NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JERMAINE FEAGIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D18-3002

Opinion filed November 25, 2020.

Appeal from the Circuit Court for Hendry County; James D. Sloan, Judge.

Howard L. Dimmig, II, Public Defender, and Richard P. Albertine, Jr., Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Jonathan P. Hurley, Assistant Attorney General, Tampa, for Appellee.

SMITH, Judge.

Jermaine Feagin appeals his judgment and sentences entered after a jury found him guilty of shooting within a dwelling, criminal mischief, grand theft, and armed

robbery with actual possession and discharge of a firearm.[1] Because the trial court erred in failing to remove a juror during the trial, after that juror belatedly disclosed his relationship with one of the victims, we reverse Mr. Feagin's conviction and sentences as to all counts that were presented to the jury and remand for a new trial on those charges.

I.

On the day of trial, prior to voir dire, the trial court asked the attorneys for a list of all witnesses, explaining he would go through the list of witnesses for the jury, "[s]ince it's a small community I want to make sure no one knows anyone testifying." During voir dire, the trial court read the names of the witnesses, including the names of both victims, and asked the venire whether they knew any of the potential witnesses. Two potential jurors indicated they knew the victim.[2] The first potential juror told the court the victim had worked for him before going to jail and he coached the victim in football. When asked if he would treat the victim's testimony any differently than someone he had never met, the juror replied, "Oh, yes, of course. I mean, you know the guy." The second potential juror went to high school with the victim. He indicated that his relationship with the victim would cause him to treat the victim's testimony

[1]Mr. Feagin was also charged with one count of possession of a firearm by a convicted felon; this count was severed from the trial and was not presented to the jury. Prior to sentencing, Mr. Feagin pleaded no contest to the charge of possession of a firearm by a convicted felon pursuant to a negotiated plea agreement. Because the judgment and sentence related to the possession of a firearm by a convicted felon charge was not a result of any juror misconduct and Mr. Feagin has not sought to withdraw his plea, his judgment and sentence related to the possession of a firearm by a convicted felon on that count is affirmed without comment.

[2]A third member of the venire knew the victim's father, who holds a public office and shares the same name. The trial court clarified that the victim is a junior.

differently than that of someone he did not know. A third potential juror indicated that she knew the second victim from high school. While she stated that she would not consider herself a close friend of the second victim, the fact that they went to high school together would cause her to treat the second victim's testimony differently than that of someone she did not know or go to high school with. Throughout the entire question and answer colloquy, the subject juror, who was later selected as an alternate, remained silent.

Upon the conclusion of voir dire, defense counsel named these three potential jurors and asked that they be stricken "for cause." The trial court agreed. No objection was raised by the State, and all three potential jurors were excused "for cause."

Once the jury was sworn, the trial court informed the jury:

> First, you may notice there are seven of you. This morning when I was talking about jurors, I said the object is to obtain six of you. One of you [is] an alternate. I'm not going to tell you who that is, because I figure maybe the alternate's mind might be wondering if they don't think they're going to be jumping right in. The trial last week, the alternate wound up being seated. It turned out that we discovered during the course of the trial that one of the jurors did in fact know one of the witnesses who was going to be testifying so we excused the juror. So there is a real chance the alternate could be seated.

The trial proceeded and following direct examination of the victim, but before cross-examination, the alternate juror sent a note to the trial court stating that he knew the victim. The trial court brought the alternate juror out for questioning but noted, "like I said, it's the alternate. So that avoids a problem there." The trial court inquired as to how the alternate juror knew the victim, and the alternate juror explained that he

has known the victim for about four years, they play basketball together, they are Facebook friends, and the victim knows the alternate juror's father. He said it had been awhile since he had seen the victim but considered the victim a "good friend." When asked what the alternate juror meant by a "good friend," he replied, "[w]e talk, like when I see him we talk a lot. We joke around. We're more than just a little bit of friends but we're not like real close friends." The alternate juror told the trial court that he had not spoken to the victim about this case and he would not give the victim's testimony any greater weight than the testimony of someone he did not know.

