ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

JEROME RENALDO CAMPBELL,
a/k/a Jerome Coaxum,

Appellant.

Appellate Case No. 2012-208426

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S.C. Bar No. 5758
P.O. Box 11549
Columbia, SC 29211
(803) 734-6305

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit
101 Meeting Street, Suite 400
Charleston, SC 29401-2214
(864) 467-8647

ATTORNEYS FOR RESPONDENT

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I. Did the lower court abuse its discretion by allowing the State to challenge and to remove an impartial juror without cause during the second day of trial?

II. Did the lower court impair Appellant's right to a fair jury selection process by giving the State a *de facto* sixth peremptory challenge during the second day of trial?

RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Jerome Renaldo Campbell, *aka* Jerome Renaldo Coaxum, was indicted at the September 2009 term of the Court of General Sessions for Charleston County for assault with intent to kill (Frank Haigler) (2009-GS-10-6730); murder (Michael German) (2009-GS-10-6731); assault with intent to kill (Anthony German) (2009-GS-10-6732); and assault with intent to kill (Michael Allen) (2009-GS-10-6733). The charges arose from an incident on January 9, 2009.

The Appellant was represented by William Stephen Harris and Jason Todd Mikell. The prosecution was handled by Assistant Solicitor Gregory Voigt and Elizabeth B. Riddle of the Ninth Circuit Solicitor's Office. On January 23, 2012, the matter was called to trial before a jury and the Honorable Deadra Jefferson, Presiding Judge. On January 27, 2012, the Appellant was found guilty of all four indictments. R.p. 81-82. He was sentenced by the Judge Jefferson to concurrent terms of imprisonment of thirty (30) years on murder, and ten (10) years on each fo the assault with intent to kill verdicts. R.p. 85, l. 5 - p. 86, l. 21.

ARGUMENT

I. The trial judge did not abuse its discretion in removing juror Givens prior to any deliberations with an alternate out of an abundance of caution where the removed juror was seen conversing with a member of the Appellant's family, where the removed juror had been instructed prior to the lunch break to not converse with anyone, where the removed juror initially denied the existence of any contact, where a video shows the removed juror grabbing and pulling the family member to her side and where there was an uncontradicted claim that a family member of the Appellant was overheard stating that the juror was "on their side" after the viewed conversation. Discretion, based upon the judge's particular concern that there would be a perception that any verdict was not fair or impartial, allowed the Court to act to remove the juror, even though the court did not conclude the juror's non-disclosure was intentional.

It has been stated that a criminal defendant does not have a right to be tried by a particular juror, but only to have fair and impartial jurors decide his fate. See State v. Rayfield, 369 S.C. 106, 113, 631 S.E.2d 244, 248 (2006). A trial judge should have the reasonable discretion to replace a juror with an alternate juror "out of an abundance of caution" to preserve the appearance of the fairness of a trial after evidence is presented concerning comments made after the juror is viewed conversing with a member of the criminal defendant's family [1] after being instructed "do not have any contact with anyone in or about the courthouse"[2] by member of the crime victim's family who overhears the defendant's family member state out loud after speaking with the juror "I have them on my side." [3] Discretion should allow under these discrete circumstances the cautionary removal of the same juror when that the juror initially failed to

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[1] R.p. 27-28, Court Exhibit 2 (surveillance video of courthouse snack bar), Court Exhibit 3 (statement or Trenell German); Court Exhibit 4 (statement of Tiffany Peacock). R.p. 88-91.

[2] R.p. 26, l. 17-19.

[3] Court Exhibit 4.

respond to a general inquiry concerning the contact between jurors and others during the lunch recess about this hidden contact,[4] even after the judge particularized to the jury that the improper contact occurred in the snack bar with members of the defendants's family.[5] Although the trial judge found that the juror's partiality had not been shown nor that her misleading non-disclosure was deliberate, the trial court concluded that she was constrained to remove the juror to avid the perception and avoid any question regarding the partiality of the verdict. R.p. 72-74. The trial court's decision to do replace the juror with an alternate, under these circumstances should not mandate a new trial. See State v. Simmons, 599 S.E.2d 448 (2004)(trial court did not abuse its discretion by dismissing a juror after a murder trial had begun, where juror admitted that he had unauthorized contact with his wife about the personal effect of a guilty verdict would have on them, and the trial judge had admonished the jury not to discuss the case with anyone).

Further any error was harmless where the alternate was present throughout the proceeding and the Appellant had not shown he was prejudiced by the substitution prior to any deliberations. State v. Williams, 469 S.E.2d 49 (1996) (defendant was not prejudiced from seating an alternate juror after juror was dismissed). See Ballentine v. State, 390 S.E.2d 887 (Ga. App. 1990) (replacement of regular juror with alternate during deliberations, due to innocent error as to who was regular juror and who was alternate, was harmless error, where correct number of jurors deliberated, extra juror had no influence upon jurors decision, and alternate juror was drawn from same source, in same manner, had same qualifications as other jurors, and listened to same evidence and charge of court); Barker v. State, 487 S.E.2d 494 (Ga. App. 1997) (no harmful

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[4] R.p. 33, l. 15- p. 34, l. 21.

[5] R.p. 35, l. 4-17, p. 35, l. 18-, p. 36, l. 15.

error in court replacing juror with alternate where court found that juror's conduct amounted to immaterial irregularity," if any , and court would thus have been entitled to retain juror, while it was claimed that investigator stated to juror "we got one," and that juror repeated the statement and shook hands with investigator, trial court conducted inquiry, and determined that only greetings were exchanged, but excused juror out of an abundance of caution and seated alternate); Lee v. State, 11 S.W. 3d 553 (Ark. 2000)(a defendant must show prejudice when the trial court removes a juror and seats an alternate in the juror's place); Thornberg v. State, 985 P. 2d 1234 (Okla. Crim App. 1999)(removal of juror on less than clear and convincing evidence of misconduct did not prejudice murder defendant and did not require reversal, where removed juror was replaced by alternate who had been passed upon by both the state and the defense); State v. Pettigrew, 860 P. 2d 777 (N.M. App. 1993)(defendant's were not prejudiced by court's excusal of juror following unauthorized contact with public defender intern and replaced with alternate chosen in same manner as excused jurors and defendant had no right to a particular juror on the panel).

The Appellant contends that he is entitled to a new trial due to the qualified juror being replaced by a qualified alternate. He contends because there was no showing that removed juror Robin Givens (juror #70) intentionally concealed information about the encounter with the defendant's family at the snack bar, no inference of partiality was shown and it was error to remove her, citing State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) and S.C. Code Ann., § 14-7-1020 (1976). He contends that when Judge Jefferson concluded that juror Givens did not intentionally conceal any information, that the court inquiry should have ended at that point and she should have remained on the jury, citing State v. Guillebreaux, 362 S.C. 270, 607 S.E.2d 99

(S.C. Ct. App. 2004). He further contends that even if juror Givens concealed information, that the court erred in allowing the state to challenge Givens because the information concealed would not have been a material factor for a peremptory challenge or support a challenge for cause, citing State v. Stone, 359 S.C. 442, 567 S.E.2d 244 (2002) ("scant acquaintance" insufficient to remove the juror where it would not support a challenge for cause nor a material factor in the state's exercise of a peremptory challenge). He claims that the allegedly similar "scant acquaintance" would not be a material factor in the state's exercise of a peremptory challenge or cause for exclusion had it been revealed. He argues that because the state had exhausted all its peremptory challenges before juror Givens was called, he was not prevented from the intelligent exercise of the strike.

