STATE OF SOUTH CAROLINA
In The Court of Appeals

ORIGINAL

APPEAL FROM GREENWOOD COUNTY
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2018-000022

THE STATE, Respondent,

v.

ADAM MARTYN ROWELL, Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

Whether the trial judge properly admitted blood Sample A into evidence where the State completed the chain of custody as far as practicable and where any weakness in the chain of custody was a factor to be considered as to the weight of the evidence and not its admissibility? Furthermore, whether any error in admitting the results of Sample A was harmless because Sample A was cumulative to other evidence presented against Appellant?

II.

Whether the trial judge properly admitted blood Sample A into evidence where Appellant's expert admitted that he did not have any proof that the State's results were unreliable and where Appellant's expert otherwise conceded the reliability of the State's testing methods?

III.

Whether the trial judge properly admitted blood Sample B into evidence where Appellant's expert admitted that he did not have any proof that the State's results were unreliable and where he even admitted the State's testing method was the "gold standard" for testing for alcohol concentration?

IV.

Whether Appellant waived any request for an evidentiary hearing regarding Juror 164's failure to disclose his prior arrest and thereby failed to preserve this issue for appeal where Appellant failed to secure Juror 164 for Appellant's post-trial hearing such that evidence could be presented? And where if we assume that this issue was properly preserved for appeal, the trial judge did not abuse his broad discretion in refusing to grant Appellant a new trial because the initial method of questioning the jury panel used by the trial judge during *voir dire* was confusing to the average juror, and therefore there was no probative evidence that Juror 164's failure to disclose his arrest was intentional?

STATEMENT OF THE CASE

In March 2015, the Greenwood County Grand Jury indicted Appellant for one count of felony driving under the influence resulting in death and one count of felony driving under the influence resulting in great bodily injury. On February 13-20, 2017, a jury trial was held in the Greenwood County Court of General Sessions with the Honorable Donald B. Hocker, presiding. Appellant was represented by Billy Garrett, Esq., Carson Henderson, Esq., and Jane Merrill, Esq. Respondent (the State) was represented by Assistant Solicitors Micah Black and Wade Dowtin of the Eighth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of both counts of felony driving under the influence. Following the verdict, the trial judge delayed sentencing for one week. On February 27, 2017, the matter was reconvened and the trial judge sentenced Appellant to a term of thirteen years' imprisonment for one count of felony driving under the influence where death results. The trial judge also sentenced Appellant to eight years' imprisonment for one count of felony driving under the influence where great bodily injury results. Both sentences ran concurrently with each other resulting in an aggregate sentence of thirteen years' imprisonment for Appellant. Appellant timely served and filed two post-trial motions to the trial judge regarding after discovered evidence and non-disclosure of an arrest by a juror and on November 27, 2017 the trial court held a hearing on those motions. At the conclusion of the hearing, the trial judge took Appellant's arguments under advisement and subsequently issued a written order denying Appellant's motions on December 27, 2017. Appellant timely filed a notice of appeal and an initial brief. This brief of Respondent now follows.

STATEMENT OF FACTS

On November 15, 2014, Appellant was involved in a head-on collision with a vehicle driven by Jeremy Cockrell on highway 225 in Greenwood County. (R. 106, 123). The wreck occurred at approximately 7:20 PM. (R. 116-17). The two cars involved in the collision were a darker colored pickup truck driven by Appellant and red pickup truck driven by Cockrell. (R. 123, 136). When EMS arrived at the scene of the wreck at 7:23 PM, Cockrell was deceased, but his passenger, Matthew Sanders was still conscious and had serious injuries to his left leg. (R. 281, 296, 313). Sanders suffered a broken femur and had surgery the following day to place a rod inside his leg. (R. 192-93, 255, 257). Appellant was conscious when first responders arrived, but his body was trapped behind the steering wheel. (R. 290-91).

