

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

DAMON JACQUISE JONES,

PETITIONER S.C. SUPREME COURT

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002564

PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Did both the initial PCR judge and the remand judge err in refusing to grant a new trial based on the misconduct of Juror #86 by intentionally concealing the fact that she was a victim of a violent crime, information that would have been a material factor in exercising a peremptory strike to exclude Juror #86 from Petitioner's jury?

STATEMENT

In August of 2005, the Spartanburg County Grand Jury indicted Petitioner Jones for murder, indictment #05-GS-42-3371. On November 29, 2005, Petitioner proceeded to jury trial before the Honorable Paul Burch. Christopher Brough represented Petitioner at trial. Barry Barnette and Jennifer Jordan prosecuted the case. The jury returned a verdict of guilty. Judge Burch sentenced Petitioner to life imprisonment. A timely notice of intent to appeal was filed and the direct appeal perfected. The South Carolina Court of Appeals affirmed the sentence and conviction. State v. Jones, Op. No. 2008-UP-424 (S.C. Ct.App. filed July 23, 2008). (App. pp. 392-394). A timely petition for rehearing was filed and then denied on September 23, 2008. (App. pp. 395-401). A timely petition for writ of certiorari was filed on December 29, 2008. (App. pp. 402-415). On December 2, 2009, the South Carolina Supreme Court granted the petition for writ of certiorari. (App. p. 417). On August 23, 2010, the South Carolina Supreme Court affirmed the conviction and sentence finding that the issue presented on appeal was not preserved for review. (App. pp. 459-461). A petition for rehearing was filed and then denied on September 22, 2010.

On December 15, 2010, Petitioner filed an application for post-conviction relief [PCR]. (App. pp. 462-478). The State filed a return on February 16, 2012. (App. pp. 493-499). Petitioner filed an amended application on March 9, 2012. (App. pp. 479-492). On June 25, 2013, an evidentiary PCR hearing was held before the Honorable R. Lawton McIntosh. C. Reed Teague represented petitioner at the PCR hearing. Suzanne H. White represented the State. In a written order signed February 26, 2014, Judge McIntosh denied relief and dismissed the application. (App. pp. 724-742). On March 18, 2014, Petitioner filed a motion to alter or amend and memorandum in support pursuant to Rule 59(e). (App. pp. 743-762). On May 22, 2014,

Judge McIntosh held a hearing on the motion. In an order signed May 29, 2014, Judge McIntosh denied the motion to alter or amend. (App. p. 777).

A timely notice of intent to appeal was filed and, on November 13, 2014, a petition for writ of certiorari was filed with the South Carolina Supreme Court. The State filed a return on April 2, 2015. On September 3, 2015, the South Carolina Supreme Court granted the petition and remanded the case to allow Petitioner the opportunity to present evidence of juror misconduct. (App. pp. 798-799).

On November 9, 2016, a hearing was held before the Honorable Frank R. Addy. Rodney W. Richey represented Petitioner at the hearing. Alicia A. Olive represented the State. On December 12, 2016, Judge Addy signed a form order, again denying relief. (App. pp. 828-831). A timely notice of intent to appeal was served on December 28, 2016. This appeal follows.

ARGUMENT

Both the initial PCR judge and the remand judge erred in refusing to grant a new trial based on the misconduct of Juror #86 by intentionally concealing the fact that she was a victim of a violent crime, information that would have been a material factor in exercising a peremptory strike to exclude Juror #86 from Petitioner's jury.

At trial during voir dire the trial judge asked the potential jurors, "Anybody on the panel ever been the victim of a violent crime or had a close personal friend or family member that's been the victim?" (App. p. 25, lines 11-13). Jurors #96, #131, #127 and #147 all responded. (App. p. 25, line 14 – p. 26, lines 1-6). Juror #86 did not respond. In the application for post-conviction relief Petitioner alleges:

Juror misconduct was committed where juror #(86) failed to reveal during voir dire that she was a victim of a violent crime. Had this been made known to the trial counsel during jurors' selection the juror would most likely been excluded from trial. Had this juror been excluded from trial the petitioner's case would have been greatly enhanced to the favorability of the petitioner and the outcome of trial would have been most favorable to the petitioner.

(App. p. 471).

A few days after the jury found Petitioner guilty but after the notice of intent to appeal had been filed, Juror Vaughn Kershner notified trial counsel that he was concerned about comments made by Juror #86. (App. pp. 507-525). In July of 2008, Juror Kershner signed an affidavit in regard to Juror #86. During the PCR hearing the affidavit was admitted over objection as Applicant's # 1. (App. p. 522, line 18 – p. 523, lines 1-17; pp. 652-653). Also in 2008, Investigator Calvin E. "Skip" Smith, III, interviewed Juror #86. Investigator Smith signed two separate affidavits in regard to his interviews of Juror #86. (App. pp. 654-658). The affidavits were admitted over objection at the PCR hearing as Applicant's #2 and #3. (App. p. 522, line 18 – p. 523, lines 1-17).