As shown more fully below, the Appellant's assessment is misplaced. The salient factor - recognized by the trial judge - was that juror Givens did not follow the instructions of the court to avoid contact. To the contrary, she was shown actually pulling the family member towards her after juror Givens had initiated the contact with a wave. Further, the juror failed to reveal the existence of her contact after it was learned by a complaint from a member of the victim's family that such improper contact had in fact occurred. It was only after the snack bar surveillance video revealed support for the victim's complaints and a second - more direct - inquiry that juror Givens admitted that there was contact. Although the trial court found that juror Givens' interaction was innocent and that juror Givens had no intention to mislead the court during the original voir dire because the family names were not revealed in her instruction, it is clear that she failed to respond to inquiry after the contact was revealed to the state and the court. While the trial court stated that it was innocent contact by the juror - albeit in derogation of the almost

contemporaneous cautionary instructions by the court - Judge Jefferson recognized that while it was not shown that the case was discussed between them - perception is often the reality and that to preserve the integrity of a verdict she was removed. Where statements were made after the contact by the person that "I have them on our side," discretion was not abused in the removal.

STANDARD OF REVIEW - Abuse of Discretion.

"[A] criminal defendant has no right to a trial by any particular jury, but only a right to a trial by a competent and impartial jury." Palacio v. State, 333 S.C. 506,511 S.E.2d 62, 68 (1999). " '[I]n order to fully safeguard this protection, it is required that the jury render its verdict free from outside influences of whatever kind and nature.' " State v. Bryant, 354 S.C. 390, 581 S.E.2d 157,160 (2003)[quoting State v. Cameron, 311 S.C. 204,428 S.E.2d 10, 12(Ct.App. 1993)].

A decision on whether to dismiss a juror and replace her with an alternate is within the sound discretion of the trial judge, and such decision will not be reversed on appeal absent an abuse of discretion. State v. Smith, 338 S.C. 66, 525 S.E.2d 263, 265 (Ct. App. 1999). More specifically, "[I]t is within the discretion of the trial court to determine whether bias results from a juror's reception of outside information concerning the case being tried." Washington v. Whitaker, 317 S.C. 108,451 S.E.2d 894, 900 (1994); see State v. Ivey, 331 S.C. 118, 502 S.E.2d 92, 94 (1998)[noting a juror's competence is within the trial judge's discretion and is not reversible on appeal unless wholly unsupported by the evidence]; see also State v. Loftis, 232 S.C. 35,100 S.E.2d 671,675 (1957)[declining to interfere with trial judge's discretion in matter concerning jury, because trial judge has the opportunity to consider credibility of jurors].

"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. Woods, 345 S.C. 583,

550 S.E.2d 282, 284 (2001).[6] "Determining whether a juror's failure to respond to a voir dire question amounts to intentional concealment is a 'fact intensive determination that must be made on a case-by-case basis.' " State v. Guillebeaux, 362 S.C. 270, 607 S.E.2d 99,101-02 (Ct. App. 2004) quoting State v. Sparkman, 358 S.C. 491, 596 S.E.2d 375, 377 (2004)]. "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.' " Id. "Concealment is considered unintentional where the voir dire 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.

The goal of the corrective measures is to insure the defendant's right to a fair trial has not been compromised. State v. Stone, 290 S.C. 380, 382, 350 S.E.2d 517, 518 (1986). Cautionary instructions or substitution of alternate jurors may cure the prejudice caused by the publicity. United States v. Hankish, 502 F.2d 71 (4th Cir.1974). The determination of what curative measures are appropriate in a given case rests in the sound discretion of the trial judge. He should exhaust other methods to cure the prejudice before aborting a trial. Id. at 77.

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[6]"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." Id. "Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn." Id.

How the Juror Exclusion Issue was Raised.

A. The General Voir Dire

On January 23, 2012, Judge Jefferson made a general voir dire of the potential jury panel. R. 3-13. Concerning the particular parties in this criminal action, Judge Jefferson inquired as follows:

> Is there any member of the panel related by blood or marriage to Jerome Renaldo Campbell, Michael Allen, Anthony German, Frank Haigler, or anyone who is related to or a member of - - or have any connection with Michael German? If so, please stand at this time?
>
> (Whereupon, no one stands.)
>
> The Court: Does any member of the panel have a close - - close personal or social relationship with Jerome Renaldo Campbell, Michael Allen, Anthony German, Frank Haigler or anyone who is related to Michael German? If so, please stand at this time.
>
> (Whereupon no one stands.)
>
> The Court: The following are a list of potential witnesses in this case. I would ask that you listen very carefully. Jerome Renaldo Campbell, Charise Coaxum, Christopher Robinson, Aaron Burnham, Sandra Campbell, Jordan Richardson, John Tisdale, Mary Phillips, Anita Moore, Mike Sherman, Richard Wiersman - - Wiersma, W-I-E-R-S-M-A, Richard Burckhardt, Sergeant Scott Ray, Rene Charles, all of the Charleston Police Department, Ryan Kelly, Anthony German, Michael Allen, Timothy McCarthy, James Tawney, Frank Haigler, Kenneth Whitler, John Roberts, all of the South Carolina Law Enforcement Division, Erin Presnell, Medical University of South Carolina, Joshua Briar-Ridgeway, and Joy Glover.
>
> Is there any member of the panel related by blood or

> marriage to any of the people that I have just listed or does anyone have a close personal or social relationship with any of these individuals? If so, please stand at this time.
>
> (Whereupon no one stands.)

R. p. 7, l. 8 - p. 8, l. 11. During the voir dire, concerning family members in law enforcement, potential juror Robin Givens (70) indicated she had a cousin who was with the North Charleston Police Department. R. p. 11, ll. 10-16. Potential juror Erica Gadsden (63) indicated that she had a cousin in the Charleston Police Department. R. p. 11, l. 18 - p. 12, l. 1.[7]

B. The Jury Selection

The jury was selected in the following manner:

Name	**State**	**Defense**	**Seated**
Kelly Grobmeyer (82)	1	-	-
Keith Culbreath (42)	-	-	1
Danielle Bowles (14)	2	-	-
Lorilee Hoyle (107)			2
Alicia Brown (16)	-	-	3
Jessica Walters (275)	-	1	-
Cynthia Wilcher (286)	3	-	-
***Erica Gadsden (63)**	**-**	**-**	**4**
Alex Pearson (193)	-	-	5
Henry Cheves (33)	-	-	6
Paul Porter (205)	-	-	7
Helen Spann (25)	-	-	8
Glenda Elayda (52)	-	2	-
Christina Janke (115)	4	-	-
Stacy Stewart (255)	-	-	9
Matthew Sullivan (259)	-	-	10
William Kufner (131)	5	-	-
Cathy Thomas (262)	-	3	-
***Robin Givens (70)**	-	-	**11**

[7] During the voir dire, Judge Jefferson did not ask the potential jurors concerning whether any of the jurors were acquainted with Jerome Campbell (Coaxum)'s family members. In addition, the appellant's family members were not specifically identified by the court.

