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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court

The Honorable John C. Hayes, III, Circuit Court Judge

Case No. 2008-GS-42-07197

State of South Carolina, Respondent,

vs.

Roy James Jenkins, Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DENYING APPELLANT A NEW TRIAL AFTER ONE OF THE JURORS INTENTIONALLY FAILED TO RESPONDTRUTHFULLY TO VOIR DIRE?

STATEMENT OF THE CASE

On June 26, 2008, law enforcement arrested Roy James Jenkins (hereinafter "Appellant") on charges of Criminal Sexual Conduct with a Minor in the Second Degree (11-14). He was ultimately indicted on two separate counts of the same crime as codified by South Carolina Code Section 16-3-655(B). Both indictments involve the same alleged victim – Appellant's adopted daughter. The incidents allegedly occurred in October of 2003 – nearly five years prior to Appellant's arrest.

The case came to trial on January 26, 2012. Jury selection began that day. Among those selected to serve on the jury was Juror Number 56. He was selected as the sixth member of the jury. At the time, Appellant had used only six of his ten peremptory challenges.

On January 27, 2012, the jury found Appellant guilty on both counts. The Court sentenced him to twenty years on each charge, with the sentences to run concurrent. The Court also ordered Appellant be placed on the Sex Offender Registry.

Appellant filed a Motion for a New Trial[1] on February 2, 2012. The Motion stemmed from Appellant's post-trial confirmation that Juror Number 56 – identified in the Motion as Adam E. Durham – gave false responses to voir dire. In specific, Adam E. Durham had a relationship with the Defendant, the Defendant's family, several witnesses, and the victim. Appellant stated in the Motion that Adam E. Durham did not answer truthfully about these relationships during voir dire.

[1] The Motion itself was captioned "Motion to Reconsider." However, Appellant's trial lawyer wrote the Court on February 21, 2012 asking the Court to treat the Motion as a Motion for New Trial. R. p. 298.

The Court held an evidentiary hearing on February 28, 2012. The Court heard testimony from various witnesses, including Adam Durham, Adam Durham's mother, and members of Appellant's Family. At the hearing, Adam Durham confirmed under oath he knew members of Appellant's family, including several witnesses at trial.

Despite this testimony, the Court (in an Order filed March 27, 2012) denied Appellant's Motion for New Trial. Appellant filed his Notice of Appeal on March 29, 2012.

STANDARD OF REVIEW

In reviewing criminal cases on appeals, the appellate courts of South Carolina may only look at errors of law. The appellate courts are bound by the trial court's findings unless these findings are "clearly erroneous." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Granting a Motion for New Trial based on a juror's failure to give honest responses to voir dire is with the sound discretion of the trial court. Morris v. Jensen, 309 S.C. 153, 420 S.E.2d 710 (Ct.App.1992). On Appeal, this discretion can only be overturned by a finding of abuse of discretion. State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 106-107 (1998).

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT A NEW TRIAL.

In criminal trials in South Carolina, Defendants have a fundamental right to a trial by an impartial jury. U.S. Const. amends. IV and XIV; S.C. Const. art. 1§ 14. The trial judge must ensure that all jurors called to a case are without bias and can be both fair and impartial. See, e.g., State v. Britt, 237 S.C. 293, 117 S.E.2d 379 (1960); State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973). Courts must disqualify potential jurors if it appears to the Court that that individual cannot be indifferent. State v. Woods, 345 S.C. 583, 590, 550 S.E.2d 282, 285 (2001) (citations omitted).

The primary mechanism through which the trial judge ensures impartiality is through voir dire. This grants Defendants– through the trial judge – two separate but equally important rights. First, Defendants use voir dire "for the purpose of showing grounds for a challenge for cause." State v. Gulledge, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982) (citations omitted). Second, Defendants use voir dire to allow them, within "reasonable limits, to elicit such facts as will enable them intelligently to exercise their right of peremptory challenge...." Id. When a question becomes part of the voir dire inquiry, Defendants are "entitled to a truthful answer to the question." Id.

