



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211  
TELEPHONE: (803) 734-1080  
FAX: (803) 734-1499

## NOTICE

IN THE MATTER OF JAMES C. SEXTON, JR., PETITIONER

Petitioner was disbarred from the practice of law, retroactive to March 22, 2005. In the Matter of Sexton, 377 S.C. 402, 661 S.E.2d 60 (2008). Petitioner has now filed a petition seeking to be readmitted.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness  
P. O. Box 11330  
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina  
May 16, 2011



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211  
TELEPHONE: (803) 734-1080  
FAX: (803) 734-1499

## NOTICE

### IN THE MATTER OF WILLIAM H. JORDAN, PETITIONER

Petitioner, who practiced law in Charleston, South Carolina, was definitely suspended from the practice of law for nine months. In the Matter of Jordan, 385 S.C. 614, 686 S.E.2d 682 (2009). Subsequently, he was definitely suspended for eighteen months, retroactive to October 26, 2009. In the Matter of Jordan, \_\_\_S.C.\_\_\_, 723 S.E.2d 586 (2012). Petitioner has now filed a petition seeking to be reinstated.

Pursuant to Rule 33(e)(2) of the Rules for Lawyer Disciplinary Enforcement contained in Rule 413 of the South Carolina Appellate Court Rules, notice is hereby given that members of the bar and the public may file a notice of their opposition to or concurrence with the petition. Comments should be mailed to:

Committee on Character and Fitness  
P. O. Box 11330  
Columbia, South Carolina 29211

These comments should be received within sixty (60) days of the date of this notice.

Columbia, South Carolina  
May 16, 2012

# The Supreme Court of South Carolina

In the Matter of Michael J.  
Pitch,

Petitioner.

---

## ORDER

---

The records in the office of the Clerk of the Supreme Court show that on September 22, 2010, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk, South Carolina Supreme Court, received April 18, 2012, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Michael J.

Pitch shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.  
s/ Costa M. Pleicones J.  
s/ Donald W. Beatty J.  
s/ John W. Kittredge J.  
s/ Kaye G. Hearn J.

Columbia, South Carolina

May 18, 2012

Cc: South Carolina Bar  
Commission on Continuing Legal Education  
U. S. District Court  
Commission on Lawyer Conduct  
Supreme Court Office of Bar Admissions

# The Supreme Court of South Carolina

In the Matter of Leigh Davis Fickling, Petitioner.

Appellate Case No. 2012-210966

---

## ORDER

---

The records in the office of the Clerk of the Supreme Court show that on November 17, 2008, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk, South Carolina Supreme Court, received April 10, 2012, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Leigh Davis Fickling shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

May 18, 2012

cc: Leigh Davis Fickling  
South Carolina Bar  
Commission on Continuing Legal Education  
U. S. District Court  
Commission on Lawyer Conduct  
Supreme Court Office of Bar Admissions



**OPINIONS**  
**OF**  
**THE SUPREME COURT**  
**AND**  
**COURT OF APPEALS**  
**OF**  
**SOUTH CAROLINA**

---

**ADVANCE SHEET NO. 18**  
**May 23, 2012**  
**Daniel E. Shearouse, Clerk**  
**Columbia, South Carolina**  
[www.sccourts.org](http://www.sccourts.org)

**CONTENTS**  
**THE SUPREME COURT OF SOUTH CAROLINA**  
**PUBLISHED OPINIONS AND ORDERS**

None

**UNPUBLISHED OPINIONS**

2012-MO-016 – State v. Sara Nicette Fastiggi  
(Berkeley County, Judge Kristi Lea Harrington)

**PETITIONS – UNITED STATES SUPREME COURT**

26805 – Heather Herron v. Century BMW	Pending
2011-OR-00625 – Michael Hamm v. State	Pending

**UNITED STATES SUPREME COURT—EXTENSION OF TIME**

27013 – Carolina Chloride v. Richland County	Granted until 5/25/2012
27081 – State v. Jerry Buck Inman	Granted until 6/11/2012

**PETITIONS FOR REHEARING**

27112 – Marilee Fairchild v. SCDOT	Pending
27113 – City of N. Myrtle Beach v. East Cherry Grove Realty	Pending
27115 – Hook Point v. Branch Banking and Trust	Pending
27117 – In the Matter of Michael E. Atwater	Pending
2011-MO-038 – James Peterson v. Florence County	Pending



## **The South Carolina Court of Appeals**

### **PUBLISHED OPINIONS**

4976-James T. Judy and Bobby Judy v. S. Scott Kennedy and Beau D. Kennedy 20

4977-The State v. Phillip Miller 28

### **UNPUBLISHED OPINIONS**

2012-UP-313-State v. Terrelle Chandler  
(Charleston, Judge Roger M. Young)

2012-UP-314-Grand Bees Development v. SCDHEC and the County of  
Charleston  
(Charleston, Judge Roger M. Young)

2012-UP-315-State v. Kevin Tijuan Hardy  
(Greenville, Judge G. Edward Welmaker)

2012-UP-316-Elizabeth M. Zetz v. Michael R. Zetz  
(Richland, Judge Robert S. Armstrong)

2012-UP-317-Creative Communications Services, Inc., v. Travelers Property  
Casualty Company of America and PAD Able Inc., d/b/a Harold Beard  
Agency  
(Richland, Judge Alison Renee Lee)

### **PETITIONS FOR REHEARING**

4920-State v. R. Taylor Pending

4937-Solley v. Navy Federal Credit Union Pending

4939-Cranford v. Hutchinson Const. Pending

4944-Consumer Adv. V. SCDI Pending

4950-Flexon v. PHC Pending

4953-CarMax Auto Superstores v. SCDOR Pending

4957-State v. J. McKerley	Denied 05/21/12
4958-State v. D. Jenkins	Pending
4960-Lucey v. Meyer	Pending
4961-Ex parte Lipscomb (Hollis v. Stone)	Pending
4962-Wachovia Bank v. Beane	Pending
4963-State v. M. Hoyle	Pending
4965-State v. S. Miller	Pending
4966-State v. A. Mahammed	Pending
2011-UP-558-State v. T. Williams	Pending
2012-UP-025-Barnes v. Charter 1 Realty	Pending
2012-UP-078-Tahaei v. Smith	Pending
2012-UP-107-Parker v. Abdullah	Pending
2012-UP-134-Coen v. Crowley	Pending
2012-UP-152-State v. K. Epting	Pending
2012-UP-165-South v. South	Pending
2012-UP-182-Guerry v. Agnew (Century 21)	Pending
2012-UP-187-State v. J. Butler	Pending
2012-UP-197-State v. L. Williams	Pending
2012-UP-202-State v. J. Robinson	Pending
2012-UP-203-State v. D. Leggette	Pending
2012-UP-214-State v. G. Salisbury	Pending

