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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF GENERAL SESSIONS

The Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No.(s)2012-GS-07-2246 & 2012-GS-07-2247

State of South Carolina, Respondent,

v.

Walter Tucker, Appellant.

REPLY BRIEF OF APPELLANT

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II. WHETHER THE TRIAL JUDGE ABSUED HIS DISCRETION BY ALLOWING THE STATE TO INTRODUCE KEAMBER BIGELOW'S TESTIMONY THAT TUCKER TOLD HER OF A LOT TO MURDER TRAVIS POLITE, HIS CODEFENDANT AND ACCOMPLICE, TO PREVENT POLITE FROM TESTIFYING AGAINST TUCKER AT TIRLA BECAUSE THIS EVIDENCE REASONABLY TENDED TO PROVE BOTH TUCKER'S CRIMINAL INTENT (MALICE) AND HIS CONSCIOUSNESS OF GUILT, AND BECAUSE THE PROBATIVE VALUE OF THIS EVIDENCE WAS NOT SUBSTANTIALLY OUTWEIGHED BY ITS PREJUDICIAL EFFECT?

III. WHETHER THE TRIAL JUDGE DENIED APPELLANT TUCKER'S MOTION FOR A DIRECTED VERDICT ON THE CHARGES OF MURDER AND ARMED ROBBERY BECAUSE THE DIRECT AND CIRCUMSTANTIAL EVIDENCE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, REASONABLY TENDED TO PROVE HIS GUILT OF THESE OFFENSES, EITHER INDIVIDUALLY OR UDNER A THEORY OF ACCOMPLICE LIABILITY.

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D. WITHOUT AN EVIDENTIARY HEARING APPELLANT CANNOT ADEQUATELY EXPLORE AND EXPOSE THE INTRODUCTION OF EXTERNAL PREJUDICIAL INFORMATION DURING DELIBERATIONS.

STATEMENT OF THE CASE

1.

On or about April 13-16, 2015, Appellant proceeded with jury trial on indictments 2012-GS-07-2246 Murder, 2012GS0702247 Robbery/Armed Robbery, and 2012GS0702248 Kidnapping. On or about April 16, 2015, the jury returned a verdict of guilty on Murder, guilty on attempted armed robbery, and not guilty of kidnapping. Appellant was sentenced to serve 39 years in prison.

2.

On or about April 24, 2015, a timely Motion for New Trial was filed. On or October 2, 2015, by email the Court set the hearing for the Motion for New Trial on October 12, 2015. Appellant disclosed to the Court and opposing counsel that an issue of juror misconduct had arisen and would need to be heard by the Court. On October 12, 2015, the written Amended Motion for New Trial Based on Juror Misconduct, Motion for Continuance, and Motion for Hearing on Juror Misconduct Inquiry was filed raising the ground of jury misconduct previously disclosed on October 2, 2015. On October 12, 2015, the Trial Court conducted a hearing as to Motion for Continuance. Specifically, Appellant requested that a continuance be granted and that an evidentiary hearing be held at which time juror could be produced and the witness for the Appellant. The Court denied the Motion for Continuance and denied the Motion for Hearing for Juror Misconduct and proceeded with a hearing on the Motion for New Trial. The State presented affidavits of approximately 6 female jurors and the Appellant presented the affidavit of one witness. The Court based its ruling strictly upon the tendered affidavits and issued an order denying the Motion for New Trial and Amended Motion for New Trial on or about October 28,

2015.

3.

On or about November 2, 2015, Appellant received notice of the entry of the order denying Defendant's Motion for New Trial. A timely Notice of Appeal was filed November 10, 2015. Appellant ordered the transcript and received a copy of the trial transcript on or about January 4, 2016. The deadline for the filing of the Initial Brief of Appellant is February 3, 2016.

ARGUMENT & CITATION

I. RESPONDENT'S ARGUMENT IN SUPPORT OF THE DENIAL OF AN EVIDENTIARY HEARING INTO JURY MISCONDUCT IS PREDICATED ON SEVERAL INCORRECT FACTUAL ASSERTIONS

In its brief, Respondent argues that the denial of an evidentiary hearing was appropriate. Respondent bases this argument on several assertions which are factual incorrect and which amount to conjecture.

A. ANTONIO AND TIA BREWER WERE ALSO ANNOUNCED AS A WITNESSES IN VOIR DIRE WHICH MADE NON-DISCLOSURE A MATTER OF INTENTIONAL CONCEALMENT

The first error can be found in the Respondent's Brief at page 8 wherein Respondent stated:

> "Moreover, neither Antonio Brewer nor his unnamed girlfriend were listed as potential witnesses. Obviously, there could not be any concealment of any possible relationship with these individuals, even assuming that juror Masanto knew who they were".