If a potential juror does not provide truthful responses to voir dire, a criminal Defendant may be eligible for a new trial. That new trial is required when the Court makes two findings: (1) that the concealment was intentional, and (2) that the concealed information would either have supported a challenge for cause or would have been a material factor in the use of a peremptory challenge. Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). Failure to disclose relationships to Defendants or

witnesses requires the Court to infer (absent justification or evidence to the contrary) that the potential juror cannot be impartial; however, "innocent" and unintentional failures do not permit such inferences. See, e.g., State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991).

To be entitled to a new trial, Appellant must establish both elements of the O'Rourke test.

A. ADAM DURHAM'S FAILURE TO DISCLOSE HIS RELATIONSHIP TO APPELLANT, APPELLANT'S FAMILY, APPELLANT'S WITNESSES, AND THE VICTIM WAS INTENTIONAL.

The first element of the O'Rourke test requires an intentional concealment. See, e.g., State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 106-107 (1998). The South Carolina Supreme Court defined intentional concealment in State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001). In Woods, the Supreme Court looked at two voir dire questions:

> Question 1: Now you can tell me are you friends or casual acquaintances with any of them [i.e., the attorneys involved in the trial] or business associates or social acquaintances with any of them, that would also include having been represented by any of them in the past[?] [I]f so please stand.
>
> Question 2: Ladies and gentlemen, are any of you contributors to or supporters of any organization which has as its primary function the promotion of law enforcement or protection of victims' rights such as MADD, SADD, CAVE, or the like[?] [I]f so please stand.

Id. at 586, 550 S.E.2d at 283. The potential juror at issue in the case did not stand in response to either question. Id. The juror was presented and seated at a time when the Defendant had one remaining peremptory strike remaining. Id.

In looking at the two voir dire inquiries, and in examining prior case law requiring

intentional concealment, the Court held that intentional concealment was a two-prong test. The Court held this test to be "fact intensive" that requires a case-by-case analysis. Id. at 588, 550 S.E.2d at 284. First, the question presented must be "reasonably comprehensible to the average juror." Id. Questions that are ambiguous and/or incomprehensible to the average juror constitute "unintentional concealment." Id; see also State v. Sparkman, 358 S.C. 491, 596 S.E.2d 375, 377 (2004) (failure to disclose being the victim of a prior assault found to be unintentional concealment when the Court asked an ambiguous voir dire questioning if any panel member had been the victim of "serious crime").

Second, "the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." State v. Woods, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001). If the subject is "insignificant or so far removed in time that the juror's failure to respond is reasonable under the circumstances," it will be unintentional. Id.

Applying its new test to the questions presented, the Court found both questions to be "reasonably comprehensible" and found that both "should have elicited a positive response." Id. at 589, 550 S.E.2d at 285.

In Appellant's case, the voir dire questioning was reasonably comprehensible. The Court asked if any member of the panel was "a close personal friend or acquaintance" of Appellant. R. p. 21, lines 6-7. No one stood to affirm that they were. R. p. 21, lines 9-10. There was no ambiguity in this question. It identified a specific person and asked if the members of the panel were acquaintances of that specific person.

The Court also told the jury panel of the possible witnesses of trial. R. p. 27, lines 18-19. The Court specifically instructed the members of the jury panel to stand if they

were "a close personal friend or acquaintance, go to the same church, belong to the same club, play bridge with, play golf with, anything like that, any of these individuals." R. p. 27, line 24 – p. 17, line 3. Each of the potential witnesses stood up and faced the jury panel in order that the panel members could "recognizes the faces as opposed to the name." R. p. 28, lines 5-6. Again, there was no ambiguity in this question.

