THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Deadra L. Jefferson, Circuit Court Judge

Case No. 09-GS-10-6730
Case Tracking Number: 2012208426

State of South Carolina, ... Respondent,

v.

Jerome Campbell
a/k/a Jerome Coaxum, ... Appellant,

REPLY BRIEF OF APPELLANT

Stephan V. Futeral
Thomas C. Nelson
Futeral & Nelson, LLC
Post Office Box 1385
Mount Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Attorneys for Appellant

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I. Appellant preserved for appeal whether Juror Givens was improperly removed.

"Error preservation rules do not require a party to use the exact name of a legal doctrine in order to preserve an issue for appellate review." State v. Brannon, 388 S.C. 498, 502, 697 S.E.2d 593, 595 (2010). In Brannon, the state argued that the court of appeals violated error preservation rules by using a seizure analysis to determine whether an arrest was being made where the Appellant never used the terms "seizure" or "Fourth Amendment" in his directed verdict motion. The Supreme Court disagreed and held that "a litigant is only required to fairly raise the issue to the trial court, thereby giving it an opportunity to rule on the issue." Id. at 502, 596 (citation omitted).

Here, Appellant argued that no cause existed to excuse Juror Givens. Appellant argued that the jurors and the defendant's family had not seen each other prior to the break, that the video did not reflect that Juror Givens and the person in the snack bar knew each other very well, and that the interaction was innocent. [R. p. 50, line 10 – p. 53, line 17] Appellant further argued that any omission to disclose was innocent, that the juror disclosed her conversation in the snack bar when asked the second time, that Juror Givens did not try to mislead or deceive the court, that she did not even know the name of the person in the snack bar, and that Juror Givens could be fair and impartial. [R. p. 66, line 20 – p. 67, line 16] Finally, Appellant attempted to reiterate his objection on this issue, but the court noted the objection without additional argument:

MR. HARRIS: Your Honor?

THE COURT: Mm-hmm.

MR. HARRIS: For the record, can I just – I mean object to the –

THE COURT: You've noted your exception.

MR. HARRIS: Okay.

THE COURT: Yeah.

MR. HARRIS: I just wanted to note my exception for the record.

THE COURT: You've already noted your exception for the record when you made your argument.

MR. HARRIS: Thank you.

THE COURT: You're welcome.

[R. p. 75, lines 2 – 14] A removal of a jury without cause at the request of a party is a *de facto* peremptory strike, and Appellant argued there was no cause for removal of Juror Givens. Accordingly, the issue is sufficiently preserved for this court's review.

II. This Court should not substitute its judgment for the trial court's judgment regarding whether there was cause to remove Juror Givens.

The State argues extensively in its brief that the trial judge had cause to remove Juror Givens. However, the trial judge did not remove Juror Givens for cause. The trial judge removed the juror in "an abundance of caution." [R, p. 71, line 15 – p. 74, line 3; p. 20, line 6]

"The trial judge is in the best position to determine the credibility of the jurors; therefore, this Court should grant [the trial judge] broad deference on this issue." State v. Kelly, 331 S.C. 132, 142, 502 S.E.2d 99, 104 (1998); *see also* State v. Harris, 340 S.C. 59, 530 S.E.2d 626 (2000) (holding the trial judge is in the best position to determine the credibility of the jurors). Here, the trial judge, despite hearing the reports of the victim's family members and evaluating the demeanor and credibility of Juror Givens, expressly

found that any concealment was innocent. This Court should not go behind the trial judge's deference and now find that the juror intentionally concealed anything.

Respondent claims that "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." However, this standard is the precise standard applied by this Court in State v. Woods, 345 S.C. 583, 550 S.E.2d 282 (2001) and State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002). Respondent's assertions are an attempt to excuse the fact that the State did not request any pre-trial *voir dire* that would have disclosed the "scant acquaintance" between Juror Givens and the person in the snack bar.

