ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Colleton County
Honorable Perry M. Buckner, Circuit Court Judge
Appellate Court No. 2011198747

THE STATE,

Respondent,

vs.

DAVID JAKES,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On October 28, 2010, a Colleton County Grand Jury indicted Appellant on three counts of attempted armed robbery and one count of possession of a weapon during the commission of a violent crime. On August 25, 2011, a Colleton County Grand Jury indicted Appellant on three counts of attempted murder.

On August 29, 2011, Appellant proceeded to trial. Attorney Harris S. Beech represented Appellant's, and Attorney David S. Matthews represented Appellant's co-defendant, Antwan McMillan. Assistant Solicitors Amanda Haselden and Ben Shelton represented the State.

On September 1, 2011, the jury returned with verdicts of not guilty on the three counts of attempted murder, guilty of three counts of first-degree assault and battery, guilty of the three counts of attempted armed robbery, and guilty of possession of a weapon during the commission of a violent crime.

The Honorable Perry M. Buckner, III sentenced Appellant to an aggregate term of 35 years. On September 6, 2011, Appellant served a timely notice of appeal. This appeal follows.

STATEMENT OF FACTS

After the fourth witness testified for the State, the trial judge received a note from the foreman of the jury regarding Juror #102. (R. p. 197.) Juror #102 asked the court if she was a "suitable juror" due to the fact her husband was a reserve deputy with the Colleton County Sheriff's Department. (R. p. 198.) The trial judge asked Juror #102 the following question: "The fact that your husband previously, more than two and a half years ago, was a full time deputy, and been a reserve deputy for the past two and a half years, would that in any way affect your ability to give the State of South Carolina or the defendant McMillan or the defendant Jakes, in this case, a fair and impartial trial?" (R. p. 202.) The juror responded, "No, it would not."

During voir dire, the trial judge never asked the potential jurors if their spouses had ever been a member of law enforcement. (R. p. 203.) Moreover, Appellant never requested that the trial court ask that question during voir dire. (R. p. 204.)[1] Appellant objected to the juror sitting and stated that he might have used his strikes differently if he had the information from the beginning. (R. p. 204.)

Ultimately, the trial judge found that the juror was fair and impartial and refused to excuse the juror. (R. p. 207.)

[1] Apparently, the Clerk's Office did not transmit everything that the juror filled out on the clerk's sheet onto the sheet the lawyers used for voir dire. (R. p. 206.)

ARGUMENT

I.

The trial judge did not err because the information the juror revealed did not automatically require the trial judge to remove the juror from the jury, the juror did not conceal any information requested during voir dire, and the trial judge acted within his broad discretion in finding the juror could be fair and impartial. Regardless, even if the trial judge did err, Appellant suffered no prejudice.

Appellant contends the trial judge erred when he refused to excuse a juror when, after jury selection, the juror voluntarily revealed the fact that her husband was a reserve deputy for the Colleton County Sheriff's Department. Appellant argues that the information the juror revealed would have been a material factor in Appellant's preemptory strikes; therefore, the trial judge erred. However, the fact that the juror's husband was a reserve deputy for the Colleton County Sheriff's Department did not automatically disqualify her from jury service. Furthermore, the fact Appellant might have used his preemptory strikes differently if he had known the information during jury voir dire is irrelevant because the juror did not intentionally conceal the information. Moreover, the trial judge acted within his broad discretion in finding the juror could be fair and impartial. Regardless, even if the trial judge erred, Appellant failed to show any prejudice.

Standard of Review

"A decision on whether to dismiss a juror and replace her with an alternate is within the sound discretion of the trial court, and such decision will not be reversed on appeal absent an abuse of discretion." State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (2007). "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. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

A. The trial judge did not err when he refused to excuse the juror.

Despite Appellant's contentions, the trial judge did not err in refusing to excuse the juror because the information the juror revealed did not automatically require the trial judge to remove her from the jury, the juror did not conceal any information requested during voir dire, and the trial judge acted within his broad discretion in finding the juror could be fair and impartial.

i. The information did not automatically require the trial judge to remove the juror.

First, the fact that a juror's spouse has some relationship with one of the witnesses does not automatically require the trial judge to remove the juror. See generally State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2011) ("[T]he fact that a juror has some relationship with the victim does not automatically require the trial judge to remove the juror."); State v. Hilton, 87 S.C. 434, 439, 69 S.E. 1077, 1078 (1910) ("There is no rule of the common law, nor is there a statute disqualifying a juror on account of his relationship to a witness . . ..").

ii. The juror did not conceal any information during voir dire.

Second, Appellant concedes the juror did not conceal any information requested during voir dire.[2]

In State v.Woods, our Supreme Court held: "When a juror conceals information inquired into during *voir dire*, a new trial is required only when the court finds the juror

[2] During voir dire, the trial judge asked if any member of the jury was employed by any law enforcement agency. However, the trial judge never asked if any jury member's spouse was ever employed by a law enforcement agency. (R. p. 203.)