Paramedic Derrick Oliver climbed into Appellant's vehicle to stabilize Appellant and remove him from the vehicle. Once inside the vehicle, Oliver could smell the odor of alcohol coming from Appellant's breath. (R. 292). Around the same time, Trooper Brunson Smith of the South Carolina Highway Patrol approached the driver's side of Appellant's vehicle and could smell the odor of an alcoholic beverage. (R. 138). Smith also observed a bottle of beer with liquid still inside of it in the backseat of Appellant's vehicle. (R. 139). First responders cut the door and roof off of Appellant's vehicle in order to remove him from the car. (R. 295). After Appellant was removed from his vehicle, he was placed inside an ambulance. Once inside the ambulance, Paramedic Larry Kidd also smelled the odor of alcohol emanating from Appellant. (R. 316-17). Appellant was eventually airlifted to Greenville Memorial Hospital at 8:32 PM. (R. 143).

Appellant's flight to Greenville Hospital lasted approximately twenty four minutes. (R. 525, 1454). During the flight, approximately 2,540 milliliters of blood and blood products were

transfused into Appellant's body. (R. 523, 1454). When Appellant arrived at Greenville Hospital a blood sample (Sample A) was taken by Nurse Amanda Baker at approximately 8:54 PM. (R. 544, 662, 1453). Sample A was received by the hospital laboratory at 9:24 PM. (R. 671, 1453). An analysis of Sample A was completed 9:40 PM which yielded a blood alcohol level of .1897. (R. 738). After Appellant's initial blood draw, he received an additional 9,510 milliliters of blood and blood products during his emergency surgery. (R. 367). Appellant's surgery ended at 11:40 PM. (R. 369-70). By the end of Appellant's surgery approximately one third to one half of Appellant's overall blood volume had been replaced with blood or blood products that were transfused into Appellant's body. (R. 374-76). Following Appellant's surgery, Nurse Leslie Childers drew a second sample (Sample B) of Appellant's blood at 12:56 AM and transferred it to Trooper Smith at 1:05 AM. (R. 157, 775-76). Sample B was transported to SLED where it was analyzed and found to contain a blood alcohol level of .096. (R. 902).

At trial, Kelly Anderson of the South Carolina Highway Patrol testified regarding the MAIT team's investigation of the scene of the wreck. Anderson determined that Appellant's vehicle crossed the center line and hit Cockrell's vehicle in its lane of travel. (R. 414). The MAIT team also determined that Appellant's vehicle was traveling at approximately 69 miles per hour prior to impact while Cockrell's vehicle was traveling at 41 miles per hour. (R. 475-76). At the conclusion of the State's case, Appellant called eight witnesses in his defense, including himself. In addition to challenging the admissibility of Sample A and Sample B on chain of custody grounds, Appellant challenged the accuracy of the results of the two samples. Appellant called Dr. Jimmie Valentine as an expert in the field of toxicology, pharmacology, and chemistry. (R. 1042). Valentine challenged the results of sample A by theorizing there may have been a false positive result because of the level of lactic acid that could have been inside

Appellant's body. (R. 1069-83). The trial judge declined to suppress the results of Sample A and found that the State had established the chain of custody as far as practicable and any weaknesses that were in the chain would go to the weight of the evidence rather than the admissibility. (R. 638-39).

Valentine admitted that there was nothing wrong with the testing methodology used by SLED for Sample B and he actually praised SLED for using good testing methods, even going as far as calling them "the gold standard to run by". (R. 813; 1067, lines 13-14; 1105). Valentine's only reservation with the results of Sample B was the presence of Benadryl in the sample. (R. 813). Valentine speculated that Appellant may have received tainted blood from one of the transfusions which would account for the presence of Benadryl. (R. 817). On cross examination, Valentine admitted that a normal person who had a blood alcohol concentration of .18 but did not receive blood transfusions would be expected to have a blood alcohol level of .13 if a sample were taken four hours later rather than the .09 level that Appellant had. (R. 816-18, 1130-31). The trial judge declined to suppress the results of Sample B, because Appellant's expert did not question the reliability of the methods used by SLED, but rather only questioned the results. (R. 825). At the conclusion of trial, Appellant was convicted of both counts.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

"'In criminal cases, the appellate court sits to review errors of law only' and is 'bound by the trial court's factual findings unless they are clearly erroneous.'" State v. Coaxum, 410 S.C. 320, 326, 764 S.E.2d 242, 245 (2014) (quoting State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001)). "In order to receive a mistrial, the defendant must show error and resulting prejudice." State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998).

