STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVONTAY HENSON,

APPELLANT

Appellate Case No. 2011-204008

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in admitting into evidence a statement made by Appellant's non-testifying co-defendant without adequately redacting his claim of Appellant's involvement in violation of Appellant's Sixth Amendment right to confront and cross-examine the witness, as interpreted by Bruton v. United States, 391 U.S. 123 (1968), and its progeny?

II. Did the trial court violate Appellant's Sixth and Fourteenth Amendment rights to confrontation and cross-examination pursuant to Crawford v. Washington, 541 U.S. 36 (2004) by allowing into evidence the statement of Appellant's non-testifying co-defendant implicating Appellant in the murder and armed robberies?

III. Did the trial court's failure to sever the trials of Appellant and his co-defendant violate Appellant's right to confront his accusers in light of the trial court's admission of the co-defendant's redacted statement to police inculpating Appellant and the co-defendant's refusal to testify?

IV. Did the trial judge err as a matter of law by removing Juror #79 after he was selected to serve on the jury when the judge failed to inquire of Juror #79 what information he had and failed to make a determination as to whether the juror intentionally concealed the unknown information, and if so, whether the unknown information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges?

STATEMENT OF THE CASE

A York County Grand Jury indicted Petitioner for murder, three counts of armed robbery, assault and battery with intent to kill (ABWIK), criminal conspiracy, and five counts of possession of a firearm during the commission of a violent crime. Indictments; R. 3, ll. 11-25. The Grand Jury indicted Petitioner's co-defendant, Donta Reid, of the same offenses. R. 4, ll. 2-11. Petitioner and his co-defendant proceeded to a joint trial during the week of November 14, 2011 before the Honorable John C. Hayes, III. Derek S. Chiarenza represented Petitioner. Melissa Inzerillo and Ashley Anderson represented the co-defendant. Kevin Brackett and Willie Thompson prosecuted the cases. R. 1. The jury found Petitioner guilty as charged. R. 862, l. 15 – R. 863, l. 12; R. 865, ll. 1-20. Judge Hayes sentenced Petitioner to life for murder, twenty years for ABWIK, thirty years on each count of armed robbery, and five years on each count of possession of a firearm during the commission of a violent crime. All of the sentences were ordered to run concurrently. R. 879, l. 2 – R. 880, l. 17.

This brief timely follows.

STATEMENT OF FACTS

Prior to the start of trial, the trial judge explained that Appellant had moved for severance. The judge explained this motion would be heard "at some point." Supp. R. 1, ll. 13-14. Additionally, the trial judge explained that Appellant moved to suppress the fourth statement made by his codefendant because the statement inculpated Appellant. Supp. R. 1, ll. 15-19.

Jury Selection

The court then proceeded to jury selection. When the case was called for trial, the trial judge engaged in voir dire of the jury. R. 2, l. 15 – R. 15, l. 20. After introducing the jury to Appellant and his co-defendant, stating the names of the alleged victims in the case, giving an explanation of the charges, and providing the address for the incident location, Judge Hayes asked the jury venire if anyone knew anything about the case. Specifically, the judge asked,

> You've been introduced to the defendants and the alleged victims and the place where this happened in the day. Do any of you know anything about this case? Have any of you heard about it from any source whatsoever? Or have any of you formed or expressed any opinion about any matter or issue which would be involved in this case. If so, please stand.

R. 6, ll. 1-7. One juror, Bill Berry, Juror #18, responded affirmatively. As a final question, Judge Hayes asked the jury panel: "Do any of you know of any reason whatsoever why you could not or should not serve as a fair and impartial juror on the trial of this particular case; if so, please stand." R. 15, ll. 16-19. No one responded. R. 15, l. 19. The parties then struck the jury. R. 16, l. 22 – R. 26, l. 12. During the selection process, Juror #79, Dwight Gilmore, was chosen as a juror. R. 21, l. 24 – R. 22, l. 7.