However, a review of the record reveals that Quornisha Jones and both Antonio Brewer and Tia Brewer were announced during voir dire as witnesses. (Trial Transcript at pg 34, ln 8)(Motion for New Trial Transcript at pg 31, ln 5; pg 31, ln 9-12). As such, the argument of Respondent that there could be no concealment fails. Moreover, the fact that juror Masanto knew Antonio Brewer, who was murdered, and Tia Brewer, who was shot in the same incident two weeks before Appellant's trial, is clearly demonstrative of prejudice against the Appellant and intentional concealment. The affidavit of Jones clearly makes this an issue which requires a full inquiry by evidentiary hearing.

Respondent seeks to direct this Court attention away from the Woods decision. Yet, the Woods decision is absolutely on point based on the facts presented in this case. Further, the

Woods decision has been examined and its holdings further affirmed recently State v. Coaxum, 410 S.C. 320 (S.C. 2014). Again, it is worth noting the mandatory language set forth in Coaxum which stated:

> "All criminal defendants have the right to a trial by an impartial jury." State v. Woods, 345 S.C. 583, 597, 550 S.E.2d 282, 284 (2001) (citing U.S. Const. amends. VI and XIV).To that end, the jury must render its verdict free from outside influences of all kinds. Kelly, 331, S.C. at 141,502 S.E.2d at 105 (quoting State v. Cameron, 311 S.C. 204, 207, 428 S.E.2d10, 12 (Ct. App. 1993)). **To protect both parties' right to an impartial jury, the trial court must conduct voir dire of the prospective jurors to determine whether the jurors are aware of any bias or prejudice against a party, as well as to "elicit such facts as will enable [the parties] intelligently to exercise their right of preemptory challenge." Woods, 345 S.C. at 587, 550 S.E.2d at 284.**
>
> ***"[T]rial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information.*** Kelly, 331 S.C. at 145, 502 S.E.2d at 106. ***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 event of such juror misconduct, the trial court must inquire into whether the withheld information affects the jury's impartiality.*** Kelly, 331 S.C. at 141, 502 S.E.2d at 104. However, the court should not grant a mistrial based on a juror's concealment of information "unless absolutely necessary." Id. At 142, 502 S.E.2d at 104. Instead, the trial judge should exhaust other methods to cure possible prejudice before aborting a trial. Id. (citing State v. Wasson, 299 S.C. 508, 386 S.E.2d 255 (1989)); see also State v. Williams, 321 S.C. 455, 459-60, 469 S.E.2d 49, 52 (1996)(affirming the trial court's decision to seat an alternate juror midtrial after another juror's impartiality came into question); State v. McDaniel, 275 S.C. 222,224, 268 S.E.2d 585, 586 (1980)(same).
>
> We have previously held that a new trial is required "*only* when the court finds the juror intentionally concealed the information, and that the information concealed would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. Woods, 345 S.C. at 587, 550, S.E.2d at 284 (emphasis added). ***In the face of a juror's intentional nondisclosure during voir dire, "it may be inferred, nothing to the contrary appearing, that the juror is not impartial." Id. 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 providing 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. Id. At 589, 550 S.E.2d 285.

Accordingly, it is enough to show that juror Masanto knew Jones, Antonio Brewer, and Tia Brewer; did not disclose that she knew them; and therefore intentional concealed the relationships. It is important to note, a review of the affidavit of juror Masanto, is silent as to whether Tia Brewer is her friend, does not state how she knew Antonio Brewer, and does not state the nature of her relationship with Quornisha Jones. (See affidavit of Jessica Masanto). As such the affidavit of juror Masanto, which was the only evidence presented by the State, does not over the affidavit of Jones nor does it overcome the presumption of prejudice created by juror Masanto's concealment.

Moreover, where there are two competing affidavits between Quornisha Jones and juror Masanto, and neither testified or were seen by the Court, there is no basis upon which a Court can assess credibility. (See Motion for New Trial Transcript at pg 6, ln 23-25). The Court did not observe them, did not question them, did not listen to any other examination, or perform any other inquiry or act upon which to assess the full testimony and veracity of either Jones or juror Masanto. Appellant repeatedly requested a evidentiary hearing and stated that such a hearing would allow for, among other things, the subpoena of social media records and other information to establish that the nature of the relationships between juror Masanto and Antonio Brewer. (Motion for New Trial Transcript at pg 9, ln 1-5). In fact, without further information there is only corroboration for Quornisha Jones' affidavit. Specifically, in support of the Jones affidavit

it is undisputed that there was:

- a working relationship between Jones and juror Masanto,
- by way of facebook/Instagram from 36 weeks prior to trial they had a social relationship or friendship,
- and by way of juror Masanto's request for Jones to call her there was not simply a Facebook friendship.
- and juror Masanto called Jones 2 days prior to juror Masanto making an affidavit.