ARGUMENT

I.

The trial judge properly admitted blood Sample A into evidence when the State completed the chain of custody as far as practicable and when any weakness in the chain of custody was a factor to be considered as to the weight of the evidence rather than its admissibility. Furthermore, any error in admitting the results of Sample A was harmless because Sample A was cumulative to other evidence presented against Appellant.

Appellant contends the trial court erred in admitting Sample A because the chain of custody for the sample was deficient. Specifically, Appellant alleges that Sample A was unaccounted for during an approximately 30 minute time period after it was drawn from Appellant, but before it reached the hospital lab. Appellant's argument is without merit. The State established the chain of custody for Sample A as far as practicable and produced witnesses who identified where the sample was from the moment it was taken from Appellant's body until it was analyzed by hospital staff.

"This Court has long held that a party offering into evidence fungible items such as drugs or blood samples must establish a complete chain of custody as far as practicable." State v. Sweet, 374 S.C. 1, 6, 647 S.E.2d 202, 205 (2007). "Testimony from each custodian of fungible evidence, however, is not a prerequisite to establishing a chain of custody sufficient for admissibility." State v. Sweet, 374 S.C. at 7, 647 S.E.2d at 206. "If the identity of each person in the chain handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion is shown in the admission, absent proof of tampering, bad faith, or ill-motive." State v. Taylor, 360 S.C. 18, 26, 598 S.E.2d 735, 738 (Ct. App. 2004). "Where other evidence establishes the identity of those who have handled the evidence and reasonably demonstrates the manner of handling of the evidence, our courts have been willing to fill gaps in the chain of custody due to an absent witness." State v. Sweet, 374 S.C. at 7, 647

S.E.2d at 206. "Where the identity of those who handled the evidence is established, 'evidence regarding its care goes only to the weight of the specimen as credible evidence' and not to its admissibility." State v. Governor, 362 S.C. 609, 612, 608 S.E.2d 474, 475 (Ct. App. 2005) (quoting State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001)).

Here, the State identified each person who handled Sample A and produced testimony from each person in the chain except one. The State established the beginning of the chain of custody with testimony from Angela Waites and Amanda Baker. Waites testified that she believed she saw Amanda Baker draw Sample A from Appellant. (R. 650-51). Baker did not remember drawing the sample from Appellant, but recognized her hospital identification number on the laboratory audit trail for Sample A. (R. 662, 1453). Baker testified that if her number appeared on an audit trail, her typical practice would be to take the blood sample and deliver it to the hospital lab. (R. 661-68). Baker did not remember taking Sample A to the hospital lab, but testified that she or technician Bill Evans would have been the one to take it to the lab. (R. 671-72). Evans did not testify. Laboratory technician Robert Smith did not remember receiving Sample A because he handles numerous samples on a daily basis. (R. 678). However, Smith was able to identify his hospital identification number on the laboratory audit trail which indicated he received Sample A. (R. 675-77, 1453). Smith explained that when he gets a blood sample from the emergency room, he makes sure the sample is properly labeled and then places the sample in a machine to be analyzed. (R. 680-81). The machine produced a result approximately 15 minutes after it was received by Smith. (R. 682, 738).

Accordingly, the State established a complete chain of custody for Sample A. The State established who took the sample, who transported the sample to the hospital lab, and who analyzed the sample. (R. 662, 665-67, 680-81). The only possible witness in the chain who did

not testify was Bill Evans. Appellant, by contrast, did not produce any evidence of tampering, bad faith, or ill-motive. Absent any proof of tampering, the trial judge did not abuse his discretion by admitting Sample A into evidence.