2012-UP-218-State v. A. Eaglin	Pending
2012-UP-219-Hill v. Deertrack Golf	Pending
2012-UP-223-Whigham v. Jackson Dawson	Denied 05/21/12
2012-UP-225-Brown v, Brown	Pending
2012-UP-226-State v. C. Norris	Pending
2012-UP-227-Singh v. City of Greenville	Pending
2012-UP-228-State v. N. Murray	Pending
2012-UP-230-Charleston Scottish Rite v. Centimark	Denied 05/21/12
2012-UP-234-Anonymous v. SCDLLR	Pending
2012-UP-235-Green v. West Oil Inc.	Pending
2012-UP-285-State v. J. Breda	Pending

**PETITIONS-SOUTH CAROLINA SUPREME COURT**

4592-Weston v. Kim's Dollar Store	Pending
4637-Shirley's Iron Works v. City of Union	Pending
4670-SCDC v. B. Cartrette	Pending
4675-Middleton v. Eubank	Pending
4685-Wachovia Bank v. Coffey, A	Pending
4705-Hudson v. Lancaster Convalescent	Pending
4711-Jennings v. Jennings	Pending
4725-Ashenfelder v. City of Georgetown	Pending
4732-Fletcher v. MUSC	Pending
4742-State v. Theodore Wills	Pending

4750-Cullen v. McNeal	Pending
4752-Farmer v. Florence Cty.	Pending
4753-Ware v. Ware	Pending
4760-State v. Geer	Pending
4761-Coake v. Burt	Pending
4764-Walterboro Hospital v. Meacher	Pending
4765-State v. D. Burgess	Pending
4766-State v. T. Bryant	Pending
4770-Pridgen v. Ward	Pending
4779-AJG Holdings v. Dunn	Pending
4785-State v. W. Smith	Pending
4787-State v. K. Provet	Pending
4790-Holly Woods Assoc. v. Hiller	Pending
4798-State v. Orozco	Pending
4799-Trask v. Beaufort County	Pending
4805-Limehouse v. Hulsey	Pending
4808-Biggins v. Burdette	Pending
4810-Menezes v. WL Ross & Co.	Pending
4815-Sun Trust v. Bryant	Pending
4820-Hutchinson v. Liberty Life	Pending
4823-State v. L. Burgess	Pending

4824-Lawson v. Hanson Brick	Pending
4826-C-Sculptures, LLC v. G. Brown	Pending
4828-Burke v. Anmed Health	Pending
4830-State v. J. Miller	Pending
4831-Matsell v. Crowfield Plantation	Pending
4832-Crystal Pines v. Phillips	Pending
4833-State v. L. Phillips	Pending
4838-Major v. Penn Community	Pending
4842-Grady v. Rider (Estate of Rider)	Pending
4847-Smith v. Regional Medical Center	Pending
4851-Davis v. KB Home of S.C.	Pending
4857-Stevens Aviation v. DynCorp Intern.	Pending
4858-Pittman v. Pittman	Pending
4859-State v. Garris	Pending
4862-5 Star v. Ford Motor Company	Pending
4863-White Oak v. Lexington Insurance	Pending
4865-Shatto v. McLeod Regional Medical	Pending
4867-State v. J. Hill	Pending
4872-State v. K. Morris	Pending
4873-MRI at Belfair v. SCDHEC	Pending
4877-McComb v. Conard	Pending
4879-Wise v. Wise	Pending

4880-Gordon v. Busbee	Pending
4887-West v. Morehead	Pending
4888-Pope v. Heritage Communities	Pending
4889-Team IA v. Lucas	Pending
4890-Potter v. Spartanburg School	Pending
4894-State v. A. Jackson	Pending
4895-King v. International Knife	Pending
4897-Tant v. SCDC	Pending
4902-Kimmer v. Wright	Pending
4905-Landry v. Carolinas Healthcare	Pending
4907-Newton v. Zoning Board	Pending
4909-North American Rescue v. Richardson	Pending
4912-State v. Elwell	Pending
4914-Stevens v. Aughtry (City of Columbia) Stevens (Gary v. City of Columbia)	Pending
4918-Lewin v. Lewin	Pending
4921-Roof v. Steele	Pending
4923-Price v. Peachtree	Pending
4924-State v. B. Senter	Pending
4927-State v. J. Johnson	Pending
4932-Black v. Lexington County Bd. Of Zoning	Pending
4933-Fettler v. Genter	Pending

4936-Mullarkey v. Mullarkey	Pending
4941-State v. B. Collins	Pending
2010-UP-090-F. Freeman v. SCDC (4)	Pending
2010-UP-356-State v. Robinson	Pending
2010-UP-425-Cartee v. Countryman	Pending
2010-UP-494-State v. Nathaniel Noel Bradley	Pending
2010-UP-523-Amisub of SC v. SCDHEC	Pending
2010-UP-525-Sparks v. Palmetto Hardwood	Pending
2010-UP-547-In the interest of Joelle T.	Pending
2010-UP-552-State v. E. Williams	Pending
2011-UP-006-State v. Gallman	Pending
2011-UP-038-Dunson v. Alex Lee Inc.	Pending
2011-UP-052-Williamson v. Orangeburg	Pending
2011-UP-059-State v. R. Campbell	Pending
2011-UP-076-Johnson v. Town of Iva	Pending
2011-UP-084-Greenwood Beach v. Charleston	Pending
2011-UP-091-State v. R. Watkins	Pending
2011-UP-108-Dippel v. Horry County	Pending
2011-UP-109-Dippel v. Fowler	Pending
2011-UP-112-Myles v. Main-Waters Enter.	Pending
2011-UP-115-State v. B. Johnson	Pending