Prior to Judge Hayes administering the oath, Juror #79 informed the court he had information on the case as a result of a "case study" he prepared for an online class with Waller University. R. 29, ll. 6-9. When the judge explained that he had asked if anyone had any

knowledge or information about the case, Juror #79 responded "[n]ot as much as - - It was, like, in a discussion. It wasn't...." After dismissing the jury panel, the judge turned to the parties to "deal with the juror." R. 31, ll. 5-6. The prosecution asked for individual voir dire with the juror "to determine what information he has, and whether or not it will affect his ability to be impartial." R. 31, ll. 7-10. The co-defendant responded, "I agree with that, Your Honor. But, I would also add that surely had we had this information prior to the selection, it may have affected our selection. So, we would ask that he either be substituted or voir dired." R. 31, ll. 12-16 (emphasis added). Appellant responded,

> Your Honor, I'd like to hear what he's got to say first as to whether or not he can still be fair or impartial. I wasn't quite sure exactly what his exposure to this case was or how, particularly since the case hasn't been adjudicated, what - - Well, I don't know, I just think - - I agree with the Solicitor, Your Honor, before I would be inclined to make any motion as to what to do with him.

R. 31, ll. 18-25.

To this request, the judge replied "Well, the problem with that is that [co-defendant's counsel]'s already told me that if she had had this knowledge, she would have exercised her strike. And she'd have been permitted to exercise her strike. Whatever he says, we can't cure that." R. 32, ll. 1-5. The prosecution then consented to removing the juror and replacing him with an alternate. R. 32, ll. 6-8. Afterwards, the judge excused Juror #79 from the panel because he had "some previous knowledge about it." He went on to explain that he could not allow the juror to remain because "as hard as you tried, **I know you would be fair and honest**, it's still hard to block things out of your mind that are in there." R. 33, ll. 10-22 (emphasis added). Thereafter, Appellant expressed his approval of the jury that included Juror #79. R. 34, ll. 14-16.

Pretrial motions

After selecting a jury, the parties returned to Appellant's motion to sever the trials. Appellant explained that he and his co-defendant planned to present antagonistic defenses. Additionally, Appellant explained that the statement made by the co-defendant implicated Appellant in the murder and armed robberies. Appellant further explained that even if the prosecution were to redact the statement by his co-defendant, this would not be sufficient to protect Appellant's rights. Appellant explained that the jurors would not be required to make "much of a leap" to "read between the lines" and learn that the co-defendant's statement referred to Appellant. Thus, the statement, even in a redacted form, deprived Appellant of his fundamental right to a fair trial. R. 40, l. 6 – R. 41, l. 5. Appellant made clear that his argument was based upon his right "to confront and cross examine witnesses against him." He also explained that he anticipated the co-defendant would not testify. R. 42, l. 18, R. 43, l. 2.

The prosecution countered that Appellant had shown no "real prejudice." He further argued that judicial economy favored a joint trial. Concerning the statement made by the co-defendant, the prosecution argued the parties could come to a "very good and successful conclusion on how to redact" it. R. 41, ll. 7-25. The prosecutor explained to the judge that the co-defendant gave three statements in which he told officers that Darius Jeter was involved in the crimes. By the fourth statement, the co-defendant "clear[ed] Mr. Jeter" and named everyone else, including Appellant. Again, the prosecutor argued he could "correct any Bruton issue with the redactions" proposed. R. 42, ll. 1-15.

Upon the request of the trial judge, the prosecution read the statement of the co-defendant into the record. App. 67, l. 9 – App. 71, l. 4. The statement made repeated references to Appellant. The prosecution then read the statement in its proposed redacted form. According to the prosecutor,

the redacted statement contained "no blanks or lines that [were] struck through." He further explained the statement had "been seamlessly put together so that it appears as if it hasn't been altered at all." App. 71, l. 6 – 75, l. 7. Essentially, the prosecution changed Appellant's name to "the guy."