Julie Lowman (143)	-	-	12
Laura Patrick (187)	-	-	1A
Laura Owings (184)	-	1	-
William Latimer (132)	-	-	2A

R. p. 14, l. 1 - p. 21, l. 24. Thus, prior to the selection of Juror Givens, the State had already exhausted all five of its peremptory challenges.

C. The Lunch Recess and Cautionary Instructions.

Judge Jefferson then advised the jury panel that they were breaking to discuss scheduling with counsel. In particular, she advised the selected panel concerning the potential lunch break:

> During this break, please do not discuss the case among yourselves. Please don't speculate about what you think it may or could be about...

R. p. 22, ll. 22-25.

After a brief break, the jury was returned and sworn. R. 24-25. Judge Jefferson gave additional and more specific instructions concerning the lunch break discussions. R. 25-27. In particular, she instructed:

> During the break, **please do not discuss the case among yourselves or with anyone else**. Please don't speculate about what you think it may or could be about. Please don't do any independent research. That includes anything that could be found on the internet or any other alternate source. As the fact finders in this case, you are bound to decide this case according to the evidence that you hear from the lips of the sworn witnesses and the other evidence that will be introduced.
>
> **Also, please do not have any contact with anyone in or about the courthouse. There are a lot of witnesses in this case and again, we would not want an innocent conversation to be observed and misinterpreted. ...**

R. p. 26, ll. 3-19 (emphasis added).

D. The Initial Motion Concerning Lunch Break Communications.

Subsequently after the lunch break, the court reconvened. At that time, Assistant Solicitor Voigt advised Judge Jefferson that members of the victim's family had reported to him that while they were in the snack bar they saw two members of the jury conversing with a family member or friend of the Campbell group (defendant's).[8] It was reported that one of the Campbell group was overheard to say after the conversation with the jurors that "they're on our side." R. p. 27, l. 25 - p. 28, l. 6.

When Judge Jefferson questioned whether they were actually jurors in this case, Solicitor Voigt reported that they had jury stickers on and he suggested it was Erica Gadsden, juror 63, in a yellow shirt and an older woman wearing a dark jacket which fit the description of Ms. Givens (juror 70). R. p. 28, ll. 16-25. Solicitor Voigt also proffered that the family member who was identified as making the statement ["on our side"] was present in the court and could be identified. R. p. 29, ll. 1-4.

Defense counsel then also questioned whether it was actually a juror in the present case.

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[8]Subsequently, a surveillance video from the courthouse snack bar was presented during a hearing on the written motion. Court Exhibit # 2 [in possession of the Court]. The silent video reveals what subsequently was determined to be juror Erica Gadsden (Juror 63) in a bright yellow shirt with juror Robin Givens in a red coat (Juror 70) entering the snack bar area at on the video. [12:26:30]. They are viewed sitting down and conversing while eating. A group of four females subsequently enters the snack bar area. Juror Givens waves at group at 1:19:52. One female walks over and juror Givens reaches out and grabs her hand and pulls the female toward her at 1:20:00. This female remains in apparent conversation at the table where Givens and Gadsden are seated while three others briefly move away. This person remains in conversation until 1:20 :36 when she moves away toward her three remaining group members. The female she spoke with in the group goes back toward the door and juror Givens gets up preparing to leave and has another brief conversation with the same female at 1:21:10. The person then leaves while the remaining three members remain [with others who later share pleasantries and replace the departed jurors at the table]. Juror Gadsden leaves, followed by juror Givens at 1:21:25. **Court Exhibit #2.**

R. 29-30.

Judge Jefferson stated she would do a voir dire. She also noted how people may perceive matters differently in matters of passing conversation. R. 30-32. Judge Jefferson stated that she would voir dire the jury to make sure that they followed her instructions without objection. R. p. 32, ll. 9-16.

The Initial Voir Dires Concerning the Contact.

The jury panel was then presented to the court. During her colloquy, she asked the following question:

> Before we begin that process of opening instruction and opening argument, I gave the jury strict instructions that they were not to have any contact with anyone in or about the courthouse who did not have a juror sticker on because, again, very innocent conversations could be very easily misinterpreted and misconstrued. I need to ask you all did any of you during the lunch and recess have any contact with anyone in or about the courthouse who did not have a juror sticker on? If so, if you did, I need you to raise your right hand for me.
>
> (Whereupon, one juror raises her right hand.)

R. p. 33, ll. 15-17. Juror Stewart indicated that she was having lunch outside the courthouse and she spoke to a gentleman, but not about the case. R. p. 34, ll. 1-13. No response was made by either juror Givens or juror Gadsden.

Judge Jefferson then made further inquiry of the jury:

> The Court: Okay. Is there anyone else who had any contact with anyone in or about the courthouse, either in the snack bar or any other parts of the building that did not have a juror sticker on and you hand any interaction with them?

(Whereupon, there is no further response from any of the jury members.).

R. p. 34, ll. 14-21.

Judge Jefferson then re-iterated her earlier instructions about the importance of avoiding innocent conversations which may be misinterpreted, particularly noting that the gallery was full of members from the victim's and defendant's families. She continued:

> **I need for you all to be aware that reports have been made to the Court that conversations took place in the snack bar otherwise with members of - - with differing parts of members of the family and that there was a perception that the jury might be inclined or already predisposed regarding this case**. Again, I don't have any independent information that that is accurate. However, I will reinforce that even an innocent conversation can be easily misinterpreted.
>
> Emotions run very high during a trial. As you are well aware, the allegations in this case are significant and perception becomes reality. so I would ask that you very stringently follow my instructions and have no conversation with anyone in or about the courthouse who does not have a blue juror sticker on....

R. p. 35, ll. 4-17. (Emphasis added). See also, R. p. 35, l. 18 - p. 36, l. 15. No exceptions to the instructions were raised by the State on defense. R. p. 36, ll. 16-18.

Judge Jefferson then continued her instructions on the case. R.p. 36-39; Tr. 50-59. Included within the instructions was another admonishment to not discuss the case with anyone or consider matters outside of the courtroom. R. p. 39, ll. 2-22.

E. The Trial.

During the trial, juror 205 wrote a note claiming that he "knows the brothers." Tr. p. 106, l. 23 - p. 107, l. 2. After further extended inquiry with the juror, it was unclear whether the Campbell brothers he knew in James Island years before were related to the Appellant. Tr. 107-

114. The trial judge concluded that the particular juror could be fair and impartial and he remained on the jury. Tr. 115-16.

