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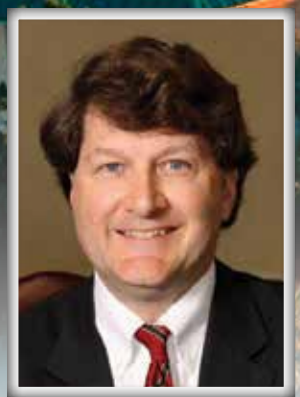

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ASKING THE RIGHT QUESTIONS AND GETTING THE RIGHT INFORMATION TO SELECT THE RIGHT JURORS – OR TO BE IN A POSITION TO COMPLAIN IF YOU DON'T

By: Deborah Alley Smith

Jury selection is more art than science – a quest to get to know a large pool of potential jurors and identify any bases upon which they cannot or, from your client's perspective, should not serve on the jury. The more a lawyer knows about a potential juror, the better he can assess whether that juror harbors any potential biases or is otherwise disqualified to serve. Lawyers often invest a lot of brain power in deciding what a model juror would look like and conversely what characteristics are least desirable for a juror in their case. Sometimes clients expend significant sums of money on jury consultants and mock trials to assist in making those determinations. Unfortunately, we very seldom get that ideal jury, and as they say, one bad apple can spoil the bunch. After an adverse verdict, we sometimes find that one or more of the jurors should not and would not have served on the jury had we known more about them. These issues generally come to light when the losing party is investigating grounds for a new trial and discovers that jurors were not entirely forthcoming during voir dire questioning.

The failure of jurors to provide full and accurate response to voir dire questions entitles a party to a new trial, right? Not always, or even usually. Without question, parties are entitled to full and accurate responses to their voir dire questions to help them make informed decisions in challenging jurors for cause and in exercising their peremptory strikes, and when jurors fail to answer questions correctly, parties are denied that right.[1] Inaccurate responses to voir dire questions do not automatically entitle a party to a new trial, however, even if the questions are directed to statutory qualification.[2] Because of the broad discretion vested in the trial court in determining juror qualification and misconduct issues and the numerous factors that weigh into the trial court's determination of whether a party was probably prejudiced by a juror's failure to respond, a high degree of precision is required in examining the jury venire. More often than not, a motion for new trial or an appeal asserting "misconduct" by a juror in failing to provide accurate and complete information in response to voir dire questions is unsuccessful, either because of a failure to demonstrate probable prejudice or because the alleged failure to respond accurately is found to have been waived or to be the result of counsel's failure to ferret out the desired information. This article will discuss the standards for obtaining post judgment and appellate relief based on juror misconduct.[3] Understanding these standards before you strike a jury not only puts you in the best position to seek relief if things go badly, but also increases the likelihood that you will actually get that ideal jury.

Beginning at the end – the standard on appeal.

Trial courts are vested with broad discretion in determining issues regarding juror qualification[4] and misconduct[5] because they are "in the best position to hear a prospective juror and to observe his or her demeanor."[6] As a result, the trial court's rulings on qualification and misconduct issues will not be disturbed on appeal unless the trial court is shown to have clearly exceeded its discretion -- a tough standard under the best of circumstances.[7] So, how do you show the court exceeded its discretion?

Make your record.

The appellate court can only review what is in the record on appeal, so a complete record is essential to the success of any appeal. "The best evidence of a judicial proceeding is the record itself,"[8] and in the absence of a complete record, the appellate court will presume that the missing information is sufficient to support the judgment and the trial court's rulings.[9] Thus, in the absence of an official record of voir dire examination, the Alabama Supreme Court found in *Faith, Hope & Love, Inc. v. First Ala. Bank, N.A.,* that the trial court acted within its discretion in concluding that an affidavit of counsel failed to prove that there were improper or non-existent responses to voir dire questions which resulted in probable prejudice to the movant.[10] Likewise, in *Parish v. State*, where the questions asked by defense counsel and the prosecutor were not included in the record, the court assumed that no question was asked

that would require the juror to respond, and affirmed the trial court's ruling that defendant was not entitled to a new trial.[11]

The record of voir dire must be sufficient to support your arguments. Even in the face of a specific request from counsel (or instruction from the court) that the jurors identify themselves when responding to a question, they often forget to do so. If the jurors responding to a question are not identified, it is extremely difficult after the fact to determine whether a particular juror who should have responded did so and, more importantly, to demonstrate that fact. Consequently, counsel should identify by name each venire member who responds to a question and when following up to obtain specific details. Remember also, the court reporter can't take down what he or she can't hear, so be sure the venire members speak loud enough for the reporter to hear them. While the court reporter is required by statute to record the examination of the venire if directed by the court or requested by a party,[12] it is incumbent on counsel to assure that a record is made that is actually useable.