Turning to the matters of law presented, the trial judge explained that the severance motion was predicated upon the Bruton matter. R. 51, ll. 13-14. The prosecution argued the redactions were not "obvious" because there were "no blanks," "no blacked out spaces," and "no large gaps in between paragraphs or sentences or things like that." The prosecutor explained that in State v. Holder, 382 S.C. 278, 676 S.E.2d 690 (2009), the Supreme Court held replacing the defendant's name with "she" failed to satisfy Bruton "because by looking at the statement on its face, everyone knew it was still meaning this particular defendant." The prosecution then attempted to distinguish the facts from Holder from the facts in the instant case by stating that in Holder, there was only one female involved, therefore, when the statement referred to "she," it obviously referred to the defendant. However, in the instant matter, there was more than one "guy" involved. The state explained that two guys had been charged. The prosecution referred to Darius Jeter who had been implicated in the co-defendant's first three statements; however, the fourth statement states the group saw Jeter, but just passed him by. The fourth statement exonerated Jeter. R. 52, l. 2 – R53. 77, l. 5.

Along those same lines, the prosecution argued that with the redactions, "you can't discern who in the world he's talking about" because he could be talking about "any number of people." The group gathered at the house of one of the female co-defendants and "you don't know who other people will be there." Additionally, the evidence would show that Elijah James was a black male who was at the house, but did not participate in the crime. The prosecutor relied upon State v.

Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010) to support his position. He argued that in Johnson, the investigator testified that after obtaining the statement from a non-testifying witness, which was admitted in a redacted form, the investigator then charged the defendant. Thus, it was "obvious" that the redacted portions of the statement referred to the defendant. The prosecutor countered that he would not present evidence that investigators issued an arrest warrant after obtaining the co-defendant's statement because the investigators were aware of Appellant's involvement based upon a statement from one of the females involved. The prosecution then circled back to the fact that the co-defendant had named other people as he went along, leaving "a wide variety of other people that this other person can be." R. 53, l. 6 – R. 56, l. 1.

Appellant argued introduction of the statement denied him his right to confront the witnesses against him, a substantial right under the Constitution. Additionally, Appellant was incredulous that the jury would "just plug in anybody" into the redacted statement in light of the prior statements and the fact that Appellant and the co-defendant were on trial together. R. 56, l. 22 – R. 57, l. 22.

Nevertheless, the trial judge held the redacted statement satisfied "the current status of the law." Thus, the judge found no violation of the Confrontation Clause, and found that "[n]o Bruton violations [would] occur as by use of the state's production of the redacted statements." Based upon these rulings, the judge denied Appellant's motion to sever the trials. R. 57, l. 23 – R. 58, l. 13.

Testimony of Tim Ayers

The prosecution called Tim Ayers, a detective with the Rock Hill Police Department to testify. Ayers testified that the morning after the robbery and murder, he and Herring went to the incident location to interview one of the victims, Maurice Jackson. R. 270, ll. 8-14. Based upon their discussion with Jackson, the detectives determined they needed to talk to the co-defendant. R.

282, ll. 14-16. Initially, the co-defendant admitted to stopping by Jackson's home, making a phone call, and then proceeding to the home of another friend. R. 284, l. 22 – R. 285, l. 2. Through their investigation, the detectives learned the co-defendant had not arrived at the home of another friend after leaving Jackson's. R. 286, ll. 2-21. The detectives then obtained a written statement from the co-defendant. In the statement, the co-defendant indicated "Duke" asked him if he knew anyone who had any money or weed, to which the co-defendant responded that Jackson did. The co-defendant went to Jackson's home and called Duke to report the number of people at the residence. The co-defendant then left the residence to meet up with Duke. He observed Duke, who was armed with a .22 caliber rifle, walking toward Jackson's home. A short time later, he heard shots. R. 297, l. 8 – R. 298, l. 17.

Ayers identified Duke as Darius Jeter. After obtaining this statement from the co-defendant, the detectives began looking for Jeter. R. 298, l. 24 – R. 299, l. 6. Later that day, officers arrested Jeter. R. 299, l. 19 – R.300, l.1. After learning what Jeter stated to officers, Ayers approached the co-defendant again. R. 300, ll. 8-13. The co-defendant gave another written statement in which he continued to implicate Duke, but included the involvement of a female named Sam. R. 305, l. 25 – R.308, l. 22. Ayers testified that as a result of what the co-defendant said in this statement, officers interviewed Samantha Ervin. R. 309, l. 24 – R. 310, l. 7. Additionally, the charges against Jeter relating to the murder and armed robbery were dismissed because the investigation revealed Jeter was not involved. R. 341, ll. 3-8.

