STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

Honorable John C. Hayes, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MICHAEL GLENN HALL,

APPELLANT

APPELLATE CASE NO 2016-001778

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In this domestic violence trial, did the trial judge err in refusing to replace a juror with an alternate when, prior to hearing trial testimony but after opening statements, the juror advised the court that, when asked during voir dire if any member of the jury was a victim of domestic violence, she failed to stand because she had forgotten about a prior altercation with her former husband?

STATEMENT OF THE CASE

On March 24, 2016, the York County Grand Jury indicted Appellant Hall for domestic violence second degree, indictment #2016-GS-46-870. On August 10, 2016, Appellant proceeded to jury trial before the Honorable John C. Hayes, III. Zachary Merritt represented Appellant at trial. Blaine Pleming prosecuted the case. The jury returned with a verdict of guilty of the lesser included offense of domestic violence third degree. Judge Hayes sentenced Appellant to ninety (90) days. A timely notice of intent to appeal was served on August 22, 2016. This appeal follows.

ARGUMENT

In this domestic violence trial, the trial judge erred in refusing to replace a juror with an alternate when, prior to hearing trial testimony but after opening statements, the juror advised the court that, when asked during voir dire if any member of the jury was a victim of domestic violence, she failed to stand because she had forgotten about a prior altercation with her former husband.

The jury found Appellant guilty of domestic violence third offense. During voir dire the judge asked, "And I'm not gonna ask you to go into particulars with this next question because it could be somewhat sensitive so just by standing I will know enough to go forward with some other questions to you . Have you or an immediate member of your family been either the victim of what you would consider domestic violence, or, been accused of committing domestic violence; if so, please stand." (Tr. p. 13, lines 1-7). The record reflects that none of the potential jurors stood. (Tr. p. 13, line 8). After opening statements juror #73 sent a note to the judge stating that she recalled an altercation from thirty-one years ago between her and her former husband. (Tr. p. 35, line 20 – p. 36, 37, lines 1-3). The note was marked as Court's exhibit #1. (R. p. **). The judge individually questioned the juror and asked, "We just need to put on the record what – I'm having your note made an exhibit, but you indicate therein in your note that inspite [sic] of this part of your history that you still could be fair and impartial to both the State and Mr. Hall. (Tr. p. 36, lines 6-10). The juror answered, "I do. I didn't even remember when you said that. I apologize for that." (Tr. p. 36, lines 11-12).

Counsel for Appellant moved to replace Juror #73 with an alternate juror. (Tr. p. 37, line 8 – p. 38, line 1). Counsel argued, "It was the question that was asked and something between when it was asked and triggered her memory throughout our opening statement the discussion of

domestic violence. As of now what I know about the incident is very vague. I just know that it was triggered or that something made her remember based off of the kind of just tense environment relating to domestic violence." (Tr. p. 37, lines 10-17). The judge denied the motion. (Tr. p. 38, line 2). The trial judge erred in refusing to replace the juror with an alternate juror. Appellant was prejudiced by the initial concealment because Appellant was unable to strike a potential and material source of bias. Despite the juror's assertion that she could be fair and impartial, the fact that she was a victim of domestic violence is a potential source of bias and would have been a material factor in Appellant exercising a peremptory strike to excuse this juror.

"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) (citing U.S. Const. amends. VI and XIV). "Through the judge, parties have a right to question jurors on their *voir dire* examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge. State v. Gulledge, 277 S.C. at 370, 287 S.E.2d at 490 (1982)." Woods, 345 S.C. at 587, 550 S.E.2d at 284 (2001).

"[T]rial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information." State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998). Should jurors give false or misleading answers during voir dire, the parties may mistakenly seat a juror who could have been excused by the court, challenged for cause by counsel, or stricken through the exercise of a peremptory challenge. State v. Gulledge, 277 S.C. 368, 371, 287 S.E.2d 488, 490 (1982).

In the face of a juror's intentional nondisclosure of pertinent information during voir dire, "it may be inferred, nothing to the contrary appearing, that the juror is not impartial." Woods at 587–88, 550 S.E.2d at 284. Thus, should the trial court fail to replace such a juror or grant a mistrial, the party need only demonstrate the error of the trial court's decision by proving the concealment was, in fact, intentional; however, the party need not show prejudice, as the bias against the moving party is inferred, and prejudice from the moving party's inability to strike the juror is apparent. Woods at 589, 550 S.E.2d at 285. "In contrast, if a juror's nondisclosure is unintentional, the trial court may exercise its discretion in determining whether to proceed with the trial with the jury as is, replace the juror with an alternate, or declare a mistrial." State v. Coaxum, 410 S.C. 320, 328, 764 S.E.2d 242, 245–46 (2014) (fn #6 omitted).