2011-UP-121-In the matter of Simmons	Pending
2011-UP-125-Groce v. Horry County	Pending
2011-UP-127-State v. B. Butler	Pending
2011-UP-131-Burton v. Hardaway	Pending
2011-UP-132-Cantrell v. Carolinas Recycling	Pending
2011-UP-136-SC Farm Bureau v. Jenkins	Pending
2011-UP-137-State v. I. Romero	Pending
2011-UP-138-State v. R. Rivera	Pending
2011-UP-140-State v. P. Avery	Pending
2011-UP-145-State v. S. Grier	Pending
2011-UP-147-State v. B. Evans	Pending
2011-UP-148-Mullen v. Beaufort County School	Pending
2011-UP-152-Ritter v. Hurst	Pending
2011-UP-161-State v. Hercheck	Pending
2011-UP-162-Bolds v. UTI Integrated	Pending
2011-UP-173-Fisher v. Huckabee	Pending
2011-UP-174-Doering v. Woodman	Pending
2011-UP-175-Carter v. Standard Fire Ins.	Pending
2011-UP-185-State v. D. Brown	Pending
2011-UP-199-Davidson v. City of Beaufort	Pending
2011-UP-205-State v. D. Sams	Pending



2011-UP-208-State v. L. Bennett	Pending
2011-UP-218-Squires v. SLED	Pending
2011-UP-225-SunTrust v. Smith	Pending
2011-UP-229-Zepeda-Cepeda v. Priority	Pending
2011-UP-242-Bell v. Progressive Direct	Pending
2011-UP-263-State v. P. Sawyer	Pending
2011-UP-264-Hauge v. Curran	Pending
2011-UP-268-In the matter of Vincent Way	Pending
2011-UP-285-State v. Burdine	Pending
2011-UP-291-Woodson v. DLI Prop.	Pending
2011-UP-304-State v. B. Winchester	Pending
2011-UP-305-Southcoast Community Bank v. Low-Country	Pending
2011-UP-328-Davison v. Scaffè	Pending
2011-UP-334-LaSalle Bank v. Toney	Pending
2011-UP-343-State v. E. Dantzler	Pending
2011-UP-346-Batson v. Northside Traders	Pending
2011-UP-359-Price v. Investors Title Ins.	Pending
2011-UP-363-State v. L. Wright	Pending
2011-UP-371-Shealy v. The Paul E. Shelton Rev. Trust	Pending
2011-UP-372-Underground Boring v. P. Mining	Pending
2011-UP-380-EAGLE v. SCDHEC and MRR	Pending

2011-UP-383-Belk v. Weinberg	Pending
2011-UP-385-State v. A. Wilder	Pending
2011-UP-398-Peek v. SCE&G	Pending
2011-UP-438-Carroll v. Johnson	Pending
2011-UP-441-Babb v. Graham	Pending
2011-UP-447-Johnson v. Hall	Pending
2011-UP-456-Heaton v. State	Pending
2011-UP-462-Bartley v. Ford Motor Co.	Pending
2011-UP-463-State v. R. Rogers	Pending
2011-UP-468-P. Johnson v. BMW Manuf.	Pending
2011-UP-471-State v. T. McCoy	Pending
2011-UP-475-State v. J. Austin	Pending
2011-UP-480-R. James v. State	Pending
2011-UP-481-State v. Norris Smith	Pending
2011-UP-483-Deans v. SCDC	Pending
2011-UP-496-State v. Coaxum	Pending
2011-UP-502-Hill v. SCDHEC and SCE&G	Pending
2011-UP-503-State v. W. Welch	Pending
2011-UP-514-SCDSS v. Sarah W.	Pending
2011-UP-516-Smith v. SCDPPPS	Pending
2011-UP-519-Stevens & Wilkinson v. City of Columbia	Pending

2011-UP-522-State v. M. Jackson	Pending
2011-UP-550-McCaskill v. Roth	Pending
2011-UP-562-State v. T.Henry	Pending
2011-UP-565-Griggs v. Ashley Towne Village	Pending
2011-UP-572-State v. R. Welch	Pending
2011-UP-581-On Time Transp. v. SCWC Unins. Emp. Fund	Pending
2011-UP-583-State v. D. Coward	Pending
2011-UP-587-Trinity Inv. v. Marina Ventures	Pending
2011-UP-590-Ravenell v. Meyer	Pending
2012-UP-008-SCDSS v. Michelle D.C.	Pending
2012-UP-030-Babae v. Moisture Warranty Corp.	Pending
2012-UP-037-Livingston v. Danube Valley	Pending
2012-UP-058-State v. A. Byron	Pending

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

James T. Judy and Bobby Judy, Appellants/Respondents,

v.

S. Scott Kennedy and Beau D.  
Kennedy, Respondents/Appellants.

---

Appeal From Dorchester County  
Patrick R. Watts, Master-in-Equity

---

Opinion No. 4976  
Heard April 12, 2012 – Filed May 23, 2012

---

**AFFIRMED AS MODIFIED**

---

Capers G. Barr, III, of Charleston, for  
Appellants/Respondents.

James E. Chellis, of Summerville, for  
Respondents/Appellants.

**KONDUROS, J.:** Beau D. and S. Scott Kennedy (collectively the Kennedys) erected a front gate and a back gate across an ingress and egress easement, respectively, belonging to James T. and Bobby Judy (collectively the Judys). The Judys appeal the master's ruling the locked front gate can remain in place, and the Kennedys appeal the master's finding the Judys did not abandon the easement. We affirm as modified.

## FACTS

In 1973, Tina and T.C. Kennerty subdivided 195 acres of land located in Dorchester County into three parcels. Tina became owner of two tracts of land, one approximately 12 acres and another approximately 85 acres. T.C. became the owner of a 97-acre tract situated between the 12-acre and 85-acre tracts. Each granted to the other the right to use a 50-foot access easement across the tracts for ingress and egress. Crooked Creek Drive is a fifteen-foot-wide dirt road located mostly inside the easement although the road exits the easement and cuts across adjacent property for a short period because of trees that currently are an obstruction.