In order to remove ambiguity as to the subject of the question, the Court then called out the names of thirteen witnesses, having each of them stand up and face the potential jurors. R. p. 28, line 7 – p. 29, line 16. No one from the jury panel stood up to admit they knew any of them. R. p. 29, lines 12-16.

As it turned out, Juror Number 56 – Adam E. Durham – knew the Appellant's family. At the hearing on Appellant's Motion for New Trial, he testified under oath. R. p. 253, lines 22-25. He remembered being asked by the Court if he knew the Appellant or the victim or their family. R. p. 254, lines 17-21. He was friends with Frankie Jenkins, son of Frank Jenkins, Jr.[2] R. p. 256, lines 9-11. He went to the same Church as Ashley Jenkins.[3] R. p. 259, lines 11-13, Appellant's niece. R. p. 285, lines 15-16. The Court specifically mentioned Church in its questioning about witnesses. Furthermore, Adam Durham was a regular at Ashley's home. R. p. 287, lines 5-6. Ashley dated his brother and traveled with the brother to receive medical treatment in Atlanta, Georgia. R. p. 287, lines 5-8. He admitted being in a family picture with Neil Jenkins[4]. R. p. 257, lines 18-20. He admitted that the picture was taken at a party at Frank Jenkins Sr.'s home. R. p. 258, lines 8-10.

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[2] During voir dire, the Court called Frank Jenkins, Jr.'s name, and he stood and faced the jury panel. R. p. 29, lines 4-5.
[3] Ashley Jenkins is now known as Ashley Dawn Copeland. See R. p. 285.
[4] Neal Jenkins faced the jury panel during voir dire. R. p. 29, lines 8-9.

Not only did Adam Durham admit he knew these people at the Motion hearing, he also admitted knowing them while the trial was on-going. He testified that he realized he knew them "halfway through" the trial. R. p. 262, lines 4-7. He made the connection when Frank Jenkins, Jr. testified that "Ashley Jenkins and Frankie Jenkins was his daughter and son." R. p. 262, lines 8-9. Frank Jenkins, Jr. faced the jury panel during voir dire. R. p. 29, lines 10-11. He did testify to having two children named Frankie (Frank Jr.) and Ashley. R. p. 173, lines 16-17. According to Adam Durham, "that's when it kinda hit me, you know, hey I think I know this guy." R. p. 262, lines 9-10. He admitted he did not inform the Court of this. R. p. 262, lines 11-12.

Adam Durham's own mother testified at the Motion hearing. R. p. 270, lines 15-16. She admitted that Frank and Shirley Jenkins[5] had helped to raise money for a son of hers who had cancer. R. p. 270, lines 19-21. Adam Durham told her about being involved in the trial after the trial had ended and admitted knowing the family connection. R. p. 272, lines 16-24.

Family members didn't recognize Adam Durham until the end of the trial. R. p. 277, lines 9-10. At that point, the jury had reached their verdict and was coming into the Courtroom. R. p. 277, lines 11-14.

Appellant introduced several photographs into evidence at the Motion hearing. Among the photographs was one of the victim taken at a birthday party that Adam Durham attended. R. p. 278, line 2 – p. 30, line 9. Another photograph had Adam Durham and Appellant together. R. p. 277, line 21 – p. 278, line 7.

The totality of the testimony presented makes it clear that Adam Durham's failure to respond was unreasonable. Despite the overwhelming evidence that Adam Durham

[5] Frank Jenkins, Sr. and Shirley Jenkins both faced the jury panel during voir dire. R. p. 29, lines 2-5.

had significant ties to Appellant's family, he did not admit that during voir dire. More significantly, he did not bring it to the Court's attention when he realized that he knew several of the witnesses. By his own testimony, he realized he knew these individuals during the testimony of Frank Jenkins, Jr. Six more witnesses testified after Frank Jenkins Jr. R. p. 14, line 18 – p. 15, line 16. The Court dismissed the jury for the evening prior to closing arguments, which resumed at 9:30 a.m. R. p. 200, lines 15-25. There was plenty of time for Adam Durham to inform the Court of his newly recalled relationships with the witnesses.

