STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2011-203569

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMAAL HINSON,

APPELLANT

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF THE CASE

The Appellant, Jamaal Hinson, was indicted by the Richland County Grand Jury on April 14, 2010 for murder involving the January 16, 2010 death of Anthony Salley. State v. Jamaal Hinson, 2010-GS-40-829. ROA 760-61. Following his indictment, Appellant was tried before the Honorable DeAndrea G. Benjamin and a jury on November 14, through November 18, 2010 in Richland County. At trial, Appellant was represented by Eleanor D. Cleary, while the State was represented by K. Luck Campbell and Nicole M. Simpson. (R. p. 1).

At the conclusion of trial, the jury convicted Appellant of murder. On November 18, 2010, Judge Benjamin sentenced Appellant to 40 years on the murder charge. (R. p. 756); (R. p. 759).

The Appellant timely served the notice of appeal on November 22, 2011. This appeal follows.

RESPONDENT'S STATEMENT OF THE FACTS

On the morning of January 16, 2010, Jamaal Hinson, the Appellant, left Lauren Banks' house in the Vineyard Crossing subdivision of Blythewood, South Carolina to complete a series of marijuana transactions. (R. p. 575). While leaving Vineyard Crossing, Hinson saw Richard Thomas and Anthony Salley [the victim of the murder] outside of Mr. Salley's own home, two houses down from Ms. Banks' house. (R. pp. 445-46, 576). Hinson and Mr. Thomas were enemies with a contentious history and "(didn't) like each other at all." (R. pp. 571, 620). Appellant beat Mr. Thomas with a pistol after an altercation at the AM-PM gas station in the Fall of 2009. (R. pp. 572-74). Hinson's testimony acknowledged tension with Mr. Salley, but claimed he did not know him well and the two never fought. (R. pp. 508, 620). Nevertheless, Lauren Banks' statement to police indicated that Hinson referred to Mr. Salley as a "pussy," stated he did not like Mr. Salley, and that he'd beaten Mr. Salley up before. (R. p. 620). Upon seeing each other on January 16, 2010, Appellant and Mr. Thomas exchanged threats. (R. p. 571). Afterwards, Appellant left Vineyard Crossing to complete his marijuana sales. (R. pp. 575-76).

Later that day, Hinson encountered his friend Devan Bailey at a gas station. Bailey was with Derrick Diamond and Quinton Emerson, who was driving the trio around in a silver/gray pickup truck. (R. p. 413). Bailey asked if Appellant could provide him with any marijuana. (R. pp. 575-76). Appellant indicated he could but first required a ride to his house. (R. pp. 577, 623). Appellant wanted to stop at his house first so he could obtain a gun. (R. p. 577). After Appellant retrieved his gun from his house, Bailey, Emerson and Diamond took Appellant back to Lauren Banks' house in Vineyard Crossing. (R. pp. 625-26).

After dropping Appellant off at Lauren's house, Bailey called Appellant asking for a cigar. (R. p. 578). Though either Emerson or Diamond could have legally purchased a cigar (R. pp. 134, 168-69, Tr. pp. 912), Appellant testified that he told Bailey to return to Lauren Banks' house for a cigar because he was uncomfortable allowing Bailey to obtain one illegally. (R. p. 578). Upon their return, Bailey instructed the driver, Emerson, to stop in front of Anthony Salley's house two doors down from where they dropped Appellant off previously. (R. p. 418). At the time, Anthony Salley was sitting with Andina Lee in his car in the driveway. (R. p. 97). Andina Lee testified that the truck blocked the driveway when it was parked behind them. (R. p. 97). Bailey got out of the truck and called Appellant to tell him he was outside. (R. pp. 146, 179-81, 578, 629). Salley got out of his car and spoke to Bailey. (R. pp. 179-81). Appellant then emerged from Lauren Banks' house and saw Salley and Bailey talking. (R. p. 630). Salley was not making any gestures or raising up his fists, and Appellant could not hear what he was saying. (R. p. 632). Appellant advanced toward the area where Salley and Bailey were talking, while armed with his gun. (R. pp. 579, 631).

As Appellant was approaching the area, Appellant claimed that Salley saw Appellant and went toward him. (R. pp. 579, 633). Appellant did not know Salley to carry a gun, and saw nothing that day to indicate otherwise. (R. pp. 572, 633). Nevertheless, when Appellant was within arms' length of Salley, Hinson pulled out his gun and aimed it at Salley, according to Hinson's testimony. [1] (R. p. 633). The State's evidence contradicted this account.

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[1]Hinson testified that he pulled the gun out to scare him away. R. p. 633-634. He stated that he felt that Salley was a threat to him when he was approaching Devan Bailey, because when Salley saw him he started to take off his jacket and ran towards him. R. p. 633, l. 13-18. Appellant admitted that before the victim ever laid a hand on him that Appellant had already pulled his gun out. R. p. 634. In his testimony, Appellant claimed that the victim had "walked up to the pistol and said if you are going to shoot me, shoot me." R.p. 634, l. 17-23. He claimed that the victim punched him and then he stumbled and that he was hit again. He claimed that at that point he dropped the pistol and then began fighting with the victim. R.p. 638, l. 17- 708, l. 14. He declared that he got the best of the

Andina Lee testified that as Appellant approached the scene, he said "Yes, you bitch ass n-----r. This is exactly what I want." (R. pp. 99-100). Andina testified that she saw Hinson walk toward Salley, pull the gun out, and point it directly at Salley. R. p. 100, l. 6-11. Quinton Emerson testified that when Appellant was face-to-face with Salley he "racked the gun" to demonstrate that it was ready to fire and pointed it at Salley's head. (R. pp. 181, 183). Eventually, Salley hit Appellant, knocking the gun from his hand. R.p. 100, l. 18-19. See R. pp. 635-38. Appellant and Salley commenced to fighting. (R. p. 100,183).[2] While they were fighting neither had a weapon. R.p. 101. After forcing Salley to the ground, Appellant punched Salley in the head, face, and chest until Salley no longer fought back. (R. pp. 638-39). Derrick Diamond testified that during the fight, Appellant told Bailey to "Bust him!" (meaning shoot Salley with the gun). (R. p. 148).

After Appellant won the fight, Appellant claimed he stood up and he saw Andina Lee toss the gun to the ground. (R. p. 581, 639). Appellant claimed he went over, picked up the gun,

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victim and finished fighting. When he got up from the fight that he saw the victim's girlfriend Andina had the pistol in her hand. R.p. 639, l. 15-16. At that point, he saw her throw it down. R.p. 639, l. 17-25. He dined in his testimony that he told Devan Bailey to "bust him." R.p. 640, l. 6-14. According to Hinson, when Andina threw the gun down on the ground, the victim was on the ground from the fight. R.p. 640-41. Hinson stated that he saw Devan run off when Hinson picked up the gun off the ground. Hinson stated that he picked up the pistol to put it in his waistband and he turned around and pointed it at the victim, saw the victim fall and knew that he shot him and then ran. R.p. 642-43. He stated that he was scared so he ran. R.p. 643, l. 17. He claimed that he threw the gun away as he was running through the neighborhood. R.p. 644. He stated that he threw the gun away because he could have gone to jail that day and would have gotten a pistol charge also. R.p. 644.