Tina's property was ultimately deeded to the Judys. James has harvested timber from the 85 acres and uses it regularly to host organized deer hunts.<sup>1</sup> He testified he may put mobile homes on the property in the future and will continue to harvest timber possibly with larger equipment. He envisions using Crooked Creek Drive to access the land for these activities. T.C.'s property was conveyed to Scott Kennedy. Scott renovated and occupied a mobile home located at the northern end of his 97-acre tract and constructed a bathhouse, pavilion, and three tree houses overlooking the Edisto River further south. He operated the property as a camp and wildlife preserve and now leases the property to a company for the same purpose. Scott conveyed 9.8 acres at the northwest portion of his 97 acres to his son, Beau. This included the mobile home, which Beau expanded. Beau

---

<sup>1</sup> At these hunts, hunting dogs are released and chase deer back to the deer stands where hunters are waiting.

eventually erected a new home on the property. In 1995, the Judys conveyed a portion of the twelve-acre tract to another party. The deed of conveyance did not specifically reserve an easement across the land in the Judys' favor.

In late 2007, Beau erected a substantial gate across Crooked Creek Drive at the point where it enters his property. The gate, supported by brick pillars, leaves approximately a twelve-foot-eight-inch-wide opening for vehicles to pass through. The gates can be opened by either a handheld electronic device or a stationary electronic pad mounted away from the gate. As one leaves Beau's property, the gates open automatically when a buried sensor is activated. Sometime later, Scott installed a less substantial metal gate in the easement near the point on the 97-acre tract as it turns to the 85-acre tract. The gate is not across the road bed of Crooked Creek Drive but just south where Crooked Creek Drive exits the easement. After this suit was commenced, Beau provided James with one handheld electronic key to the front gate.

At trial, Beau testified people drove on Crooked Creek Drive although he could generally not determine if they were hunters or not. On one occasion, he had a contentious encounter with a hunter as to who would yield the roadway. In another instance, he came home and found a child he did not know in his home without his permission. This is primarily what prompted him to erect the gate. Beau testified hunting dogs had been in his yard at times but this was not really a concern to him. He further stated the hunts mostly take place on Saturdays and that he did not really even see the hunters entering or exiting the property when he is in his front yard or driveway. James testified the gates unreasonably interfere with the use of his property, particularly for hosting deer hunts, and he is concerned it will impede the possibility of continuing to harvest timber or bring in mobile homes.

The master determined Beau was entitled to keep the front gate in place for the protection of his property and that the front gate did not unreasonably interfere with the Judys' use of their property. The master required Beau to also provide Bobby with an electronic opening device for the gate. He further concluded the possibility of bringing mobile homes to the 85-acre

tract or requiring larger equipment for harvesting timber was too speculative. Finally, he concluded the second gate should be removed as it did not appear to protect any interest of the Kennedys. The master supplemented his original order with the finding that the easement was not abandoned by the Judys. These cross-appeals followed.

## LAW/ANALYSIS

### I. The Judys' Appeal<sup>2</sup>—The Reasonableness of the Front Gate

The Judys contend the master erred in finding the front gate was needed for the protection of the servient estate and in the alternative finding it reasonable that the gate remain locked with the only access being two electronic devices. We agree in part.

"In an appeal of an equitable action tried before a master authorized to enter final judgment, this Court must review the entire record and make its own findings of fact according to its view of the preponderance of the evidence." Thomas v. Mitchell, 287 S.C. 35, 37, 336 S.E.2d 154, 155 (Ct. App. 1985). "This requirement does not, however, command us to ignore the findings of the trial judge who heard the witnesses." Id. at 38, 336 S.E.2d at 155.

"[T]he general rule is that the owner of the servient estate may erect gates across an easement if they (1) are so located, constructed[,] and maintained as not to unreasonably interfere with the right of passage of the dominant estate, (2) are necessary for the preservation of the servient estate, and (3) are necessary for use of the servient estate." Brown v. Gaskins, 284 S.C. 30, 33, 324 S.E.2d 639, 640 (Ct. App. 1984).

---

<sup>2</sup> We address all four of the Judys' issues on appeal together as they all relate to the same facts and the applicable law to all questions is essentially whether the master's resolution sufficiently protects the Kennedys' interests without unreasonably burdening the Judys.

"Whether the owner of land over which a right of way runs is justified in erecting a locked gate across it depends upon the circumstances. No hard and fast rule may be prescribed. Each case must be controlled, in large measure, by the particular facts and circumstances of the case." Thomas, 287 S.C. at 39, 336 S.C. at 156. (internal citations omitted). The court has "applied a balancing test to determine the reasonableness of placing a gate across an easement." Id.

Beau demonstrated some need to keep trespassers off his property. His main concern had been that a child, unknown to him, was in his home without his permission. Other complaints involved persons, not necessarily members of James's hunt club, being on Crooked Creek Drive. However, Beau testified to only one specific instance of a confrontation. Unlike other cases in which locked gates have been found necessary, there are no allegations of vandalism or littering on Beau's property. See Thomas, 287 S.C. at 37, 336 S.E.2d at 155 (finding need to protect servient estate when plagued by trespassers, night hunters and vandals who drove vehicles over planted fields); Brown, 284 S.C. at 32, 324 S.E.2d at 640 (finding need to protect servient estate when trespassers vandalized and littered property and broke into homes located thereon); Ballington v. Paxton, 327 S.C. 372, 376-77, 488 S.E.2d 882, 885 (Ct. App. 1997) (finding need to protect servient estate when trespassers littered at pond, vandalized pond house, and shot firearms on property). Therefore, the necessity of protecting the servient estate here is not as significant as in those cases.

On the other side of the scale, the burden placed on the Judys in accessing their property is substantial under the specific facts of this case. Were the activities of the Judys more limited, the provision of two remote control keys to James and Bobby might be sufficient and not place an unreasonable burden on the dominant estate. However, James utilizes the 85-acre parcel for hosting hunts for his hunt club. As a property owner, he is permitted to use the land in that manner and has done so for many years. Because the 85 acres is bisected by a swamp, the northern portion of it can only be accessed via Crooked Creek Drive. Hunters may enter the property from that direction, and hunters may need to access that area to collect their



dogs at the end of a hunt. However, any arguments regarding the width of the gate are not persuasive as to the complete removal of the gate. The testimony did not establish that the gate could not remain in place and allow larger vehicles to pass. Beau testified the gate is not currently programmed to open to its widest potential, which would be approximately fourteen and one-half feet. He testified the gates can also be removed entirely from the pillars in about fifteen minutes which would provide an opening of approximately fifteen feet. James testified the narrowest mobile home one can purchase is approximately fourteen-feet wide and the widest equipment he might use for timbering and clearing would be around fourteen-feet wide.

