THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY

Court of General Sessions

DeAndrea G. Benjamin, Circuit Court Judge

C/A No. 2010-GS-40-0829

Appellate Case No. 2011-203569

The State of South Carolina,..... Respondent,

v.

Jamaal Hinson,..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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ARGUMENT I

A. The State Admits Juror 226 Did Not Conceal Information.

The State acknowledges "[h]ere, there is no concealment, intentional or otherwise." (Brief of Respondent p. 18).

B. The State Improperly Attempts To Impugn Juror 226 For Being Honest And Impartial.

Since there was no concealment, the State acknowledges "the language from *Stone*[1] regarding whether the [concealed] information would have been a material factor in the use of a preemptory challenge is inapplicable to this case." (Brief of Respondent p. 18).[2] Curiously, the State then posits "[t]hough 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." (Brief of Respondent pp. 19-20). This naked statement is utterly without any supporting evidence,[3] and is a continuation of the prosecutor's attempt to somehow make the situation the fault of the juror even though it is uncontested Juror 226 did not intentionally conceal any information and in fact affirmatively brought the matter to the attention of the trial judge. The trial judge improperly at least somewhat relied on this argument when defense trial counsel argued "[Juror 226] certainly couldn't be struck for cause because he played basketball with somebody" and the judge responded by saying

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[1] *State v. Stone*, 350 S.C. 442, 567 S.E.2d 244 (2002).

[2] This is different than the position taken at trial by the prosecuting attorney. (R. p. ____; Tr. p. 363, ll. 6-18).

[3] There is no citation to the transcript as anticipated by Rule 208(b)(4), SCACR.

"[y]es, but if [the prosecutor] had known it [the prosecutor] said she would have struck [Juror 226]." (R. p. ____; Tr. p. 365, ll. 11-14).

The State points out that the trial judge also based her decision on her speculation that Juror 226 might know another witness to be called – "I just don't want him standing up again saying, oh, I know that person too." (Tr. p. 366, ll. 8-9). This is yet another example of the trial judge failing to properly apply the law. The State slants this as saying the trial judge thought the problem with Juror 226 was serious enough to remove him because doing so potentially effects "internalized costs" to the trial court such as use of resources and delay. (Brief of Respondent p. 20). That argument is better left to one surrounding the funding of the judicial branch than to whether a man convicted of murder should get a new trial when a fair and unbiased juror was improperly removed

C. The State Admits The Trial Court Committed An Error Of Law By Dismissing Juror 226.

The State concedes Judge Benjamin made an error of law. In its brief, the State recognizes this Court's "decision in *State v. Burgess*[4] clarifies *Stone's* holding that a failure to apply the *Woods*[5] test constitutes error." (Brief of Respondent p. 19). There is no evidence Judge Benjamin applied the *Woods* test, and the State does make that argument.

D. The State Improperly Attempts To Require A Showing Of Prejudice In Addition to Legal Error.

Having admitted there was no concealment by the juror and the trial judge made an error of law, the State is left to frame the decision on appeal around the issue of prejudice.

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[4] *State v. Burgess*, 391 S.C. 15, 703 S.E.2d 512 (Ct. App. 2010).
[5] *State v. Woods,* 345 S.C. 583, 550 S.E.2d 282 (2001).

As recently as three months ago, the Supreme Court reaffirmed that "a new trial is warranted on the basis of juror misconduct if it is shown that (1) the juror intentionally concealed information; and (2) 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. *McCoy v. State*, 737 S.E.2d 623, 627-628 (2013) (citing *Woods* for the proposition that a juror's intentional failure to disclose a relationship gives rise to an inference of bias and rejecting the State's argument that a new trial should be warranted only where an individual shows he was prejudiced by the juror's failure to disclose information). Noting such a circumstance "necessarily threatens the defendant's right to a fair and impartial jury," the State agrees "it is sensible to reverse the trial court and grant a new trial solely upon a finding of legal error . . ." (Brief of Respondent, pp. 14-15).