[2]Andina Lee testified that while they were fighting another male got out of a car and came over and started Salley to make him get on the ground. R.p. 101. She stated that at that point Andina picked up the gun from the ground and told them they needed to stop fighting. She said she pointed the gun at the guy who came to Hinson's aid who then came toward her and that she then threw the gun back down to the ground because she was afraid of him. R.p. 101-105. She stated that she was afraid and feared someone trying to take the gun from her hand. She stated that the fight had stopped on its own. R.p. 104-105. She stated that she and Salley then tried to go to the house. However, Hinson picked up the gun while she was trying to get Salley off the ground and shot Salley. R.p. 105-106. She stated that Salley was defenseless without a weapon and Hinson was within a few steps when he shot him. R.p. 106 -108. Lee stated that Hinson pointed the gun at Salley's stomach. R.p. 108-109. She described the fact that Anthony Salley fell and grabbed his stomach after he was shot. R.p. 109-110.

turned, and fired the gun, hitting Anthony Salley. (R. pp. 582-83). Andina Lee testified that she was helping Salley get up from the ground in order to retreat into the house, and Appellant pointed the gun and shot Salley. (R. pp. 105, 109). Salley died that afternoon from a single gunshot wound to his abdomen. (R. pp. 367-78).

After shooting Salley, Appellant ran to Jerrod Crudup's house where Demario Evans was parked. (R. pp. 584-85).[3] Appellant asked Mr. Evans to drive him away from Vineyard Crossing. (R. pp. 205, 585). Later that day, Appellant met with Devan Bailey to "get their story straight." (R. p. 649). Appellant eventually fled to Atlanta, where he was later apprehended and brought back to South Carolina for trial. (R. pp. 647-48, 653).

[3]The gun was not recovered.

ARGUMENT

I. Trial Court Did Not Commit Reversible Error By Dismissing A Juror, Even Though Juror Did Not Intentionally Conceal His Knowledge Of The Identity Of One Of The Witnesses and the Fact that He Played Basketball With Him and Possibly Other Witnesses, Where The Juror's Removal Did Not Prejudice Appellant At Trial Because The Removed Juror Was Replaced By An Alternate, And The Removal Occurred Prior to Deliberations Based Upon An Abundance of Caution and Concern .

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). 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). This case evidences the discretion that should be used by trial judges to insure a fair trial when a juror indicates that he has knowledge of a witness from personal contact with that witness in playing basketball and had initially indicated to the court that he identified other witnesses. This removal and replacement with a selected fair and impartial alternate was reasonably appropriate where that newly disclosed information would have led to a peremptory challenge by the State due to a connection between that witness and other witnesses and that the court was concerned that future witnesses in the case might develop a similar disclosure by the juror based upon his comments to the court.

Appellant is not entitled to a new trial because he has not demonstrated that he was prejudiced by the trial court's removal of Juror 226. State court precedent, doctrinal structure and prudential considerations all require that the "abuse of discretion" language be read to

mandate independent findings of both legal error and prejudice to reverse a trial court's decision to dismiss a juror. Juror 226's dismissal did not prejudice Appellant, and Appellant's brief fails to make any assertion to the contrary. Therefore, Appellant's conviction should be affirmed.

HOW THE ISSUE WAS RAISED BELOW

On November 14, 2011, the trial court conducted voir dire in Appellant's trial for murder. Judge Benjamin read the names of every anticipated witness, **including the name "Jarrod Crudup,"** and asked that each witness present stand upon hearing their name called. (R. pp. 23, 25). After reading the names, the judge asked:

> Q, "[I]s there anyone related by blood or marriage or has a close personal or social relationship with any of the witnesses that I have called?" (R. p. 27)
>
> Q. "Does any member of the jury panel know of any reason whatsoever why he or she should not serve as a juror in this case with particular emphasis being placed on your ability to be fair and impartial to both the State and the Defendant? If so please stand." (R. p. 31).

Juror 226 [Guy Rodgers, a single male employed by Richland School District One as a painter] did not respond to either question. He was ultimately placed on the jury. (R. p. 49, ll. 1-12).

The Testimony of Jarrod Crudup

On November 15, 2011, the second day of the trial, the State called Jarrod Crudup to testify about Appellant's departure from the Vineyards Crossing neighborhood after shooting Anthony Salley. (R. pp. 199-212). Crudup recounted the afternoon of January 16, 2010, when he was hanging out with his sister, his niece, and his friend, Demario Evans.[4] (R. p. 202). Devan Bailey and Appellant came to his house around 2:30. (R. p. 203). Crudup knew Bailey from school and playing football together (R. p. 203) and knew of Appellant through friends. (R. pp.

[4]Demario Evans was one of Appellants chauffeurs (meaning he would drive Appellant around in exchange for marijuana and gas money). (R. p. 584).

201, 204). Appellant told Crudup that he and Bailey had been in a fight and asked Evans for a ride. (R. pp. 203, 205). Crudup later identified Appellant and Devan Bailey in photo lineups as the individuals who had come to his house that day (R. pp. 208-11) and identified Appellant again at trial. (R. p. 211).

Juror 226 Requests To Speak to the Court

Early on the third day of trial, November 16, 2011, Judge Benjamin stated that "Juror 226 wants to talk to me. I have no idea why...," and stepped out of the courtroom with her law clerk to inquire into the matter. (R. pp. 322-23). Judge Benjamin returned and reported that Juror 226 had not recognized the names of some of the witnesses because he doesn't know them, but recognized them from playing basketball in the area where he works. (R. p. 323).

The Trial Court's Inquiry of Juror 226

After she made this announcement, the judge asked Juror 226 if her summary reflected what he had told her in the hallway, and he responded "yes, ma'am." (R. p. 323, II. 18-20). Thereafter, Judge Benjamin and the juror had the following exchange in the presence of counsel:

The Court: And the fact that you have seen some of the people before, you don't know their name, but you have seen them at the gym, would that affect your ability to be fair and impartial in this trial?

Juror 226: No, ma'am.

(R. p. 323, 1. 21 - p. 361, 1. 1).

The Senior Assistant Solicitor Campbell then inquired "which witnesses?", and the trial judge then inquired :

The Court: Which witnesses?

Juror 226: The one with the - -

The Court: He doesn't know their names.

Juror 226: The one with the dreads.

The Court: Any of the other ones? Anybody else?

Juror 226: No. That's the only one I know, the one that came up. I played with him not too long ago at the gym.