On balance, the existence of the gate is not an unreasonable burden on the dominant estate. However, locking the gate and providing only two electronic keys to James and Bobby, under the circumstances of this case, is not the resolution that best balances the equities of the parties. Therefore, so long as the gate remains in its current location and locked, Beau must provide James and Bobby Judy with the current numeric code to unlock the gate as well as the two remote opening devices already provided. Furthermore, Beau must apprise the Judys of any change in the numeric code in a timely manner.

## **II. The Kennedys' Appeal—Abandonment of the Easement**

The Kennedys argue the master erred in concluding the Judys had not abandoned the easement because they failed to specifically reserve an easement for themselves when they conveyed a portion of the twelve acres and because they did not use the easement exactly as designated on the Chewing plat. We disagree.

"[T]ermination of an easement by abandonment is a factual question in an action at law . . . ." Eldridge v. City of Greenwood, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998). In a law case tried by the judge without a jury, this court reviews for errors of law and reviews factual findings only for evidence which reasonably supports the court's findings." Id.

[A]n easement may be lost by abandonment and in determining such question the intention of the owner to abandon is the primary inquiry. The intention to abandon need not appear by express declaration, but may be inferred from all of the facts and circumstances of the case. It may be inferred from the acts and conduct of the owner and the nature and situation of the property, where there appears some clear and unmistakable affirmative act or series of acts clearly indicating, either a present intent to relinquish the easement, or purpose inconsistent with its further existence.

Carolina Land Co., v. Bland, 265 S.C. 98, 109, 217 S.E.2d 16, 21 (1975). The burden of proof is upon the complaining party to show the abandonment by clear and unequivocal evidence. Id.

The burden is on the Kennedys to establish the Judys abandoned the easement. That burden is a high one that cannot be satisfied by mere nonuse. See Witt v. Poole, 182 S.C. 110, 115, 188 S.E. 496, 499 (1936) ("The authorities are harmonious in holding, that mere nonuse[] of an easement created by deed for a period however long will not amount to an abandonment, except where otherwise provided by statute, or by the deed itself."). The record established the Judys used the easement, although not precisely as platted due to an area of old trees obstructing the way. Additionally, the failure to specifically reserve an easement in themselves when conveying a portion of the property does not establish a clear intent to abandon the easement when the deed refers to the Chewing plat, which shows the easement. These facts do not establish a clear intent by the Judys to abandon the easement. Thus, the master's ruling is supported by the record and is affirmed.

## CONCLUSION

In balancing the need to protect the servient estate against the right of the dominant estate to have reasonable access to property, we conclude if the front gate is to remain locked, Beau must provide each of the Judys with an electronic handheld key and the numeric code for the keypad. Furthermore, we affirm the master's ruling the Judys did not abandon the easement.<sup>3</sup> Accordingly, the ruling of the master is

**AFFIRMED AS MODIFIED.**

**PIEPER and GEATHERS, JJ., concur.**

---

<sup>3</sup> Nothing in this opinion shall be construed to prevent the parties from seeking any future relief should the circumstances change.

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

The State,

Respondent,

v.

Phillip Miller,

Appellant.

---

Appeal From Lancaster County  
J.C. "Buddy" Nicholson, Jr., Circuit Court Judge

---

Opinion No. 4977  
Heard October 19, 2011 – Filed May 23, 2012

---

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

---

Appellate Defender LaNelle Cantey DuRant, of  
Columbia, for Appellant.

Attorney General Alan M. Wilson, Chief Deputy  
Attorney General John W. McIntosh, Assistant  
Deputy Attorney General Salley W. Elliott, Assistant  
Attorney General William M. Blich, Jr., all of  
Columbia; and Solicitor Douglas A. Barfield, Jr., of  
Lancaster, for Respondent.

**FEW, C.J.:** Phillip Miller appeals his conviction for possession with intent to distribute crack cocaine. He argues the trial court erred in admitting the drugs into evidence and in denying his motion for a new trial based on a juror's failure to respond to a question asked during voir dire. We affirm the admission of the drugs. As to the ruling on the new trial motion, we reverse the trial court's finding that the information the juror concealed would not have been a material factor in Miller's use of his peremptory challenges. We remand for a factual determination of whether the juror intentionally concealed the information.

### **I. Facts and Procedural History**

Miller was tried in Lancaster County. During voir dire, the trial court asked potential jurors: "Is there any member of the jury panel who has been a victim of a crime in Lancaster County or member of your immediate family a victim of a crime . . . ?" Ten months earlier, the juror at issue testified for the State in a Lancaster County assault and battery with intent to kill (ABWIK) trial of a man accused of stabbing the juror's mother. Despite this, the juror did not respond to the voir dire question. Defense counsel had two peremptory strikes remaining when the juror was seated.

The jury found Miller guilty. After the verdict was published but before the jury was released, former Lancaster County assistant solicitor William Frick entered the courtroom. Frick was one of the prosecutors in the ABWIK trial, and he "immediately recognized" the juror. At his first opportunity, which was after the trial court excused the jury, Frick told Miller's lawyer about the juror's involvement in the ABWIK trial.

Miller filed a motion for a new trial based on the juror's failure to disclose the attack on her mother. At the hearing on the motion, Miller offered an affidavit prepared by Frick. In the affidavit, Frick explained that he interviewed the juror before the ABWIK trial and conducted her direct examination. Based on Frick's interactions with the juror, he stated he was "absolutely certain" of her identity. Miller also offered the indictment, the sentencing sheet, and a docket report from the ABWIK trial. However, neither the State nor Miller contacted the juror, nor did she appear at the hearing. The trial court did not rule on the motion at the hearing. Instead, the

court left the record open to give the parties a chance to subpoena the juror to testify. The juror was never called to testify. The court later denied Miller's motion in a written order.

## **II. Denial of Motion for New Trial**

The trial court must grant a motion for a new trial based on a juror's failure to disclose information requested during voir dire "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." State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001). A circuit court's ruling on a new trial motion will not be disturbed absent an abuse of discretion amounting to an error of law. State v. Sparkman, 358 S.C. 491, 495, 596 S.E.2d 375, 377 (2004).