The record clearly shows that the trial judge's sole reason for removing Juror Givens was "in an abundance of caution." For sound policy reasons, this Court should not allow an "abundance of caution" to serve as a valid reason for a trial judge to remove a juror. To do so would essentially give trial judges unfettered decision-making in the jury selection process and would take part of this process out of the hands of the parties, which is where it belongs. As discussed at length in Appellant's Initial Brief, the judge gave preference and control to the prosecution in violation of the concepts discussed in Harbin. Even if the judge did not label the removal as a peremptory strike at trial, a peremptory strike (a strike at the request of one party without cause) is precisely what it was. Following this Court's precedent in Stone, it is clear that the trial judge erred in removing the juror.

III. This Court should not apply harmless error analysis regarding Appellant's fundamental and substantial right to a fair jury selection that was jeopardized when the lower court gave the state a *de facto* sixth peremptory challenge during the second day of trial.

Respondent urges this Court to apply a harmless error analysis to affirm the trial court. However, this Court should not apply a harmless error analysis. South Carolina has never addressed the issue of whether automatic reversal is required in a case where a judge strikes a juror without cause. However, the Seventh Circuit discussed this issue at length in U.S. v. Harbin, 250 F.3d 532 (7th Cir. 2001), which was argued throughout Section 2 of Appellant's Initial Brief. Notably, the Harbin Court applied a standard where reversal is warranted if the error affects a "substantial right." Also, in Harbin, the trial court's actions did not allow the State to exceed its total number of peremptory strikes, where here the trial court allowed the State to remove a juror mid-trial, without cause, thereby exceeding the statutorily-allowed number of peremptory strikes.

None of the cases cited by Respondent involve the removal of a juror, mid-trial, without cause. For example, the State cites to State v. Williams, 321 S.C. 455, 469 S.E.2d 49 (1996) for the proposition that a harmless error analysis should be applied. In Williams, at the conclusion of the second day of trial, a juror approached counsel table and shook hands with a man sitting with the defendant. The man was a pastor at the defendant's church, and he had assisted defense counsel in contacting witnesses. During an *in camera* hearing, the juror testified he had previously worked with the pastor and had gone to hear him preach on occasion. The trial court, finding that a problem may have arisen by virtue of the pastor's being seated at counsel table, relieved the juror and replaced him with the alternate.

Here, unlike Williams, the trial court found no problems with the challenged juror. The trial judge had no concerns about Juror Givens' impartiality, found that the snack bar interaction was innocent, and was not troubled by the fact that Juror Givens did not disclose the snack bar interaction at the first opportunity.[1] [R. p. 71, line 15 – p. 74, line 3] The trial judge only removed the juror in "an abundance of caution." Further, the Court in Williams found that the challenge as to the removal of the juror for cause was not preserved and did not address the defendant's argument. The Court only focused on whether there was a problem with the alternate. Here and in Harbin, unlike Williams, the juror was removed without cause.

Respondent also cites to State v. Simmons, 360 S.C. 33, 599 S.E.2d 448 (2004). In Simmons, Juror C discussed the case with his wife, including the personal effect of a possible verdict, despite the trial judge's express admonition not to do so. The Supreme Court held that "the trial judge acted within his discretion in excusing Juror C for the juror's unauthorized communication with his wife." Id., S.E.2d at 452. Here, unlike Simmons, the verdict would have no personal effect on the juror, and the trial judge did not remove the juror based upon her conversation.

On appeal, the trial court's disqualification of a prospective juror will not be disturbed where there is a reasonable basis from which the trial court could have concluded that the juror would not have been able to faithfully discharge his or her responsibilities as a juror under the law. *See* State v. Green, 392 S.E.2d 157, 301 S.C. 347 (S.C. 1990); State v. Gaskins, 284 S.C. 105, 326 S.E.2d 132 (1985); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981). Here, because the judge expressly found

[1] Notably, without being prompted, during the second *voir dire* concerning this issue, Juror Givens disclosed her snack bar interaction without hesitation. [R. p. 60, line 7 – p. 61, line 3]

that no reason existed to believe the juror would not have been able to faithfully discharge her responsibilities as a juror under the law, and this Court should reverse and remand for a new trial.

