THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
General Sessions Court
The Honorable J. Derham Cole, Circuit Court Judge

Appellate Case No. 2019—001570

State of South Carolina.....Respondent,

vs.

Devin Zachary Elijah Ruttle.....Appellant.

MOTION TO SUSPEND APPEAL AND FOR LEAVE TO FILE MOTION REGARDING DISQUALIFICATION OF JUROR OR, ALTERNATIVELY, FOR EXTENSION OF TIME TO FILE

Appellant hereby moves the Court to suspend this appeal and to grant Appellant leave to file a timely motion pursuant to Rule 29(b), SCRCrimP, seeking a new trial due to a juror's intentional concealment of information plainly requested during voir dire—in the alternative Appellant requests a thirty (30) day extension of time to file and sever his Initial Brief and Designation of Matter to be Included in the Record on Appeal. This Motion is being made in good faith and for good cause on the grounds that subsequent to Appellant's trial and sentencing, and while a separate post-trial motion under Rule 29, SCRCrimP, was pending, Appellant discovered that Juror 92 failed to respond to multiple clear and unambiguous questions regarding any school and church connections Juror 92 had to Appellant, thereby denying 1) the trial court

the ability to determine whether a for cause ground existed to strike Juror 92, and 2) the parties the right to intelligently exercise their rights to peremptory challenges.

At the commencement of voir dire, and just prior to introducing and presenting the Appellant, his co-defendant, defense counsel, the solicitors, and the potential witnesses, the court unequivocally sought for potential jurors to disclose "any connection whatsoever" with anyone involved in the trial, stating:

> [T]he purpose of the introductions is to find out if you have any connection whatsoever with anybody that's involved in the trial of this case or any members or their respective offices or any members of their respective families. I need to know if you have any connection by blood or by marriage, do you have any connection through work, school or church, have you met them, do you socialize with them, or do you know them in any fashion whatsoever, whether personally or through a family member…I'll, of course have the—each of the defendants introduced. I'll have the lawyers who will be introduced. Each of the witnesses to testify in the case will be introduced in order to find out if you have any connection with any of them so that we can make that determination and determine whether or not any connection that you may have would have any bearing upon your decision….

Trial Tr. p. 31, l. 22—p. 32, l.16 (emphasis added). In addition to requesting potential jurors disclose "any connection," including any through school or church, to anyone involved in the trial, the court specifically inquired whether any potential juror, their parent, spouse, child, or sibling "attend or have [] ever attended New Life Deliverance Worship Center." Trial Tr. p. 43, ll. 3—9. At the conclusion of voir dire, and after introducing all the people involved with the trial, the court, after again asking all witnesses and related family members in the gallery, which included Appellant's father who is the pastor of New Life Deliverance Worship Center, to stand and face the jury panel, sought for the potential jurors to disclose if any potential juror thought

they had seen, recognized, knew, or had "any connection" to the witnesses or related family members. Trial Tr. p. 56, l. 21—p. 57, l. 16.

Despite several jurors responding affirmatively to the court's requests for potential jurors to disclose "any connection" to any of the parties, attorneys, witnesses, or their families, which resulted in potential jurors disclosing even attenuated connections, including one potential juror disclosing that she knew the mother of Appellant's attorney "years ago," Juror 92 did not disclose her various connections to Appellant and his family through both school and church, or the fact that Juror 92 had attended New Life Deliverance Worship Center and its weekly youth group meetings. Trial Tr. p. 39, ll. 9—16. At the time Juror 92's name was drawn, Appellant had seven (7) peremptory challenges remaining. By Juror 92 failing to disclose the connections she had to Appellant, her worship and participation at New Life Deliverance Worship Center, and her having gone to high school with Appellant, Juror 92's concealment violated Appellant's rights to trail by a fair and impartial jury.

Both the United States Constitution and the South Carolina Constitution entitle all criminal defendants to the inviolate right to a trial by an impartial jury and "voir dire can be an essential means of protecting this right." State v. Tucker, 423 S.C. 403, 815 S.E.2d 467, 471 (Ct. App. 2018) (quoting Warger v. Shauers, __ U.S. __, 135 S.Ct. 521, 528-29 (2014)); U.S. Const. Amends. VI and XIV; S.C. Const. Art. I § 14. Accordingly, to protect the rights of both parties to an impartial jury the "trail court must conduct voir dire of the prospective jurors to determin[e] whether the jurors are aware of any bias or prejudice against a party, as well as to 'elicit such facts as will enable the [the parties] intelligently to exercise their right of peremptory challenge.'" State v. Coaxum, 410 S.C. 320, 327, 764 S.E. 2d 242 (2014) (quoting State v.

Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001)) (second change in original). It is axiomatic that for voir dire to function properly as an essential means of protecting the right to an impartial jury, "[f]ull knowledge of all relevant and material matters that might bear on the possible disqualification of a juror is essential to a fair and intelligent exercise of the right of counsel to challenge either for cause or peremptorily." Long v. Norris & Assocs., LTD., 342 S.C. 561, 573, 538 S.E.2d 5 (Ct. App. 2000) (quoting 47 Am. Jur. 2d Jury § 191 (1995)) (emphasis added). "[T]rial judges and attorneys cannot fulfill their duty to screen out biased jurors without accurate information." Coaxum, 410 S.C. at 327, 764 S.E.2d at 245 (citation omitted; change in original); see also State v. Gulledge, 277 S.C. 368, 370, 287 S.E.2d 488, 490 (1982) (holding "[w]here the trial judge grants counsel's request that the judge ask a particular question on voir dire, counsel is entitled to a truthful answer to the question") (emphasis added).

Necessarily, the "voir dire oath mandates that a prospective juror tell the entire truth. A juror's lack of honesty and candor during voir dire is a violation of his oath, as well as a barrier to a party's efforts in identifying potential jurors who harbor a bias" Long, 342 S.C. at 578, 538 S.E.2d at __ (emphasis added). Where jurors fail to respond to particular voir dire questions or provide false or incomplete responses, the parties are wrongfully denied the "intelligent[] exercise [of] their right of peremptory challenge." Woods, 345 S.C. at 587, 550 S.E.2d at __ (quoting Gulledge, 277 S.C. at 370, 287 S.E.2d at 490); Long, 342 S.C. at 573, 538 S.E.2d at __ ("It is the duty of every potential juror to make true and full disclosures during voir dire because counsel is entitled to rely on the answers in determining whether to exercise a peremptory strike.") (emphasis added). Consequently, "[j]uror concealment of material facts during voir dire is anathema to justice." Long, 342 S.C. at 578, 538 S.E.2d at __. Accordingly, in the event of

juror misconduct arising from a juror's concealment of information during voir dire, "the trial court must inquire into whether the withheld information affect[ed] the jury's impartiality." Coaxum, 410 S.C. at 327, 764 S.E.2d at ___; see also State v. McCoy, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013) ("[E]valuating the merits of a juror misconduct claim is a fact-intensive inquiry, which is most appropriately conducted after a hearing.").

As dictated by the South Carolina Supreme Court in Woods, "the first inquiry in the juror disqualification analysis is whether the juror intentionally concealed the information during voir dire." 345 S.C. at 587, 550 S.E.2d at 284. "[I]ntentional concealment occurs when the question presented to the jury on voir dire is reasonably comprehensible to the average juror and the subject of the inquiry is of such significance that the juror's failure to respond is unreasonable." Id. at 588, 550 S.E.2d at 284. Reviewing the transcript of voir dire, it is patently clear that each of the above-noted inquires posed by the trial judge was reasonably comprehensible. The straightforward and unambiguous presentation of the inquiries in question is directly attributable to the trial judge's clear and repeated point of utilizing simple and commonplace language, concepts, and sentence structure that is readily accessible and understood by the common man. Initially the trial judge unambiguously sought a response from any juror that had "any connection whatsoever," including any through "school or church", to anyone involved in the trial. Trial Tr. p. 31, l. 22—p. 32, l.16. Although the initial request for the disclosure of any connection through church should itself have elicited a response from a juror who attended the same church as a party, attorney, or witness, the trial judge followed the initial church inquiry up with a pointed inquiry as to whether any potential juror "attend or have [] ever attended New Life Deliverance Worship Center," where Appellant's father was the pastor and where Appellant

attended church and was involved in weekly youth group meetings. Trial Tr. p. 43, ll. 3—9 (emphasis added). Finally, at the conclusion of voir dire, after having all related family members in the gallery, which included Appellant's father, stand and face the jury panel, the trial judge sought for the potential jurors to disclose if any potential juror thought they had "seen", "recognize[d]", "kn[e]w", or had "any connection" to any of the related family members. Trial Tr. p. 56, l. 21—p. 57, l. 16. Thus, even if it were reasonable to claim that the plain and simple language of the preceding voir dire inquiries was somehow not reasonably comprehensible, the trial judge showed the potential jurors the people about whom it was inquiring before asking whether the potential jurors had "any connection" with or had even merely "seen" any of the related family members. Id. (emphasis added).

