

STATE OF SOUTH CAROLINA ORIGINAL

IN THE COURT OF APPEALS

Appeal from Colleton County

Perry M. Buckner, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID JAKES,

APPELLANT

APPELLATE CASE NO. 2011-198747

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in not excusing Juror 102 and allowing her to remain seated on the jury when she disclosed, after the jury was seated and sworn, that her husband had been a full time deputy with the Colleton County Sheriff's Department until two and one/half years ago and was currently a reserve deputy?

STATEMENT OF THE CASE

On October 28, 2010, the Colleton County grand Jury indicted Jakes on three counts of attempted armed robbery, and possession of a weapon during a crime of violence. On August 25, 2011, the Colleton County Grand jury indicted Jakes on three counts of attempted murder. On August 11, 2011, a pretrial hearing on a motion to quash the indictments was held for Jakes and one of his co-defendants, Antwan D. McMillan before the Honorable Perry M. Buckner, III. Jakes was represented by Harris S. Beach, and the state was represented by Amanda Haselden and Ben Shelton. On August 29 – September 1, 2011, Jakes and McMillan proceeded to trial jointly before Judge Buckner and a jury. Jakes again was represented by Harris Beach, and the state by Amanda Haselden and Ben Shelton. The jury found Jakes guilty of three counts of the lesser included offense of attempted assault and battery, and three counts of attempted armed robbery, and possession of a weapon during a crime of violence. Judge Buckner granted a directed verdict on another charge, possession of a stolen pistol. R. 566, ll. 2 -4. Judge Buckner sentenced Jakes to a total incarceration of thirty-five years. R. 718, ll. 1 – 21. Jakes' attorney filed a notice of appeal. This appeal follows.

ARGUMENT

The trial court erred in not excusing Juror 102 and allowing her to remain seated on the jury when she disclosed, after the jury was seated and sworn, that her husband had been a full time deputy with the Colleton County Sheriff's Department until two and one-half years ago and was currently a reserve deputy.

On June 3, 2010, Jeanine Metzfield was following her daughter, Amanda Metzfield and Amanda's husband, Jesse King, with a U- Haul trailer as they were moving to Florida. As they were passing through Colleton County, engine troubles with her truck forced them to stop and transfer the U-Haul to the other vehicle. R. 147, ll.15 – 25; R. 148, ll. 1 – 25.

They stopped on the exit ramp around midnight. As Jesse knelt down to work on the truck, a car stopped in the middle of the intersection. A male jumped out of the back seat with a large pistol in his hand and a black t-shirt over most of his head. R. 149, ll. 1 – 25; R. 150, ll. 1 – 25; R. 151, ll. 1 – 25. The man said to Jeanine to either "put'em up, pretty lady" or "get'em up, pretty lady." R. 152, ll. 1 – 25.

At that point, Jesse, who was an explosives disposal specialist with the Army, jumped up, pulled his gun, and ordered the man to get back in his car and leave. The man then pointed his gun at Jesse. Jesse shot at the man several times until the man fell. Then the people in the car started firing at Jesse. The injured man dropped his gun and crawled into the car, and the car drove away. R. 171, ll. 1 – 25; R. 172, ll. 1 – 25; R. 174, ll. 1 – 25; R. 175, ll. 1 – 25. Jesse called 911. R. 176, ll. 1 – 24.

According to the testimony of the third co-defendant, James Davis, Jakes came and picked him up from his house on June 3, 2010 to go out and "look for girls." They picked up McMillan, and then returned to Jakes' grandmother's house for him to get his gun.

Although the Cadillac Jakes was driving belonged to his grandmother, McMillan started driving. R. 210, ll. 14 – 25; R. 213, ll. 1 – 25; R. 216, ll. 1 – 25; R. 217, ll. 1 – 25; R. 218, ll. 1 – 25; R. 219, ll. 25; R. 220, ll. 1 – 25; R. 221, ll. 1 – 25; R. 222, ll. 1 – 25; R. 223, ll. 1 – 25.

On the way to Walterboro, they saw the three victims on the side of the road at I-95. McMillan then had the idea to rob them as he said it would be easy. Davis said he did not want any part of it, but Jakes said he would do it. R. 225, ll. 1 – 25; R. 226, ll. 1 – 25.