Harmless Error

Even if this Court concludes the trial judge abused his discretion in admitting Sample A, the evidence was merely cumulative to Sample B and other evidence regarding Appellant's impairment rendering any such error harmless. See State v. Kirton, 381 S.C. 7, 37, 671 S.E.2d 107, 122 (Ct. App. 2008). ("The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence."). Three witnesses testified that the odor of an alcoholic beverage was emanating from Appellant. (R. 138, 292, 316-17). Trooper Smith also testified that he saw at least one open alcoholic beverage inside Appellant's vehicle. (R. 139). Sample B, taken approximately six hours after the wreck, yielded a blood alcohol level of .096. Appellant does not challenge the chain of custody for Sample B. (Final Brief of Respondent 17). Therefore, even if the trial judge erred by admitting Sample A, Sample B proved that Appellant was still impaired six hours after the wreck even after a blood transfusion. Accordingly, any error in admitting Sample A is harmless in light of the admission of Sample B and the rest of the evidence presented against Appellant regarding his impairment. Appellant's convictions and sentences should be affirmed.

II.

The trial judge properly admitted blood Sample A into evidence when Appellant's expert admitted that he did not have any proof that the State's results were unreliable and Appellant's expert otherwise conceded the reliability of the State's testing methods.

Appellant contends the trial judge erred by admitting Sample A when Appellant had approximately 50% of the blood in his body replaced with transfused blood and blood products. Specifically, Appellant contends the trial judge erred because the State did not offer any proof that the test result was reliable. However, Appellant did not question the reliability of the methods used to test Sample A at trial, but merely differed with the results that were reached by the hospital. Appellant offered Dr. Valentine to suggest the results of Sample A were a false positive because the hospital did not account for the presence of lactic acid in Appellant's body, but Appellant did not question the actual method of testing used by the hospital. (R. 1069-83). The trial judge did not abuse his discretion in admitting the results of Sample A because any questions raised about the results of Sample A are related to the weight of the evidence and not its admissibility.

The decision as to whether to admit or exclude expert testimony rests within the trial court's sound discretion and will not be reversed on appeal absent a prejudicial abuse of that discretion. State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). In order to admit scientific evidence under rule 702 SCRE, the trial court must find: (1) the testimony will assist the trier of fact, (2) the witness is qualified, (3) the underlying science is reliable, and (4) the testimony's probative value is not outweighed by its prejudicial effect. State v. Council, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). In considering the reliability of scientific evidence, our appellate courts consider several factors including: "(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3)

the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures." State v. Council 335 S.C. at 19, 515 S.E.2d at 517.

Here, Appellant never challenged the reliability of the methods used to test Sample A by Greenville Hospital. The trial judge heard testimony from four witnesses *in camera* to determine the admissibility of Sample A on chain of custody grounds. (R. 574-638). At the conclusion of the *in camera* hearing, the trial judge ruled that a chain of custody had been established. (R. 638). In responding to the trials judge's ruling, Appellant asserted that he would still challenge the results of Sample A, although he did not specify what grounds he would challenge the results under. (R. 640). Appellant then clarified that he planned to challenge the reliability of Sample A through his expert witness and through cross examination of the State's witnesses. (R. 644-45). However, when the State called Dr. John Reddic to describe how Sample A was tested, Appellant did not object to the admissibility of Sample A on grounds of reliability. (R. 733-39). Appellant cross examined Reddic about whether lactic acid could cause a false positive alcohol result, but Appellant did not question whether the machine used by the hospital was reliable. (R. 742-61). In fact, Appellant's expert, Dr. Valentine, acknowledged the hospital used a different test than SLED because it was a quicker test and was better suited for a Doctor's needs in providing quick care for a patient in an emergency situation. (R. 1067). Valentine did not, however, question the fundamental reliability of the hospital's test for obtaining an alcohol concentration. Valentine merely presented an alternative hypothesis that could account for Appellant's elevated blood alcohol reading. (R. 1065-84). Appellant confuses the trial judge's role in assessing the reliability of a test with the jury's role in determining the weight of the results of that test. Because Appellant did not challenge the reliability of the test used by the

hospital, but merely differed with the result, the trial judge did not abuse his discretion in admitting the results of Sample A. Appellant's convictions and sentences should be affirmed.