Properly support your post judgment motion.

A motion for new trial is required to preserve for appeal the issue of juror misconduct in failing to respond accurately to voir dire questions.[13] The movant must present evidence in support of the motion to prove that a juror responded untruthfully or failed to disclose relevant information that was actually requested. That sounds relatively simple, but as discussed in more detail below, demonstrating that the questions propounded to the jurors *required* a response and that the juror's response was actually inaccurate can be a difficult task. Depending on the nature of the information allegedly withheld or misstated, the necessary proof may take the form of certified copies of court records, affidavits or even live testimony. In accordance with Rule 59(c), any affidavits supporting a motion for new trial must be served with the motion.[14] While the rule specifically applies only to affidavits, caution dictates that any documentary proof that will be offered be served with the motion. In addition, the transcript of voir dire should be made available to the trial court so the court can compare the actual questions and answers with the proof presented in support of the new trial motion.[15] If counsel anticipates presenting live testimony or other evidence at the hearing on the motion for new trial, counsel should specifically request an evidentiary hearing and make sure that a court reporter is present.[16]

Establish probable prejudice.

In addition to proving that a juror failed to respond or responded inaccurately, to be entitled to a new trial, the movant must also prove probable prejudice – that is, that the juror's failure to accurately respond *might* have prejudiced the movant.[17] A prima facie showing of prejudice may be made by establishing that the juror's disclosure of the truth would have resulted in the juror being removed from the venire, either via a successful challenge for cause or the exercise of a peremptory challenge.[18] In some circumstances, the obvious tendency of the true facts to bias the juror is sufficient to establish prejudice.[19] More often, the claim of probable prejudice will fail without direct testimony from trial counsel that the true facts would have resulted in a challenge to the juror.[20]

The determination of whether probable prejudice resulted from the juror's failure to respond accurately does not end there, however. The factors a court may consider in making the probable prejudice determination include, but are not necessarily limited to, "the temporal remoteness of the matter inquired about, the ambiguity of the question, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter asked about."[21] Whether the movant suffered probable prejudice is a matter within the trial court's discretion,[22] and courts are quick to attribute jurors' failures to respond to inadvertence, misunderstanding, ambiguity or immateriality. Thus, while counsel have the right to inquire (and get full and accurate responses) about anything that might aid in exercising their peremptory strikes,[23] if the matter a juror fails to disclose is remote in time or is of questionable materiality to the subject and parties to the suit, the court is unlikely to find probable prejudice.[24] Likewise, if the juror's failure to accurately respond is inadvertent – the juror didn't understand the question or didn't recall the matter inquired about – the court will likely find that no probable prejudice exists.[25] In arguing a new trial should be granted, counsel should address of each of the probable prejudice factors and demonstrate how it supports a finding that the movant was probably prejudiced by the juror's failure to respond accurately.

It should be readily apparent by now that demonstrating

the trial court exceeded its discretion in ruling on a motion for new trial based on juror misconduct is extremely challenging given the broad discretion vested in the court and the various factors that may be considered in determining probable prejudice. So, what should counsel do (or not do) in examining the jury venire to be in the best position to get complete information from prospective jurors and to get a new trial if you don't get that information?

Do ask about all relevant information.

Venire members are not required to volunteer information that is not specifically requested. They "cannot be expected to reveal information not elicited by the litigants"[26] and are allowed to remain silent until they are asked a question demanding a response.[27] Consequently, if a party fails to inquire specifically about a matter during voir dire, he is not entitled to relief on that basis thereafter.[28] The failure to use due diligence in testing jurors as to qualifications or grounds of challenge is an effective waiver of those grounds of challenge.[29] That is true even if the basis of disqualification is statutory.[30]

Don't rely on the court's or another lawyer's questions.