### **A. Material Factor**

The trial court based its decision solely on the second prong of Woods, ruling that the concealed information would not have supported a challenge for cause and would not have been a material factor in Miller's use of his peremptory challenges. The written order states in its entirety: "Defendant's motion for a new trial is denied. The issue raised in Defendant's motion is not a material factor, because there is no victim in the Defendant's case and there is no violent crime in the Defendant's case."<sup>1</sup>

---

<sup>1</sup> The trial court's ruling that the information would not support a challenge for cause is implicit in its ruling denying the motion, as the information obviously would not support such a challenge, and the court would otherwise have been required to consider the intentional concealment prong of Woods. See State v. Lowery, 332 S.C. 261, 266, 503 S.E.2d 794, 797 (Ct. App. 1998) (explaining that a juror may be excused for cause "only if her opinions would prevent or substantially impair the performance of her duties as a juror in accordance with her oath and instructions." (citation and quotation marks omitted)).

We believe the trial court took too narrow a view of materiality. "Material" means "[o]f such a nature that knowledge of the item would affect a person's decision-making; significant; essential." Black's Law Dictionary 1066 (9th ed. 2009). Here, a juror failed to disclose that, just ten months earlier, she participated in a criminal trial in which a man who had stabbed her mother was successfully prosecuted by the same solicitor's office that was prosecuting Miller. This information would have been significant to Miller, and therefore a material factor, in deciding how to use his peremptory challenges. Accordingly, we find the trial court committed an error of law.

The State argues the information concealed by the juror would not have been a material factor because unlike the ABWIK case, Miller's case concerned drug possession, involved no weapons or violence, and had no "other logical connection to the trial involving her mother's attacker." We disagree. The "logical connection" that makes the information material is the solicitor's office, which prosecuted both defendants and with which the juror cooperated in convicting the person who stabbed her mother. The focus of the voir dire question on crimes occurring in Lancaster County indicates that at least part of the question's purpose was to identify potential jurors who may be biased for or against members of the local criminal justice system, such as prosecutors, defense attorneys, or law enforcement officers.

The supreme court's holding in Woods supports our conclusion. In that case, the defendant was convicted of possession with intent to distribute crack cocaine. 345 S.C. at 585, 550 S.E.2d at 283. The defendant later learned that before his trial, one of the jurors had volunteered as a victim's advocate in the solicitor's office that prosecuted him. Id. In analyzing whether this information would have been a material factor, the supreme court focused on the juror's connection to the prosecution, not on whether she had participated in factually similar cases. See 345 S.C. at 590, 550 S.E.2d at 286 (concluding "a juror's previous three year relationship as a victims' advocate with the prosecuting solicitor's office would be a material factor in the use of a criminal defendant's peremptory challenges"). Despite the differences between the drug case being tried and the crimes that connected the juror to the solicitor's office, the supreme court found the juror's previous relationship with the office would have been a material factor. Id.

The situation here is comparable to Woods because of the relationship between the juror and the solicitor's office. Standing alone, a juror's participation in a factually dissimilar trial might not be significant in trial counsel's decisions on peremptory strikes, particularly if the earlier trial occurred in another state or even a different county. Here, however, the information withheld has significance beyond the nature of the other case. The juror's participation in the ABWIK trial reveals a relationship between the juror and the solicitor's office prosecuting Miller. The mere existence of this relationship is significant. The fact that this relationship developed in the context of the juror's participation in the office's successful attempt to incarcerate a man who attacked her mother increases its significance.

We hold the information withheld by the juror would have been a material factor in the use of Miller's peremptory challenges in this case. The information also could not support a challenge for cause. Therefore, we reverse.

## **B. Intentional Concealment**

The trial court made no factual determination on the first prong of the Woods test—whether the juror intentionally concealed the information. Because we believe this determination should be made by the trial court based on information that is not in the record before us, we remand the case to the trial court.

At the hearing before the trial court, the State argued the juror must provide an explanation before the court could decide if the concealment was intentional. The assistant solicitor stated:

I don't know how we can answer whether she understood it, didn't understand it, didn't hear it, thought you were referring to a case involving the same prosecutors and defense lawyers that are here. We don't have that information about her and . . . I'd argue it's probably fatal to the motion without having some testimony or explanation from her.



The trial court disagreed with the State's argument, stating:

[Woods] says "reasonably comprehensible to the average juror" . . . . So they . . . put it on the reasonable man type of concept; i.e., a reasonable average juror, not the individual . . . state of mind of the juror at the time they didn't reveal information[. That] is the way I interpret the case, which is contrary to what you're saying.

After much discussion, the trial court returned to the question of the juror's testimony, stating to the assistant solicitor:

Your initial argument was that you felt like there's no way I could make this decision without knowing why she didn't [answer] and whether it was intentional or not and [I] can't make the determination of intention without having talked with her. So I'm offering the opportunity to bring her in under oath and ask her the question if you think that's necessary to your argument.

The assistant solicitor then stated "I think it's necessary to his argument." The trial court's response and the ensuing dialogue indicate the trial court believed that if the juror's testimony was necessary, the responsibility to obtain it belonged to the State.

The Court: Okay. Well, he doesn't think so. You're the one who brought it up.

Solicitor: Yes, sir.

The Court: Why don't we do this? If you want to do that, you think about it and let me know. We'll reconvene the hearing, we'll issue a subpoena, and we'll bring her in, put her under oath and take her

testimony. If I have to come to Lancaster to do that, I'll do that.

Solicitor: Yes, sir, I appreciate you giving us that opportunity.

Thus, the trial court apparently believed the question of intentional concealment should be decided objectively, and the juror's testimony was not necessary to either party's position. We disagree. In Woods, the supreme court defined intentional concealment as follows:

[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. 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.

345 S.C. at 588, 550 S.E.2d at 284. This definition suggests an objective component to the analysis, which is not dependent on the juror's testimony. However, we interpret Woods to support a subjective analysis, in addition to an objective one, in which the trial court considers the testimony of the juror if it is reasonably available.