It is important to emphasize that the request of juror Masanto to have Jones call her was made 2 days prior to juror Masanto's affidavit. (Motion for New Trial Transcript at page 16, ln 20-25). Clearly a reasonable person would only call a friend, not a stranger or distant co-worker, prior to meeting with law enforcement to discuss things. Again, at the very least, there is evidence of a relationship, not disclosed by juror Masanto, which the trial Court was required to explore by way an evidentiary hearing. See State v. Aldret, 333 S.C. at 315, 509 S.E.2d at 815 (holding where affidavits supporting juror misconduct are credible, the trial court must conduct an evidentiary hearing to determine if misconduct occurred).

Respondent admits and cites authority that "***Determining whether a juror's failure to respond to a voir dire amounts to intentional concealment is a 'fact intensive determination that must be made on a case by case basis'***". (Respondent's Brief at pg 7). However, Respondent wants to limit the inquiry to its own interpretation of the Court's statements to the jury panel. Such an argument seeks to avoid a fact intensive inquiry and avoid the clear inferences of prejudice which exist in this case. At the very least, the issue requires full inquiry by the trial Court. Reliance on a self-serving affidavit which was prepared by the State and which Appellant has no opportunity to confront its author, cannot eliminate or circumvent the constitutional right of Appellant to a fair trial. Appellant established a prima facia showing upon

which to obtain an evidentiary hearing. In essence, Respondent would alter the law of South Carolina and propose that any criminal defendant that raises the issue of jury misconduct can be silenced with an affidavit and denied any opportunity to voir dire the juror to expose the misconduct. At the very least, a remand to the trial Court for an evidentiary hearing is appropriate.

B. THE TRIAL COURT'S INITIAL REMARKS TO THE PROSPECTIVE JURORS REFERRED TO "ANY RELATIONSHIP" WITH A NAMED WITNESS AND "CLOSE PERSONAL OR SOCIAL RELATIONSHIP" AND NOT THE STATEMENT OF "RELATED BY BLOOD OR MARRIAGE OR HAD A CLOSE PERSONAL RELATIONSHIP WITH A WITNESS" WHICH THE TRIAL COURT RELIED UPON TO DENY THE MOTION FOR NEW TRIAL.

The next incorrect allegation made by Respondent in its brief is that the trial Court only inquired during voir dire as to whether "any member of the jury panel ever had a close personal or social relationship with any of the attorneys involved in the case, any of the witnesses that have been identified to you, or the defendant himself." (Respondent's Brief at pg 2). First, it is important to note that later on its brief Respondent contradicts it assertion on page 2 by arguing that the Court based its order on there being "no credible evidence that Ms. Masanto was related by blood or marriage or had a close personal relationship with Ms. Jones, Mr. Brewer or any other potential witness". (Respondent's Brief at pg 8).

However, a review of the transcript also reveals that the Court actually first stated to the jury panel before the witnesses were identified the following (Trial Transcript at pg 33, ln 5-15):

> Before I do that I'm going to ask the attorneys who are involved in the case if they will stand and identify themselves to you. And the solicitor I believe by prearrangement is going to give the names of potential witnesses that might be called by either the State or by the defense.

> And after all of that is done ***I'm going to ask you questions about your relationship if any with any of those individuals***, with any of the attorneys involved in the case, with the victims, with the defendant, with any of those individuals. And we will begin with the State.

Shortly thereafter the Court inquired as follows (Trial Transcript at pg 38, ln 1-7):

> "Has any member of the jury panel ever had a close personal relationship or social relationship with any of the attorneys involved in this case, any of the witnesses that have been identified to you, or the defendant himself, if you have ever had a close personal or social relationship with any of those individuals would you please stand."

Accordingly, there are two statements to be interpreted. First, when the trial Court stated "any relationship". Second, when the trial Court stated "close personal or social relationship". The Court never inquired in the manner set forth and relied upon in its order denying the motion for new trial. As such, the Respondent's reliance on trying to limit the inquiry to the "related by blood or marriage or close personal relationship" is as erroneous as the trial Court's reliance in its order.