III.

The trial judge properly admitted blood Sample B into evidence when Appellant's expert admitted that he did not have any proof that the State's results were unreliable and even admitted the State's testing method was the "gold standard" for testing for alcohol concentration.

Appellant contends the trial judge erred by admitting the results of Sample B because Sample B was drawn from Appellant after approximately 9,000 milliliters of blood and blood products had been transfused into Appellant's body. Appellant also takes issue with the amount of Benadryl that was present in Sample B because Dr. Valentine testified that such a level of Benadryl would have made Appellant comatose. Appellant also complains that the State did not call an expert in rebuttal to contradict Valentine's testimony. (Final Brief of Appellant 18). Appellant's argument is without merit. As discussed previously in regards to Appellant's second issue on appeal, Appellant confuses the trial judge's role in assessing the reliability of a test with a jury's role in determining the weight of the results of that test. As with Sample A, Appellant did not question the reliability of the test used by SLED to analyze Sample B but merely offered an alternative theory to explain why Appellant had such a high blood alcohol level. Because Appellant did not challenge the reliability of the State's method of testing, the trial judge did not abuse his discretion in admitting the results of Sample B.

Appellant's expert took no issue with the testing methods used by SLED. In fact, Valentine praised the test as "the gold standard" to use when testing for alcohol. (R. 813, 1067, 1100, 1105). The trial judge astutely recognized that Appellant was not challenging the reliability of the test used, but merely casting doubt on its results when he made the following ruling:

> The Court: In light of the fact that Dr. Valentine is not attacking the reliability of the methodology and science behind the SLED testing and the procedures that they use, he's only attacking the reliability of the results itself, I am not going to suppress the result at this time, assuming that everything else comes into play properly to get the results in. And certainly in the Defense case and chief they can put up Dr. Valentine to offer that same line of testimony. And this is in no way an indication that I don't believe that Dr. Valentine's expert opinion and his testimony was not a good sound basis. I'm sure it is. But again, he's not attacking the methodology of the test, just the results, and that would go to the weight.

(R. 825, lines 6-18). As the trial judge suggested in his ruling, Appellant did try to attack the reliability of the results of Sample B through Valentine's testimony. Valentine suggested that Sample B may have been contaminated by alcohol contained in the foreign blood that had been transfused into Appellant's body. However, Valentine could not offer any scientific studies to substantiate his theory because no studies have been done on the subject because of the unethical nature of such a test. (R. 1097-98). Valentine also offered the alternative hypothesis that the blood from the donor bank could have been contaminated with various drugs, such as Benadryl. (R. 1101-04). However, Valentine also acknowledged that any theory about Appellant receiving contaminated blood would be mere speculation. (R. 1103-04). Furthermore, Valentine admitted the blood alcohol reading in Sample B was consistent with Appellant's blood being diluted from so many transfusions. (R. 816-18, 1130-31).

Appellant maintains the State was obligated to produce rebuttal testimony to contest the findings of Valentine. (Final Brief of Appellant 18, 22). This argument is meritless. The State is under no obligation to call rebuttal witnesses or contest the findings of a defense expert. This is especially true when the defense expert agrees the State's testing method is the "gold standard", there are no scientific studies to support the defense's alternate theories, and when the defense expert admits one of his alternate theories would be mere speculation. (R. 1097-98, 1100, 1103-04). Ultimately, Appellant's expert sought to cast reasonable doubt on the weight of the State's

evidence in regards to Sample B, but they did not question the reliability of the underlying test. The jury concluded Appellant failed in this regard. Because Appellant does not question the reliability of SLED's testing methods, the trial judge did not abuse his discretion in admitting the results of Sample B. Appellant's convictions and sentences should be affirmed.

