STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County
Honorable John C. Hayes, III, Circuit Court Judge

Appellate Case No: 2012-211108

THE STATE,

Respondent,

v.

ROY JAMES JENKINS,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial court did not abuse its discretion in denying Appellant's motion for a new trial.

STATEMENT OF THE CASE

A Spartanburg County Grand Jury indicted Appellant for two counts of second-degree criminal sexual conduct with a minor. (ROA. pp. 3-4.) On January 26, 2012, Appellant proceeded to trial before a jury. Patricia Anderson, Esquire, represented Appellant, and Assistant Solicitor Abel Gray represented the State. The jury found Appellant guilty of both charges. (ROA. p.245.) The Honorable John C. Hayes, III sentenced Appellant to twenty years' imprisonment for each offense, to be served concurrently. (ROA. p.247.) Appellant filed a motion for a new trial on February 2, 2012. The trial court held an evidentiary hearing on February 28, 2012, and took the matter under advisement. On March 27, 2012, the trial court filed an order denying Appellant's motion for a new trial.

On March 29, 2012, Appellant filed a Notice of Intent to Appeal.

STATEMENT OF FACTS

Appellant and his wife adopted her sister's daughter, Victim, when the girl was six or seven years old. (ROA. p.45 lines 10-18; ROA. p.121 lines 6-8.) Victim testified that Appellant began asking her to massage his back, feet, and legs shortly after she moved in with him. (ROA. p.47 lines 23-25; ROA. p.48 lines 1-4.) Victim stated that between the ages of eleven and fourteen, the incidents became sexual, progressing to "hand jobs," oral sex, and fondling. (ROA. p.48 lines 7-16.) She further testified that between the ages of fourteen and fifteen, the incidents graduated to intercourse. (ROA. p.51 lines 8-10.) Eventually, Victim told a family friend about the incidents. (ROA. p.57 lines 16-25.) Victim then told her adopted mother, who Victim reported was initially sorry but then changed her opinion and no longer believed her. (ROA. p.58 lines 10-22.) At that point, Victim went to the Spartanburg County Sheriff's Office. (ROA. p.58 lines 21-25.)

Appellant was indicted on two counts of second-degree criminal sexual conduct with a minor. (ROA. pp.3-4) During *voir dire*, the trial court asked the jurors whether any of them were a close personal friend or acquaintance of Appellant; and there was no response. (ROA. p.21 lines 5-10.) The trial court also called out the names of all potential witnesses and asked the jurors to respond "if you're 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 . . . ." (ROA. p.27 line 18-25; ROA. p.28 lines 1-25; ROA. p.29 lines 1-11.) There was no response. (ROA. p.29 lines 15-16.) Finally, the trial court asked if any juror knew any reason he could not or should not serve as a fair and

impartial juror in the trial of that particular case, and there was no response. (ROA. p.29 lines 21-25.)

Ultimately, the jury found Appellant guilty of both counts, and the trial court sentenced him to twenty years' imprisonment for each offense, to be served concurrently. (ROA. p.247 lines 24-25.) Appellant filed a motion for a new trial on February 2, 2012. The trial court held an evidentiary hearing on February 28, 2012.

During the hearing, Appellant alleged Juror No. 56 did not disclose during *voir dire* that he knew Appellant's family. (ROA. p.252 lines 17-19.) Appellant called Juror No. 56, and he testified that during *voir dire* he did not realize he knew any of Appellant's family members. (ROA. p.255 lines 14-16.) However, he explained when the trial was almost over, he realized he knew some of them but did not tell anyone. (ROA. p.255 lines 17-21.) Appellant introduced a photograph of Juror No. 56 at a birthday party at the home of Appellant's family, and Juror No. 56 verified he was in the photo and was somewhere between the ages of eleven and thirteen. (ROA. p.255 line 25; ROA. 256 lines 1-4.) He admitted that as a child he visited Ashley and Frankie Jenkins, who were the children of Frank Jenkins, Jr., one of the witnesses. (ROA. p.259 lines 24-25; ROA. p.260 line 1.) However, Juror No. 56 did not know his childhood friends' father as Frank, but rather by the name Burt or Brute.[2] (ROA. p.260 lines 12-13.) He also testified that Frank Jenkins, Jr. changed dramatically from how he looked when Juror No. 56 was a kid. (ROA. p.260 lines 17-18.) Juror No. 56 further explained he did not know Appellant or Appellant's parents, Shirley Jenkins and Frank Jenkins, Sr. (ROA. p.261 lines 6-9.) He was not aware Appellant's parents helped raise money for