The Court: Okay. All right. And the fact that you played with him at the gym, does that affect your ability to be fair and impartial?

Juror 226: No. I don't even know him.

(R. p. 324, 11. 2-18) (emphases added).

Prosecution Requests to Remove Juror 226.

The State asked that Juror 226 be removed. (R. p. 328). Particularly, the prosecution stated:

Solicitor Campbell: Your Honor, we do have a concern. And I understand he didn't mean to do that or anything, but that would have been one of the witnesses that is friends with the Defendant. Apparently, he has some type of at least social - - or some type of communication with him playing basketball. It is not his fault or anything like that, but we would be concerned that he does have affiliation with the Defendant in this case or someone closely affiliated with the Defendant, and that would be a grave concern to us.

(R. p. 324, 1. 23 - p. 362, 1. 8). [5]

Essentially, the State argued that Jarrod Crudup was closely connected with friends of the

[5]In his brief before this Court, the Appellant claims that the State misrepresented the juror's statements - asserting that he never indicated even communicating with Mr. Crudup, much less a social relationship with him. *Initial Brief of Appellant*, p. 12. The statements by the prosecution - read in context speak for themselves as to the reference of connection with Crudup playing basketball with the juror. The fact is that the prosecution identified witness Crudup as the witness with "the dreads" and it was never contested in the trial court. R. p. 325, ll. 10-14. See R.p. 324, ll. 9-14. In fact, counsel Cleary interpreted the identification similarly. R.p. 325, ll. 20-21. Counsel Cleary however did assert that there was no indication that he even had a conversation with him, "other than playing basketball." R.p. 325, l. 23- p. 326, l. 2.

Appellant,[5] and Juror 226 had at least "some type of communication with [Crudup] playing basketball." (R. pp. 325, 326, 330). The State went on to assert that had they known about Juror 226's connection to Jarrod Crudup, the matter would have been a consideration in their use of strikes. (R. p. 327). Particularly, the prosecutor stated:

> It is of grave concern to the State, and we just feel like had we had this information - - and we're not blaming the juror - - of course it would have been a consideration of use of strikes, and it would have been a neutral reason for us to strike him.

R. p. 326, l. 13-17.

It was pointed out that Demario Evans, Crudup's friend, was also a potential witness in the case.[6] The prosecution stated that Evans was eluding the State at that point. R.p. 327, l. 14-19. The prosecution stated that the evidence already in the record was that Demario was at his house at the time of the crime and helped Appellant escape. R.p. 327, l. 20-24.

Counsel Cleary responded asserting that the juror said that he does not know the people. He had seen them before and played basketball with them but did not know their names. She further asserted that it was not central to any issue in the trial and did not know what relevance it would have. Particularly, she pointed out that the juror could not be struck for cause because he played basketball with somebody." R.p. 328, l. 11-12. However, Judge Benjamin pointed out that "if she (Campbell) had known it she said she would have struck him." R.p. 328, l. 13-14.

Assistant Solicitor Campbell pointed out that their concern was that they had kept out the gang issue and that her client was a member of the Folk Nation and PAN organization within

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[5] The prosecution stated that Crudup was best friends with Demario Evans and that he was closely affiliated with Hinson. R.p. 326, l. 9-12.

[6] Evans did not end up testifying at the trial. The prosecution presented testimony that he could not be located. R.p. 463-464.

that gang. She opined that this affiliation would be a concern. She noted that she did not know whether it would work for her or against her, but "in fairness to everyone," she asked that the juror be removed and replaced with an alternate. R.p. 328, l. 15-23. She also stated that Appellant had self-proclaimed himself to be a member of the Gangster Disciples, which was coming up in the next witness. R.p. 329.

The Trial Judge's Decision To Remove The Juror.

Judge Benjamin at that time took a break to consider the matter. Upon her return, she indicated that she would dismiss the juror:

> In an abundance of caution, because I don't know who you all are going to call next , and I just don't want him standing up again saying oh, I know that person too. He said he believed - - -initially he said he knew some of the witnesses, but when he came in he said he knew one of the witnesses. And he said that a lot of them come and – he said a lot of the guys come up there and play and they play on a team or something together, so I guess in an abundance of caution I will take him off. And considering that we only have one alternate left, I will make that alternate the permanent juror.

R.p. 328, l. 6-18.

The defense objected, arguing there was no evidence Juror 226 could not be fair and impartial, and Appellant was entitled to a fair and impartial jury. (R. p. 330).

The prosecution reiterated that the dismissed juror had initially indicated that he knew witnesses and that the defense had acknowledged that she had allowed an earlier juror to be excused because that juror knew more than one witness. R. p. 330, l. 16-22, citing R. p. 330, l. 3-6.[7] The prosecutor also noted that in addition, it would be the defendant's friends that he knew.

[7] Counsel Cleary stated that she had agreed to the dismissal of the first juror because it was early in the process and the juror "seemed to know more than one witness and something about these people." R.p. 330, l. 3-6. The record reflects that juror 180 was dismissed after he had spoken with the court and advise her that he had not realized that he knew the Appellant until he saw him and that the other witnesses he did not realize their names because they go by nicknames, but apparently that they all live in the same neighborhood. R.p. 55. The trial judge replaced the juror with an alternate. Id.

Judge Benjamin called the juror back into the courtroom. At that point, she dismissed the juror with the following colloquy:

Court: . . .because you know the witnesses and our concern - - my concern is that some of these other witnesses may be people that you know through playing at the - - basketball at the gym.

Juror : Yes, ma'am.

Court : In an abundance of caution, I am going to go ahead and remove you from service. I appreciate you serving thus far and I know that you have been attentive in listening to the witnesses, but I think in an abundance of caution I'm going to probably – I'm going to go ahead and remove you from service.

Juror: Yes, ma'am.

Court: I appreciate you being honest and bringing it to our attention. And everybody understands that you didn't intentionally do this, that you just did not put names with faces. And that happens all the time.

Juror: Yes ma'am. I mean, they are kids, and I don't socialize with them kids. I mean, I play ball, but I don't have one-on-one conversation with them.

Court: Okay. All right. Thank you.

R.p. 331, l. 12- p. 332, l. 12. The trial judge replaced the juror with alternate juror Jennifer Waller. R. p. 332.

STANDARD OF REVIEW

A trial court's decision to remove a juror and replace them with an alternate is within the discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Bell, 374 S.C. 136, 147, 646 S.E.2d 888, 894 (Ct. App. 2007); State v. Smith, 338 S.C. 66, 71, 525 S.E.2d 263, 265-66 (Ct. App. 1999). A defendant is not entitled to a new trial where the trial court's decision to replace a juror with an alternate does not prejudice the defendant. See State

v. McDaniel, 275 S.C. 222, 224, 268 S.E.2d 585, 586 (1980). In State v. McDaniel, the appellant argued that the trial court erred by removing a juror, who was seen making improper gestures, and replacing the juror with an alternate. Id. The Supreme Court affirmed the trial court's decision and explained that, even if the trial court's procedure was irregular, the appellant failed to establish the manner in which the irregular procedure prejudiced him. Id. (Stating that "the procedure employed by the trial court, however irregular, was not sufficient to deprive appellant of his right to a jury trial"). McDaniel's holding indicates that granting a new trial based on a juror's removal requires a showing of prejudice, in addition to legal error.