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." 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (emphasis added).

Although our Supreme Court provided our trial courts with the two part test mentioned above, Appellant wants this Court to only apply the second part of the two part test, which deals with whether or not the information concealed would have been a material factor in the use of the party's peremptory challenges.[3] Appellant blatantly ignores the first part of the Woods test, which deals with whether or not the juror intentionally concealed the information.

Our case law is clear: This Court cannot reach the second part of the Woods test because the juror did not intentionally conceal the information during voir dire. See Burgess, 391 S.C. at 20, 703 S.E.2d at 514-15 (holding that a court may not remove a juror if either part of the two part test is not met; therefore, it would have been error for the trial judge to remove the juror because the juror's failure to disclose the information was innocent); State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101 (Ct. App. 2004) ("[A] determination that a juror did not intentionally conceal the information **ends** the court's inquiry.") (emphasis added); Smith v. State, 3775 S.C. 507, 518, 654 S.E.2d 523, 529 (2007) ("Where a juror, without justification, fails to disclose a relationship, it may be inferred . . . that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn." (quoting Woods, 345 S.C. at 587-88, 550 S.E.2d at 284)).

[3] (App. Br. 10.)

Moreover, the reason Appellant did not know the information regarding the juror beforehand was because he never asked for a voir dire question regarding whether or not any member of the jury had a spouse that was in law enforcement. See State v. Carlson, 363 S.C. 586, 595, 611 S.E.2d 283, 287 (Ct. App. 2005) ("A party cannot complain of an error which his own conduct induced."). Thus, Appellant's contention that he might have used his peremptory strikes differently if had known the information beforehand is without merit.

Furthermore, the fact that there were three alternate jurors available does not mean that the trial judge had to replace the juror with one of the alternates. In fact, in State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002), the trial judge decided to replace the juror with an alternate even though the juror said she could be fair and impartial. In Stone, our Supreme Court held the trial court abused its discretion in removing the juror because the juror's failure to disclose her acquaintance with one of the witnesses was innocent. Id. at 448, 567 S.E.2d at 247-48. As in Stone, the juror in this case did not intentionally conceal any information. Thus, it would have been error for the trial judge in this case to replace the juror with one of the three alternates.

iii. The juror stated that she could be fair and impartial even though her husband was a reserve deputy.

Finally, the trial judge acted within his discretion in finding the juror could be fair and impartial. See State v. Mercer, 381 S.C. 149, 158, 672 S.E.2d 556, 560-61 (2009) (describing the trial judge's broad discretion to determine whether a juror is qualified). The juror in this case voluntarily gave the information regarding the status of her husband's employment even though she was never asked for the information during voir

dire. Moreover, the juror told the trial judge that she could be fair and impartial despite the fact that her husband was a reserve deputy and former active deputy.

In summary, the trial judge did not err when he refused to excuse the juror.

B. Appellant received a fair trial by twelve impartial jurors; therefore, Appellant suffered no prejudice.

Even if this Court finds that the trial court erred in refusing to excuse the juror, any error was harmless because Appellant failed to show any prejudice. See State v. McWee, 322 S.C. 387, 393, 472 S.E.2d 235, 239 (1996) (noting error without prejudice does not warrant reversal).

In the case at hand, the juror stated that she could be fair and impartial even though her husband was a reserve deputy and former active deputy. (R. p. 202.) The judge stated that he was not going to punish the juror by removing her from the jury because the juror was honest enough to tell the court about her husband's employment status even though it was not asked of her. (R. p. 207.) Because the trial court found the juror to be fair and impartial and there is no evidence of any prejudice, this Court should affirm the trial court's ruling. See State v. Evins, 373 S.C. 404, 418, 645 S.E.2d 904, 911 (2007); see Patton v. Yount, 467 U.S. 1025, 1038 (1984) (instructing that a trial judge's determinations on the impartiality of a prospective juror are presumed to be correct and are entitled to special deference on appeal). Not only can Appellant not point to any prejudice but, in fact, Appellant was acquitted of three counts of attempted murder. Thus, Appellant received a fair trial.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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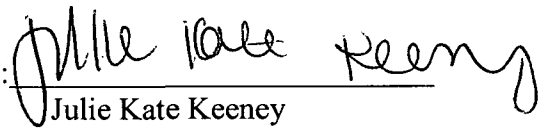
BY: 
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December 11, 2012

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Norma Bigbee, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle Cantey Durant, Esquire
S.C. Commission on Indigent Defense
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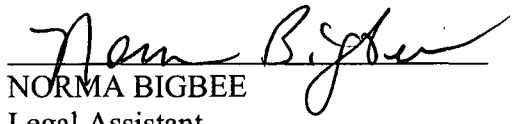
I further certify that all parties required by Rule to be served have been served. This 11th day of December, 2012.



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