Defendants are often placed in a difficult position in conducting voir dire. If plaintiff's counsel has conducted extensive voir dire, the judge and the venire members may grow impatient with what they view as redundant or unnecessary questions, and defense counsel may be tempted to forego certain areas of inquiry. Due diligence, however, requires the defendant to explore and follow up on all possible areas of qualification and potential bias. A party who relies upon the examination by the court or the opposing party does so at his peril. Thus, in *GMC v. Hopper*, the Court held that the trial court erred in granting a new trial where the disqualification could have been discovered during voir dire, noting: "Although counsel was not required to conduct a voir dire examination which would be repetitious of that already conducted by the court, the fact remains that the ground of challenge could have been discovered before trial just as easily as it was discovered after trial."[31] Counsel's failure to ask a question or follow-up question about a juror qualification issue may result in a waiver of any argument for new trial based on that issue.[32]

Do ask questions that are specific and precise, but not too limiting.

A juror's failure to answer a question on voir dire furnishes no basis for complaint where the question as applied to that particular juror does not *clearly* call for an express response.[33] Questions must be specific and precisely tailored to require a response, but not so narrow as to unduly limit the inquiry.[34]

The case law is replete with examples of voir dire questions that did not clearly call for a response from a juror later claimed to have improperly failed to respond. For example, in *Pearson v. State,*[35] the appellant was not entitled to relief where counsel inquired "if anybody here is employed ... by the county of Greene?" and the non-responding juror was employed by Greene County Hospital. The court concluded that if any mistake was made by the juror in failing to respond, it was attributable to counsel's failure to articulate the question in such a way as to show that it covered the Hospital.[36]

In *Estes Health Care Ctrs., Inc. v. Bannerman*, counsel asked whether "any member of the jury panel [has] a close relative – by that, a parent, brother, sister, child – who is at this time or has been in a nursing home or an institution of that kind."[37] The Court concluded that the question was qualified and its scope narrowed by the definition of "close relative," so the failure of two jurors to disclose that their grandmothers had resided in nursing homes was not grounds for a new trial.[38]

Similarly, in *McDonald v. Kubota Mfg. of Am. Corp.,*[39] the trial court denied plaintiff's motion for new trial based on a juror's alleged misconduct in failing to disclose that he had a contract to perform mowing and brush cutting for the City of Calera. The Supreme Court affirmed, noting that the juror was the first member of the venire to identify himself as owning Kubota equipment; thereafter, he answered all counsel's questions regarding the type of equipment he owned, and counsel did not specifically ask him if he ever used his Kubota tractors for commercial purposes. Counsel's later question asking if "anyone else" was in a business involving frequent contact with a tractor or mower did not clearly call for a response from the juror because he had already identified himself as owning Kubota tractors.[40]

Don't ask questions that are ambiguous or subject to misunderstanding.

If a question is ambiguous, or phrased such that it is

difficult to understand, a juror's failure to respond will not support any relief.[41] In *Land & Associates, Inc. v. Simmons*,[42] for example, counsel inquired: "Are any of you on the panel or any member of your immediate family ever been either a plaintiff – that is a claimant bringing a suit – or a defendant – that is a person against whom a suit is brought?" Three jurors failed to respond. The Supreme Court "could not say that the trial court exceeded its discretion" in not granting relief, and noted that based on the phrasing of the question, the cause of the failure to respond was likely a misunderstanding on the part of the jurors.[43]

The language used in questioning the venire must be easily understood and the terms carefully defined. Court's have found that terms like "plaintiff" and "defendant" may be ambiguous or confusing to potential jurors. The jurors may not view themselves in one of those roles in a domestic relations case or a bankruptcy proceeding, for example.[44] Similarly, the phrase "a lawsuit for damages" could reasonably be interpreted by a juror as summarily excluding collection cases from consideration.[45] Further, where all the jurors seemed to assume that "filing a lawsuit" meant "going to court," the jurors' failures to respond regarding prior lawsuits were attributed to misunderstanding of the questions as they related to the jurors.[46]

Do follow up.

Counsel must diligently follow up seeking to obtain more specific information. A party is not entitled to a new trial based on information that was not disclosed by a juror where counsel could easily have elicited the desired information or cleared up any doubts by asking follow up questions.[47]

Don't wait to investigate or challenge a juror's qualifications.