The standard for granting a new trial has occasionally been phrased as simply requiring "abuse of discretion" where appellants challenge a trial court's decision not to remove a juror after finding the juror failed to disclose information on voir dire. See State v. Woods, 345 S.C. 583, 592, 550 S.E.2d 282, 286 (2001) (Stating that "...trial judge's denial of a new trial motion will not be disturbed on review absent an abuse of discretion"); State v. Bell, 374 S.C. at 147, 646 S.E.2d at 894 (Stating that "...such decision will not be reversed on appeal absent an abuse of discretion"); State v. Burgess, 391 S.C. 15, 18, 703 S.E.2d 512, 514 (Ct. App. 2010) (Holding that "...the judge acted within his discretion in finding the juror could be fair and impartial"). However, this phrasing simply masks the underlying requirement that a defendant must be prejudiced by the trial court's error to obtain a new trial. The Court of Appeals decision in State v. Covington revealed this requirement by conditioning reversal upon finding a "prejudicial abuse of discretion." State v. Covington, 343 S.C. 157, 163, 539 S.E.2d 67, 69-70 (Ct. App. 2000) ("Where a new trial motion is based upon allegations that a juror gave misleading and incomplete answers on voir dire, the trial court's denial of that motion will be affirmed absent a

prejudicial abuse of discretion").

"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)).

The simple "abuse of discretion" language makes sense where the trial court does not remove a potentially biased juror, because in such circumstances, prejudice is implied. Courts apply the Woods test to determine whether a juror should be removed for failure to disclose information in voir dire. Woods, 345 S.C. at 587-88, 550 S.E.2d at 284. The Woods test asks, 1) whether a juror's failure to disclose information was intentional, and 2) if so, whether such information would support removal for cause, or have been a material factor in use of the party's peremptory challenges. Woods, 345 S.C. at 592, 550 S.E.2d at 286-87. The Woods test is designed to protect a defendant's right to trial by an impartial jury (Id. at 587-88, 284) and presumes bias from a juror's unjustified concealment of information. Id. at 589, 285. Where the trial court misapplies Woods and decides not to remove the juror in question, it is sensible to reverse the trial court and grant a new trial solely upon a finding of legal error, because such error leaves a potentially unfair or biased juror on the jury and necessarily threatens the defendant's right to a fair and impartial jury. Thus, a trial court's error in applying or failing to apply Woods is inherently prejudicial where that error leaves the potentially biased juror on the jury.

However, this rationale does not apply where the court decides to remove a juror and replace them with an alternate. Replacing a juror with an alternate, even where removal was in

error, does not result in prejudice or jeopardize the defendant's right to a trial by a fair and impartial jury. See McDaniel, 275 S.C. at 224, 268 S.E.2d 586.[8] A defendant has no right to be tried by a jury composed of particular individuals. State v. Williams, 321 S.C. at 460, 469 S.E.2d at 52; McDaniel, 275 S.C. at 225, 268 S.E.2d at 586. An appellant fails to establish prejudice from the removal of a juror where the alternate was approved by both sides at the inception of trial, and the appellant does not demonstrate manner in which he was prejudiced by seating the alternate. Williams, at 321 S.C. at 460, 469 S.E.2d at 52; McDaniel, 275 S.C. at 225, 268 S.E.2d at 586.

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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[8] 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 settings 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).

ANALYSIS

Appellant attempts to rely on State v. Stone to demonstrate that the trial court abused its discretion by removing Juror 226, and such abuse of discretion requires reversal. (Initial Brief of Appellant, p. 15-18). However, this reliance is misplaced. The Stone decision simply recognized a legal error without finding that the error prejudiced the defendant, and went on to reverse the trial court on separate grounds. State v. Stone, 350 S.C. 442, 567 S.E.2d 244 (2002).

In State v. Stone, the Court determined that the trial judge had abused its discretion in removing a juror.[9] 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

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[9] 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).

acquaintance with a witness whose name she did not even know, would not have affected her in any way." Stone, supra. 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 failure to instruct on certain mitigating circumstances and the failure to give a parole ineligibility charge did not include any similar language in its opinion that it " required reversal."[10] The harmless error issue was not addressed or whether it warranted a new trial standing alone.[11]

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

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[10] 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.

[11] In Stone, the Supreme Court determined that the trial court abused its discretion by failing to apply Woods and removing a juror where that the juror unintentionally failed to disclosure information in voir dire. Id. at 448-49, 247-48. However, the Stone court did not reverse the trial court's decision on those grounds, despite finding an "abuse of discretion." Id. While Stone explicitly stated that two of the appellant's claims "required reversal" (Id. at 450, 248 and 451, 249), the court omitted such language from its holding that the juror's removal constituted an "abuse of discretion." Id. at 449, 248.

impacted on the use of the peremptory challenges. Here, there is no concealment, intentional or otherwise, of information by a juror on the initial voir dire as determined by Judge Benjamin. 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. [12]

The Court of Appeals decision in State v. Burgess clarifies Stone's holding that a failure to apply the Woods test constitutes error, but Burgess makes no mention of prejudice, nor any suggestion that such error is per se reversible. State v. Burgess, 391 S.C. 15, 19-20, 703 S.E.2d 512, 514-15 (Ct. App. 2010). Thus, Stone should not be interpreted to permit reversal whenever a trial court improperly removed a juror, if that removal did not prejudice the defendant, particularly as here out of a concern in an abundance of caution concerning future witnesses being identified, as well as the fact that the prosecution may well have used a peremptory

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[12] In State v. Guillebreaux, 362 S.C. 270, 607 S.E.2d 99 (S.C. Ct. App. 2004), 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 was the confidential informant 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.

challenge.

The facts in this case demonstrate the flexibility and assurance of impartiality alternate jurors are intended to provide. See State v. Stone, 290 S.C. 380, 382, 350 S.E.2d 517, 518 (1986) (Explaining that the goal of curative measures, such as the use of alternate jurors, is to insure the defendant's right to a fair trial has not been compromised, and the use of such curative measures is at the discretion of the trial court). Though Juror 226 may not have intentionally concealed the information, there was more reason to think he was a threat to the trial's fairness and reliability than for the pre-approved alternate who replaced him.[13] The trial judge expressed this concern that there was a likelihood that future witnesses would cause Juror 226 to again reveal belated recognition from his social contact at the basketball court. Thus, this type of "error" identified by Stone cannot be said to protect the defendant's right to a fair trial. Instead, it must simply protect judicial economy by conserving resources, avoiding delay, and preserving alternates for more severe circumstances. Judicial economy is not the type of competing interest that requires finding reversible error in this case.[14] The trial courts themselves internalize the costs on judicial economy imposed by unnecessary juror removal, and thus, should be allowed to

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[13] In the instant case, the alternate went through voir dire and approved by both sides (R.p. 53). Appellant's brief makes no attempt to demonstrate the manner in which Appellant was prejudiced by the alternate juror. Therefore, Appellant has failed to establish prejudice from the trial court's decision.