As such, the first two statements of inquiry are the only statements which require analysis. As to the first inquiry, which is inclusive all relationships, no argument is needed as failure to disclose any relationship would constitute concealment. Certainly, for all the reasons previously stated it is undisputed that juror Masanto had relationships with witnesses.

As to the second inquiry of the trial Court, certainly without further inquiry how can it be determined as to what each juror believed a "close personal" or "social" relationship to mean? One consideration is to review whether other jurors responded and how they responded. Appellant has set forth many examples of collective responses of the juror panel which make it

clear that jurors understood that the inquiry was not limited to only close personal relationships. And during all of the response of the collective juror panel where juror Masanto was present, there was no response from juror #210 Jessica Monsanto regarding Jones or the Brewers.

A review of the trial court's order reveals that the trial court, without the benefit of the transcript, incorrectly believed that ***"the Court inquired of all jurors, including Ms. Mansanto, if they were connected by blood or marriage or had a close personal friendship with any of the potential witnesses in the case."*** (See Order Denying Motion for New Trial, pg 2, ln 6-10). The trial court was mistaken. The trial court did not simply ask for close personal relationships, but in fact inquired as to "social relationships". (Trial Transcript at pg 38, ln 1-7). As such, a review of the trial court's order demonstrates that the Court's own order acknowledged that there was evidence of social media contacts between juror #210 Monsanto and the witness Quornisha Jones, that they worked together, and that they had each other's phone number. (See affidavit and attachments to affidavit of Quornisha Jones which were exhibits to the Amended Motion for New Trial). As such, even on affidavits, a prima facia case was made in support of Appellant's claim of juror misconduct. At a minimum, an evidentiary hearing should have been granted and the Court conduct an inquiry. The failure to set down an evidentiary hearing and have a full inquiry denied Appellant due process and was an abuse of discretion.

C. THE EVIDENCE OF FRIENDSHIP BETWEEN THE JUROR AND WITNESS JONES DID ESTABLISH MORE THAN A FACEBOOK FRIENDSHIP

Appellant incorporates by reference the arguments in the preceding section. Accordingly, Respondent's argument and citations regarding Facebook friends is irrelevant and off point. First, because the Court inquired as to social relationships which would include Facebook and Instagram and other social media. Second, because there was clear evidence of a friendship far

beyond mere Facebook friends. Lastly, it is worth repeating that the Court itself commented on another juror that was removed where that juror worked with Jones at the hospital and specifically made further inquiry. (Trial Transcript, pg 150, 16-19).

D. WITHOUT AN EVIDENTIARY HEARING APPELLANT CANNOT ADEQUATELY EXPLORE AND EXPOSE THE INTRODUCTION OF EXTERNAL PREJUDICIAL INFORMATION DURING DELIBERATIONS.

Respondent completed its argument in support of the trial Court's denial of an evidentiary hearing and denial of Appellant's Motion for New Trial by stating that if Jones and juror Masanto were "truly" friends, they would have had a conversation prior to the trial. This is pure conjecture, but worth analysis. First, no juror knows what case they are empaneled to serve on. Second, how would Jones even know juror Masanto is on jury duty and on Appellant's case. Third, friends don't talk every day or even every week. Assuming that every friend updates each and every one of their friends on a weekly basis is absurd. In sum, the evidence in the record establishes that Jones and juror Masanto knew each other long before the trial, establishes that they worked together, establishes that they contacted each other on social media, establishes that they called each other, and establishes that juror Masanto tried to communicate with Jones after disclosure of Jones affidavit but before juror Masanto signed her affidavit.

All of this points to a crystal clear conclusion. The trial Court erred by not ordering an evidentiary conclusion and making further inquiry. Thus, Appellant has been denied a fair trial.

CONCLUSION

For the above reasons and citations of authority, Appellant requests as follows:

1. That this Court reverse and set aside the convictions of the Appellant and enter judgments of acquittal for Appellant;

2. That this Court reverse and set aside the convictions of the Appellant and grant Appellant a new trial;

3. In the alternative, that this Court remand this case back to the Trial Court for an evidentiary hearing on juror misconduct and further proceedings; and

4. For such other and further relief which this Court deems just and proper.

This July 11, 2016.

Respectfully submitted,

/s/ Derek M. Wright

Derek M. Wright
Attorney for Appellant

/s/ Robert E. Ferguson, Jr.

Robert E. Ferguson, Jr.
Attorney for Appellant

I CERTIFY that I have this day served the within and foregoing:

- **Reply Brief of Appellant**

upon all parties to this matter by depositing a true copy of the same in the United States Mail with proper postage affixed thereto and addressed as follows:

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This August 11, 2016.

Respectfully submitted,

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