It is incumbent upon the parties to both timely investigate a juror's qualifications and timely challenge a juror upon learning of a potential ground of disqualification. The failure to challenge a juror on a timely basis on any ground of disqualification that is known or through due diligence should be known results in waiver.[48] A party who is on notice of a potential ground of disqualification but fails to challenge the juror until after judgment is not entitled to relief.[49] Even when a party learns of a potential ground of disqualification after the jury is seated, he waives the objection if he waits to raise it post trial rather than asserting it immediately. In *Eaton v. Horton*, for example, when defense counsel learned during the course of trial about a pending lawsuit involving a juror's company that was not disclosed in response to voir dire questioning, it "imposed on [counsel] the duty to further investigate if [counsel were] truly disturbed by the juror's presence on the jury."[50] Their failure to investigate and raise the issue until after the verdict was returned waived the issue. [51]

The limits of due diligence.

As noted, the failure to timely challenge a juror on any ground that *through due diligence should be known* results in waiver. In this day and age, information about venire members is one Google search away. That reality may place a higher burden on lawyers conducting voir dire. In some circuits the venire list is available a week or more in advance of trial. Do lawyers have an obligation to investigate the jurors before trial? Even if the venire list is not available until the morning of trial, a lawyer or paralegal could sit in the courtroom with a laptop computer or iPad and search the jurors' names to locate criminal convictions, prior lawsuits, social media posts, etc. Should you do so?[52] Does due diligence require it?

Courts around the country are increasingly less likely to grant a new trial based upon juror disqualifications that could have been discovered before trial with a simple internet search. In fact, some jurisdictions have imposed new standards of diligence that *require* online research during the voir dire process.[53] The Missouri Supreme Court, for example, has imposed an affirmative duty upon lawyers to use reasonable diligence to examine the litigation history of jurors via the electronic filing system and to present any relevant information to the court prior to trial.[54] Such diligence requirements may soon be expanded to include websites like Facebook, LinkedIn, and Twitter, as well as other information publicly available online.[55] Some commentators have even suggested that it may be malpractice not to conduct internet research regarding potential jurors.[56]

While the Alabama courts have consistently held that a party waives any grounds that could have been discovered through the use of due diligence, the appellate courts have not specifically held as of yet that due diligence requires any independent investigation of the venire members before or during trial, via the internet or otherwise. However, the language used in some cases suggests that such a requirement may in fact exist.[57] In *Boudreaux v.*

Pettaway,[58] the trial court certainly concluded that due diligence required such investigation. The trial court's order denying defendant's motion for new trial noted that the evidence that was presented during the hearing on defendants' post judgment motions was all a matter of public record, and observed:

> 'Were Defendants genuinely concerned before the trial or before the verdict was returned about the prospective jurors' participation in prior bankruptcies and the like, they could have and should have looked at the available public records prior to or during the trial and afforded the Court an opportunity to take measures to address any concerns rather than waiting for a verdict to be returned, the jury discharged and a judgment entered on the verdict.'[59]

The Supreme Court affirmed the trial court's order without commenting on this particular observation by the trial court.

Arguments that due diligence requires counsel to explore electronic and other publicly available information about venire members will likely gain momentum as more and more information becomes easily accessible. Only time will tell whether the Alabama courts will conclude that due diligence requires online research before or during voir dire, but prudence dictates that such research be conducted to avoid waiver by failing to timely discover relevant information that would disqualify a juror.

Conclusion

A review of the case law shows that the questions asked venire members often do not uncover the information needed to strike the ideal jury. If identifying good jurors (or removing bad ones) is key to a good result at trial, and if getting full and complete information in voir dire is key to identifying "good" and "bad" jurors, counsel should focus on formulating the most precise questions possible with respect to all relevant areas of inquiry so as to *require* a response from the venire members and on exercising diligence in uncovering information to timely challenge the jurors. Obtaining post judgment or appellate relief based on a juror's failure to respond to voir dire questions is challenging, to say the least. By making the proper inquiries on the front end, counsel may actually get all the information needed to strike that ideal jury, or at least to be in the best position to seek post judgment relief if he does not.

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[1] *Union Mortgage Co. v. Barlow*, 595 So. 2d 1335, 1342 (Ala. 1992).