However, according to the State, "[r]eplacing 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." (Brief of Respondent, p. 15, citing *State v. McDaniel*, 275 S.C. 222, 268 S.E.2d 585 (S.C. 1980)[6]). In that situation, the State argues

[6] The language relied upon by the State in *McDaniel*, to the extent relevant, is dicta, as the Supreme Court affirmed in that case after it concluded "appellant waived the right to raise this [juror removal] issue on appeal." *Id.* at 224, 586. In its 1996 opinion in *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996), the Supreme Court stated "in *State v. McDaniel*, this Court held there is no right to be tried by a jury composed of particular individuals." 321 S.C. 455, 469 S.E.2d 49. That was not the holding in *McDaniel*, as described above. *Williams* is also a case where the holding was that the issue was "not preserved for review." *Id.* at 459, 52. Thus, the two cases cited by the State as requiring prejudice were based on other grounds, that being issue preservation. There is no binding precedent from a South Carolina court that requires a showing of prejudice. *Cf. State v. Smalls*, 336 S.C. 301, 308, 519 S.E.2d 793, 797 (Ct. App. 1999) "no showing of actual prejudice is required to find reversible error" for the denial or impairment of the right to a preemptory challenge.

the defendant must prove prejudice in addition to legal error. (Brief of Respondent p. 15).

Stated another way, the State's position, based at least partially on policy concerns,[7] is that mistakenly keeping a biased juror in the box is reversible just because of legal error, but mistakenly booting a fair juror from the box is only reversible upon the showing of legal error and a second showing of prejudice. Both the Supreme Court and this Court have had every opportunity to make that pronouncement in several recent cases, and each time the respective appellate courts have avoided such a statement.[8] The State recognizes "*Burgess* makes no mention of prejudice. . ." (Brief of Respondent p. 19).

The State is silent as to why prejudice should not be presumed when a fair and unbiased juror is improperly removed. Under the State's position, improper removal of a fair and unbiased juror is held to a higher standard than keeping a biased juror; that is, it would be perfectly acceptable at any time during any trial to remove a fair and unbiased juror from service and that removal would only require reversal if the appellant could prove prejudice (in addition to the legal error). That is not the law in South Carolina, and if it were, it would significantly undercut the ability of either the State or a defendant to receive a constitutionally adequate trial.

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[7] The State argues that reversing and remanding in this case may promote increased post-conviction relief filings. (Brief of Respondent p. 20, n.14). This bogeyman argument should be ignored as it is not relevant to this appeal and there is no evidence to support it. Mr. Hinson is entitled to appellate review of his case, which should not be confused with the system as a whole.

[8] Oddly, the State notes this Court (twice) and the Supreme Court in recent years have described the standard as "abuse of discretion" as opposed to a specific requirement of a prejudicial showing, (Brief of Respondent p. 13), but then dispenses with those opinions as "simply masking" the alleged required showing of prejudice. (*Id.* at p. 14).

Moreover, Juror 226, having been seated, had a right to serve. Over 175 years ago, our Court of Appeals recognized:

> Every tax-paying citizen of South Carolina is liable to be drawn as a juryman; and when it falls to his lot *he has a right to serve*, which no one can deprive him of, unless it can be shown that he labors under some legal disability which disqualifies him, or unless he can be challenged for some good and sufficient cause by the parties in court. A legal exemption does not affect the right, or in any wise abridge the privilege, of any man to sit on a jury. This privilege is of little value ordinarily, but there may be occasions and junctures in the republic, when a citizen would sooner perish than yield his privilege.

Greer v. Norvill, 21 S.C.L. (3 Hill), 1837 WL 1472, 1 (Ct. App. 1837) (emphasis in original).

Greer is instructive, as the Court of Appeals analyzed the dismissal of a juror not just from the perspectives of the parties, but also from the perspective of the juror and the judge.