In his affidavit Juror Kershner stated, "I subsequently wrote to trial counsel to notify him that I thought one woman juror, who I describe as being in her 40's with "big blonde hair," had improperly brought her own dealing with domestic violence and guns into the jury deliberations. Specifically, this juror was talking with another woman juror during deliberations about a gun being pointed at her head by her former husband, and she knew how it felt." (App. p. 652).

In Investigator Smith's affidavit he stated, "[Juror #86] was eventually asked directly if she remembered any discussion about a gun being pointed at anyone in the past being discussed during the jury deliberations in this case. [Juror #86] told me she did not remember saying anything about a gun, but she acknowledged in the presence of her husband that her ex-husband had pointed a held [sic] a .357 magnum with the hammer back at her for a period of time. She expressed to me that she feared for her life, and that he had held the gun on her for some time. She ultimately was able to talk him down and get the gun away from him." (App. p. 655).

In his second affidavit Investigator Smith stated that Juror #86 became defensive when she was asked to sign an affidavit about failing to disclose the prior incident. (App. p. 657). Investigator Smith stated, "[Juror #86] told me that she did not disclose the fact of a gun being pointed at her because it was no one's business." (App. p. 657). The husband of Juror #86 told Investigator Smith that Juror #86 would not sign the affidavit and he was waiting on a call from his attorney. (App. p. 658).

Juror #86 testified at the PCR hearing. Juror #86 denied telling another juror that her ex-husband pointed a gun at her. (App. p. 518, lines 3-9). Instead, Juror #86 claimed that she told the other juror that she was no longer afraid of guns because, . . . I ha - - had to take a gun away from my ex-husband, that he was sayin he was gonna kill himself and I talked him into handing the gun to me." (App. p. 518, line 23 - p. 519, line 1). The PCR judge did not allow further

questioning of the juror. (App. p. 519, lines 5-18). Petitioner moved to cross examine Juror #86 about the statements she gave to Investigator Smith that were inconsistent with her in-court testimony. (App. p. 521, lines 16-20) Additionally, Petitioner sought to introduce the testimony of Juror Kershner. (App. p. 521, line 22 – p. 522, lines 1-3). Although Juror Kershner and Investigator Smith were present, under subpoena and prepared to testify, as noted in the order of dismissal (App. p. 737), the PCR judge did not allow their testimony but instead only admitted their affidavits. (App p. 523, lines 11-19).

In the order of dismissal the PCR judge wrote:

[Juror #86] testified that she did not recall a jury voir dire question regarding whether or not she had ever been a victim of a violent. However, McGraw testified that she has never said in the jury room that her ex-husband had held a .357 to her head and did not consider herself to have been a victim of a violent crime. Following her testimony, this Court held that the Applicant could not proceed with its claim of juror misconduct because any other testimony support this allegation would be purely hearsay. The South Carolina Supreme Court has held that “a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial” on those grounds. Shumpert v. State, 378 S.C. 62, 67, 661 S.E.2d 369, 371 (2008). Because this Court finds [Juror #86’s] testimony to be credible, this Court found that the Applicant failed to meet his burden of proof as to this claim and it is denied and dismissed.

(App. pp. 737-738).

The order of dismissal was appealed and this Court remanded the case to allow petitioner the opportunity to present evidence in support of the juror misconduct claim. (App. p. 798). During the remand hearing Juror #86 again denied telling another juror that her ex-husband pointed a gun at her. (App. p. 805, line 25 – p. 806, lines 1-2). Juror #86 testified that she was not the victim of a violent crime. (App. p. 806, lines 3-9). In contrast, Juror Kershner testified that Juror #86 stated that her ex-husband pointed a gun at her in a domestic violence situation. (App. p. 813, line 14- p. 814, lines 1-14). Trial counsel testified at the remand hearing that if he had known about the statements made by Juror #86 that her ex-husband pointed a gun at her,

he “absolutely” would have struck her from serving on the jury. (App. p. 821, line 24 – p. 822, 823, lines 1-24).

Investigator Smith was not available to testify at the remand hearing due to physical illness. (App. p. 803, p. 828). The investigator was initially scheduled to testify via Skype but became uncooperative and quit communicating with counsel. (App. p. 828). As a result, in the form order of dismissal the judge wrote:

Mr. Richey [PCR counsel] also represented to the court that Mr. Smith had previously stated that he had no independent recollection of the events contained in Mr. Smith’s affidavits of July 18, 2008 and July 23, 2008, but that if he were called to testify, he would essentially testify that what is reflected in the affidavits must be accurate because he would not have otherwise attested to those facts. After discussion with counsel, and based on Mr. Richey’s representation that Mr. Smith’s live testimony would not provide any additional information which is not already reflected in Mr. Smith’s affidavits, the parties and the court agreed that the court would proceed to rule on this matter based upon the record developed to date.