[2] *See, e.g.*, Ex parte Toyota Motor Corp., 684 So. 2d 138 (Ala. 1996) (where juror had been convicted of burglary plaintiff was not entitled to a new trial because plaintiff did not attend judge's initial qualifying session, juror could have misunderstood term "moral turpitude" used by the judge and plaintiff did not inquire about criminal convictions or loss of right to vote); *Haisten v. Kubota Corp*, 648 So. 2d 561 (Ala. 1994) (plaintiff was not entitled to a new trial where inaccurate information provided by a juror in response to voir dire related to prior litigation that was remote in time and circumstances indicated the incomplete or inaccurate answers were the result of inadvertence or confusion rather than willfulness); *Watters v. Lawrence County*, 551 So. 2d 1011 (Ala. 1989) (defendant was not entitled to a new trial on the ground that two jurors did not reside in the jurisdiction, as required for service on a jury, where the two jurors specifically stated during voir dire the cities in which they resided, thereby revealing that they did not live in the jurisdiction, and the defendant failed to challenge the jurors' service until after trial).

[3] The juror misconduct addressed in this article is limited to the failure of jurors to respond fully and accurately to voir dire questions. Different standards apply with respect to other forms of juror misconduct.

[4] "Qualification" as used in this article encompasses any basis upon which a party might challenge a juror for cause or by exercising a peremptory challenge.

[5] *Haisten*, 648 So. 2d at 563-64 (the trial court was in the best position to determine the biases of a potential juror and did not exceed its broad discretion in denying motion for new trial).

[6] *Ex parte Dinkins*, 567 So. 2d 1313, 1314 (Ala. 1990).

[7] *Dinkins*, 567 So. 2d at 1314; *Barlow,* 595 So. 2d at 1342.

[8] *Kroger Co. v. Puckett*, 351 So. 2d 582, 587 (Ala. Civ. App. 1997). *See also E&S Facilities, Inc. v. Precision Chipper Corp.,* 565 So. 2d 54, 61 (Ala. 1990) ("[T]he trial judge's recollection of what transpired is due to be given considerable weight over affidavits of counsel.").

[9] *Zaden v. Elkus*, 881 So. 2d 993, 1009 (Ala. 2003) ("The law is settled that it is the appellant's duty to ensure that the appellate court has a record from which it can conduct a review. Further, in the absence of evidence in the record, this Court will not assume error on the part of the trial court."); *Yates v. El Bethel Primitive Baptist Church,* 847 So.2d 331 (Ala. 2002) (when the record on appeal is incomplete, the court presumes that the missing matter is sufficient to support the trial court's judgment); Ruberti *v. Ruberti,* 117 So. 3d 383, 386 (Ala. Civ. App. 2013) (when a trial court order is based on evidence that is not before the appellate court, the appellate court conclusively presumes that the trial court's judgment is supported by the

evidence); *Parker v. Williams*, 977 So. 2d 476 (Ala. 2007) (when the record is silent as to evidence considered by the trial court, the appellate court must presume that the evidence considered was sufficient to support the trial court's judgment).

[10] 496 So. 2d 708, 710 (Ala. 1986).

[11] 480 So. 2d 29, 30 (Ala. Crim. App. 1985).

[12] *See* Ala. Code § 12-17-275 ("The official court reporter shall attend in person, except as otherwise herein provided, the sessions of court held in the circuit for which he is appointed, and in every case, where directed by the judge or requested by a party thereto, he shall take full stenographic notes of the oral testimony and proceedings, except argument of counsel, and note the order in which all documentary evidence is introduced, all objections of counsel, the rulings of the court thereon and exceptions taken or reserved thereto.")

[13] *See Lloyd Noland Hosp. v. Durham*, 906 So. 2d 157, 173 (Ala. 2005) (appellate court will not reverse a trial court's judgment based on an issue or argument not presented to that court).

[14] Ala. R. Civ. P. 59(c) provides: "When a motion for new trial is based upon affidavits, they shall be served with the motion. The opposing party has fifteen (15) days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty (20) days by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits."

[15] If the transcript is not before the trial court, the non-movant can argue on appeal that anything in the transcript favorable to the movant that was not actually considered by the trial court cannot be considered by the appellate court to find the trial court exceeded its discretion in ruling on the motion for new trial, but that anything that is favorable to the non-movant can be considered in upholding the trial court's ruling. *See Premiere Chevrolet v. Headrick*, 748 So. 2d 891, 893 (Ala. 1999) ("The appellate courts will affirm the ruling of the trial court if it is right for any reason, even one not presented to or considered by the trial judge."); *Norman v. Bozeman*, 605 So. 2d 1210, 1214 (Ala. 1992) (a trial court cannot be held in error based on issues or evidence not presented to the trial court).