[2] The first time Frank Jenkins, Jr.'s nickname is mentioned in the transcript, it is spelled "Burt." However, for the rest of the time he is referred to as "Brute."

his brother when he had cancer. (ROA. p.261 lines 10-17.) Further, Juror No. 56 testified at the hearing that he did not know Victim at all. (ROA. p.255 lines 22-24.)

When Frank Jenkins, Jr., Appellant's brother, was called to testify and said Ashley and Frankie were his children, Juror No. 56 testified that he then realized he knew him. (ROA. p.262 lines 4-10.) He admitted he did not inform the court. (ROA. p.262 lines 11-12.) Juror No. 56 testified he was twenty-five years old and had not been to Appellant's family's home in at least ten years. (ROA. p.263 lines 21-25; ROA. p.264 lines 1-5.) He explained he did not willfully try to hide anything and that he had no ill will toward Appellant. (ROA. p.265 lines 13-25.) Shirley Jenkins, Appellant's mother, testified she knew Juror No. 56 at the beginning of the trial but could not place him and did not tell Appellant's counsel. (ROA. p.282 lines 2-6.) She then realized who Juror No. 56 was at the end of the trial right before the verdict was announced. (ROA. p.276 lines 24-25; ROA. p.277 lines 1-13.) Shirley Jenkins did not inform Appellant's lawyer until the following day. (ROA. p.279 lines 1-4.)

Following all the testimony, Appellant argued the situation with Juror No. 56 satisfied the test in Thompson v. O'Rourke, 288 S.C. 13, 339 S.E.2d 505 (1986), because the concealment was intentional. (ROA. p.291 lines 13-25; ROA. p.292 lines 1-2.) Appellant further argued that Juror No. 56 had a duty to tell the court when he recognized Frank Jenkins, Jr. and alleged that he would have struck that juror if he had known about the relationship. (ROA. p.292 lines 2-24.) The trial court noted that Juror No. 56 did not recognize the witness until well after all Appellant's strikes were over. (ROA. p.293 lines 6-9.) Appellant then argued he would have moved for a mistrial if Juror No. 56 had disclosed the relationship when he realized it. (ROA. p.293 lines 16-18.) The State argued that because the non-disclosure was unintentional, State v. Gulledge requires a

showing of prejudice, and there was no prejudice. 277 S.C. 368, 287 S.E.2d 488 (1982). (ROA. p.294 lines 22-25; ROA. p.295 lines 1-16.)

In its order denying the motion for a new trial, the trial court found Juror No. 56's concealment of information during *voir dire* was not intentional. (Or. 3.) Moreover, it found pursuant to State v. Woods, 345 S.C. 583, 588, 550 S.E.2d 282, 284 (2001), "the subject of the inquiry [was] insignificant or so far removed in time that the juror's failure to respond [was] reasonable under the circumstances." (Or. 4.) Because the court found Juror No. 56's failure to respond was reasonable and unintentional, it did not need to determine whether the information concealed would have supported a challenge. (Or. 5.) See Thompson, 288 S.C. at 15, 339 S.E.2d at 506. The court further noted there was no evidence of bias or prejudice. (Or. 5.)

ARGUMENT

The trial court did not abuse its discretion in denying Appellant's motion for a new trial.