[14] Prudential concerns also demand this interpretation. If the decision to remove a juror without finding that the juror's nondisclosure meets the factors laid out in Woods constitutes reversible error, then anytime such a removal occurs without any objection from defense counsel the defendant may well have an ineffective assistance claim in post-conviction relief. While Appellant objected to the juror's removal in the instant case, Appellant's interpretation of Stone would create inadequate representation claims out of less controversial scenarios. Defense counsel may choose not to object for strategic reasons, or simply to avoid undue delay where an alternate was available. In any conceivable post-conviction relief petition arising from such facts, the State would be able to argue that counsel's errors did not deny the defendant a fair trial. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) ("[D]efendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). Therefore, there is no reason to even create the claim by recognizing the facts in this case and Stone as reversible error.

exercise their discretion when determining whether to remove a juror "in abundance of caution," where that juror can be replaced with an alternate posing no risk of prejudice to the defendant.[15] This was not an abuse of discretion by Judge Benjamin.

Respondent further submits any error is 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).[16] See Ballentine v. State, 390 S.E.2d 887 (Ga. App. 1990) (replacement of regular juror with alternate during

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[15] "The general rule in this State is that the conduct of a criminal trial is left largely to the sound discretion of the 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 Juror 226 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 .

[16] 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.

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 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) (defendants 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).

In the case at hand, Appellant claims the trial judge abused her discretion by removing Juror 226, even though the juror's nondisclosure was unintentional and could not have supported a strike for cause or been a material factor in the prosecution's use of peremptory challenges. (R. p. 329-30). However, Appellant never demonstrated the manner in which he was prejudiced by

Juror 226's removal, or by the seating of the alternate. Moreover, because Juror 226 was replaced by a pre-approved alternate, this is not a case where an error in applying the Woods test would necessarily prejudice the defendant by creating some threat of unfairness or partiality. Therefore, Appellant has failed to establish prejudice and is not entitled to a new trial. Appellant's conviction and the trial court's decision should be affirmed.

II. Appellant Was Not Entitled To A Charge On The Elements Of Involuntary Manslaughter Where There Was No Evidence That Appellant Was Lawfully Armed In Self-Defense When He Fired The Fatal Shot.

HOW THE ISSUE WAS PRESENTED BELOW

Viewed in the light most favorable to the Appellant, the record demonstrates that after encountering and exchanging threats with Mr. Thomas and Mr. Salley, Appellant arranged for transportation to his house, with the intent to obtain his gun. (R. p. 577). By his own testimony, Appellant wanted to get the gun in response to Richard Thomas' threats on his life, (R. p. 625) and Appellant did not know Mr. Salley to carry a weapon. (R. p. 572). After retrieving the gun, Appellant returned to Vineyards Crossing, where he previously encountered and exchanged threats with Mr. Thomas and Mr. Salley, and now knew Mr. Salley to be located. (R. p. 624).

After returning to Vineyards Crossing, Appellant received a call from Devan Bailey instructing Appellant to come outside and give Bailey a cigar. (R. p. 631). Appellant then went outside, with his gun in his waistband, and saw Salley "yelling at" Bailey two houses down. (R. pp. 578-79, 630-32). Appellant chose to advance toward the area where Salley and Bailey were standing, at which point , under Appellant's theory, Salley saw Appellant and came running towards him. (R. p. 633). Appellant claimed that he saw nothing to indicate that Salley was armed at the time. (R. p. 633). As Salley approached, Appellant pulled the gun from his waistband and aimed it at Salley. (R. p. 579, 633).

While Appellant was armed and pointing the weapon at Salley , Salley then struck Appellant. (R. p. 579). Appellant lost the gun, and proceeded to fight Salley, eventually beating him until he no longer resisted. (R. p. 580). After the fight was over, Appellant saw that Andina Lee had the gun. (R. pp. 582, 639). Andina Lee then threw the gun to the ground, and Appellant

went to retrieve it. (R. pp. 582, 639). As he reached the gun, Appellant picked it up with his finger on the trigger. (R. pp. 641-42). Appellant claims he accidentally fired the gun in the process of retrieving it, shooting Anthony Salley in the stomach. (R. p. 641 - 643). Salley later died as a result of the gunshot wound. (R. pp. 367-78).

During the charge conference, the Defense requested a charge on involuntary manslaughter, claiming that evidence supported the theory that Appellant was acting lawfully in self-defense, when he recklessly shot Salley.. (R. pp. 716-17, 720-22)

The trial court denied the charge, finding no evidence that Appellant was acting lawfully. (R. p. 743 - 746). Particularly, Judge Benjamin found that all the evidence in the case indicated that the Appellant was acting unlawfully at the time of the killing and that as a result he was precluded from an instruction on involuntary manslaughter. R.p. 743, l. 8-22. Judge Benjamin found that from the Appellant's testimony that he was engaged in selling drugs in the community at the time of the incident and that he was unlawfully in possession of a firearm because he was a felon. R.p. 743 - 744. She found that at the time of the shooting, the victim was on the ground and defeated and the Appellant even claimed that he had won the fight. R.p. 744. At the time, the Appellant had no reason to think that the victim was armed at the time he was either pointed at by the weapon he had knocked away or defeated while still on the ground. Judge Benjamin further concluded that at the time of the actual shooting the Appellant was again unlawfully armed and was clearly pointing and presenting a firearm. She concluded that any claim that he was acting in self-defense was negated by Appellant's own testimony because he was aware that Salley was not carrying a weapon and had won the altercation. R.p. 744.

Judge Benjamin found that Appellant was not justified in re-arming himself at the time

the gun discharged since he claimed to have won the fight and that the victim was on the ground, where there was no testimony that the victim ever possessed the gun or was with a gun at or near the time of the incident. R.p. 745. Judge Benjamin sought to distinguish State v. Mekler, 379 S.C. 12, 664 S.E.2d 477 (2008) and State v. Burris, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). She found that in Mekler, there was evidence that the victim was armed and acting in a threatening manner at the time of the shooting and in Burris, two men had attacked and knocked down the defendant and continued to attack after he had picked up the gun. Neither situation occurred in this case. R.p. 745-746.