(App. pp. 828-829).

In the form order of dismissal the judge found that Juror Kershner’s testimony was prohibited by Rule 606. (App. p. 829). The judge wrote:

Having considered the testimony of Mr. Kershner and assessed his credibility, the court concludes that his testimony closely resembles the affidavit advanced in *Shumpert*, and the court finds that this juror most likely contacted trial counsel after the verdict because he was suffering from a bad case of “buyer’s remorse.” *Shumpert v. State*, 378 S.C. 62, 68, 661 S.E.2d 369, 372 (2008). Mr. Kershner was simply less credible than [Juror #86]. Therefore, this judge concurs with Judge McIntosh’s finding that his testimony is prohibited by rule 606.

The judge erred.

In *Shumpert v. State*, 378 S.C. 62, 67, 661 S.E.2d 369, 371 (2008)(fn 1 omitted) this Court wrote:

Although Rule 606 expressly prohibits the introduction of juror testimony regarding both the content and the effect of statements occurring during the jury’s deliberations, this Court has recognized an exception to that categorical

prohibition. In State v. Hunter, this Court held that juror testimony involving internal misconduct may be received only when necessary to ensure fundamental fairness. 320 S.C. 85, 88, 463 S.E.2d 314, 316 (1995). That case involved allegations by a juror that the verdict was tainted by racial prejudice, and this Court affirmed the rule announced in Hunter in the later case State v. Aldret, 333 S.C. 307, 509 S.E.2d 811 (1999), which involved allegations that the jury began deliberations prematurely. The Court has instructed that a defendant must demonstrate prejudice from jury misconduct in order to be entitled to a new trial. Id. at 314, 509 S.E.2d at 814.

Rule 606, SCRE, does not prohibit the introduction of Juror Kershner's testimony because the testimony was necessary to ensure fundamental fairness. The affidavit in the present case is distinguished from the affidavit in Shumpert. As noted by the Court in Shumpert, "We think it is plain that the portion of the affidavit pertaining to what may have confused other jurors or influenced their votes is pure speculation presented without any specific factual support, and the juror's testimony about his own deliberative process is similarly flawed." 378 S.C. at 68, 661 S.E.2d at 372 (2008). In contrast, Juror Kershner's affidavit specifically states that the juror told another juror that her former husband pointed a gun to her head, a fact that Juror #86 admitted to Investigator Smith. Neither the affidavit nor the testimony of Juror Kershner contain the "buyer's remorse" found in the affidavit in Shumpert. The record simply does not support this finding.

Additionally, the record does not support the credibility finding made by the judge. Juror Kershner stated that Juror #86 told another juror that her former husband pointed a gun to her head. As a result, Investigator Smith interviewed Juror #86 who admitted that her ex-husband held a gun to her head. Juror #86 told the investigator that she did not disclose that a gun had been pointed at her head because it was none of anybody's business. It was only after Juror #86 realized that she may be in trouble for the failure to disclose that she denied the incident.

Rule 606(b) clearly does not prohibit Investigator Smith's affidavit. Rule 606(b) provides:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

In the July 18, 2008 affidavit Investigator Smith wrote that Juror #86 did not remember a discussion during deliberations about a gun being pointed at her but admitted that her ex-husband pointed a gun at her. (App. p. 655). Rule 606 is inapplicable because the affidavit does not address a juror testifying about deliberations. Instead, Investigator Smith's affidavit shows that Juror #86 failed to disclose on voir dire that she was the victim of a violent crime.

In the form order of dismissal the judge wrote, "In short, assuming for the moment that [Juror 386's] ex-husband may have pointed a gun at her at some point in the past, her failure to disclose this information during voir dire was clearly inadvertent and unintentional." (App. p. 829). In support of the finding that her failure to disclose was unintentional the judge wrote, "The court notes that no other jurors responded to the court when this question was asked." (App. p. 829). The assertion that no other jurors responded is factually incorrect. The record reflects that Jurors #96, #131, #127 and #147 all responded when asked if any member of the jury pool had been the victim of a violent crime. (App. p. 25, line 14 – p. 26, lines 1-6). Additionally, during the remand hearing trial counsel testified, "I think it would be objectively unreasonable to fail to answer that question in the affirmative if you had had a gun pointed at you

and you were dealing with a gun situation.” (App. p. 822, lines 16-19). The judge’s finding that the failure to disclose was inadvertent is not supported by the record.

In the form order of dismissal the judge wrote, “This judge also wishes to note that jurors are commonly told they should use and apply their life experiences in making their decisions.” (App. p. 830). Juror #86’s life experience of having a gun pointed at her head is the basis for the use of a peremptory strike because the experience prevents the juror from making an objective decision. If trial counsel had known of the experience, he would have struck the juror.