IV.

Appellant waived any request for an evidentiary hearing regarding Juror 164's failure to disclose his prior arrest and thereby failed to preserve this issue for appeal, because Appellant failed to secure Juror 164 for Appellant's post-trial hearing such that evidence could be presented. Even assuming this issue is properly preserved for appeal, the trial judge did not abuse his broad discretion in refusing to grant Appellant a new trial because the initial method of questioning the jury panel utilized by the trial judge during *voir dire* was confusing to the average juror, therefore there was no probative evidence that Juror 164's failure to disclose his arrest was intentional.

Appellant contends the trial court erred in not conducting an evidentiary hearing regarding Juror 164's failure to disclose a prior arrest. Appellant also seems to suggest the trial court erred by not granting Appellant a new trial on this basis. (Final Brief of Appellant 28). However, Appellant does not allege that error in the relevant issue statement of his final brief. (Final Brief of Appellant 1, 23)[1]. Appellant did not raise any issues about juror misconduct at trial, but brought the issue to the trial court's attention via a post-trial motion for a new trial (R. 1363-64, 1368-69). A hearing took place to address Appellant's motions on November 27, 2017. At this hearing, Appellant explained to the trial judge that Juror 164 was arrested and charged with possession with intent to distribute marijuana, possession with intent to distribute within proximity of a school, and unlawful neglect of a child in the weeks preceding Appellant's trial in January 2017. (R. 1403-06). Appellant did not clearly articulate what relief he was asking for at

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[1] See Rule 208(b) SCACR ("...The Statement shall be concise and direct as to each issue, and may be stated in question form. Broad general statements may be disregarded by the appellate court. Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal.")

the hearing, but merely stated that "We still are not abandoning this issue of putting somebody with an arrest record on the jury." (R. 1407, lines 7-8). Because Appellant appears to be alleging two separate errors within the fourth issue in his Final Brief, it is instructive to address each issue separately.

Evidentiary Hearing

As an initial matter, Appellant waived any claim he had to an evidentiary hearing on the juror issue, by not attempting to secure Juror 164's appearance for offering evidence at the evidentiary hearing. Appellant failed to develop an adequate record for this Court's review. Indeed, without presenting testimony from Juror 164 about the answers given during *voir dire* and his ability to render a fair verdict, this issue was not raised to and ruled upon by the trial court, and it is not properly preserved for appeal.

"An objection withdrawn at trial constitutes an express waiver of the issue and does not preserve the issue for appellate review." Ligon v. Norris, 371 S.C. 625, 634, 640 S.E.2d 469, 472 (Ct. App. 2006). "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal." State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). "Our law is clear that a party must make a contemporaneous objection that is ruled upon by the trial judge to preserve an issue for appellate review." State v. Sheppard, 391 S.C. 415, 420-21, 706 S.E.2d 16, 19 (2011). "A proffer of testimony is required to preserve the issue of whether testimony was properly excluded by the trial judge, and an appellate court will not consider error alleged in the exclusion of testimony unless the record on appeal shows fairly what the excluded testimony would have been. State v. Santiago, 370 S.C. 153, 163, 634 S.E.2d

23, 29 (Ct. App. 2006). The burden is on an Appellant to provide a sufficient record for review. State v. Hutto, 279 S.C. 131, 303 S.E. 2d 90 (1983).

Here, Appellant not only did not secure Juror 164's appearance for the post-trial hearing, but Appellant appeared to make little to no effort to do so. Ostensibly, the trial judge held a hearing on November 27, 2017 for that very purpose and yet Appellant did not present any witnesses to prove there had been juror misconduct and openly admitted that he voluntarily chose not to do so. When asked if he wanted to be heard on this issue, Appellant stated:

> Mr. Henderson: Your honor, as it relates to this juror – and – and again, nothing has been produced to us indicating that he was a confidential informant. And because he does have a lawyer, Ms. Nelson with the public defender's office, we ethically thought that we can't directly contact him. Even on an unrelated matter, we don't think we're – it's – proper to contact him. But we've contacted Ms. Nelson, and she's made it very clear to us, he has no interest in talking to us.