F. The Written Motion to Exclude Jurors and Hearing.

On January 24, 2012, the prosecution made a written motion to exclude two jurors. [*State's Motion to Exclude Jurors*]. R.p. 1. The focus of the State's motion again concerned jurors 63 (Gadsden) and juror 70 (Givens). In particular, the motion declared:

> 3. The State is in possession of video from the Snack Bar taken during the Court's lunch break. The video (attached hereto as Attachment #1)[9] clearly shows members of the defendant's family enter the Snack Bar. **One family member, identified as defendant's sister, engages Jurors numbers 63 and 70 in conversation and goes as far as giving Juror number 70 a hug. Later, another of the defendant's family appears to have given the jurors a short greeting.**
>
> 4. The actions captured by the Snack Bar video belie the answers given by these jurors to the Court's clear questions regarding potential improper contact during the lunch break. More troubling than the contact is the jurors' lack of candor towards the court. The jurors' mendacity undermines any faith that these jurors can fulfill their oath fairly.
>
> 5. Had the State known of any familiarity, however, slight, between these jurors and a member of the defendant's family, the State would have exercised its peremptory challenges on these jurors.

State's Motion, p. 1-2. ROA 1-2. (Emphasis added). The State supplemented the motion with Court Exhibit 3 (Statement of Trenell German)[10] and Court Exhibit 4 (Statement of Tiffany

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[9]Court Exhibit #2 described infra, at fn. 2.

[10]In Trenell German's January 23, 2012 statement he declared:

Peacock).[11] R.pp. 46, 88-91; Tr. 154. At the motion hearing, the prosecutor asserted that during the inquiry the day before neither juror raised their hands upon the trial judge's inquiry. Assistant Solicitor Voigt stated that he saw juror Gadsden look into the audience on the inquiry. R.p. 48, ll. 2-17. Judge Jefferson commented that in her view she was avoiding her eyes and looked toward the bailiffs. R.p. 48, ll. 18-23.

Counsel for the State asserted that in the earlier voir dire, the court gave the jurors the

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I witness Candance Ladson speaking with the juror with the yellow shirt on, heavy set female looks like to be about 24, African America, they talked for about two minutes.

Q. How do you know they were jurors?
A. As Jurors were coming out in the courtroom first time she had on blue/white juror sticker.
Q. How do you know Ms. Ladson?
A. She the mother of my sister in law and sister of Jerome Campbell
Q. Where did the conversation take place?
A. Courtroom snack bar.
Q. Describe the juror in question the best you can.
A. She's an African American female on the heavy side she has on a yellow shirt (bright). She had diamond heart earring in her ears. She has pink nail polish (on nails). She looks to be 24.

Court Exhibit 3. ROA 88-89.

[11]In Tiffany Peacock's January 23, 2012 statement she declared:

> I did on 1-23-2012 observe two of the jury members. The conversation appeared to last approx. 2 -4 min. , and it appeared that the jurors and the family of the defendant knew each other. During the conclusion of the conversation I observed a black female with a brown jacket and pants casual sweat suit making the statement "I have them on our side." I proceeded to ask Trenelle "I thought we could not have contact with the jury." She stated that she thought the same and that she would speak with Mrs. Porcel. The two jury members that I observed were both black females, one heavier set with a yellow screen print type shirt. The other had long wavy hair and a heavy jacket that was dark in color. This conversation took place in the court house snack bar approx. 1:20 PM on 1-23-2012.

Court Exhibit 4. ROA 90-91.

opportunity for an innocent explanation and now the conversation is shown on the video from the snack bar. R. p. 49, ll. 9-18. The State contended that there was deliberate misleading of the court and asked that the jurors be removed. R. 49-50.

The defense asserted that he also viewed the juror during the questioning and the person in the video (a cousin, not his sister) was not in the courtroom after lunch as earlier asserted by the State. R. 50-51. The defense stated that there was no audio in the video so the conversation is not revealed and suggested it could have been innocent or that they did not know the person was on the jury. R. 52. The defense expressed a concern about a mistrial if both jurors are removed due to the earlier concern by juror Porter about the "Campbell brothers", potentially leaving eleven (11) jurors. R. 52-53.

The defense stated that juror 70 (Givens) on the video was the only person talking with a relative and the video did not show the juror badge on her, although it shows it on juror Gadsden. R. 53. The defense stated: "If Your Honor is going to excuse on that you excuse Ms. Givens based on that you can see somebody talking to her, but we don't know what the conversation entails." R. p. 53, ll. 14-17.

Judge Jefferson stated she had viewed the video several times. She stated that some alleged members of the defendant's family walk into the snack bar and made contact with a juror seated at a round table. R. p. 53, ll. 18-25. The person is seated with her back to the camera and identified as interacting, but she did not see a hugging.[12] Judge Jefferson described the other juror in the yellow shirt as quiet and exits. **From the video, Judge Jefferson stated it was difficult,**

[12] The video, in fact, reveals the juror reaching out while remaining seated, grabbing a female's outstretched hand and pulling her towards her. Court Exhibit #2, 1:20:00.

but notes that there was clearly interaction between a juror and a member of the defendant's family that was prohibited in her instructions. R. p. 55, ll. 3-9. Judge Jefferson noted that the names German, Coaxum, and Campbell were used in the voir dire, but it was possible that they would not have been recognized. However, she noted it was troubling that this contact was not disclosed in the intervening voir dire. R. 56.

a. <u>The Givens Voir Dire</u>

Judge Jefferson first voir dired juror Givens. R. 60-65. Juror Givens declared she had lunch at the snack bar with juror 63 (Juror Gadsden). R. 60-61. She confirmed that while having lunch a girl from James Island came up to her. She stated she knew her through a friend and that they had "hung out together a few times," like going to birthday parties. R. p. 61, ll. 7-20. Juror Givens stated she had seen the girl last year in June or July, but not since until yesterday. R. p. 61, l. 21 - p. 62, l. 1. She did not consider the girl a close friend and did not talk to her on the telephone, but recalled she was named after a champagne or wine. She said that they hailed each other in the snack bar and was surprised to see her. R. 62. She did not think she was involved in the case and asserted that she did not have a discussion about the case. R. 62-63. She said that they just talked about the friend they had in common and about the girl's grandmother she had moved in with. R. 63.

Juror Givens again stated she did not have a discussion about the case and that the girl was not to her knowledge related to the defendant. R. 63. Juror Givens stated that she recalled the instructions not to speak with anyone, but admitted that she forgot it when she saw someone from the neighborhood. R. p. 64, ll. 4-16. She opined that she could still be fair and impartial and decide the case on the evidence. R. 63-64.

The State urged the court, in reliance on its written motion, to remove contending that Juror Givens had misled the court yesterday in her failure to answer the court's questions about the contact. He stated that due to the omission, she was not entitled to any presumption of impartiality. R. p. 66, ll. 12-18.

The defense asserted it was not an intentional omission on her part. He asserted it was cleared up when asked if she was in the snack bar and spoke with someone. R. 67. He noted her statements about impartiality and that it was a passing acquaintance. R. 66-67.

b. The Gadsden Voir Dire

Judge Jefferson next voir dired juror Gadsden (63). Although she initially denied having lunch with Ms. Givens at the snack bar, she then confirmed she had lunch with her, but did not know her name. R. 68. She confirmed that someone came up to juror Givens and juror Gadsden asked her if she knew the person from someplace and the girl responded no. R. 68-69. Gadsden claimed she did not have further contact with anyone other than Givens. Gadsden had no reason why she did not respond yesterday about having interaction with anyone in the courthouse other than a juror. R. 69. She denied knowing anyone who was a family member of Michael German or Campbell. R. 69-70. She opined that she could be fair and render a verdict based on the evidence. R. 70.