After the trial court's colloquy with the alternate, counsel for Mr. Feagin moved to strike the alternate juror, arguing that while the alternate juror said he was not going to give more credibility or weight to the victim's testimony, "just by human nature he's going to be more favorable to [the victim]" and he will believe the victim is more credible, which adds weight to the victim's testimony. On the other hand, the State argued the alternate juror had been properly rehabilitated by the trial court, but ultimately stated it had no objection to releasing the alternate juror, as he was only the alternate. The trial court then ruled:

> Well, given the answers that he gave to the questions that I asked, I would not have indicated that there would be valid challenge for cause during the initial voir dire so I'm going to allow him to remain. Like I said he is the alternate juror in this particular case and may not even be called upon to deliberate, but I don't think there would have been a challenge for cause under the circumstances. All right, let's proceed. Return the jury.

After the State rested, the trial court announced that another juror had a medical issue with her child that required her attention. That juror was excused and the alternate juror was seated in her place. No objection was raised to the excusal of this

juror; however, Mr. Feagin's counsel then addressed the trial court: "[N]ow the issue is the [alternate] juror." The court responded:

> The [c]ourt had considered those arguments earlier and had questioned [the alternate juror] and found that there was no cause challenge that could be raised. I believe that he's going to treat all of the evidence and testimony as he's heard's [sic] indicated the same as anyone else, so I'm going to go ahead and seat [the alternate juror].

On appeal, Mr. Feagin argues the trial court erred in denying his motion to strike the alternate juror after the juror disclosed his friendship with the victim. We agree.[3]

II.

We review the trial court's midtrial refusal to remove a juror who failed to

---

[3]To the extent the State argues Mr. Feagin has failed to preserve for appellate review the issue of juror misconduct because Mr. Feagin failed to move for a mistrial, the record reveals that when the alternate juror disclosed his relationship to the victim, Mr. Feagin immediately sought to remove the alternate juror. He raised the issue again when the alternate juror was seated on the panel after another juror had been excused for medical issues. Mr. Feagin's failure to move for a mistrial does not preclude him from seeking review of the trial court's refusal to remove the alternate juror after he initially disclosed a relationship with the victim. See Nicholas v. State, 47 So. 3d 297, 303 (Fla. 2d DCA 2010) ("[A] juror's concealment of material information during voir dire provides good cause for removal of that juror mid-trial . . . ."); Dery v. State, 68 So. 3d 252, 255 (Fla. 2d DCA 2010) (reversing and remanding for new trial where trial court improperly denied defense's mid-trial motion to strike juror who was not candid during voir dire); Mobley v. State, 559 So. 2d 1201, 1202 (Fla. 4th DCA 1990) (same). In the instant case, had the trial court properly removed the alternate juror at the time of his disclosure there would still have been six jurors on the panel and no reason for a mistrial. When the second opportunity arose to remove the alternate after the medical excusal of the other juror, the parties could have considered scheduling alternatives, including continuing the trial until the other juror was able to return, or they could have entered into an on-the-record waiver and a stipulation to a trial by less than six jurors; the trial court would then have had to consider whether a mistrial was necessary. See Blair v. State, 698 So. 2d 1210, 1211, 1217 (Fla. 1997). How these proceedings could have played out differently is, however, speculation. Mr. Feagin is not precluded from obtaining relief based upon the trial court's improper denial of his motion to strike the alternate juror because he failed to move for a mistrial that was not yet implicated.

disclose material information during voir dire for an abuse of discretion. See Dery v. State, 68 So. 3d 252, 254-55 (Fla. 2d DCA 2010).