SUMMARY

Appellant was not entitled to an involuntary manslaughter charge because there was no evidence presented at trial to support the claim. The evidence at trial necessarily showed that Appellant unlawfully possessed the gun when he shot Anthony Salley. Appellant could not demonstrate lawful possession in self-defense, because Appellant's unlawful possession of a weapon proximately caused the incident and ultimately, Anthony Salley's death. Therefore, Appellant's conviction should be affirmed.

STANDARD OF REVIEW

The law to be charged is determined by the evidence presented at trial. State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010). "If there is any evidence warranting a charge on involuntary manslaughter, then the charge must be given." State v. Reese, 370 S.C. 31, 36, 633 S.E.2d 898, 900 (2006). "In determining whether the evidence requires a charge on a lesser included offense, the court views the facts in a light most favorable to the defendant." State v. Brayboy, 387 S.C. 174, 179, 691 S.E.2d 482, 485 (Ct. App. 2010). The negligent handling of a

loaded gun can be sufficient to support a charge on involuntary manslaughter. Brayboy, 387 S.C. at 180, 691 S.E.2d at 485. "In order to amount to reversible error, the failure to give a requested charge must be both erroneous and prejudicial." State v. Gibson, 390 S.C. 347, 356, 701 S.E.2d 766, 770-71 (Ct. App. 2010).

Involuntary manslaughter is defined as: (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm; or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Smith, 391 S.C. 408, 706 S.E.2d 706 S.E.2d 12 (2011);[17] State v. Rivera, 389 S.C. 399, 404, 699 S.E.2d 157, 159 (2010); State v. Cabrera–Pena, 361 S.C. 372, 380–81, 605 S.E.2d 522, 526 (2004). "It is unlawful for a person to present or point at another person a loaded or unloaded firearm." S. C. Code Ann. § 16–23–410 (2003). Presenting a weapon means "to offer to view in a threatening manner, or to show in a threatening manner." In re Spencer R., 387 S.C. 517, 522–23, 692 S.E.2d 569, 572 (Ct.App.2010). Thus Appellant must have been acting lawfully at the time he shot Salley to be entitled to a charge on involuntary manslaughter.

ANALYSIS

Appellant claims that he lawfully armed himself in self-defense before the gun went off.

[17] In State v. Smith, 391 S.C. 408, 706 S.E.2d 706 S.E.2d 12 (2011), the Supreme Court held that found that he second definition of involuntary manslaughter did not apply in his case. The Court found that Smith entered the trailer to sell crack cocaine, a felony, to Victim. Smith pursued the drug deal while armed with a loaded gun, knowing Victim owed him $40 from a previous drug transaction. During the confrontation, Smith brandished the gun and used it to pistol-whip Victim. According to Smith, he pistol-whipped Victim because Victim was approaching him in a "real serious demeanor." Victim was unarmed, the door to Victim's trailer was unlocked, and there is no evidence Smith was unable to retreat from the dangerous situation he created. Based on these facts, we find no evidence to support Smith's assertion that he was acting lawfully by arming himself in self-defense. Specifically, the Court found that there was no evidence to suggest that Smith was without fault in bringing on the difficulty, that he believed or actually was in imminent danger of losing his life or sustaining serious bodily injury, or that he "had no other probable means of avoiding the danger" other than drawing the loaded weapon

(*Initial Brief of Appellant*, p. 20). There is no doubt that "a person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting." State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). A defendant can claim they were lawfully armed in self-defense, despite being in unlawful possession of a weapon, if the unlawful possession was merely incidental to the lawful act of arming themselves in self-defense. State v. Slater, 373 S.C. 66, 70, 644 S.E.2d, 50, 53 (2007). Nevertheless, the unlawful possession of a weapon can render a defendant's actions unlawful, and thus preclude a defense of accident if the weapon was the proximate cause of the killing. State v. Slater, 373 S.C. at 71, 644 S.E.2d at 53. This reasoning applies equally to an involuntary manslaughter charge premised on the lawful possession of a firearm in self-defense. Id. Therefore, Appellant's involuntary manslaughter claim rests on the lynchpin assertion that Appellant lawfully armed himself in self-defense and was therefore acting lawfully when he recklessly fired the gun.

In State v. Slater, the Supreme Court determined that the appellant was not lawfully armed in self-defense because his unlawful possession of the firearm proximately caused the resulting homicide. Slater, 373 S.C. at 71, 644 S.E.2d at 53. In making this proximate cause determination, the Slater Court analyzed the appellants' actions and the general circumstances surrounding the possession of the gun. Id. at 71, 53. The court noted that the appellant displayed a cocked gun as he approached the scene of an ongoing confrontation he was not involved in. Id. The Court of Appeals' decision in State v. Burriss provided further clarification on when an appellant can claim to be lawfully armed in self-defense. In Burriss, the court found the appellant lawfully armed himself in self-defense by "snatching" his gun after being attacked by

two men who had been smoking crack-cocaine, one man moved threateningly toward him, and appellant had reason to believe one of the men had a gun. Burriss, 334 S.C. at 262-63, 513 S.E.2d at 108.

Slater and Burriss illustrate how Appellant's actions, including his unlawful possession of a weapon, proximately caused the homicide of Anthony Salley. Like the appellant in Slater, Appellant approached what he understood to be an "argument" between Salley and Bailey, with a loaded weapon. (R. p. 579, 633). Whereas the appellant in Burris had reason had already been attacked, in the instant case, the fight did not begin until Appellant aimed a gun at Salley from point blank range. (R. pp. 579-80). Moreover, Appellant had no reason to believe Salley had a weapon, unlike the appellant in Burris. (R. pp. 572, 633). Finally, by pointing the gun at Salley from point blank range, Appellant mirrored Slater appellant's actions in displaying a loaded handgun as he approached the fray. Both actions unnecessarily escalated an already tense situation and caused other parties to react in a way that eventually led to homicide.[18]

Appellant argues that despite the preceding events, he was entitled to lawfully arm himself in self-defense when he ended the fight as the victor and saw Andina Lee with the gun. (R. p. 751). See *Initial Brief of Appellant*, p. 23. However, the proximate cause language in Slater prevents the Appellant from obscuring the factual timeline in this way. By asking whether Appellant's unlawful possession proximately caused the subsequent homicide, Slater requires the court to look back in time to find the point at which the victim's death was proximately caused.

[18]In State v. Light, 378 S.C. 641, 664 S.E.2d 465 (2008), the Supreme Court noted this Court had correctly found the petitioner was lawfully armed in self-defense because he took the loaded gun from the decedent who had been threatening him with it. Id. at 648, 468469. Light is distinguishable because the victim here never possessed any weapon. To the contrary, it was Appellant who brought upon the difficulty by initially presenting the weapon he brought to the confrontation that the victim had knocked out of his hand, but never possessed. At the time of the shooting, there was no struggle over the weapon, no threatening by its use by the victim as in Light. Hinson was never armed in self-defense, he was armed in intimidation.