Regarding the rights of the juror, he "may be excused at any time when he is not actually engaged in the trial of a cause; but he can at no time be arbitrarily discharged against his consent." *Id.* It is readily apparent Juror 226 did not consent to be removed. (R. p. ___; Tr. p. 359-369). When it is obvious that a juror only gave up his seat as a result of an improper challenge, "the challenge should not only have been rejected, but that the juryman should have been instructed to keep his seat. I do not say that a juryman might not be challenged for favor, by reason of his enmity either to one of the parties or to their counsel; but his incapacity must appear from higher evidence than the assertion or opinion of counsel." *Greer* at 1. This is further evidence that a showing of prejudice by Mr. Hinson is not required to show prejudice since Juror 226 was removed as a result of a legal error.

Regarding the rights of the judge, this Court stated the judge has discretion to remove a juror, but failing an appropriate use of discretion "[a]s soon as the trial commences the parties acquire their rights, and can compel the jury charged with the case to decide on it." *Id.* at 2.

Finally, regarding the rights of the parties, the Court noted either party has the right to challenge a juror to be removed by the judge without consent of the other party, but "if the challenge is not sustained, the opposite party has a right to the jury as it was empannelled [sic]." *Id.* "[W]here neither party has a right to object to a juror, it is not competent for the court or the other party to remove him, except by consent." *Id.*

The State argues that replacing a seated juror with an alternate sanctioned by both parties does not jeopardize a defendant's right to a fair trial. (Brief of Respondent p. 15). This argument ignores the fact that Juror 226 "formed a part of the tribunal to which the defendant was willing to trust his cause when he announced himself ready for trial; that tribunal was changed contrary to his consent, and a new one formed at the instance of his adversary." *Greer* at 2. Even if the change could be shown not to make a material difference, and even if the change was not done for undue advantage, which here cannot be shown, "[i]t is sufficient to say, however, that such might be the case, if the practice were to receive the sanction of the court. *Id.* This Court has known since at least 1837 that allowing one side to arbitrarily have a fair juror dismissed was a significant threat to the rule of law.

Even if a showing of prejudice is required, which Mr. Hinson does not concede,[9] Mr. Hinson was necessarily prejudiced as the judge improperly removed a fair and unbiased juror from his case without sufficient legal reason. *See id.* ("[b]y getting rid of one juryman and substituting another, a wonderful difference may be made in the tribunal. The supernumerary jurymen are known, and frequently the order in which they stand; and to remove one juror and substitute another, is giving a party a great advantage").

Ultimately, in *Greer* this Court held:

> [A]fter the parties announce themselves ready for trial before a particular jury, the judge cannot discharge one of that jury, at the instance of one party and contrary to the consent of the other, unless the ground of challenge be legal and properly sustained. The parties should be regarded as standing on their rights. Vague and capricious objections should not receive the countenance of the court. They only serve to irritate parties and to embarrass the court.

Id. at 3.

The State now admits Juror 226 was not properly removed, and Mr. Hinson's conviction should be reversed and the matter remanded for a new trial.

[9] In a case where the juror is removed for concealing information during voir dire, even if unintentional, the juror's self-proclaimed impartiality is dispositive of the issue as to whether he should be removed. *See State v. Simmons*, 360 S.C. 33, 43, 599 S.E.2d 448, 452 n.4 (2004). Here, it is uncontested Juror 226 repeatedly stated his ability to be impartial.

ARGUMENT II

A. The State's Reliance On *State v. Slater*, 373 S.C. 66, 644 S.E.2d 50 (2007) Is Misplaced.

The State begins its analysis of the second issue on appeal with *Slater*. (Brief of Respondent p. 28). In *Slater*, "the court included a manslaughter option in the jury charge." 373 S.C. at 69, 644 S.E.2d at 52.

The State argues "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." (Brief of Respondent p. 28, citing *Slater* at 71, 53). The State then purports to cite *Slater* for the proposition that "[t]his reasoning applies equally to an involuntary manslaughter charge premised on the lawful possession of a firearm in self-defense." (*Id.*). In fact, that is an improper statement of *Slater*, as the Supreme Court actually said "the analysis is equally applicable in determining if a defendant in unlawful possession of a weapon is entitled to a charge on self-defense." *Slater*, 373 S.C. at 71, 644 S.E.2d at 53. *Slater* equated the analysis between accident and self-defense, not between accident and involuntary manslaughter.