A harmless error analysis in this circumstance would rarely prove fruitful in that there is great difficulty in the aggrieved party to show prejudice. Here, the State was allowed five strikes by statute, and the defense was allowed ten strikes by statute. Granting the State's request to remove the juror, despite the trial judge's express findings that there was no cause to do so, allowed Respondent to alter the composition of the jury with information it learned mid-trial. There is fundamental unfairness here, and no requirement should be imposed on Appellant to show prejudice. *See* State v. Short, 327 S.C. 329, 489 S.E.2d 209 (Ct. App. 1997) (holding the erroneous denial of a criminal defendant's right of peremptory challenge requires automatic reversal where a juror whom the defendant should have been able to strike is a member of a convicting jury).

IV. Because the trial court expressly found no issue with Juror Givens' competence to serve as a juror, the State received an extra peremptory challenge.

"A juror's competence is within the trial judge's discretion and is not reviewable on appeal unless wholly unsupported by the evidence." State v. Simpson, 325 S.C. 37, 41, 479 S.E.2d 57, 59 (1996). Here, the trial judge expressly found no issues with the juror's competence. She removed the juror "in an abundance of caution."

Juror Givens and Juror Gadsden both failed to disclose their snack bar encounter after the lunch break. The State went further to challenge Juror Gadsden's demeanor when the mid-trial *voir dire* concerning the lunch break took place. [R. p. 48, line 24 – p. 49, line 7] Regardless, the State withdrew its motion regarding Juror Gadsden.

It is clear that that State desired to remove Juror Givens as a result of her "scant acquaintance" with the person in the snack bar. This "scant acquaintance" does not amount to a strike for cause, and the judge expressly declined to remove Juror Givens for cause. Accordingly, the result was to allow the State to strike a juror based upon a bias that it "perceived," and the State received a sixth peremptory strike.

CONCLUSION

The lower court erred by allowing the State to challenge and to remove a juror during the second day of trial despite the lower court's express finding that there was no cause to remove the juror. By allowing the State to challenge and to remove an impartial juror on the second day of trial without cause, the lower court gave the State a *de facto* sixth peremptory challenge thereby skewing the jury selection process in the State's favor and adversely impacting the ability of the peremptory challenge process to fulfill its function as a means of ensuring an impartial jury and a fair trial. Appellant is entitled to a jury process that does not give the State one-sided control over the jury's makeup during trial by allowing the State to remove an impartial juror without cause. Accordingly, this Court should reverse and remand this case for a new trial.

Attorney Signature on Following Page.

Respectfully submitted,

FUTERAL & NELSON, LLC

Stephan V. Futeral, Esquire
S.C. Bar ID 66427
Thomas C. Nelson, Esquire
S.C. Bar ID 71178
Post Office Box 1385
Mt. Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Facsimile (843) 284-5501
email to: sfuteral@charlestonlaw.net
Attorneys for Appellant

Dated: 3/12/13

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PROOF OF SERVICE
OF FINAL BRIEF OF APPELLANT, REPLY BRIEF OF APPELLANT, AND RULE 211 CERTIFICATION

I certify that I have served the Final Brief of Appellant, Reply Brief of Appellant, and Rule 211 Certification by depositing a copy of each in the United States Mail, postage pre-paid, on March 12, 2013, addressed as follows:

Donald Zelenka, Esq.
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

Attorney Signature on Following Page.

Respectfully submitted,

FUTERAL & NELSON, LLC

Stephan V. Futeral
S.C. Bar ID 66427
Thomas C. Nelson
S.C. Bar ID 71178
Post Office Box 1385
Mt. Pleasant, South Carolina 29465-1543
Telephone (843) 284-5500
Facsimile (843) 284-5501
email to: sfuteral@charlestonlaw.net

Dated: 3/12/13

Attorneys for Appellant