Testimony of Leslie Herring

Detective Leslie Herring testified on behalf of the state. Herring testified that after learning from Jeter that he had seen the co-defendant with Samantha Ervin on the evening of the incident, the detectives interviewed the co-defendant a third time. R. 460, ll. 12-18. In his third written

statement, the co-defendant implicated Ervin in the robbery and murder. R. 463, l. 24 – R. 464, l. 6. Officers then issued warrants for Ervin's arrest. R. 464, ll. 20-22. Several days later, Ervin gave a statement to Detective Herring. R. 466, ll. 23-24. At that point, Herring obtained warrants on Appellant and Aileen Newman. R. 467, ll. 6-9.

Detective Herring spoke to the co-defendant a fourth time. R. 467, ll. 10-15. The prosecution offered the fourth statement into the record. R. 471, ll. 24 – 25. Appellant renewed his prior objections, which were overruled. R. 472, ll. 2-9. Detective Herring then read the statement, as it had been redacted, to the jury. R. 474, l. 13 – R. 478, l. 5.

ARGUMENT

I. The trial court erred in admitting into evidence a statement made by Appellant's non-testifying co-defendant without adequately redacting his claim of Appellant's involvement in violation of Appellant's Sixth and Fourteenth Amendments rights to confront and cross-examine the witness, as interpreted by *Bruton v. United States*, 391 U.S. 123 (1968), and its progeny.

The Confrontation Clause of the Sixth Amendment, as applied to the states through the Fourteenth Amendment, guarantees criminal defendants the right to confront and cross-examine witnesses against them. Richardson v. Marsh, 481 U.S. 200, 206 (1987). The United States Supreme Court held that admission of a non-testifying co-defendant's statement that expressly inculpates the defendant violates the defendant's Confrontation Clause in a joint trial. Bruton v. United States, 391 U.S. 123, 136-137 (1968). Additionally, a limiting instruction is not sufficient to remove any prejudice to the defendant. Id. The Supreme Court recognized that in some cases the use of redactions may comply with Bruton. Richardson, 481 U.S. at 208-209.

Examining this issue again, the Supreme Court held that redactions that are simply replacements of the defendant's name with a blank space, a symbol, or a word such as "deleted," are not sufficient. Gray v. Maryland, 523 U.S. 185, 197 (1998). The Court explained the necessity of looking at the kind of inferences necessary to connect the defendant, not the fact of the existence of the inference, in order to determine the applicability of Bruton. Id. at 196. In Gray, the inferences drawn from the statements, even in redacted form, "obviously refer[red] directly to someone, often obviously the defendant, and which involve[d] inferences that a jury ordinarily could make immediately." Id. at 196. Such statements are forbidden under Bruton. Id. at 196-197.

In Holder, 382 S.C. at 285-286, 676 S.E.2d at 694, the South Carolina Supreme Court held a trial court erred in admitting a statement by Holder's non-testifying co-defendant concerning

injuries to the victim where the statement was redacted to replace the defendant's name with "she." The "jury could readily determine that the statement referred to her as she was the only female defendant." Id. In a similar case, State v. Johnson, 390 S.C. 600, 703 S.E.2d 217 (2010), our Supreme Court held the trial court erred in admitting a redacted statement by a non-testifying co-defendant in which a nickname was blacked out with magic marker. The redaction eliminated the words "and Knock." Id. at 605, 703 S.E.2d at 219. Although no evidence was introduced to indicate the defendant was known as "Knock," the statement clearly referred to another person. Additionally, the officer testified that based on this statement, he arrested the defendant. Id. at 606, 703 S.E.2d at 220. This "effectively told the jury that [the co-defendant]'s unredacted statement named [the defendant]." Id.