After the inquiry with Gadsden, the State withdrew its motion to remove her. R. p. 71, ll. 8-12.

c. The Court's Decision to Remove Juror Givens

Judge Jefferson announced her intent to view the video again. She noted the juror's flat affect. R. p. 71, ll. 15-21. Judge Jefferson then stated:

> Now I really don't have any concerns about Miss Givens' impartiality. She's indicated she can be fair and impartial and she can render a fair and impartial decision. But I am troubled I guess and I use that word very lightly because I'm not really not troubled by the fact that she didn't disclose when I asked the question because she's a typical juror. They just don't - - The things we think are important they don't think are important and I really don't think she had any intention to mislead the Court and there would have been no reason for her to have disclosed the individuals in voir dire because they weren't in the courtroom and their names specifically were not mentioned and in addition to that, she indicated I really don't even know this person's name. I just know she has the name of a wine or champagne or something.
>
> I do think that the interaction was innocent. **I really don't think it amounts to anything, but out of an abundance of caution I'm going to excuse her just because I don't want there to be any perception that whatever verdict is rendered that it was not fair and impartial.** But I really think that anything she did was innocent. I don't even think she really knows the woman. I think it's one of those things because you can tell on the video the lady is very shocked that she sees her. She's like - - It's almost like, oh, that's you, I haven't seen you in a long time. There is no indication that they discussed anything about this case.
>
> I have no reason to question that she would mislead the Court about it, but perception as I've indicated is often reality for people and I'm going to dismiss her just out of ....

R. p. 72, l. 3 - p. 73, l. 5 (emphasis added).

Judge Jefferson brought in Juror Givens to address her removal from the jury with her.

R. p. 73, l. 20 - p. 74, l. 19. She stated to her:

> The Court: Miss Givens, **out of an abundance of caution**, I do not believe you have misled the Court in any way. I believe you have been candid and I believe the person you interacted with in the snack bar was an innocent interaction with somebody you hadn't seen in a while. **But out of an abundance of caution, I'm going to excuse you as a juror in this case so that there can never be any question regarding**

the impartiality of the verdict. We appreciate your candor and your time.

R. p. 73, l. 20 - p. 74, l. 3 (emphasis added).[13] The defense noted its objection. R. p. 75, ll. 9-12. The trial judge replaced juror Givens with an alternate, juror Latimer. R. 77-78.[14]

ANALYSIS

The Appellant primarily relies upon three cases State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001), State v. Guillebreaux, 362 S.C. 270, 607 S.E.2d 99 (S.C. Ct. App. 2004) and State v. Stone, 359 S.C. 442, 567 S.E.2d 244 (2002) to support his argument for a new trial.[15]

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[13]It is interesting to note that juror Givens was perceived as being happy to be removed as a juror and being ready to go. See R.p. 74, ll. 5-19.

[14] The defense renewed its prior motions and objections in a summary fashion after the State had rested. R.p. 79, ll. 7-8. It was denied. A similar general motion was after rebuttal. Tr.p. 652. The Court denied the motions. R. p. 80, ll. 21-22. After the guilty verdict, the trial court heard post-trial motions. R.p. 83-84. Counsel only made a general motion, asserting that he would reiterate and renew all objections during the trial and all motions made during the trial. The trial judge stated that it would note all motions and deny based on its previous ruling. R.p. 84, ll. 8-17. No specific mention was made by counsel or the court concerning the replacement of an alternate. Id.

[15] Jurors should be admonished not to discuss the case with anyone, including each other, prior to submission of the case. State v. Hoffman, 312 S.C. 386, 440 S.E.2d 869 (1994); Gallman v. State, 307 S.C. 273, 276, 414 S.E.2d 780, 782 (1992). "The rule is well settled that jurors should not, prior to the submission of the case to them, converse with outsiders or among themselves on any subject connected with the trial, or form or express any opinion thereabout; and that the jurors should be so admonished when they are permitted to separate during the trial." State v. Parker, 255 S.C. 359, 361, 179 S.E.2d 31, 32 (1971).

Any unauthorized communication, contact, or tampering directly or indirectly, made by a nonjuror with a juror during a trial about the matter pending before the jury is generally deemed presumptively prejudicial, if not made in accordance with rules of court and the instructions and directions of the court made during the trial, with full knowledge of all the parties. The presumption is not conclusive, but the burden rests heavily upon the nonmovant to establish, after notice to and hearing, that such contact with the juror was harmless. Prejudice may be shown by evidence that an extrinsic factual matter may taint the jury's deliberations. Essentially, an impermissible "outside influence" is an unauthorized communication or overt act by a third party which creates an extraneous influence on the jury.

However, a closer reading of these cases does not support the relief that he seeks in contrast with the unique facts in this proceeding.

In State v. Stone, the Court determined that the trial judge had abused its discretion in removing a juror.[16] In particular, at sentencing, the state called the defendant's aunt as a witness. When she was placed on the witness stand, Juror Thompson indicated to the court that she knew the aunt. Although the aunt had been announced as a witness at the start of voir dire, Thompson later claimed did not know her name. Thompson had lived down the street from the aunt five or six years earlier, and they were casual acquaintances only. Thompson indicated her acquaintance would not affect her ability to be fair and impartial. The Supreme Court concluded that it is patent here that Juror Thompson's failure to disclose her acquaintance with Perry [during the opening voir dire] was innocent. Moreover, the Court concluded that "her scant acquaintance would neither have supported a challenge for cause nor would it have been a material factor in the state's exercise of its peremptory challenges. Thompson clearly indicated her former acquaintance with a witness whose name she did not even know, would not have affected her in

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[16] In Stone, the Court relied upon State v. Woods, 345 S.C. 583, 587-88, 550 S.E.2d 282, 284 (2001), wherein the Court had stated:

> 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. Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986). Where a juror, without justification, fails to disclose a relationship, it may be inferred, nothing to the contrary appearing, that the juror is not impartial. On the other hand, where the failure to disclose is innocent, no such inference may be drawn. State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct.App.1991).

any way." Stone, supra.[17] The Court held the trial court abused its discretion in removing her. However, a closer reading of the case reveals that the new sentencing proceeding was not granted based upon this alleged error. The Court, unlike its response to the issues related to the failed to instruct on certain mitigating circumstances and the failure to give a parole ineligibility charge did not include any similar language that " required reversal."[18] The harmless error issue was not addressed or whether it warranted a new trial standing alone.

The Appellant also relies on State v. Woods, supra. Importantly, in Woods, the Court defined that "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. 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. Necessarily, whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." In Woods, the court found that the juror's failure to reveal the prior relationship with the solicitor's office during the opening voir dire was intentional concealment and would have impacted on the use of the peremptory challenges. Here, there is no concealment, intentional or

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[17]Here, the issue was not about the failure to reveal a scant acquaintance" with the family member during the initial voir dire, but the failure to acknowledge the existence of the contact in the snack bar and the direct violation in the contact with the person and impression it made on the observers and participants in the contact.