The supreme court stated in Woods: "whether a juror's failure to respond is intentional is a fact intensive determination which must be made on a case by case basis." 345 S.C. at 588, 550 S.E.2d at 284. Ordinarily, the juror's testimony is part of the basis of that determination. See Sparkman, 358 S.C. at 496-97, 596 S.E.2d at 377 (finding juror's failure to respond to voir dire question seeking to identify victims of "serious" crimes was reasonable, where juror testified he did not immediately recall that he had been assaulted forty years earlier and was not sure if the assault was a

"serious" crime). The juror testified in Woods, and the court carefully considered the juror's testimony in concluding she intentionally concealed the information. 345 S.C. at 586-87, 589, 550 S.E.2d at 284, 285 (noting the juror "offered inconsistent explanations for her failure to respond"). The court specifically noted the possibility that "contrary" information may affect the inferences to be drawn from a juror's failure to disclose a relationship: "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." 345 S.C. at 587-88, 550 S.E.2d at 284 (emphasis added). Finally, in Williams ex rel. Wilford v. Barnes Hospital, 736 S.W.2d 33 (Mo. 1987), a case relied on by our supreme court in Woods, the Missouri Supreme Court made a juror's actual recollection of the information concealed part of its intentional concealment analysis. See 736 S.W.2d at 36 (cited in Woods, 345 S.C. at 588, 550 S.E.2d at 284-85).

Because the juror in this case did not testify, potentially important facts are missing from the record before us. Further, the record raises concerns that the voir dire question may not have been asked separately, but as one in a long series of questions with no pause in between to allow jurors a chance to respond. In this context, it is uncertain whether the question was reasonably comprehensible. Therefore, we find it necessary to remand to the trial court to determine whether the juror intentionally concealed the information.<sup>2</sup>

### **C. Burden of Proof**

The dissent argues that Miller had the burden of proof and that his conviction should be affirmed because he failed to meet his burden. In light of the approach taken by the trial court, however, we do not find it appropriate to base our decision on the burden of proof. The State argued the

---

<sup>2</sup> At oral argument before this court, the State took the position that if a factual finding is required on the question of intentional concealment, we should remand for the trial court to make the finding. After a lengthy discussion on this procedural question, the court asked the State: "So, on the first prong, if we disagree with this circuit judge on the second prong, you're asking us to remand to the circuit court for a ruling on the facts?" The State replied: "That's correct."

juror's testimony was necessary, and Miller argued it was not. By interpreting Woods "contrary" to the State's argument, the trial court essentially ruled that it was not Miller's obligation to obtain the testimony of the juror. It is counterintuitive to penalize Miller for not disagreeing with the trial court on an issue as to which the court ruled in Miller's favor. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("It would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments.").

Moreover, our courts have not clearly indicated that the defendant has the burden of proving the juror's concealment of the information was intentional. In support of the position that the defendant does bear the burden, the dissent cites only State v. Bonneau, 276 S.C. 122, 276 S.E.2d 300 (1981), which does not involve a motion for a new trial based on a juror's intentional concealment of information during voir dire. Rather, as the Bonneau court stated, "[t]he sole question for determination of the court [was] whether the fact that an alternate juror was in the jury room briefly after the judge completed his charge denied the defendant a fair trial." 276 S.C. at 123, 276 S.E.2d at 300. In Woods, the supreme court did not expressly impose the burden of proof on the defendant as to this issue.<sup>3</sup> Describing the two-prong test trial courts should use, the supreme court stated "a new trial is required only when the court finds" both of the prongs exist. 345 S.C. at 587, 550 S.E.2d at 284 (emphasis added). The supreme court then stated a trial court may infer the juror was not impartial "nothing to the contrary appearing." 345 S.C. at 587-88, 550 S.E.2d at 284 (emphasis added). Explaining its decision in State v. Kelly, 331 S.C. 132, 502 S.E.2d 99 (1998), the Woods court wrote "we stated that the first inquiry in the juror disqualification analysis is whether the juror intentionally concealed the information." 345 S.C. at 588, 550 S.E.2d at 284 (emphasis added). Finally, the Woods court stated "where a juror's response to *voir dire* amounts to an

---

<sup>3</sup> In Woods, the supreme court affirmed this court's decision to reverse the trial court and grant a new trial. Significantly, this court also did not place the burden of proof on the defendant. State v. Woods, 338 S.C. 561, 564, 527 S.E.2d 128, 129-30 (Ct. App. 2000) (stating "the juror did not justify her failure to disclose particular information that was specifically sought by a *voir dire* question").

intentional concealment, the movant need only show 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." 345 S.C. at 589, 550 S.E.2d at 285 (emphasis added).

We do not interpret this language to mean there is no burden of proof. Rather, we interpret the lack of a clear statement about it to indicate that the existence and scope of any burden remains an open question. This uncertainty magnifies the significance of the trial court's interpretation of Woods as not requiring the testimony of the juror. Under these circumstances, we decline to decide this case by holding Miller failed to meet a burden of proof. If the burden of proof remains an issue on appeal from the trial court's ruling on remand, our appellate courts may address it on a complete record.

### **III. Admission of Drugs into Evidence**

Miller argues the trial court erred in admitting drugs into evidence because the State failed to establish a sufficient a chain of custody for the drugs. We affirm the trial court's ruling pursuant to Rule 220(b)(1), SCACR, and the following authorities: State v. Sweet, 374 S.C. 1, 4-5, 647 S.E.2d 202, 204 (2007) (stating a trial court's decision to admit evidence will not be reversed on appeal absent an abuse of discretion); State v. Taylor, 360 S.C. 18, 22, 598 S.E.2d 735, 737 (Ct. App. 2004) (stating a party offering into evidence fungible items such as drugs must establish a chain of custody as far as practicable); State v. Carter, 344 S.C. 419, 424, 544 S.E.2d 835, 837 (2001) ("[W]here there is a weak link in the chain of custody, as opposed to a missing link, the question is only one of credibility and not admissibility."); Sweet, 374 S.C. at 6, 647 S.E.2d at 205-06 ("[I]f the identity of each person handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion by the trial court is shown in admitting the evidence absent proof of tampering, bad faith, or ill-motive."); State v. Hatcher, 392 S.C. 86, 94, 708 S.E.2d 750, 754 (2011) (holding a mere suggestion that evidence tampering could possibly have occurred is insufficient to establish a break in the chain of custody).