Although not directly on point, our Supreme Court noted "[i]t [could] be forcefully argued that the method of redacting was ineffective" where the statement was redacted to replace the defendant's name with "Mister X." State v. LaBarge, 275 S.C. 168, 170, 268 S.E.2d 278, 280 (1980). As the other testimony unfolded, "Mister X" pointed directly to the defendant. Id. The Court held it was error for the trial judge to refuse to withdraw the statement from evidence after the non-testifying co-defendant changed his plea from not guilty to guilty. Id. at 171, 268 S.E.2d at 280.

In State v. McDonald, Op. No.5033 (S.C. Ct. App. filed September 12, 2012), this Court found no error in admitting the statement of the defendant's non-testifying co-defendant in light of the redaction, which replaced the names of all co-defendants with "another person." This Court found the phrase "another person" to be neutral. Additionally, the Court reasoned that the redacted statement only implicated its maker and did not limit the participants to three, which would implicate the three defendants on trial. Id.

Bruton and its progeny prohibit the admission of the redacted statement at issue in the instant matter. The redaction was not gender neutral as it identified the shooter as a male, by using the term "the guy." The statement, even in its redacted form, limited the participants to four people, two of whom testified against the defendants and were named specifically in the fourth statement, leaving the remaining two on trial – the confessor and Appellant. The co-defendant's first three statements were admitted in an unredacted form, naming Darius Jeter. Even in the fourth statement, Jeter's name appears as someone the group of four passed on the street while on the way to the murder. The obvious inference for the jury to draw was that "the guy" named in the fourth statement was not Darius Jeter, but was Appellant.

II. The trial court violated Appellant's Sixth and Fourteenth Amendment rights to confrontation and cross-examination pursuant to Crawford v. Washington, 541 U.S. 36 (2004) by allowing into evidence the statement of Appellant's non-testifying co-defendant implicating Appellant in the murder and armed robberies.

In Crawford v. Washington, 541 U.S. 36, 50-51 (2004), the United States Supreme Court held that testimonial out-of-court statements are not admissible under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Statements given to police during the course of the investigation are testimonial. Davis v. Washington, 547 U.S. 813 (2006); see also State v. Stokes, 381 S.C. 390, 401, 673 S.E.2d 434, 439 (2009).

In light of the Bruton violation presented in this case, the co-defendant's redacted statement, which was admitted into evidence, was a testimonial out-of-court statement used as evidence against Appellant. Due to the co-defendant's exercise of his right not to testify, he was unavailable as a witness and Appellant had no prior opportunity to cross-examine the co-defendant. Thus, Appellant's Sixth and Fourteenth Amendment rights to cross-examine and confront the witnesses against him were violated by the introduction of the co-defendant's redacted statement.

III. The trial court's failure to sever the trials of Appellant and his co-defendant violated Appellant's right to confront his accusers in light of the trial court's admission of the co-defendant's redacted statement to police inculpating Appellant and the co-defendant's refusal to testify.

"A motion for severance is addressed to the sound discretion of the trial court." State v. Harris, 351 S.C. 643, 652, 572 S.E.2d 267, 272 (2002); State v. Simmons, 352 S.C. 342, 350, 573 S.E.2d 856, 860 (Ct. App. 2002). "The trial court's ruling will not be disturbed on appeal absent an abuse of that discretion." State v. Rice, 368 S.C. 610, 613, 629 S.E.2d 393, 394 (Ct. App. 2006); see also State v. Tucker, 324 S.C. 155, 164, 478 S.E.2d 260, 265 1996). "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Rice, 368 S.C. at 613, 629 S.E.2d at 395; see also State v. Lopez, 352 S.C. 373, 378, 574 S.E.2d 210, 212 (Ct. App. 2002). "A severance should be granted only when there is a serious risk that a joint trial would compromise a specific trial right of a codefendant or prevent the jury from making a reliable judgment about a codefendant's guilt." State v. Walker, 366 S.C. 643, 657, 623 S.E.2d 122, 129 (Ct. App. 2005); see also Harris, 351 S.C. at 652-653, 572 S.E.2d at 273; State v. Dennis, 337 S.C. 275, 282, 523 S.E.2d 173, 176 (1999). "A defendant who alleges he was improperly tried jointly must show prejudice before an appellate court will reverse his conviction." State v. Halcomb, 382 S.C. 432, 440, 676 S.E.2d 149, 153 (Ct. App. 2009)(citing Dennis, 337 S.C. at 281, 523 S.E.2d at 176; State v. Thompson, 279 S.C. 405, 408, 308 S.E.2d 364, 366 (1983)).