[18] The failure to specify that the juror issue "required reversal" is a difference with a distinction. The Court was not required to address the issue concerning prejudice and harmless error concerning the removal. The absence of this language is telling of the limitation in the holding.

otherwise, of information by a juror on the initial voir dire as determined by Judge Jefferson. Thus, the language from Stone regarding whether the information would have been a material factor in the use of a peremptory challenge is inapplicable to this case.

Here, it was not about the failure to reveal on voir dire that supported juror Givens removal, but her failure to follow the instructions, have the contact with a third party and then failure to reveal it in a response in the court.

In State v. Guillibreaux, the Appellant also seeks support. Therein, the Court of Appeals, through Judge, now Justice, Beatty, concluded a juror's failure during voir dire to disclose an alleged social relationship with State witness, who was the confidential informant who purchased crack from defendant, was not intentional. The Court of Appeals found that the juror's knowledge of who the confidential informant was and a rare exchange of greetings with him in her community did not constitute social relationship. The court found that the juror answered questions posed to her honestly, her failure to reveal her knowledge of confidential informant was reasonable response to question posed. In seeking a new trial based upon the juror's retention and alleged failure to disclosed the unfounded social relationship with the witness, the court concluded that a new trial was not warranted. As the Court stated: "[A]s we find no intentional concealment on Juror's part, we need not further determine whether the information would have been a material factor in the exercise of Guillebeaux's peremptory strikes. [State v.] Sparkman, 358 S.C. at 497, 596 S.E.2d at 377-78. Based on this evidence, we find the trial judge did not abuse his discretion in denying the motion for a new trial."

In Smith v. State, 375 S.C. 507, 654 S.E.2d 523 (2007), the Court cited Guillibreaux addressed whether a juror had intentionally concealed a prior relationship with the defendant.

The Court found that the juror did not intentionally conceal the existence of his prior relationship with defendant during voir dire. The defendant claimed after the trial that he learned that they had been incarcerated together prior to defendant's murder trial at the detention center and did not recognize the juror due to a change in his appearance by his head being shaved and that he knew him only by a nickname "Rum Gully." He claimed without documentation that he had altercations with him in prison. The Court found that the defendant failed to establish that he suffered a per se violation of his due process right to a fair and impartial jury. It concluded that it was reasonable for juror to remain silent when asked during voir dire whether any member of the jury pool was "related by blood or marriage or a close personal friend of [defendant]." The juror testified that he and defendant were not close friends, juror also testified that he did not have any bias or prejudice against defendant, and he and the other members of the jury held the State to its burden of proof before finding defendant guilty of the two murder charges.

Unlike these cases, there was intentional concealment, although not during the initial voir dire. The Appellant asserts that this failure to show intentional concealment during the initial voir dire provides sanctuary and a requirement to have retained juror Givens despite her failure to acknowledge during the later voir dires the existence of the snack bar contact, the failure to follow the no contact instructions. Simply put the setting in this case is different than the settings in Guillibreaux and Stone. He ignores that juror Givens did intentionally conceal her out of court contact with the person in the snack bar when expressly asked the following questions by Judge Jefferson:

> Before we begin that process of opening instruction and opening argument, I gave the jury strict instructions that they were not to have any contact with anyone in or about

the courthouse who did not have a juror sticker on because, again, very innocent conversations could be very easily misinterpreted and misconstrued. I need to ask you all did any of you during the lunch and recess have any contact with anyone in or about the courthouse who did not have a juror sticker on? If so, if you did, I need you to raise your right hand for me.

R. p. 33, ll. 15-17. Juror Givens did not respond to this clear inquiry.

Judge Jefferson then made further inquiry of the jury:

The Court: Okay. Is there anyone else who had any contact with anyone in or about the courthouse, either in the snack bar or any other parts of the building that did not have a juror sticker on and you hand any interaction with them?

(Whereupon, there is no further response from any of the jury members.).

R. p. 34, ll. 14-21. Juror Givens did not respond to this clearer response!

Judge Jefferson continued:

I need for you all to be aware that reports have been made to the Court that conversations took place in the snack bar otherwise with members of - - with differing parts of members of the family and that there was a perception that the jury might be inclined or already predisposed regarding this case. Again, I don't have any independent information that that is accurate. However, I will reinforce that even an innocent conversation can be easily misinterpreted.

Emotions run very high during a trial. As you are well aware, the allegations in this case are significant and perception becomes reality. so I would ask that you very stringently follow my instructions and have no conversation with anyone in or about the courthouse who does not have a blue juror sticker on....

R. p. 35, ll. 4-17. (Emphasis added). See also, R. p. 35, l. 18 - p. 36, l. 15. Again, no response about the proven contact by Juror Givens. This can only be concluded as "intentional

concealment." This is more than merely whether the removed juror had a relationship with the defendant's family.

"Determining whether a juror's failure to respond to a voir dire question amounts to intentional concealment is a 'fact intensive determination that must be made on a case-by-case basis.' " State v. Guillebeaux, 362 S.C. 270, 274, 607 S.E.2d 99, 101-02 (Ct.App.2004)(quoting State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004)). Here, the questions put to juror Givens and the other jurors by the trial judge were 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.' " Id. These inquiries were not "ambiguous or incomprehensible to the average juror" shortly after the lunch recess and therefore it was not reasonable for Juror Givens to fail to respond.

The snack bar video of January 23 shows the basis of the intentional concealment by Juror Givens. Court Exhibit #2. The video shows juror Erica Gadsden (Juror 63) in a bright yellow shirt and juror Robin Givens in a red coat entering the snack bar area at 12:26:30. They are viewed sitting down and conversing with each other while eating. Shortly thereafter, four females enter the snack bar area at around 1:19. Juror Givens initially waves at group at 1:19:52. One female walks over toward the table where Givens and Gadsden are sitting and juror Givens reaches out, grabs her hand and then pulls the female towards her at 1:20:00. This female remains in apparent close contact conversation at the table where Givens and Gadsden are seated while three others briefly move away. This person remains in conversation at the table until 1:20 :36 when she moves away toward her three remaining group members standing at the end of the snack bar counter. The female Givens spoke with in the group goes back toward the door and

juror Givens gets up preparing to leave and has another brief conversation with the same female at 1:21:10. The person then leaves while the remaining three members remain [with others who later share pleasantries and replace the departed jurors at the table]. Juror Gadsden leaves, followed by juror Givens at 1:21:25. Court Exhibit #2. This information cannot be disputed.

Was there an instruction to not have contact or discussions with anyone? Yes. Did the juror have improper discussions with such a person shortly after the instructions? Yes. Did she reveal the contact after the first inquiries were made after lunch? No. Was this improper contact with a family member of the defendant? Yes.