The State further misapprehends *Slater* by claiming 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." (Brief of Respondent p. 28, citing *Slater* at 71, 53). Again, this is not a correct recapitulation of *Slater*. In fact, the Supreme Court merely noted unlawful possession of a firearm can, under some circumstances, constitute an unlawful activity *so as to preclude an accident defense* if the weapon is the proximate cause of the killing." *Id.* at 71, 53 (citing *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999) (emphasis added). Receiving an accident

charge is not the same thing as being lawfully armed in self-defense; "[t]here is a difference between being lawfully *armed* in self-defense and *acting* in self-defense." *Burriss*, 334 S.C. at 265, 513 S.E.2d at 109 n.10 (1999) (emphasis in original).

In any event, this appeal is not about a charge of self-defense, a charge to which the prosecution consented. This appeal is about being lawfully armed in self-defense.

The State argues that could not happen in the instant case because Mr. Hinson approached what he understood to be an argument and "the fight did not begin until Appellant aimed a gun at Salley from point blank range" and "Appellant had no reason to believe Salley had a weapon." (Brief of Respondent p. 29). This recitation of the facts ignores evidence in the record that:

- Earlier in the day, Mr. Hinson saw Mr. Salley with Richard Thomas on that very street. (R. p. ____; Tr. p. 645, ll. 11-14);
- Mr. Thomas and Mr. Hinson were adversaries – "they didn't like each other at all" – with multiple verbal and physical incidents between them over the preceding year. (R. p. ___; Tr. p. 640, ll. 13-17; p. 685, ll. 8-10);
- Mr. Hinson did not know Mr. Salley, but knew of him as being a friend of Mr. Thomas. (R. p. ___; Tr. p. 640, l. 24 – p. 641, l. 1; p. 661, ll. 10-14);
- Both Mr. Thomas and Mr. Salley exchanged threats with Mr. Hinson that morning. (R. p. ___; Tr. p. 645, ll. 11-19);
- Mr. Thomas was known to carry a pistol. (R. p. ___; Tr. p. 646, ll. 8-16; p. 669, ll. 5-7);
- At the time of the incident, when Mr. Salley saw Mr. Hinson walking, Mr. Salley removed his jacket and rushed at Mr. Hinson in a threatening manner. (R. p. ____; Tr. p. 180, ll. 24-25; p. 648, ll. 4-6; p. 700, ll. 13-14; p. 702, ll. 13-16);
- Mr. Hinson was at the bottom of an incline, and Mr. Salley ran down from the top of the hill towards him. (R. p. ___; Tr. p. 186, ll. 22-26);
- Mr. Salley was a larger man than Mr. Hinson. (R. p. ___; Tr. p. 727, ll. 14-17); and

- Mr. Hinson was afraid. (R. p. ____; Tr. p. 648, ll. 7-11 and 21-25; p. 704, ll. 17-20).

Each and every one of the above facts occurred before Mr. Hinson ever displayed his firearm.

The State then moves to the second possibility of Mr. Hinson lawfully being armed in self-defense, when the fistfight between Mr. Hinson and Mr. Salley was over and Mr. Hinson retrieved the weapon that Mr. Salley had earlier knocked from his hand. The State again resorts to its misconstrued *Slater* language to argue Mr. Hinson is "obscuring the factual timeline" and more alarmingly "[i]f 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 at any time they faced danger, regardless of their role in creating the danger." (Brief of Respondent p. 30).

The facts of this case stand alone. Mr. Hinson is not arguing all future appeals, just as he is not arguing post-conviction relief policy or the funding of the judicial branch. He is arguing his own appeal based on controlling law, and that law mandates his receipt of a charge of involuntary manslaughter.