When the car stopped, Jakes jumped out pointing his gun at the people telling them to “Give it up.” Then Davis heard gunshots, and McMillan allegedly started shooting through the car window. Then he realized Jakes was shot, and he opened the car door for Jakes to get in the car. R. 227, ll. 1 – 25; R. 228, ll. 1 – 25; R. 229, ll. 1 – 25; R. 230, ll. 1 – 25; R. 231, ll. 1 – 25.

Jakes was screaming for them to take him to the hospital, but they were going home. They passed some friends, including LaToya Bryant, who transported Jakes to the hospital. R. 232, ll. 1 – 25; R. 233, ll. 1 – 25; R. 236, ll. 1 – 25; R. 237, ll. 1 – 8; R. 273, ll. 8 – 25; R. 283, ll. 1 – 25; R. 284, ll. 1 – 25; R. 285, ll. 1 – 24.

Lieutenant Fred Inabinett with the Colleton County Sheriff’s Office testified for Co-Defendant McMillan that he took a statement from Jakes after Jakes requested to see him about fourteen months after the incident. According to the testimony, Jakes admitted being at the scene but said McMillan was not there. He said the third person was J-Sneez. R. 569, ll. 1 – 25; R. 570, ll. 1 – 25; R. 571, ll. 1 – 25; R. 575, ll. 1 – 5.

Jakes allegedly told him they were drinking heavily that day. When they saw the victims on the side of the road, Jakes remembered seeing only the two women. R. 574, ll. 1 –

25; R. 575, ll. 5 – 25; R. 576, ll. 1 – 25; R. 577, ll. 1 – 25; R. 578, ll. 1 – 25; R. 579, ll. 1 – 25. Jakes said they stopped to check a donut tire they were using when he saw the two women. Jakes said he did not have his gun in his hand when he got out of the car. He did yell to the women; “Hey pretty lady!” R. 579, ll. 1 – 25; R. 580, ll. 1 – 25. When the male victim stood up and Jakes saw he had a gun, then Jakes retrieved his gun. Then the male victim started shooting at him, and Jakes was injured. R. 580, ll. 1 – 25; R. 581 ll. 1 – 25. Jakes’ gun was not fired. R. 447, ll. 2 – 25; R. 448, ll. 1 – 25; R. 449, ll. 1 – 25.

After the testimony of the three state’s witnesses, the trial judge *in camera* told the attorneys that he received a note from Juror 102, Yvonne Lightsey, signed by the jury Foreperson. R. 197, ll. 1 – 24. The note read:

I need to make sure that I’m a suitable juror for this trial due to the status of my husband.

R. 197, ll. 15 – 17.

The judge, with the agreement of the attorneys, called the juror into the court room and discussed the issue after he confirmed there was a Deputy Lightsey on reserve status with the Colleton County Sheriff’s Office. Juror Lightsey revealed that her husband for the first few years was a full time deputy with the Colleton County Sheriff’s Office. For the past two and one-half years, he was a Reserve Deputy. When the judge asked her if that would affect her ability to give a fair and impartial trial, she replied no. R. 198, ll. 1 – 25; R. 199, ll. 1 – 25; R. 200, ll. 1 – 25; R. 201, ll. 1 – 25; R. 202, ll. 1 – 25. The judge said he did not ask a question about spouses during *voir dire*. R. 203, ll. 1 – 25.

Jakes’ attorney, to which McMillan’s attorney joined in, then objected to Juror 102 continuing on the jury. The judge told them that they did not present a question for *voir dire*

related to this issue. R. 204, ll. 1 – 25; R. 208, ll. 7 – 13. Jakes' attorney argued that Juror 102's responses to the questionnaire from the Clerk of Court's office lists her husband as Environmental Health Management, but had nothing about his being a reserve deputy. The judge then reviewed the form from the Clerk's Office which indicated the husband was Environmental health Management and reserve deputy. R. 205, ll. 1 – 25.

After reviewing the attorney's form from the Clerk's Office, the judge said that the Clerk's Office did not transmit everything the juror filled out on the Clerk's form to the form the attorneys received. The judge said it was a Scribner's[sic] error. Defense counsel argued that the juror did not indicate during *voir dire* that she had knowledge of any of the Sheriff's Department witnesses. R. 206, ll. 1 – 25; R. 207, ll. 1 – 25. Counsel argued that they may have used their strikes differently if they had known the husband was a deputy. The judge refused to excuse the juror. R. 204, ll. 8 – 25; R. 208, ll. 1 – 13.