A defendant is entitled to a new trial if a juror is guilty of misconduct that prejudices the defendant's substantial rights. See Fla. R. Crim. P. 3.600(b)(4) (providing that juror misconduct is a basis for a new trial where the substantial rights of the defendant were prejudiced thereby). The substantial right implicated in this case is Mr. Feagin's right to be tried by six impartial jurors. See Art. 1, § 16, Fla. Const.; see also Fla. R. Crim. P. 3.251. Thus, "[i]t is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that *not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof*." Nicholas v. State, 47 So. 3d 297, 305 (Fla. 2d DCA 2010) (quoting Elliott v. State, 82 So. 139, 142 (Fla. 1919)). "[I]f there is any reasonable doubt as to whether a particular juror can render an impartial verdict based solely on the evidence presented and the law announced at trial, that juror should be removed, even if the juror affirmatively states that he can be impartial." Id. (citing Graham v. State, 470 So. 2d 97, 97-98 (Fla. 1st DCA 1985)).

"A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct[.]" De La Rosa v. Zequeira, 659 So. 2d 239, 241 (Fla. 1995) (quoting Loftin v. Wilson, 67 So. 2d 185, 192 (Fla. 1953)). Additionally, "a juror's concealment of information which may have been material to whether that juror would be excused by peremptory challenge or for cause, when such concealment is not revealed or discovered until after trial, can in certain circumstances justify the granting of a new trial." State v. McGough, 536 So. 2d 1187, 1189 (Fla. 2d DCA 1989); but see State v. Tresvant, 359 So. 2d 524, 526 (Fla. 3d DCA

1978) (holding that seating an acceptable alternate juror to replace a juror who conceals and later discloses a material fact alleviates the necessity for a mistrial).

Whether Mr. Feagin is entitled to a new trial based upon the alternate juror's nondisclosure is controlled by the three-prong test set forth by the Florida Supreme Court's decision in De La Rosa, 659 So. 2d at 241. See Companioni v. City of Tampa, 958 So. 2d 404, 420 (Fla. 2d DCA 2007) (Casanueva, J., concurring specially) (explaining the De La Rosa test "is appropriate in both criminal and civil cases"). The De La Rosa three-prong test provides:

> First, the complaining party must establish that the information is relevant and material to jury service in the case. Second, that the juror concealed the information during questioning. Lastly, that the failure to disclose the information was not attributable to the complaining party's lack of diligence.

De La Rosa, 659 So. 2d at 241.

The first prong requires that "the complaining party must establish not only that the nondisclosed matter was 'relevant' . . . but also that it is 'material to jury service in the case.' " Roberts v. Tejada, 814 So. 2d 334, 339 (Fla. 2002) (quoting De La Rosa, 659 So. 2d at 241). Information is considered "material" where "the omission [of the information] prevented counsel from making an informed judgment—which would in all likelihood have resulted in a peremptory challenge." De La Rosa, 659 So. 2d at 242 (quoting Bernal v. Lipp, 580 So. 2d 315, 316-17 (Fla. 3d DCA 1991)); see also James v. State, 843 So. 2d 933, 936 (Fla. 4th DCA 2003) (explaining that a material fact is one that "exposes an inherent bias in favor or against either party."). In the instant case, the alternate juror's relationship with the victim was relevant and material to the alternate juror's service in this case. The alternate juror knew the victim for about four years, he

and the victim were Facebook friends, they played basketball together, and the victim knew the alternate juror's father. While the alternate juror had not seen the victim in "a while," he considers the victim a "good friend." These facts create doubt as to whether the alternate juror could render an impartial verdict based solely on the evidence presented and not influenced by any bias or prejudice. See Elliott, 82 So. at 142 ("It is the duty of a trial court to see that defendants in criminal cases are tried by a jury such that not even the suspicion of bias (leaning) or prejudice (prejudgment) can attach to any member thereof.").