B. The State Improperly Attempts To Equate Being Armed In Self-Defense With Acting In Self-Defense.

The State spends considerable effort attempting to show that Mr. Hinson was not acting in self-defense (Brief of Respondent pp. 31-35) and therefore "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." (*Id.* at p. 35). Acting in self-defense and being lawfully armed in self-defense are two separate things, and the State does not cite any authority for the requirement that

one can only be lawfully armed in self-defense if one is acting in self-defense/is entitled to a charge of self-defense.[10] *State v. Brayboy*, 387 S.C. 174, 182, 691 S.E.2d 482, 487 (Ct. App. 2010) (*State v. Light*, 378 S.C. 641, 647-648, 664 S.E.2d 465, 468 (2008), "makes it clear the question is not whether one is **acting** in self-defense at the time of the shooting, but whether the defendant is **lawfully armed** at the time of the shooting. Therefore, whether a defendant is entitled to a self-defense charge is of no consequence") (emphasis in original).

C. The State Improperly Ignores Evidence Regarding A Third Party's Conduct.

Perhaps most surprisingly, the State attempts to force the analysis to be solely in the context of Mr. Hinson and Mr. Salley, arguing "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." (Brief of Respondent p. 31). In so arguing, the State waits until the very last page of its brief – indeed, the penultimate paragraph before its one sentence conclusion – to address the conduct by Mr. Salley's girlfriend Andina Lee.

During the fistfight between Mr. Hinson and Mr. Salley, the pistol was lying on the ground where it had fallen after being knocked out of Mr. Hinson's hand. (R. p. ____; Tr. p. 219, ll. 17-21). The pistol was on the ground in an area not close to where the men were fighting. (R. p. ____; Tr. p. 145, ll. 4-20). Mr. Salley's girlfriend Andina Lee went over to where the gun was lying on the ground and picked it up. (R. p. ___; Tr. p. 125, ll. 21-22; p. 127, ll. 10-11; p. 145, ll. 21-23; p. 478, ll. 17-19).

[10] Again, in this case, the prosecution consented to a self-defense charge for Mr. Hinson.

She did not pick it up for safekeeping. She affirmatively pointed the gun at Devan Bailey, a witness, demanding the fight stop. (R. p. ___; Tr. p. 125, ll. 21-24; p. 182, ll. 6-8). She admitted her intent in grabbing the gun was "just really to scare [Mr. Hinson] . . ." (R. p. ____; Tr. p. 127, ll. 15-16). To make sure Mr. Hinson knew how serious she was,[11] she yelled "get the fuck back" three times and told Mr. Bailey if he moved she was going to shoot him. (R. p. ____; Tr. p. 147, l. 17 – p. 148, l. 11; p. 183, ll. 14-22). Mr. Bailey was afraid and ran away. (R. p. ___; Tr. p. 483, ll. 21-24; p. 484, ll. 7-8; p. 485, ll. 7-8).

As the fight ended, Mr. Hinson saw Ms. Lee pointing the pistol, which she then threw on the ground. (R. p. ____; Tr. p. 650, ll. 7-14). Mr. Hinson then realized (a) Mr. Salley knew where he was, having seen Mr. Hinson come from his girlfriend's house, and could act on that information including telling his friend Mr. Thomas (known to carry a gun and with whom Mr. Hinson had exchanged threats that day); (b) Ms. Lee had the wherewithal to pick up the pistol the first time and use it in a threatening manner, and she Lee could pick up the pistol a second time and take further action; (c) Mr. Salley – fresh off a loss in a fistfight but already up and moving – could pick up the pistol and take revenge. (R. p. ____; Tr. p. 650, l. 9 – p. 652, l. 7).

Mr. Hinson was lawfully armed in self-defense when he negligently handled the firearm, and he was entitled to a charge of involuntary manslaughter.

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[11] Mr. Hinson "heard some commotion going on the whole time." (R. p. ____; Tr. p. 650, ll. 8-9). Presumably Mr. Bailey was aware of the seriousness of the situation due to the pointing of a pistol at his person.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 8th day of May, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 8th day of May, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013 .