It being readily apparent that the specific questions presented to the jurors on voir dire were reasonably comprehensible to the average juror the Court must determine whether "the subject of the inquiry [was] of such significance that the juror's failure to respond [was] unreasonable." Woods, 345 S.C. at 588, 550 S.E.2d at 284. As to the question of significance, the analysis is not about the importance of the subject to the case at hand, but rather about whether the subject of inquiry was memorable, i.e., significant, enough that it would be unreasonable for a juror to claim to have forgotten the experience. Id. (quoting Missouri Supreme Court's formulation of the intentional concealment analysis in Williams By & Through Wilford v. Barnes Hosp., 736 S.W.2d 33, 36 (Mo. 1987), which states the significance prong of the analysis as whether "the prospective juror actually remembers the experience or that it was of such significance that his purported forgetfulness is unreasonable"); cf. State v. Sparkman, 358 S.C. 491, 498, 596 S.E.2d 375 (2004) ("Unintentional concealment, on the other hand, occurs

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.") (citation omitted).

With regard to the subject of the voir dire inquiries at issue, each of the questions posed by the trial judge focused on "school" and "church."[1] Regardless of varying opinions on whether the four years of high school are an enjoyable social and academic experience or a form of cruel and unusual punishment, it certainly cannot be said that high school is an insignificant experience that is easily forgotten. Furthermore, in the case of Juror 92, she had only just finished high school, having graduated from Spartanburg High School in 2016, only one year after Appellant graduated therefrom, and only two years prior to the trial of this case. Further compounding the unreasonableness of Juror 92's failure to disclose her connections to Appellant through school and church is the fact that Juror 92 not only attend Spartanburg High School with Appellant, but also attended church and weekly youth group at New Life Deliverance Worship Center where Appellant's father was and is the pastor and Appellant attended church, operating the soundboard for services, and participated in the weekly youth group meetings. Moreover, Juror 92's attendance at services and weekly youth group meetings at New Life Deliverance Worship Center was not a one time occurrence that might excuse a juror's forgetfulness. Rather, Juror 92 regularly attended New Life Deliverance Worship Center over an extended three (3) year period from 2010 to 2013, a time shortly after New Life Deliverance Worship Center began

[1] The trial judge's first inquiry, which immediately preceded Appellant being introduced and standing to present himself to the jury, specifically directed jurors to reflect on "school" and "church" and to disclose to the court "any connection whatsoever," to Appellant or anyone else involved in the trial. Trial Tr. p. 31, l. 22—p. 32, l.16. The second and third inquiries also concerned the subject of church in that Appellant attended and participated in services at New Life Deliverance Worship Center, the church founded by Appellant's father and where Appellant's father is still the pastor. See Trial Tr. p. 43, ll. 3—9; p. 56, l. 21—p. 57, l. 16.

its ministry and during which the congregation was smaller and more intimate.[2] Additionally, on the interrelated note of the unreasonableness of Juror 92's failure to disclose that she thought she had seen, recognized, knew, or had "any connection" to Appellant's father after he and Appellant's other family members were presented to the jurors for their inspection, Appellant's father, being the pastor during the entirety of the three (3) years that Juror 92 attended New Life Deliverance Worship Center, was the object of Juror 92's, as well as the rest of the congregation's, attention on a weekly basis as he lead church services. Thus, we are again not talking about a juror failing to remember a person she saw once in passing decades ago, but instead allegedly failing to remember the pastor of the church at which she regularly attended services and youth group over a three (3) year period in the recent past. Gray v. Bryant, 298 S.C. 285, 379 S.E.2d 894 (1989) (granting new trial due to juror failing to disclose on voir dire examination that she "had been treated by the respondent on at least one occasion") (emphasis added); cf. State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, ___ (2004) (holding a juror's failure to disclose information on voir dire examination was unintentional because the juror's "attack occurred approximately forty years ago—a lapse of time that we believe renders [the juror's] failure to response reasonable."). Given both the recency of the subjects in question and the fundamental and lasting impact that school and church have in people's lives, it is patently unreasonable that Juror 92 failed to disclose 1) that she had a connection to Appellant through school, 2) that she had a connection to Appellant through church, 3) that she attended New Life

[2] After Appellant and his family learned that Juror 92 was in fact the same person who went to high school with Appellant and attended New Life Deliverance Worship Center, Appellant's father reviewed photos and video from New Life Deliverance Worship Center's archives and discovered that Juror 92 appears in at least one photograph and two videos from New Life Deliverance Worship Center's services.

Deliverance Worship Center, and 4) that she thought she had seen, recognized, knew, or had "any connection" to Appellant's father, the man who was her pastor for a period of three (3) years. Woods, 345 S.C. at 589-90, 550 S.E.2d at 285 (holding juror's failure to disclose a three (3) year relationship with the solicitor's office in response to a voir dire question that "unambiguously sought a response from any juror having a business association with any of the attorneys trying the case" constituted intentional concealment of information on voir dire).