#### **IV. Conclusion**

We affirm the trial court's decision to admit the drugs into evidence. We reverse the court's ruling that the information the juror concealed would not have been a material factor in Miller's use of his peremptory challenges. We remand to the trial court for a determination as to whether the juror intentionally concealed the information.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

**KONDUROS, J., concurs.**

**THOMAS, J. (concurring and dissenting):** I agree with the majority's decision to uphold the admission of the drugs into evidence. I disagree, however, with the majority's decision to remand this matter to the circuit court for a determination as to whether the juror intentionally concealed that her mother had been the victim of a crime. Although I agree with the majority that the juror's failure to disclose that her mother had been the victim of a violent crime could have been a material factor in the defense's decision to use one of its peremptory challenges, I note the trial judge never ruled—nor was he requested to rule—as to whether this failure could have supported a challenge for cause. See State v. Woods, 345 S.C. 583, 587, 550 S.E.2d 282, 284 (2001) (stating concealment of information by a juror is grounds for a new trial only when (1) the court finds the juror intentionally concealed the 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 requesting party's peremptory challenges).

When a party argues on appeal that a new trial should have been granted because a juror failed to disclose information during the voir dire, the first question for the appellate court is whether the concealment was intentional. State v. Kelly, 331 S.C. 132, 146, 502 S.E.2d 99, 106-07 (1998). There are two prerequisites for intentional concealment. First, the voir dire question must be "reasonably comprehensible to the average juror." Woods, 345 S.C. at 588, 550 S.E.2d at 284. In addition, the party seeking a new trial must show "the subject of the inquiry is of such significance that the juror's

failure to respond is unreasonable." Id. I would hold Miller satisfied neither prerequisite in this case.

The majority is correct that a determination of intentional concealment should be made by the trial judge; however, the trial judge cannot make such a finding unless evidence is presented upon which he can rule. Miller, as the moving party, had the burden to present that evidence. Cf. State v. Bonneau, 276 S.C. 122, 125, 276 S.E.2d 300, 301 (1981) ("It is, of course, incumbent upon an appellant in this court to prove that he was denied a fair trial.").

The majority has quoted portions of the transcript in which the trial judge stated he interpreted Woods to impose an objective standard in determining whether a juror's nondisclosure was deliberate and the juror's testimony was therefore not necessary to either party's position. The majority construes the trial judge's statements as a ruling in Miller's favor and asserts it would be counterintuitive to penalize him for not disagreeing with it. The portions of the colloquy following what the majority has quoted, however, show the trial judge offered both Miller and the State the opportunity to subpoena the juror at a later date to determine her intention when she failed to advise the court about her participation in the earlier trial:

Defense Counsel: Right. Well, but the issue is not whether — it's simply would I have used it had she said yes, she was, and that really, the material factor is really in the mind — is what the judge believes is in the mind of the defense or whoever is exercising the strike, but we'll try to get you some more guidance on that.

The Court: That's all I'm asking you. If you all want to take her testimony, let me know and we'll come over to Lancaster one day and see what she's got to say.

Solicitor: Thank you, Judge.

Defense Counsel: Thank you. So within 30 days you want an order with all this?

The Court: Do a short order and say it's under advisement and you all will have 30 days to file your memo. If you would like to take her testimony, let me know and I'll reconvene the hearing and we'll come to Lancaster and we'll get the clerk to subpoena her and bring her in to hear what she's got to say. If you want to do that. If you don't, that's fine. I'm not trying to tell you how to try your case. I'm just affording you the opportunity.

Defense Counsel: Thank you, Judge.<sup>4</sup>

The trial court left the record open after the motion hearing for counsel to take testimony from the juror on this issue. Neither the State nor the defense took advantage of this opportunity despite having nearly a year to do so. Under these circumstances, I would hold a remand is unnecessary. See State v. Cooper, 334 S.C. 540, 551, 514 S.E.2d 584, 590 (1999) (noting in response to the appellant's argument that the trial court should have done something more to investigate a juror's alleged misconduct, "defense counsel never requested that the trial court do anything else").

Furthermore, nothing in the record or briefs indicates the defense requested the trial judge to find the subject of the inquiry was of such significance that the juror's failure to respond was unreasonable, and no foundation was laid for such a finding. Thus, the second prerequisite for intentional concealment was not met, and this failure alone is sufficient to

---

<sup>4</sup> The record did not include an order prepared by either Miller or the State pursuant to these instructions; however, defense counsel's statements to the court suggest he understood he was responsible for drafting it. Whether or not such an order was prepared, the record includes a letter from defense counsel to the trial judge in which counsel states he sent a memorandum within thirty days after the hearing on Miller's new trial motion.



hold that intentional concealment, for the purposes of determining whether a new trial was warranted, was not established.

Finally, I would hold the voir dire question was not reasonably comprehensible to the average juror. As stated in the majority opinion, the trial judge inquired of potential jurors whether any of them had been a victim of a crime in Lancaster County or whether a member of "your immediate family" had been the victim of a crime. I do not think it would have been unreasonable for the juror to have understood the question to apply to only members of her household, which may not have included her mother. Cf. Barkley v. Int'l Mut. Ins. Co., 227 S.C. 38, 42-43, 86 S.E.2d 602, 604 (1955) (agreeing with the view that "family" "signifies the collective body of persons living in one house," characterizing the term "immediate family" as "one more restricted in meaning and scope," and noting this term, when used in the policies of mutual benefit societies, has been held to exclude those living outside the insured's household) (quoting Home Ins. Co. v. Pettit, 143 So. 839, 840 (Ala. 1932)). In addition, as the majority acknowledges, the voir dire question with which we are concerned was part of a long series of questions with no pause to allow jurors a chance to respond. Contrary, then, to the position the defense took during the hearing on Miller's new trial motion, I would decline to hold either that the question was on its face comprehensible to the average juror or that the juror's failure to respond to the question amounted to deliberate nondisclosure. See Woods, 345 S.C. at 588, 550 S.E.2d at 284 ("Unintentional concealment . . . 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."). Without the juror's testimony about her understanding of the inquiry, I would be reluctant to hold her nondisclosure amounted to a deliberate attempt on her part to mislead the court about her impartiality.

I would affirm Miller's conviction.