See Slater, 373 S.C. at 73, 644 S.E.2d at 53. If Appellant's analysis were accepted, appellants could parse the factual timeline down to the point at which they were in danger and claim they lawfully possessed the weapon any time they faced danger, regardless of their role in creating that danger. The so-called re-arming of Appellant after the fight caused by his pointing and presenting of the firearm improperly in the first place placed this alleged standard for involuntary manslaughter in an improper state. At the time of initially arming himself he was not in imminent fear or death or serious bodily injury. In fact, he stated that he pointed the weapon initially to scare and threaten Salley. R.p. 580, 658. He also claimed that he could have killed Salley had he wanted to when he won the fight. R.p. 662-663.

In State v. Rivera, the Court found that where the defendant testified that he was not in imminent fear of death or serious bodily injury, involuntary manslaughter did not apply. In State v. Cabrera Pena, 361 S.C. 372, 605 S.E. 2d 522 (2004), The Court found that Cabrera -Pena was not entitled to an involuntary manslaughter instruction when he took advantage of an unfair and extremely dangerous situation that he created by bringing a loaded deadly weapon into an area of potential dispute as Hinson did in this case. In addition, in Cabrera Pena, the Court found that the negligent handling of a weapon was insufficient to support the involuntary manslaughter charge and it is insufficient here under the second definition of involuntary manslaughter. The Appellant's testimony is that he recovered his own weapon that caused the fracas after defeating the victim and then flinched when he saw the victim and shot him. R.p. 641-643. His claim is that the shooting was unintentional. However, unlike Burris, there is no suggestion that the victim was armed at the time of the shooting - to the contrary Hinson knew he was not armed because he had recovered his illegally possessed weapon. Unlike Burris, Hinson was not acting

lawfully when the gun was fired, he was still acting unlawfully as he had been throughout the confrontation.

In Mekler, the South Carolina Supreme Court found that involuntary manslaughter should have been charged. Therein, the Court concluded that the following supported a charge:

(1) the three statements given by Mekler and introduced at trial in which Mekler stated she did not remember pulling the trigger or the shotgun discharging;

(2) Mekler's trial testimony in which she stated she did not remember pulling the trigger and had to be told by Spires that she shot Victim;

(3) Mekler's trial testimony in which she stated the gun was positioned at her hip so she could cock the hammer back and that her finger must have slipped on the trigger, causing the gun to fire suddenly;

(4) testimony by a neighbor who looked out of her window right before the shot was fired and saw one of Mekler's arms down at her side and the other waving when she talked; and

(5) Mekler's insistence at trial that she did not intend to shoot Victim and that she was shocked when the gun fired immediately after she cocked the hammer.

Here, Hinson's actions are distinguishable from Mekler. Unlike Mekler, where the victim approached the defendant screaming while armed with a knife after an earlier confrontation, Salley was unarmed when the Appellant pointed and presented the gun to scare Salley who he did not know to be armed. Unlike Mekler, where the defendant testified that the victim had approached him with a knife and stood in the yard threatening to get the defendant, it was the Appellant who came upon the scene. Unlike Mekler, who claimed that she pulled the hammer

back on her shotgun and the gun shot when the victim leaned in, here as a result of the presenting the gun was knocked from his hand and a physical fracas occurred, not over the gun but against each other with Appellant the victor. The fight was over when he recovered his weapon when he turned and shot the victim. Although he similarly claimed he did not intend to kill, like in Mekler, it was the illegal activity in presenting the gun that caused the fracas which cannot turn it into a later involuntary manslaughter when his initial intent in the display of the weapon was to scare and intimidate.

Plainly, one could understand the Appellant to have brought on the difficulty by pointing and presenting the gun when he aimed it at Salley before the fight began which caused the physical encounter. Appellant should not be able to claim his actions prior to the fight were justified under the four prongs of self-defense. Therefore aiming the gun at Salley constituted illegal pointing and presenting. This illegal pointing and presenting would form the predicate "unlawful activity" to show that Appellant brought on the difficulty he encountered after Salley hit him knocking the gun from Hinson's possession.

Appellant did not act in self-defense by pulling the gun out and aiming it at Salley, therefore those actions constituted illegal pointing and presenting. To be acting in self-defense, a defendant must establish four elements:

> "First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have been in actual imminent danger of losing his life or sustaining serious bodily injury, or he must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant was actually in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger."

State v. Bryant, 336 S.C. 340, 344-45, 520 S.E.2d 319, 321-22 (1999).

When Appellant pulled the gun on Salley, evidence shows that he did not believe he was in actual or imminent danger of losing his life or sustaining serious bodily injury, if he did believe he was in such danger, his belief was unreasonable, and he had other means of avoiding the danger. In State v. Goodson, evidence showed that the appellant pulled a gun out after another man threatened him with a pool stick. State v. Goodson, 312 S.C. at 279, 440 S.E.2d at 372. After a the victim intervened and took the appellant outside, the gun fired, hitting the victim. The Goodson court rejected the appellant's defense of accident on the grounds that appellant never offered any evidence to suggest he believed he was in imminent danger, nor was he in any actual danger. Appellant in this case also fails to present such evidence.

The only evidence that Appellant might point to as suggesting danger would be Appellant's previous earlier confrontations with Richard Thomas in the fall of 2009 where Salley was not present (R. p, 571-574, 597, 616), a verbal confrontation that he had with Thomas and Salley on the morning of the incident that prompted Appellant to get his pistol although he told Bailey that it was to get marijuana (R.p. 576 - 577) and his claim that Salley running towards Appellant before the fight began. (R.p. 144-145, 161). However, Appellant testified that he did not know Salley to carry a weapon before or at the time of the incident. R.p. 572, ll. 9-10.

However, Goodson demonstrates that an appellant does not necessarily believe they are in danger simply because of some threatening actions made towards them. More importantly, Hinson, just like the appellant in Goodson, did not present any evidence that he believed he was in danger, nor does any independent evidence of such danger exist. Appellant only stated that he pulled out the gun because he did not want to fight Salley, and that he didn't want to lose a fight

in front of his friends. (R. p 579, 633-634). Furthermore, Appellant stated he did not see anything to indicate Salley had a weapon (R.p. 572, 632-633), and acknowledged he (the Appellant) was a good fighter after the fight. (R.p. 638-639). Finally, Appellant consistently stated that he was afraid of what Richard Thomas would do to him, not Anthony Salley. (R.p. 571, 573-574, 576, 598-600, 602). Appellant failed to demonstrate that he believed he was in imminent danger, or that any real danger existed. [19] Therefore, Appellant was acting unlawfully when he aimed the gun at Anthony Salley.