Also, in the form order of dismissal the judge wrote, “To the extent the testimony of [Juror #86], Mr. Kershner, and Mr. Smith violates Rule 606, this court concurs with Judge McIntosh and finds the testimony inadmissible to impeach Applicant’s verdict. Additionally, even if admissible under Rule 606, Applicant has not demonstrated sufficient prejudice to warrant a new trial. State v. Aldret, 333 S.C. 307, 509 S.E.2d 811(1999).” (App. p. 830). The judge erred. Rule 606 is inapplicable to the testimony of Juror #86 and Investigator Smith because the testimony did not involve jury deliberations. Because Rule 606 is inapplicable, the proper analysis for the testimony of Juror #86 and Investigator Smith is found in McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013) and discussed below. The testimony of Juror Kershner meets the fundamental fairness exception to Rule 606 found in Shumpert.

In McCoy v. State, 401 S.C. 363, 371–72, 737 S.E.2d 623, 627–28 (2013), this Court wrote:

Provided a claim is timely raised, a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) 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. See State v. Woods, 345 S.C. 583, 587–89, 550 S.E.2d 282, 284 (2001) (finding that a juror's intentional failure to disclose a relationship gives rise to an inference of bias and rejecting the State's argument that a new trial should be warranted only where an individual shows he was prejudiced by the juror's failure to

disclose information); State v. Kelly, 331 S.C. 132, 145–46, 502 S.E.2d 99, 106–07 (1998) (recognizing that trial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information and finding that the first inquiry in the juror disqualification analysis is whether the juror intentionally concealed information during voir dire). Further, evaluating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing. See State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004) (“Whether a juror's failure to respond [during voir dire] is intentional is a fact intensive determination that must be made on a case-by-case basis.”).

Applying the test from McCoy, Juror #86 intentionally concealed the fact that she was the victim of a violent crime. This concealed information would have been a material factor in the use of peremptory challenges.

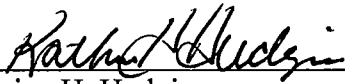
In seating a jury, it is the trial court's duty to assure itself that each juror is impartial. State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1976). Where the trial judge asks jurors a particular question, counsel is entitled to a truthful answer. State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982). It is "expected and required that jurors in their answers shall be completely truthful and that they shall disclose, upon a general question, any matters which might tend to disqualify them from sitting on the case for any reason." State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998), citing Gulledge at 277 S.C. 371, 287 S.E.2d 490. False or misleading answers to *voir dire* questions "may result in the seating of a juror who might have been discharged by the court, challenged for cause by counsel or stricken through the exercise of peremptory challenge." Gulledge at 277 S.C. 371, 287 S.E.2d 490, citing Photostat Corp. v. Ball, 338 F.2d 783, 786 (10th Cir. 1964). If a juror intentionally fails to disclose requested information, it may be inferred that the juror is not impartial. State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991), cert. denied, Jan. 22, 1992; See also State v. Woods, 338 S.C. 561, 527 S.E.2d 128 (2001).

Intentional concealment occurs when the *voire dire* question is "reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." State v. Guillebeaux, 362 S.C. 270, 607 S.E.2d 99 (Ct. App. 2004). There is no intentional concealment if the *voir dire* question is so "ambiguous or incomprehensible" that a juror's failure to respond is reasonable under the circumstances. State v. Sparkman, 358 S.C. 491, 596 S.E.2d 375 (2004).

The judge's question was not ambiguous or incomprehensible. Other jurors responded to the question. The failure of Juror #86 to respond was unreasonable. It can be inferred from the juror's failure to respond that she was not impartial. Petitioner is entitled to a new trial based on juror misconduct.

CONCLUSION

Based on the above argument, the petition for writ of certiorari should be granted to allow further briefing on the issue.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR PETITIONER

This 18th day of August, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Spartanburg County

Honorable Frank R. Addy, Circuit Court Judge

DAMON JACQUISE JONES,

PETITIONER

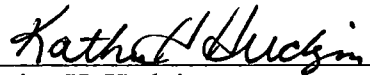
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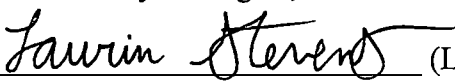
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Valerie Garcia Giovanoli, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Petition for Writ of Certiorari and a copy of the Appendix have been served on Damon Jacquise Jones, #250332, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 18th day of August, 2017.



Kathrine H. Hudgins
Appellate Defender

SUBSCRIBED AND SWORN TO before me ATTORNEY FOR PETITIONER
this 18th day of August, 2017.

 (L.S)

Notary Public for South Carolina
My Commission Expires: July 5, 2027.