(R. 1406, lines 5-13). Counsel for Appellant expressed ethical reservations about speaking with Juror 164, but did not issue a subpoena to require Juror 164's attendance at the hearing or ask the trial judge to require his attendance. Juror 164 may very well have invoked his fifth amendment privilege against self-incrimination at such a hearing, but the trial judge could not verify that because Appellant did not present the trial judge with that request. This illustrates the problem of Appellant not creating an adequate record for review. Therefore, to the extent Appellant is arguing that the trial judge erred by not conducting an evidentiary hearing, Appellant has waived that issue and it is not preserved for appeal.

Motion for New Trial

Assuming for the sake of argument that Appellant means to argue the trial judge erred by not granting a new trial, Appellant's argument is nevertheless without merit. Juror 164 did not disclose that he had recently been arrested to the trial judge. However, Juror 164's failure to

disclose this fact was unintentional because the method in which the question was asked was ambiguous.

"When a juror conceals information inquired into during *voir dire*, 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." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). The first question an appellate court must address in a juror disqualification analysis is whether the juror intentionally concealed information during *voir dire*. State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 106-107 (1998). An "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." Woods 345 S.C. at 588, 550 S.E.2d at 284. An unintentional concealment "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." Id. "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, 246 (2014).

Here, the manner in which the trial judge presented the questions to the jury panel was ambiguous and confusing. The trial judge gave the following instruction that is relevant to Juror 164:

> The Court: Now, these next questions – and I'm going to number them right before I read the questions. These next questions, if you need to respond just keep a good mental note of the question and your response and you'll speak with me privately. I don't even need for you to stand, okay? But I do need for you to keep

> a good mental note so you can speak with me privately. I'm going to go ahead and tell you there will be one, two, three, four, five, six, seven, eight, nine – there's going to be eleven questions. Okay? So, you're going to have to pay really good attention and keep good memory, okay?
>
> Question one, any member of the jury panel or any member of your immediate family members or close personal friends ever been arrested and charged with any criminal offense through whatever state, local, or federal law enforcement agency? It's actually ten questions. I misspoke.

(R. 56, lines 5-21). After asking the aforementioned question, the trial judge asked nine additional questions before the jury panel was allowed to come forward. Neither Appellant nor the State objected to the manner of the questioning.

The manner of questioning utilized by the trial judge was ambiguous and could be confusing to the average juror. Even if Juror 164 had understood and comprehended the first question asked by the trial judge, he was forced to listen to and process nine additional questions before he had a chance to answer. In the trial judge's post-trial order, he conceded that this method of questioning could be confusing to the average juror. (R. 1426). The trial judge also acknowledged that since presiding over Appellant's trial, he has changed his method of questioning potential jurors. (R. 1426). Because the method of questioning used by the trial judge was confusing to the average juror the trial judge effectively concluded, Juror 164's failure to disclose his recent arrest was unintentional. Accordingly, because Juror 164's failure to disclose his arrest was unintentional, the trial judge did not abuse his discretion in refusing to grant Appellant a new trial. Similarly, even if the failure to disclose had been discovered during trial, the trial judge could appropriately have exercised his discretion to proceed with the jury as it was without excusing Juror 164. State v. Coaxum, 410 S.C. at 328, 764 S.E.2d at 246. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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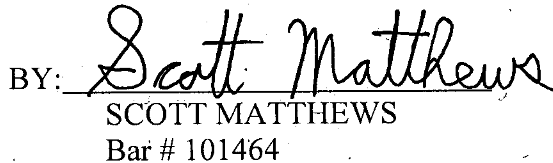
BY: 
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December 21, 2018

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY
The Honorable Donald B. Hocker, Circuit Court Judge

Appellate Case No. 2018-000022

THE STATE, Respondent,

v.

ADAM MARTYN ROWELL, Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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