Thus, given that the questions asked by the trial judge on voir dire were reasonably comprehensible and the subjects thereof were of such significance that Juror 92's failure to respond was unreasonable, Juror 92's failure to respond to the voir dire inquiries at question constituted an intentional concealment of information and dictates that the court determine "if the information concealed would have supported a challenge for cause or would have been a material factor in the use of [Appellant's] peremptory challenges." Id. Unfortunately, [b]ecause Juror [92] did not respond to any of the questions asked during voir dire, any potential biases she might have had toward the State were not discovered until after the trial," and, accordingly, the trial court and the parties did not have an opportunity to examine Juror 92 to determine if her school and church connections to Appellant and his family would have supported a for cause challenge. Id. at 590, 550 S.E.2d at 285; Coaxum, 410 S.C. at 328, 764 S.E2d at 245 ("In the face of a juror's intentional nondisclosure of pertinent information during voir dire, 'it may be inferred, nothing to the contrary appearing, that the juror is not impartial.'") (quoting Woods, 345 S.C. at 587-88, 550 S.E.2d at 284). Regardless of the inability to determine if Juror 92 was subject to a for cause challenge, undersigned counsel has spoken with Appellant's trial counsel, Mr. Richard Vieth, regarding Juror 92's school and church connections to Appellant and

Appellant's family and Mr. Vieth confirmed that had Juror 92 not improperly concealed those connections to Appellant he would have requested further inquiry into those connections, discussed the connections with Appellant, and that the connections "would have been a material factor in the use of [Appellant's] peremptory challenges."[3] Woods, 345 S.C. at 587-88, 550 S.E. 2d at 284. Given the youth and closeness in age of Juror 92 and Appellant and the physical and psychological development and flux that is attendant to connections that arise during adolescence and young adulthood, which not infrequently give rise to capricious and petty feelings, it is reasonable to conclude that Juror 92's connections to Appellant and his family through school and church would have been a material factor in Appellant's use of his remaining peremptory challenges. Id. at 590, 550 S.E.2d at 285 (holding it was "reasonable to conclude" that a relationship about which a juror was specifically asked during voir dire "would be a material factor" in a criminal defendant's use of peremptory challenges and that failure to disclose that relationship "prevented the [defendant's] intelligent exercise of his peremptory challenges"). Consequently, "[b]ecause Juror [92] failed to respond to questions on voir dire which clearly applied to her, and because her concealment deprived [Appellant] of information material to his intelligent use of peremptory challenges," Appellant is entitled to a new trial. Id. at 590-91, 550 S.E.2d at 285.

In light of the strong grounds for Juror 92's disqualification and Appellant's attendant entitlement to a new trial as a result thereof, Appellant hereby moves this Court to stay Appellant's appeal and to grant leave for Appellant to file a motion and supporting affidavits

[3] When Juror 92's name was selected from the venire, respondent still had seven (7) peremptory challenges remaining.

with the trial court seeking a new trial for Appellant. In the alternative, if the Court will not grant Appellant a stay and leave to file a motion for a new trial with the trial court, Appellant respectfully moves the Court for a Thirty (30) day extension of time in which for Appellant to file his Initial Brief and the Designation of Matter to be Included in the Record on Appeal. This Motion is being made in good faith and for good cause. Moreover, undersigned counsel was just recently retained by Appellant to represent him in this Appeal, and as such, this is the first extension undersigned counsel has requested.[4] Undersigned counsel has been diligently working on this appeal since being retained, however, given that the juror disqualification issue may be dispositive of this appeal, undersigned counsel directed the majority of time and energy to fully developing the grounds for this Motion. Accordingly, additional time is required to fully develop Appellant's other arguments concerning his trial and the immunity hearing that was held pursuant to the Protection of Persons and Property Act, S.C. Code Ann. 16-11-410 et. seq. Should the Court deny Appellant the stay and leave to file a motion for new trial and instead grant this request for extension, undersigned counsel will take all action necessary to ensure that any further delay of the appellate process will be unnecessary.

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[4] This is the fourth extension overall to be requested on Appellant's behalf and undersigned counsel understands that if granted this would constitute a fourth extension for purposes of the South Carolina Supreme Court's Order regarding Extension Requests in Criminal Direct Appeals.

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PROOF OF SERVICE

I certify that I have filed with the Court of Appeals and served Appellant's Motion to Suspend Appeal and for Leave to File Motion Regarding Disqualification of Juror or, Alternatively, for Extension of Time to File on Respondent's attorney, Melody J. Brown, by email, mbrown@scag.gov, on April 16, 2020.

Respectfully submitted,

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