The questions were clear and unambiguous. The subject matter was material to the parties and to the witnesses. There was simply no excuse for Adam Durham's failure to disclose his relationships. Therefore, Appellant has met his burden under the first half of the two-pronged O'Rourke test.

B. ADAM DURHAM'S INTENTIONAL FAILURE TO DISCLOSE HIS RELATIONSHIP WITH APPELLANT, APPELLANT'S FAMILY, AND THE WITNESSES AT TRIAL MEETS THE SECOND HALF OF THE O'ROURKE TEST.

The second requirement under O'Rourke is that that the concealment would either have supported a challenge for cause or would have been a material factor in the use of a peremptory challenge. Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). This is an either-or requirement. State v. Woods, 345 S.C. 583, 590, 550 S.E.2d 282, 285-286 (2001).

If a Defendant had remaining peremptory challenges, a statement of trial counsel that a truthful response would have led that attorney to use a peremptory challenge is sufficient to meet this requirement, especially if the record is absent of refuting evidence. Id. But see State v. Stone, 350 S.C. 442, 448-449, 567 S.E.2d 244, 247-248 (2002) (juror's "scant acquaintance" with a potential witness was an innocent failure to disclose, especially when juror testified that this "scant acquaintance" would not have affected her ability to serve.)

Ultimately, the jury was selected. Adam Durham was accepted as the sixth member of the jury. R. p. 299. At the time, Appellant had used six peremptory strikes. R. p. 299. He had ten strikes to use at the beginning of jury selection. R. p. 19, lines 11-18. He could have used one of his four remaining strikes and chosen to strike Adam Durham. In oral argument at the Motion hearing, Appellant's trial counsel stated that "if he had just said he knew the family, I could've at least found out if I wanted to challenge him for cause or if I wanted to strike him." R. p. 292, lines 10-12. When Adam Durham did not stand in response to the voir dire on these questions, Appellant and his attorney

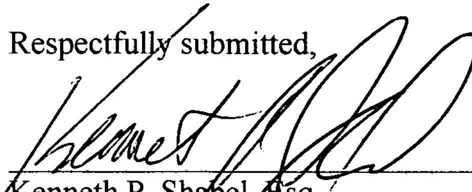
were denied their opportunity to exercise their right to strike him. When Adam Durham did not later disclose these relationships when (on his own testimony) he became aware of them, Appellant and his attorney were denied their opportunity to exercise their right to strike him.

There is no requirement for prejudice under O'Rourke. Once there has been an intentional (as defined under Woods) failure to disclose, the bias is inferred (as required by Savage). The test is not whether Appellant would have struck Adam Durham or would have challenged him for cause. The test is whether it was a factor. Clearly, given the relationship that Adam Durham had with the members of the Appellant's family, it would have been a factor. When it is a factor, it meets the second half of the O'Rourke test.

CONCLUSION

For the reasons and on the grounds stated, Appellant respectfully requests that the Court reverse the decision of the trial court and grant Appellant a New Trial based on Adam Durham's intentional failure to disclose his relationship to Appellant, to Appellant's family, and to the witnesses at trial.

Respectfully submitted,



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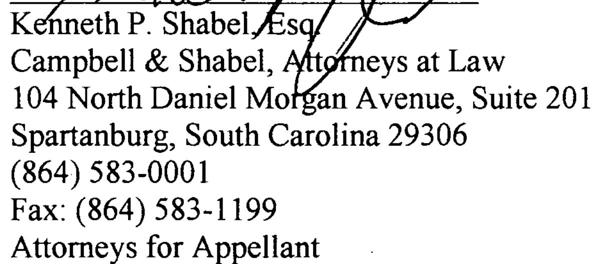
CERTIFICATE OF COMPLIANCE

I certify that this Final Brief complies with Rule 211(b), SCACR.



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