Moreover, while the trial court ultimately ruled there would not have been a basis for a "for cause" challenge to the alternate juror, the record reveals that three other prospective jurors were excused "for cause" based on similar, if not more remote, relationships with the two victims in this case. Based on Mr. Feagin's "for cause" challenge to the other three prospective jurors who admitted to knowing the victims, it is more likely than not that Mr. Feagin would have moved to remove the alternate juror, had he disclosed his relationship with the victim during voir dire. And even if, as the trial court stated, there was no "for cause" basis for removal, Mr. Feagin could have exercised one of his remaining peremptory challenges against the alternate juror if he had known that the alternate juror was friends with one of the victims. However, Mr. Feagin was denied the "inalienable right " to use such a challenge because of the alternate juror's nondisclosure during voir dire. See Mobley v. State, 559 So. 2d 1201, 1202 (Fla. 4th DCA 1990). While the alternate juror's belated assurances that he could be impartial may have obviated a challenge "for cause," it did nothing to resurrect the ability to exercise a peremptory challenge. Id. (citing Mitchell v. State, 458 So. 2d 819

(Fla. 1st DCA 1984)); see also Nicholas, 47 So. 3d at 305 ("If a juror conceals relevant and material information, his subsequent claim that he can be fair and impartial is of no moment."). Here, the alternate juror's concealment of his friendship with the victim constitutes a relevant and material fact, and thus, the first prong of the De La Rosa test is satisfied.

The second prong of the De La Rosa test turns on whether the alternate juror concealed the information during voir dire. In Skiles v. Ryder Truck Lines, Inc., 267 So. 2d 379, 382 (Fla. 2d DCA 1972), this court stated:

> [T]he fact that the false information was unintentional, and that there was no bad faith, does not affect the question, as the harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant; while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; . . . when the fact appears that false information was given, and that it was relied upon, the right to a new trial follows as a matter of law.

(emphasis added) (quoting Drury v. Franke, 57 S.W.2d 969, 985 (Ky. 1933)). The facts here leave no question that the alternate juror failed to disclose his relationship to the victim. While his failure to disclose this material fact may not have been intentional, the fact remains, Mr. Feagin was denied his right to exercise a peremptory challenge to this juror by reason of the juror's material concealment of a relevant fact that was clearly elicited during voir dire. And so, it follows that the second prong of the De La Rosa test has been met.

The third prong of the De La Rosa test is known as the "due diligence" test. The due diligence prong is not satisfied "when the failure to disclose the potential juror's concealment or untruthfulness on voir dire was due to a lack of diligence by the complaining party." McGough, 536 So. 2d at 1189. Here, the trial court inquired into

the potential jurors' knowledge or acquaintance with the prospective witnesses, including the victim. Three prospective jurors discussed with the trial court their relationships with the victims and later answered questions about those relationships when asked by counsel for Mr. Feagin. At no time did the alternate juror speak up and say anything about his friendship with the victim. These facts do not give rise to a lack of due diligence on the part of Mr. Feagin's counsel, and therefore, the third prong of the De La Rosa test has been met.

III.

Once an appellant has established juror misconduct, "he is entitled to a rebuttable presumption of prejudice and, thus, a new trial." Gould v. State, 745 So. 2d 354, 358 (Fla. 4th DCA 1999); see also James, 843 So. 2d at 937. Unless the State can "demonstrate . . . that any prejudice was harmless." Gould, 745 So. 2d at 358. The harmless error analysis "places the burden on the [S]tate, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986) (citing Chapman v. California, 386 U.S. 18, 24 (1967)). Upon reviewing the record before us, the State made no attempt whatsoever to rebut the presumption and satisfy its burden by showing that any error was harmless. Therefore, Mr. Feagin is entitled to a presumption of prejudice and, thus, a new trial. See James, 843 So. 2d at 937; Gould, 745 So. 2d at 358.

IV.

Because the alternate juror's failure to disclose his friendship with the

victim constitutes juror misconduct that deprived Mr. Feagin of his right to receive a fair trial before an impartial jury, we reverse Mr. Feagin's judgment and sentences on the charges that were presented to the jury and remand for a new trial on those charges.

Affirmed in part; reversed and remanded for a new trial in part.

CASANUEVA and LUCAS, JJ., Concur.