The concealment in the present case was unintentional. In Woods, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001), the South Carolina Supreme Court wrote:

> 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.

In Coaxum, 410 S.C. 320, 764 S.E.2d 242, (2014), the South Carolina Supreme Court found that the trial court did not abuse his discretion in replacing a juror who unintentionally failed to disclose that one of the defendant's family members was a former co-worker who claimed to be a distant cousin of the juror. The Court in Coaxum discussed the analysis with regard to intentional verses nonintentional juror concealment and wrote:

> (" 'Only where a juror's intentional nondisclosure does not involve a material issue, or where the nondisclosure is *unintentional,* should the trial court inquire into prejudice.' " (quoting Doyle v. Kennedy Heating & Serv., *Inc.*, 33 S.W.3d 199, 201 (Mo.Ct.App.2000))). Paralleling the inquiry in cases of intentional

> concealment, the trial court in the unintentional concealment situation must determine whether the information concealed would have supported a challenge for cause or would have been a material factor in a party's exercise of its peremptory challenges. State v. Stone, 350 S.C. 442, 448, 567 S.E.2d 244, 247–48 (2002) (citing Woods, 345 S.C. at 587–88, 550 S.E.2d at 284).
>
> However, "where the failure to disclose is innocent, no inference of bias can be drawn." Woods, 345 S.C. at 589, 550 S.E.2d at 285. Accordingly, the moving party has a heightened burden to show that the concealed information indicates the juror is potentially biased, and that the concealed information would have been a material factor in the party's exercise of its peremptory challenges. In other words, the moving party must show that it was prejudiced by the concealment because it was unable to strike a potential—and material—source of bias.

Coaxum, 410 S.C. at 328–29, 764 S.E.2d at 246. The Court in Coaxum acknowledged that, in the case of unintentional juror concealment, "[o]ur previous decisions have not focused on the need for this prejudice analysis. . ." Id. Importantly, the Court in Coaxum noted that while bias is not inferred in unintentional concealment cases, the materiality of the unintentional concealed juror information must still be considered.

In the present case Appellant met the heightened burden of Coaxum. Appellant showed that the concealed information that juror #73 was the victim of domestic violence indicates that juror #73 was potentially biased. The concealed information would have been a material factor in the exercised of peremptory challenges. The trial judge abused his discretion in refusing to remove the juror and replace with an available alternate juror. In State v. Sparkman, 358 S.C. 491, 596 S.E.2d 375 (2004), the Court found that a juror's unintentional concealment of the fact that he was the victim of an attack forty years ago, revealed by comments made by the juror during deliberation, did not result in prejudice requiring a new trial when the judge questioned the other jurors who confirmed that the juror's comments did not persuade them. The Court wrote, "Because Scott's concealment was unintentional our inquiry is over, however, we fail to

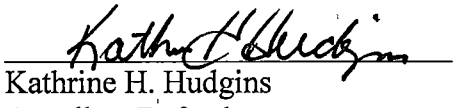
see how Sparkman was prejudiced given that the trial judge questioned the jury after the verdict. Sparkman, 358 S.C. at 491, 596 S.E.2d at 378.

Sparkman was decided before the Court made it clear in Coaxum that the materiality of the concealment must be considered even when the concealment is unintentional. As such the Court in Sparkman focused on the comments the juror made during deliberations and the fact that the judge questioned all of the jurors rather than the determination of whether the unintentional concealment was the source of potential bias and would have been a material factor in the exercise of peremptory strikes.

The trial judge's decision to refuse to replace the juror with an alternate constitutes an abuse of discretion. The concealed fact that the juror had an altercation with a former husband is the source of potential bias because Appellant was charged with domestic violence. This concealed information would have been a material factor in the exercise of peremptory strikes. While Appellant had already used his five strikes when juror #73 was called, if Appellant had known about the prior domestic violence, he would have saved a strike for juror #73. (Tr. p. 20, lines 18-25; pp, 139-140). An alternate juror had been selected (Tr. p. 21, lines 12-20) and was available to replace juror #73. The jury had not yet heard any testimony, just opening statements, when Appellant learned of the concealment and moved to replace juror #73.

CONCLUSION

Based on the above argument, this Court should reverse the sentence and conviction and remand the case for a new trial before a new jury.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 8th day of April, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Michael Glenn Hall, at 2344 Nuthatch Drive, Rock Hill, SC 29732, this 8th day of April, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of April, 2017.

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