Appellant applies the wrong standard when he asserts that removal of a juror is only supported when the removed juror intentionally concealed information which would have supported a challenge for cause or a would have been a material factor in the party's use of peremptory challenges, because it does not address all setting that could lead to the need to remove a juror. See Thompson v. O'Rourke, 288 S.C. 13, 15, 339 S.E.2d 505, 506 (1986) (affirming denial of motion for new trial based on after-discovered evidence where jurors' relationship with doctor's attorney was not a basis for disqualification). See also State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) (post-verdict motion for new trial should have been granted where juror intentionally concealed prior association with solicitor's office, which denied defendant effective use of peremptory challenges); State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998) (affirming denial of new trial motion based on after discovered evidence based on information that juror attended pro-death penalty rally, where information was not intentionally concealed); State v. Gulledge, 277 S.C. 368, 287 S.E.2d 488 (1982) (pre-verdict mistrial should have been granted for juror's failure to disclose relationship with police officer, where

information would have supported a challenge for cause or would have been a material factor in the exercise of a peremptory strike); State v. Savage, 306 S.C. 5, 409 S.E.2d 809 (Ct. App. 1991) (post-verdict mistrial motion properly denied because no evidence party would have struck juror, and juror's failure to disclose distant relationship with witness was not intentional).

The state agrees Juror Givens concealment during the pre-selection voir dire did not appear to be intentional. However, her failure to respond about the contact after the smack bar incident during the subsequent voir dire is much more troubling. Absent the revelations on the surveillance video, juror Gadsden was the only juror specifically identified, not juror Givens. The video also revealed that it was juror Givens who initially waved and then pulled the defendant's family member towards herself and then engaged in the "close contact" conversation. While the video is silent, it remains uncontradicted that family member orally expressed a comment that "I have them on my side." Court Exhibit #4. R.p. 90. The focus of the Appellant is on the initial voir dire before jury selection. However, the critical mistake is juror Givens failure to reveal the unauthorized contact in the snack bar after being instructed to not have the contact and the effect the contact had on others - to both the defendant's family - " I have them on my side." and the victim's family upon seeing and hearing it and then reporting it.

Contrary to the assertions of the Appellant, it is more than the mere fact that juror Givens did not reveal a "scant acquaintance" with a member of the defendant's family during the pretrial voir dire. Instead, this was a wholly different scenario where the juror was perceived after the unauthorized contact as being turned to the defendant's side and then intentionally failed to reveal that there was any contact when the jury was specifically asked. In addition, when the juror physically pulled the family over for close contact conversation, an appearance of

impropriety cannot be disabused, particularly when she failed to reveal it during the post-lunch voir dires. Contrary to Appellant's claims, juror Givens had to be removed to maintain integrity to any verdict after the video surveillance was revealed. In fact, counsel for the Appellant, prior to the voir dire of Givens noted that she was the only person talking with the family member (whom he identified as a cousin - not a sister) and if you excuse on that, you only excuse Givens, not Gadsden. R.p. 53, ll. 14-17.

Despite Appellant's contentions, Thompson and the other cases cited above instead provide the standard for the granting of the extreme measures of a mistrial or a new trial, when juror concealment of relevant information is discovered. State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 106 (1998) (quoting Thompson as the standard for a new trial due to retaining as juror, not as the standard for removal of a juror). Thompson and the other cases mandate when a trial court has to address the problem of newly discovered juror information with new trial or mistrial.

However, trial courts may still as a matter of discretion remove jurors for alternates in lesser circumstances than those which require mistrial as defined by Thompson and its progeny. This standard is discussed below.

"The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of th presiding judge and [an appellate court] will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way". State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982). Along these lines, the typical appellate standard of review for the discretionary pre-deliberation removal of a juror and replacement with an alternate, is whether or not the trial court's decision was so unreasonable as to be an abuse of

discretion resulting in actual prejudice. State v. Rogers, 263 S.C. 373, 210 S.E.2d 604 (1974); State v. Williams, 321 S.C. 455, 469 S.E.2d 52 (1996). In this case, Appellant can show no prejudice from the seating of Alternate, nor can he show that the trial court's decision to excuse Givens was so unreasonable as to amount to an abuse of discretion.

This case is similar to State v. Williams, 321 S.C. 455, 469 S.E.2d 52 (1996). During trial in Williams, a juror spoke to a minister seated at counsel table. The juror testified he had worked with the minister and had heard him preach. The minister was seated at counsel table because he had assisted the defense in contacting witnesses. The trial court excused the juror and replaced him with an alternate to prevent any problems. The Court rejected the defendant's claim that the excusal violated Batson v. Kentucky, 476 U.S. 79 (1986), and Georgia v. McCollum, 505 U.S. 42 (1992), by first noting that the issues were not preserved. However, the Court went on to hold that there was no reversible error, because (1) there is no right to be tried by a jury composed of particular individuals, (2) the alternate juror had been approved by both sides at the inception of trial, and (3) there was no showing of any prejudice from the seating of the alternate juror. Williams, 321 S.C. at 459-60, 469 S.E.2d at 52.

The same result is warranted here as is warranted in Williams. Appellant has no right to be tried by a particular juror, and the alternate juror in this case was approved by both sides Appellant has identified no sustainable reason why he was prejudiced by the seating of the Alternate . Here, the party aggrieved by the Juror Givens' belated revelations about her contact at the snack bar and disobedience with the trial court's no contact admonishment was the court and the state, not the defense.

The Removal of the Juror Based Upon the Lunch Room Contact Did Not Equate With An Additional Peremptory Challenge.

In his second argument, Initial Brief of Appellant, pages 10-15, Appellant attempts to show prejudice by contending that the effect of the judge's decision was to give the state an extra peremptory strike. This is incorrect. He asserts that the trial court found that because there was no cause to remove juror Givens. However, the trial court's decision, that a juror's improper contact, failure to follow her instructions and acquaintance with a relative of Appellant warrants excusal, is not so unreasonable as to be an abuse of discretion. The trial court acknowledged that it was removing the juror "out of an abundance of caution" to preserve the integrity of the verdict, not to award the state an additional peremptory challenge. Contrary to the characterization by the Appellant, the State was not provided an additional peremptory challenge as a matter of state law or by the action of the trial judge. This action occurred solely because of the post-selection contact between juror Givens and a member of the Appellant's family.

This Peremptory Challenge Issue Is Not Preserved For Appeal.

Nevertheless, this peremptory challenge claim is not preserved for review. At no time did the Petitioner claim that the state was given a de facto additional peremptory challenge. See R.p. 30-32, 50-53, 66-67, 79, 80, 83-84. As such, this specific claim is not preserved. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000) (party may not argue one ground for objection at trial and a different ground on appeal); See State v. McWee, 322 S.C. 387, 472 S.E.2d 235 (1996) (Eighth Amendment challenge to parole eligibility not preserved because no constitutional basis was raised at trial); State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996) (Batson issue regarding dismissal of juror during trial not preserved where it was not raised at trial).