Appellant contends the trial court abused its discretion in denying Appellant a new trial. First, he asserts Juror No. 56 intentionally failed to disclose his relationship with Appellant, Appellant's witnesses, and the victim. Second, he argues the intentional failure to disclose meets the second part of the two-part test based on Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986), for determining whether a juror's failure to disclose information warrants granting a new trial. However, because Juror No. 56 did not realize he knew any of Appellant's family members and had not seen any of them in at least ten years, the failure to disclose was clearly unintentional. Thus, it fails the O'Rourke test on the first prong without even having to get to the second prong. Accordingly, the trial court was within its discretion in finding the failure to disclose was both unintentional and reasonable under the circumstances, correctly found the failure to disclose information during *voir dire* did not warrant granting a new trial, and properly denied Appellant's motion.

"It is well settled that the grant or refusal of a new trial is within the sound discretion of the trial [court]." State v. Taylor, 348 S.C. 152, 159, 558 S.E.2d 917, 920 (Ct. App. 2002) (citations omitted). "A trial court's denial of a new trial motion will not be disturbed on review absent a showing of an abuse of discretion which results in prejudice to the defendant." State v. Kelly, 331 S.C. 132, 145, 502 S.E.2d 99, 106 (1998).

"The United States and South Carolina Constitutions guarantee a criminal defendant the right to an impartial jury." Id. at 145, 502 S.E.2d at 106 (citing U.S. Const.

amend. VI; S.C. Const. art. I, § 14). "Necessarily 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." Id. at 146, 502 S.E.2d at 106. "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) (emphasis added). "The inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred." Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986).

In Woods, the supreme court defined what constitutes intentional concealment.

> We hold that intentional concealment occurs when the question presented to the jury on *voir dire* is reasonably comprehensible for the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable. Unintentional concealment, on the other hand, 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. at 588, 550 S.E.2d at 284. The court found that determining if a juror's failure to respond is intentional is fact intensive and should be made on a case by case basis. Id. Woods clarified that when a juror's failure to disclose information is intentional, bias will be inferred. Id. at 589, 550 S.E.2d at 284. On the other hand, no inference of bias can be drawn from an unintentional failure to disclose. Id.

In State v. Guillebeaux, 362 S.C. 270, 275, 607 S.E.2d 99, 102 (Ct. App. 2004), this court found a juror did not intentionally conceal information when she was not asked during *voir dire* if she knew any of the witnesses but was asked if she had any type of social relationship with the witness in question. This court found the juror's knowledge of who the witness was did not constitute a "social relationship." Id. Thus, this court found the juror answered the *voir dire* questions honestly, and her failure to reveal her knowledge of the witness was a reasonable response and did not amount to intentional concealment. Id. at 276, 607 S.E.2d at 102. Further, the juror indicated during *voir dire* that she knew of no reason she could not be impartial to both the defense and the State and there is no evidence to the contrary. Id. This court found no intentional concealment on the juror's part, determined it need not decide whether the information would have been a material factor in the exercise of Guillebeaux's peremptory strikes, and found the trial court did not abuse its discretion in denying the motion for a new trial. Id.

In the case sub judice, Juror No. 56 was asked during *voir dire* to respond "if you're 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 . . . ." with any of the witnesses. At that time, each witness who was present stood before the jury panel. Because Juror No. 56 did not recognize any of the witnesses, including Frank Jenkins, Jr., he did not respond. This was not an intentional failure to disclose because he did not recognize Frank Jenkins, Jr. by name or appearance at the time. As revealed during the motion hearing, Juror No. 56 did not know Frank Jenkins, Jr. by that name and had not seen Frankie Jenkins (Frank Jenkins, Jr.'s son who was not a witness) in approximately ten years. Additionally, Juror No. 56 did not know Shirley or Frank Jenkins, Sr., so he had no reason to respond when they stood. Finally, just as the juror in Guillebeaux, Juror No.