In Bruton, 391 U.S. 135-137, the United States Supreme Court held that an example of a specific trial right that may be prejudiced due to a joint trial is the constitutional right to cross-examination when a co-defendant's confession expressly implicates another co-defendant, but the confessor fails to testify during the trial. A curative instruction cannot remedy this violation. Id.

Thus, the trial court violated Appellant's rights by refusing to grant his motion for severance and introducing the statement of his non-testifying co-defendant. No physical evidence connected Appellant to the crimes. The victims were unable to identify Appellant as the shooter. All of the evidence against Appellant resulted from the testimony of cooperating co-defendants.

IV. The trial judge erred as a matter of law by removing Juror #79 after he was selected to serve on the jury when the judge failed to inquire of Juror #79 what information he had and failed to make a determination as to whether the juror intentionally concealed the unknown information, and if so, whether the unknown information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges.

The trial court erred as a matter of law in excusing Juror #79 without engaging in individual voir dire concerning the juror's alleged prior knowledge of the case, without inquiring whether the juror could remain fair and impartial, and by removing the juror based upon co-defendant's counsel's representation that knowing the juror had prior knowledge of the case **may** have influenced her selection process. When considering whether to remove a juror for failure to disclose information during voir dire, the trial judge must first determine whether the juror intentionally concealed the information. If the judge determines the juror intentionally concealed information, then the judge must determine if the concealed information 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); State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 106 (1998); State v. Woods, 345 S.C. 583, 587-588, 550 S.E.2d 282, 284 (2001); State v. Burgess, 391 S.C. 15, 19, 703 S.E.2d 512, 514 (Ct. App. 2010). The trial judge in the instant case failed to conduct the proper legal analysis and applied the wrong legal analysis concerning the removal of Juror #79.

"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, 101-102 (Ct. App. 2004)(quoting State v. Sparkman, 358 S.C. 491, 496, 596 S.E.2d 375, 377 (2004)). If the question presented

during 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," then the juror intentionally concealed the information. Id.; see also Woods, 345 S.C. at 588, 550 S.E.2d at 284. However, a juror's failure to respond is reasonable if the question posed is "ambiguous or incomprehensible to the average juror" or if the subject matter is insignificant or if the subject matter is so far removed in time. Id. "Where the juror's failure to disclose information is 'without justification,' i.e., intentional, the juror's bias will be inferred." However, if the failure to disclose is not intentional, then no inference of bias may be drawn. Woods, 345 S.C. at 589, 550 S.E.2d at 285; see also State v. Savage, 306 S.C. 5, 8, 409 S.E.2d 809, 810 (Ct. App. 1992).

It is not enough that information be intentionally concealed. Rather, removal is appropriate only when the concealed information would have supported a challenge for cause, or would have been a material factor in the use of the party's peremptory challenges. Thus, "[t]he inquiry must focus on the character of the concealed information, not on the mere fact that a concealment occurred." Thompson, 288 S.C. at 15, 339 S.E.2d at 506. As explained by the Court, whether a basis for disqualification exists depends on the circumstances of each case. Id.