Parties are entitled to truthful and accurate information during voir dire so that they may intelligently make peremptory challenges; there is no question that the state did not have this information at selection about the contact in the lunch room and the overheard comments that "I have them on our side" by a family member after the contact because it did not exist until after the selection. See, e.g. State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998). Further, the failure of the juror to accurately respond after the initial inquiries about the contact brings her partiality into reasonable question where the defendant's family is overheard making the "on our side" comments and then followed by the non-disclosure. Although it certainly appears that the relationship was likely minimal based upon juror Givens eventual testimony, the state pointed out its concern about a juror who violated the court's instructions not to speak with people not wearing juror badges . State's Motion, p. 1-2. ROA 1-2. R.p. 27-29, 49-50. Like the judge in Williams, where the relationship between the juror and the minister was admittedly more defined than the present case, yet still very casual, the trial court in this case was not unreasonable in deciding to avoid any possible appearance or existence of unfairness by seating the alternate.

The reliance by Appellant on the decision in U.S. v. Harbin, 250 F.3d 532 (7th Cir. 2001) is misplaced on the peremptory challenge issue. In Harbin, the Seventh Circuit reversed a decision by the district court allowing the government to use, in the middle of trial, a statutory peremptory challenge it had foregone during voir dire, when new information about a juror came to light. Id. at 538–39. The defendants had exhausted their strikes during voir dire but were unaware that they might be able to save them and use them during the trial. Id. at 538, 541. The Seventh Circuit held that the district court's decision was erroneous because "[t]he prosecution was unilaterally granted control over the composition of the jury during the trial stage ... [and

the] jury selection process ... failed to minimally inform [defendants] of the procedures that ultimately were followed." Id. at 541 - 42.

The current case is nothing like the situation in Harbin. Here, each side received the statutory number of peremptory challenges. Both sides also knew full well that they were prohibited from using any of their challenges in a racially discriminatory manner nor had the ability to save strikes to use during the trial. All parties to the case were subject to the same requirements, and the jury selection process was not weighted in either the State or Campbell's favor beyond the statutory limits for peremptory challenges. At no point did the State claim any entitlement to an additional strike. To the contrary, they were arguing prior to the voir dire the standard set out by the Court in Woods and Stone due to the improper contact, lack of candor with the court. State Motion, p. 2. He argued that the mendacity undermined that they could fulfill their duty. The Appellant seeks to parse the information and ignore that the motion was additionally based upon the overheard comment that "I have them on my side." Under Stone, Woods, etc., had any prosecutor (or defense counsel) been aware that after contact with a family member by a juror that the juror was reported to be "on my side" that a peremptory challenge would have been used, thus satisfying the materiality component Stone and Woods to have required their removal and a new trial.

SUMMARY

Under these circumstances, the proper way to maintain integrity with the jury selections was to replace the juror with a qualified alternate.[19] This was reasonable discretion on the judge's

[19] The Appellant tries to make the peremptory challenge issue to be supported because it withdrew it motion to remove juror Gadsden after the voir dire of juror Givens and Gadsden. However, the difference in their settings was clear after the testimony revealed the

part .

A New Trial Is Not Warranted by Harmless Error.

As stated above, Stone itself does not mandate reversal and the grant of a new trial should this Court find that the trial judge abused its discretion. Assuming Appellant is correct in his assertion that the record does not reflect by clear and convincing evidence that Juror Givens violated the rule of sequestration by the conversation with the defendant's family and the failure to acknowledge it upon voir dire after the lunch break, Appellant's argument that this error requires reversal is less convincing. Although Juror Givens may have been improperly removed, she was replaced by an alternate juror who had been passed upon by both the State and defense. Appellant has shown no prejudice from having his case decided by alternate Juror Latimer rather than Juror Givens and this Court should decline to find any. Reversal and a new trial is not warranted.

Although juror Givens claimed only a casual relationship with a family member who she "hung out together a few times, " but claimed not to see in around a year and spoke only about a common friend, she claimed she could remain fair and impartial. There is no right to have a juror with a casual connection with the defendant's family to sit as a juror. However, when the removal occurred "out of an abundance of caution, " jury deliberations had not begun. In fact, only a few witnesses [4] had even testified during the first day. The alternate was qualified in the same manner as juror Givens and was subject to peremptory challenges by both the state and defense with one strike remaining by each. R.p. 20-21. The alternate was present throughout the

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communication was virtually only with Givens, not Gadsden. Although Gadsden did not reveal the brief encounter she had, by the testimony she was an uninvolved bystander to the actions of juror Givens.

first day of the evidence.

Any error was harmless where the alternate was present throughout the proceeding and the Appellant had not shown he was prejudiced by the substitution prior to any deliberations. State v. Williams, 469 S.E.2d 49 (1996) (defendant was not prejudiced from seating an alternate juror after juror was dismissed).[20] Accord Ballentine v. State, supra.; Barker v. State, 487 S.E.2d 494 (Ga. App. 1997) (no harmful error in court replacing juror with alternate where court found that juror's conduct amounted to immaterial irregularity," if any , and court would thus have been entitled to retain juror, while it was claimed that investigator stated to juror "we got one ," and that juror repeated the statement and shook hands with investigator, trial court conducted inquiry , and determined that only greetings were exchanged, but excused juror out of an abundance of caution and seated alternate); Lee v. State, 11 S.W. 3d 553 (Ark. 2000)(a defendant must show prejudice when the trial court removes a juror and seats an alternate in the juror's place); Thornberg v. State, 985 P. 2d 1234 (Okla. Crim App. 1999)(removal of juror on less than clear and convincing evidence of misconduct did not prejudice murder defendant and did not require reversal, where removed juror was replaced by alternate who had been passed upon by both the state and the defense); State v. Pettigrew, 860 P. 2d 777 (N.M. App. 1993)(defendant's were not

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[20] As the Court stated in Williams,

> In any event, in State v. McDaniel, 275 S.C. 222, 268 S.E.2d 585 (1980), this Court held there is no right to be tried by a jury composed of particular individuals. In McDaniel, an alternate was seated after a juror was dismissed for making improper gestures. The McDaniel court noted the alternate juror had been approved by both sides at the inception of the trial, and there was no showing in what manner the seating of the alternate prejudiced him. As in McDaniel, we discern no prejudice to Williams from the seating of the alternate juror here.

prejudiced by court's excusal of juror following unauthorized contact with public defender intern and replaced with alternate chosen in same manner as excused jurors and defendant had no right to a particular juror on the panel).

CONCLUSION

For all the foregoing reasons, the appeal should be dismissed and judgment of conviction affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
S. C. Bar #5758

SCARLETT A. WILSON
Solicitor, Ninth Judicial Circuit

ATTORNEYS FOR RESPONDENT

By: 

Columbia, South Carolina
March 6, 2013

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Deadra L. Jefferson, Circuit Court Judge
Appellate Case No. 2012-208426

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

JEROME RENALDO CAMPBELL,

Appellant.

CERTIFICATE OF COMPLIANCE

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

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

March 6, 2013

CERTIFICATE OF SERVICE

I, Donald J. Zelenka, hereby certify that I have served the ***Final Brief of Respondent*** in the foregoing action by depositing copies in the United States Mail to:

Stephan V. Futeral, Esquire
Futeral & Nelson, LLC
P. O. Box 1543
Mt. Pleasant, SC 29465-1543

Thomas C. Nelson, Esquire
Futeral & Nelson, LLC
P. O. Box 1543
Mt. Pleasant, SC 29465-1543

This 6th day of March, 2013.

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General