56 did not respond when asked whether he knew of any reason he could not or should not serve as a fair and impartial juror. According to the court's definition of unintentional concealment in Woods, "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." Woods at 588, 550 S.E.2d at 284 (emphasis added). Juror No. 56 was approximately fifteen years old the last time he saw anyone in Appellant's family. He did not recognize any of the witnesses, either by name or appearance. Further, although Appellant argues Juror No. 56 also did not disclose his relationship to Appellant and Victim, Juror No. 56 testified at the hearing that he did not know Victim or Appellant at all. Even if Juror No. 56 had realized he knew Frank Jenkins, Jr. as the father of his childhood friends, based on this court's analysis in Guillebeaux, it would have been reasonable for him not to respond. He was not a close personal friend or acquaintance of any of the witnesses. Accordingly, even more so than the juror in Guillebeaux, Juror No. 56's failure to disclose was unintentional and reasonable under the circumstances.

Because the failure to disclose the information was unintentional, it is not necessary to determine "if the information concealed would have supported a challenge for cause or would have been a material factor in the use of [Appellant]'s peremptory challenges." Woods at 590, 550 S.E.2d at 285. "[A] determination that a juror did not intentionally conceal the information ends the court's inquiry." Guillebeaux, 362 S.C. at 274, 607 S.E.2d at 101. Nonetheless, because Juror No. 56 was friends with Appellant's brother's children, it could be argued the defense would have desired to have him on the jury instead of striking him. At the hearing, Appellant's mother admitted she had recognized Juror No. 56 "at the first" but could not place where she knew him or who he was. At that point, she did not inform Appellant's counsel she recognized the juror. At

the end of the trial but prior to the verdict, Appellant's mother realized who Juror No. 56 was; yet she still did not tell Appellant's counsel until the next day. The supreme court has held a defendant's failure to call alleged juror misconduct to the trial court's attention at his first opportunity to do so procedurally bars him from raising the issue in a motion for a new trial. See State v. Aldret, 333 S.C. 307, 312, 509 S.E.2d 811, 813 (1999).

Finally, Appellant argues he was denied his opportunity to strike Juror No. 56 because he did not disclose his relationship when he became aware of it. However, in State v. Stone, our supreme court considered whether the trial judge erred in removing a juror during trial after the juror recognized one of witnesses testifying during the sentencing phase of Stone's capital trial. 350 S.C. 442, 448, 567 S.E.2d 244, 247 (2002). After the witness, who was Stone's aunt, took the stand, the juror revealed she was a casual acquaintance with the witness, was unfamiliar with the witness' name, and had previously lived down the street from the witness five to six years earlier. Id. The solicitor challenged the juror based on the potential impact the discovered relationship potentially could have had on the juror's ability to sentence an acquaintance's nephew, and the trial judge removed the juror and replaced her with an alternate. Id. On appeal, the supreme court looked to the test enunciated in State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001), and determined the trial judge abused his discretion in removing the juror based on the fact the juror's non-disclosure was unintentional and the unrevealed information would not have been a material factor in the exercise of a peremptory strike. Id. at 448-449, 567 S.E.2d at 247-248. Thus, if Appellant had taken an opportunity to strike Juror No. 56 if the juror had disclosed his knowledge of the witness when he realized it, and the trial court had replaced him with an alternate, it likely would have been reversed based on the reasoning in Stone.

In this case, the failure to disclose during *voir dire* does not meet the test articulated in Thompson and Woods, and no new trial was required under the circumstances of this case. Accordingly, the trial court's decision to deny the motion for a new trial should be affirmed.

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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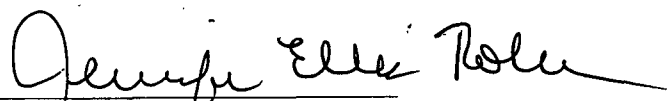
BY: 
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October 4, 2012

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CERTIFICATE OF COUNSEL

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

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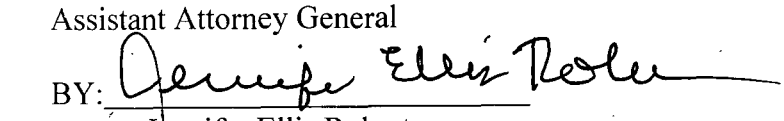
BY: 

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