knowledge of ‘Fletch’ would have on her ability to be fair and impartial. Juror Young unequivocally stated her knowledge of ‘Fletch’ would have no effect on her ability to render an impartial verdict. The trial judge did not abuse his discretion in allowing Juror Young to remain on the jury.”); see also State v. Simpson, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996) (“A juror’s competence is within the trial judge’s discretion and is not reviewable on appeal unless wholly unsupported by the evidence.”). Accordingly, under those circumstances, the trial judge’s decision not to remove Juror # 102 from the jury does not warrant a reversal of Jakes’ convictions, and the Court of Appeals correctly affirmed the trial judge’s ruling. See Coaxum, (Shearouse Adv. Sheet No. 40 at 32) (“[A]s we have previously stated, ‘ a new trial is *required* only when the court finds the juror *intentionally* concealed the information ’ ” (italics in original and citations omitted)). Jakes’ convictions should be affirmed.

B. Absence of Prejudice and Harmlessness of Any Error

In every criminal case tried in South Carolina, a defendant has a constitutional right to a fair trial. Woods, 345 S.C. at 587, 550 S.E.2d at 284; see State v. Harris, 340 S.C. 59, 63, 530 S.E.2d 626, 627 (2000) (“The Sixth and Fourteenth Amendments of the United States Constitution guarantee a defendant a fair trial by a panel of impartial and

indifferent jurors.”). That right guarantees to a defendant a trial by a panel of impartial, indifferent jurors. State v. Parker, 381 S.C. 68, 96, 671 S.E.2d 619, 633 (Ct. App. 2008). Importantly though, a defendant in South Carolina does not have a right to be tried by a jury composed of any particular jurors. See Palacio v. State, 333 S.C. 506, 517, 511 S.E.2d 62, 68 (1999) (“[T]his Court has held that a criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury.”); see also 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**[.]” (emphasis added)); S.C. Const. art. I, § 14 (“The right to 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**[.]” (emphasis added)).

In the case at bar, any error that occurred as a result of the trial judge refusing to replace Juror # 102 – even assuming one did occur – was entirely harmless and resulted in no prejudice to Jakes because no evidence was presented of any kind suggesting Jakes did not receive a fair and impartial trial. See State v. Bonneau, 276 S.C. 122, 125, 276 S.E.2d 300, 301 (1982) (“It is, of course, incumbent upon an appellant . . . to prove that he was denied a fair trial.”). Critically, after questioning Juror # 102 both during voir dire and in the middle of trial, the trial judge expressly determined she could be fair and impartial, and no evidence was presented supporting a conclusion to the contrary. See State v. Maxey, 218 S.C. 106, 110, 62 S.E.2d 100, 102 (1950) (“The findings of the trial court on questions of fact relating to the fitness of a juror are conclusive, and will not be disturbed on review unless manifestly erroneous. This principle of law is so well establishing it hardly becomes necessary to cite authority to sustain it.”). Because Juror # 102 was a fair and impartial member of the jury, the trial judge’s decision not to replace

her with an alternate did not have any impact on Jakes' receipt of a fair trial by a fair and impartial jury, which was all he was entitled to under the law. See Rogers, 263 S.C. at 382, 210 S.E.2d at 609 (“[T]he defendant has no right to a trial by any particular jury or jurors and has the right only to a trial by a competent and impartial jury.”); cf. Sparkman, 358 S.C. at 497, 596 S.E.2d at 378 (“[I]n this case, the juror testimony is clearly ‘contrary’ to an inference of bias or prejudice, and the trial judge was in the best position to make a factual decision concerning the effects of Scott's alleged misconduct.”). Therefore, Jakes suffered no prejudice as a result of the trial judge’s decision not to remove Juror # 102 from the jury, and the trial judge’s decision – even assuming it was erroneous – could not have constituted reversible error. See State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005) (“Error without prejudice does not warrant reversal.”); see also Thomasko v. Poole, 349 S.C. 7, 17, 561 S.E.2d 597, 602 (2002) (“It is well established that an appellant seeking reversal of a decision by the trial court must show both error and prejudice.”).

In arguing to the contrary, Jakes appears to suggest his right to exercise a peremptory challenge on Juror # 102 was erroneously abridged, which he contends entitles him to a reversal of his conviction even if he did not suffer any actual prejudice. However, unlike cases where the defendant was actually denied the right to exercise a peremptory challenge on a particular juror, Jakes was not prevented from exercising a peremptory challenge on Juror # 102 during voir dire, and his right to exercise a peremptory challenge is not the issue implicated in his case. Cf. State v. Short, 333 S.C. 473, 477-478, 511 S.E.2d 358, 360-361 (1999) (instructing no showing of prejudice was required where the trial judge denied Short the right to exercise peremptory challenges on particular jurors during the jury selection process and explaining “the complaining party

must of course establish the denial of his right to exercise a peremptory challenge” before reversible error can be found). Instead, the issue in Jakes’ case hinges on whether the trial judge abused his discretion in refusing to remove a seated and sworn juror during trial based on the discovery of information about the juror that was not disclosed during voir dire. See Coaxum, (Shearouse Adv. Sheet No. 40 at 32) (“[T]o receive a new trial, the defendant must show a prejudicial abuse of discretion.”).