The evidence presented at trial also shows Appellant could have avoided the danger. Appellant's failure to avoid the danger provides another reason why pulling the gun on Anthony Salley was not justified by self-defense and, therefore, was unlawful pointing and presenting. In State v. Santiago, the Court of Appeals found that an appellant had other probable means of avoiding the danger where the perceived threat was unarmed and the appellant was at the time of the incident. State v. Santiago, 370 S.C. 153, 161, 634 S.E.2d 23, 28 (Ct. App. 2006). Much like the situation in Santiago, the Appellant here was the only party with a gun and had no reason to think any other party had a gun. Though Appellant testified that Salley ran toward him at the initial confrontation, there was no evidence of any significant physical disparity between Appellant and Salley (such as a gap in age or a disability) that would have prevented Appellant

[19] Hinson did testify at trial that he beat up Salley to the point that he stopped defending himself. R.p. 580, l. 20-22. Hinson stated that he felt the fight was over at that point because there was no need to keep fighting him because there was not any fighting back, R.p. 580, l. 20-25. He stated that after he got up and saw Andina had stopped pointing the gun at Devan and thrown it on the ground, he reached down and got the pistol. He stated he did this because he had just beaten Salley up so why would he turn his back on him and leave it for Andina to pick it up or to give the pistol to Salley where he could shoot him. R.p. 582. He claimed that when he picked up the pistol he saw that the victim was off the ground and walking toward him, although he had thought he was still on the ground. Hinson claimed that he flinched and pulled the trigger and the victim was hit. R.p. 582-583.

from running away.[20] Cf. State v. Dickey, 394 S.C. 491, 502-03, 716 S.E.2d 97, 103 (2011). The Dickey decision is also distinguishable because the appellant in that case had reason to believe that his assailant was armed. Id. at 503, 103. Thus, the evidence shows that Appellant had other probable means of avoiding the danger, and he cannot claim to have been acting lawfully in self-defense when he pointed and presented the gun at Anthony Salley.

This unlawful pointing and presenting brought on the ultimate difficulty by initiating a fight between Appellant and Salley, and therefore Appellant cannot claim he acted in self-defense when he fought and eventually shot Salley after retrieving the gun. **Since Appellant brought on the difficulty by unlawfully pointing and presenting the gun, he cannot meet the threshold elements of self-defense and therefore was not lawfully armed in self-defense.**[21] Alternatively, one could regard the illegal pointing and presenting unlawful activity that proximately caused the homicide, precluding Appellant from claiming he acted lawfully in self-defense when he shot Salley. See Slater, 373 S.C. at 71, 644 S.E.2d at 53; State v. Goodson, 312 S.C. at 281, 440 S.E.2d at 372.

His claim that he was entitled to lawfully pick up the weapon that he had brought illegally since it could have been used to shoot him should provide a basis for an involuntary manslaughter charge where there was no threat to him at the time. The victim was never armed. His claim that when Andina threw the gun to the ground, that it could have allowed the defeated

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[20] In fact, Appellant claimed that he did not want to fight Salley because he was bigger. He claimed that he pulled the weapon because he thought Salley would leave him alone. R.p. 658. However, at the time of the shooting he had already beaten up the beaten to the point of his surrender.

[21] Oddly, at trial, Appellant stated that he could not legally carry a gun, but that he can carry a gun in self-defense. R.p. 600, l. 10-13.

victim to carry through with his alleged threats from earlier in the morning, [22] however, he testified that he did not want to shoot him when he initially pulled the pistol because he wanted to scare him and that he did not want to fight him. He noted that this led to the fight where he beat up the victim and that there was no need to fight him further because he was not even fighting back. R.p. 580. Hinson stated that when Andina threw the pistol on the ground that Salley was on the ground and he realized that Andina could have shot him, but did not do so and he then recovered the weapon. Although he claimed that he did not leave the pistol on the ground because Andina could have picked it up and given the pistol to the victim or shot him, this assertion is also defeated by the facts that she had just dropped the weapon to the ground rather than shoot him. Nevertheless, this retrospective hindsight cannot defeat the fact that it was Appellant who initially and illegally brought the gun on the scene and was not arming himself in self-defense. He had armed himself and initially used the weapon in intimidation as a response to coming into the area where Thomas and potentially Salley might be. His suggestion otherwise does not provide entitlement to this instruction. Had Petitioner been unlawfully pointing the firearm at Salley and then dropped it and then picked it up and the gun fired prior to the fist-fight, Hinson would not be entitled to an involuntary manslaughter instruction. The brief time lapse which occurred in this setting should not provide a different result.

The evidence at trial shows that Appellant's unlawful actions proximately caused Anthony Salley's death. Since Appellant did not lawfully possess the gun in self-defense, he was acting unlawfully when he shot Salley. Therefore, the evidence cannot support an

[22] Jamaal Hinson testified that he had gotten into a verbal altercation with Richard and Anthony but that he did not recall the words but did state that "we were threatening each other." R.p. 576, l. 17-19. He claimed that he armed himself against Richard after that, but made no similar claim concerning Salley. Id.

involuntary manslaughter charge, which requires Appellant to have been acting lawfully with reckless disregard. The trial court's decision should be affirmed.

CONCLUSION

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

Respectfully submitted,

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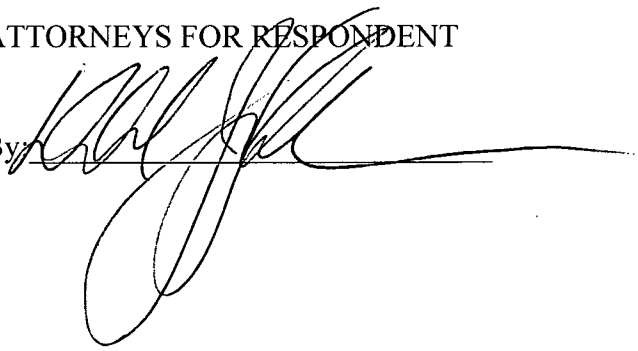
By: 

Columbia, South Carolina
June 14, 2013

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County
DeAndrea G. Benjamin, Circuit Court Judge

Appellate Case No. 2011-203569

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

JAMAAL HINSON,

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
Assistant Deputy Attorney General

June 14, 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, postage prepaid, to Reid T. Sherard, Esquire, Nelson Mullins Riley & Scarborough, LLP, P.O. Box 11070, Columbia SC 29211-1070 and by Inter Agency Mail to Robert M. Dudek, Chief Attorney, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 14th day of June, 2013.

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June 14, 2013

Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
P. O. Box 11629
Columbia, SC 29211

Re: The State v. Jamaal Hinson
Appellate Case No. 2011-203569

Dear Ms. Kitchings:

Enclosed please find the original and nine (9) copies of the **Final Brief of Respondent** in the above-referenced case for filing. By copy of this letter, I am serving opposing counsel with same.

Sincerely,

Lonetta B. Brawley
Legal Assistant to Donald J. Zelenka
Senior Assistant Deputy Attorney General

/lbb
Enclosures

cc: Reid T. Sherard, Esquire
Robert M. Dudek, Esquire
Daniel E. Johnson, Solicitor
Sandi Wofford, Victims Assistance