Applying the analysis outlined in Woods, the South Carolina Supreme Court held the trial court abused its discretion in removing a juror during the sentencing phase of a capital trial. State v. Stone, 350 S.C. 442, 448, 567 S.E.2d 244, 247 (2002). The prosecution called the defendant's aunt to testify. When the aunt appeared, a juror informed the court that she knew the aunt. The juror did not know the aunt's name, and as a result, did not respond affirmatively when the question was posed during voir dire. The juror stated she lived down the street from the aunt five or six years prior to the trial, and described the relationship between the two as casual acquaintances. Further, the juror indicated the relationship would not affect her ability to be fair and impartial. At the

conclusion of the questioning, the prosecutor objected to the juror's continued participation because "it would be difficult for her to impose a death sentence on a former acquaintance's nephew." The trial judge removed the juror and replaced her with an alternate. Id. The Court held the failure to disclose the relationship with the aunt by the juror was obviously innocent, and 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." Id., at 448, 567 S.E.2d at 247-248.

In Smith v. State, 375 S.C. 507, 519, 654 S.E.2d 523, 529 (2007), the Supreme Court held a juror's silence when asked if any member of the juror pool was related by blood or marriage or a close personal friend of the defendant where the juror knew the defendant from a prior incarceration. Similarly, the Supreme Court held a juror had not intentionally concealed his involvement in a death rally to support the execution of Terry Roach where the juror had not been asked about his participation in a death penalty rally. Kelly, 331 S.C. at 144, 502 S.E.2d at 105-106. The Court held that asking the juror about his "position" on the death penalty would not prompt the juror the respond with his involvement in the rally. Id., at 146, 502 S.E.2d at 107. In another case, the Supreme Court held a juror's failure to disclose knowing the estranged wife of the victim because she supervised the estranged wife's brother at work was innocent. Burgess, 391 S.C. at 20, 703 S.E.2d at 514.

On the other hand, the South Carolina Supreme Court found a juror intentionally concealed her status as a former volunteer victims' advocate in the solicitor's office that prosecuted the case where the questions on voir dire were reasonably comprehensible and unambiguous. During voir dire, the judge asked if anyone had a business relationship with any of the lawyers involved in the case and whether anyone contributed to or supported any organization which had a primary function of promotion of victims' rights. Woods, 345 S.C. at 589-590, 550 S.E.2d at 285. The

juror offered inconsistent explanations for her concealment and she answered affirmatively to a similar question during voir dire at a later trial during the same term of court. Id.

In Woods, the Court determined the juror's failure to disclose her relationship with the prosecution "prevented the [defendant]'s intelligent exercise of his peremptory challenges" where the defendant's trial attorney stated that he would have exercised a peremptory strike had he known of the juror's relationship. Id. at 590, 550 S.E.2d at 285-286As a result, it was unnecessary for the Court to determine whether the concealed relationship would have supported a challenge for cause. Id. at 590, 550 S.E.2d at 285.

Conducting the proper analysis in the instant case is impossible in light of the trial judge's application of the wrong legal standard and his refusal to permit individual voir dire as requested by Appellant, the co-defendant, and the prosecution. Answering whether the concealment were intentional requires an intensive and comprehensive review of the facts, which is not possible. Although the judge asked if anyone had any information whatsoever, the type of information held by Juror #79 is unknown, therefore, determining whether the concealment were intentional based upon the question and the limited information disclosed by the juror prior to removal is not possible. Even if this Court were to determine the concealment were intentional, in order to remove the juror, the second part of the analysis must be answered affirmatively as well. The next step in the analysis requires answering whether the concealed information would have supported a challenge for cause or would have been a material factor in the use of the party's peremptory challenges. In light of the limited record available, the information concealed would not have supported a challenge for cause. Juror #79 said he had some knowledge of the case due to an online course he was taking. He explained his knowledge of the case was the result of a discussion. Additionally, the trial judge explained that the knew the juror would be fair, but that it would be hard to to block things from his

mind. Finally, the record is clear that the concealed information would not have been a material factor in the use of a peremptory challenge as counsel for the co-defendant said knowing the juror had prior knowledge of the case may have influenced jury selection.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand the matter for a new trial.

Respectfully submitted,

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Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of May, 2013.

CERTIFICATE OF COUNSEL

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

May 13th, 2013

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from York County

John C. Hayes, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVONTAY HENSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Brendan McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 13th day of May, 2013.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
~~this~~ 13th day of May, 2013.

_____(L.S.)
Notary Public for South Carolina

My Commission Expires: July 24, 2022.