Critically, in Jakes’ case, he was fully afforded the right to exercise a peremptory challenge on Juror # 102 – and any of the other prospective jurors – during the jury selection process, and he simply chose not to do so based on the information that was uncovered during voir dire. Once the jury selection process was over and the trial began, Jakes no longer had a right to exercise peremptory challenges on the jurors, and that right was no longer at issue. See State v. Bailey, 273 S.C. 467, 469, 257 S.E.2d 231, 232 (1979) (“ ‘Generally speaking, peremptory challenges arise from the exercise of a privilege granted by the legislative authority. They are allowed by legislatures as an act of grace, rest entirely within the discretion of legislatures, **can be exercised as a matter of right only to the extent allowed by statute**, and must be taken subject to the legislative limitations placed upon the manner of their exercise.’ ” (emphasis added and citation omitted)); see also S.C. Code Ann. § 14-7-1030 (mandating all objections made to jurors after they are impaneled are waived). Therefore, the trial judge’s decision not to remove Juror # 102 – a seated and sworn juror – in the middle of trial in no way denied Jakes the right to exercise a peremptory challenge, and Jakes was required to establish prejudice in order to establish the trial judge committed reversible error in making that decision. See Coaxum, (Shearouse Adv. Sheet No. 40 at 32) (expressly requiring a

defendant to show a **prejudicial** abuse of discretion in order to be entitled to a reversal of his convictions).

Under the circumstances of Jakes' case, he could not – and cannot – meet his burden of establishing prejudice because Juror # 102's presence on the jury did not prevent him from receiving a fair trial, which was all he was entitled to under the law. See State v. Evins, 373 S.C. 404, 416, 645 S.E.2d 904, 910 (2007) (“[A] defendant has no right to trial by a particular jury.”); Bonneau, 276 S.C. at 126, 276 S.E.2d at 302 (“The defendant was entitled to a fair trial, but not necessarily one satisfactory to him. This he had.”); see also Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) (“As we have stressed on more than one occasion, the Constitution entitles a criminal defendant to a fair trial, not a perfect one.”); see generally State v. Stanko, 376 S.C. 571, 576, 658 S.E.2d 94, 96-97 (2008) (“While . . . a defendant [has] the constitutional right to a fair and impartial jury of his peers, this right does not entitle a defendant to handpick a jury.”). Significantly, the societal costs resulting from a retrial are substantial and should only be sustained in situations where the defendant suffered some actual prejudice as the result of an alleged trial error. See United States v. Mechanik, 475 U.S. 66, 72 (1986) (“The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. . . . These societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.” (citations omitted)); see also Calderon v. California, 525 U.S. 141,

146 (1998) (“The social costs of retrial or resentencing are significant. . . . The State is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error.” (citations omitted)). Because Jakes received a fair trial by twelve competent, qualified, and impartial jurors, a reversal of his convictions is simply not warranted even if the trial judge somehow erred by declining to remove Juror # 102 from the jury.⁸ See Van Arsdall, 475 U.S. at 681 (“[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt. The harmless-error doctrine recognizes the principle that the central purpose of a criminal trial is to decide the factual question of the defendant’s guilt or innocence . . . and promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error.” (citations omitted)); see also State v. Smith, 230 S.C. 164, 168, 94 S.E.2d 886, 887 (1956) (“The burden is upon the appellant to satisfy [the appellate] court that there has been prejudicial error.”). As a result, Jakes’ convictions should be affirmed.

⁸ Moreover, the evidence of guilt in regard to Jakes – who was apprehended after he went to the hospital seeking treatment for the gunshot wounds he received from the victim – was absolutely overwhelming, which further rendered any error that could have possibly occurred in his case entirely harmless. See State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (“When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result.”); see also United States v. Hastings, 461 U.S. 499, 509 (1983) (“[T]he [United States Supreme] Court has consistently made clear it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations[.]”).

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals and the judgment and conviction of the trial court should be affirmed.

Respectfully submitted,

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October 9, 2014

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from Colleton County
Honorable Perry M. Buckner, Circuit Court Judge
Appellate Case No. 2013-002571

THE STATE,

Respondent,

vs.

DAVID JAKES,

Petitioner.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent 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."

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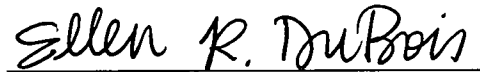
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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Brief of Respondent on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
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I further certify that all parties required by Rule to be served have been served.
This 9th day of October, 2014.



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