At the time Juror 102 was seated during jury selection, Jakes had exercised three of his five strikes. R. 77, ll. 1 – 25; R. 78, ll. 1 – 25; R. 80, ll. 1 -25. The trial judge had granted each defendant five strikes. R. 75, ll. 1 – 8.

In State v. Bell, 374 S.C. 136, 646 S.E.2d 888 (Ct. App. 2007), the Court of Appeals held that the decision on whether to dismiss a juror and replace her with an alternate was within the sound discretion of the trial court, and such decision would not be reversed on appeal absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

The constitutional standard of fairness requires that a defendant have a panel of impartial, indifferent jurors. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999); U.S. Const. Amend. 14.

In State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001), the Supreme Court held:

All criminal defendants have the right to a trial by an impartial jury. U.S. CONST. amends. VI and XIV; S.C. CONST. art. I, § 14. To protect both parties' right to an impartial jury, the trial judge must ask potential jurors whether they are aware of any bias or prejudice against a party. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). "Through the judge, parties have a right to question jurors on their *voir dire* examination not only for the purpose of showing grounds for a challenge for cause, but also, within reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge." Gulledge, 277 S.C. at 370, 287 S.E.2d at 490.

In State v. Woods, *supra*, the Supreme Court held that when the court finds that the juror intentionally concealed the information, and that the information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges, the trial court must grant a motion for a new trial. Material means "of such a nature that knowledge of the item would affect a person's decision-making. Black's Law Dictionary 1066 (9th ed. 2009).

In State v. Burgess, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010), the Court of Appeals held that the trial court did not abuse its discretion in declining to remove a juror after the juror informed the court that the murder victim's estranged wife was the sister of someone he supervised, where the juror did not conceal any information requested during the *voir dire*.

Jakes' case is distinguished from Burgess in that the relationship of Juror 102 to her husband was closer than the relationship in Burgess which was more removed and involved an employee of the juror involved. Jakes' case is also distinguished from Burgess in that the juror in Burgess' case notified the court before opening statements of the relationship. In Jakes' case, the juror volunteered the information after voir dire, and after the testimony of the three victims.

Although the issue in this case is not whether the juror intentionally or non-intentionally concealed information, the issue is whether the omitted information, that she was married to a reserve deputy, from the jury information sheet would have been a material factor in the use of peremptory challenges. This information would have been used by defense counsel in the exercise of peremptory strikes. It was material to the peremptory challenges as the attorneys said they would have used their strikes differently.

Another issue to be considered in this case is the fact that Jakes did not seek a mistrial but rather moved to replace the juror with one of the three alternate jurors. R. 206, ll. 1 – 25; R. 207, ll. 1 – 25; R. 208, ll. 1 – 5.

The information that Juror 102 was married to a reserve deputy who had been a full deputy until two and one-half years ago would have been a material factor in the use of the peremptory strikes. The trial judge abused his discretion by not removing the juror. By finding that it was a Scrivener's error did not lessen the prejudicial impact to Jakes.

CONCLUSION

Based on the above, the convictions and sentences should be reversed, and the case remanded for a new trial.

Respectfully submitted,

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a large initial "L" and a long, sweeping underline.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of December, 2012.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant 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."

December 12, 2012

A handwritten signature in black ink, reading "LaNelle Cantey DuRant". The signature is written in a cursive style with a long horizontal line extending to the right.

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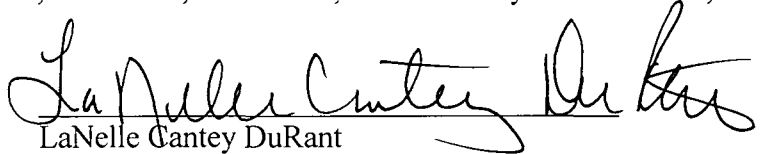
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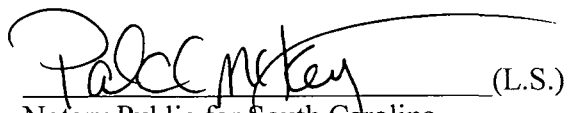
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Julie Kate Keeney, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of December, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of December, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022