[16] *See Frederick v. Strickland*, 386 So. 2d 1150 (Ala. Civ. App. 1980) (although Rule 59(g) requires that the court provide a party an opportunity to be heard, that right is waived if the party fails to specifically request a hearing).

[17] *Ex parte Dobyne*, 805 So. 2d 763, 771 (Ala. 2001); *Barlow,* 595 So. 2d at 1342 ("The proper inquiry on a motion for new trial based on improper or nonexistent response to voir dire questions is whether the response or lack of response resulted in probable prejudice to the rights of the movant.").

[18] *Dobyne*, 805 So. 2d at 773.

[19] *See, e.g., Ex parte Ledbetter*, 404 So. 2d 731, 734 (Ala. 1981) (under circumstances of the case, juror's failure to disclose that he was a former deputy sheriff and that he had been the victim of a crime was sufficient to show probable prejudice).

[20] *See Dobyne*, 805 So. 2d at 773 (concluding that Dobyne was not entitled to relief on his juror-misconduct claim because he failed to offer evidence that a true answer by the juror would have caused him to challenge the juror for cause or exercise a peremptory strike to remove the juror).

[21] *Haisten v. Kubota Corp.*, 648 So. 2d 561, 564 (Ala. 1994) (citing *Freeman v. Hall*, 238 So. 2d 330 (Ala. 1970)). The Supreme Court articulated these factors as relevant to the probable prejudice question, but they often lead to a finding that the juror did not fail to accurately respond. *See, e.g., Jones v. State,* 753 So. 2d 1174, 1201-02 (Ala. Crim. App.), *cert. denied (1999)* (juror's failure to respond did not constitute juror misconduct where the question asked left room for subjective interpretation by venire members*).*

[22] *Dobyne*, 805 So. 2d at 772.

[23] *McLain v. Routzong*, 608 So. 2d 722, 724 (Ala. 1992) ("To effectuate the fundamental right to an impartial jury, courts must permit a meaningful and effective voir dire examination ...; therefore, a very wide latitude is allowed in conducting the examination, extending to any matter that might aid the parties in exercising their peremptory challenges and to any matter that might tend to affect the verdict.")

[24] *See, e.g., Volkswagen of Am. v. Marinelli*, 628 So. 2d 378 (Ala. 1993) (probably prejudice did not exist where undisclosed prior lawsuits were remote, approximately 12 years before the trial of the subject case and the nondisclosures were inadvertent); *Jimmy Day Plumbing & Heating, Inc. v. Smith*, 964 So. 2d 1, 56 (Ala. 2007) (in suit based on collision between motorcycle and car, trial court did not exceed its discretion in denying motion for new trial based on juror's failure to disclose lawsuit he filed based on a collision between his bicycle and a car; trial court could have determined that the matter was not material and that defendant's arguments that the accidents were "strikingly similar" and that juror would necessarily identify with the plaintiff were rank speculation).

[25] *See Alfa Mut. Fire Ins. Co. v. Payton*, 742 So. 2d 1228, 1235 (Ala. 1997) (the trial court exceeded its discretion in concluding that defendant suffered probable prejudice based on juror's failure to respond to question inquiring whether anyone knew the plaintiff where juror testified that he recognized the plaintiff's face but did not know her name until trial); *Jones v. State*, 753 So. 2d 1174, 1201-1202 (Ala.Crim.App.) *cert. denied* (1999) (juror's failure to respond did not constitute juror misconduct where the question asked left room for subjective interpretation by venire members); *Harris v. Whitehead*, 244 So. 2d 603, 606-07 (Ala. Civ. App. 1971) (finding no probable prejudice where juror did not say during voir dire that she knew the plaintiff because she thought the question was whether knowing the plaintiff would affect her consideration of the case and the record reflected that the juror had only a casual relationship with the plaintiff).

[26] *Davis v. State*, 283 So. 2d 650, 652 (1973)

[27] *Tomlin v. State*, 695 So. 2d 157, 175 (Ala. Crim. App. 1996).

[28] *Parish v. State*, 480 So. 2d 29, 30 (Ala.Crim.App.) *cert.denied* (1985) ("Unless a juror is asked a question which applies to him in a manner demanding response, it is permissible for a juror to remain silent; the juror is under no duty to disclose"); *Beasley v. State*, 337 So. 2d 80, 82 (Ala. Crim. App. 1976) (finding no ground for ordering a new trial when a juror recognized a witness during trial, where counsel was "given every opportunity" to question the venire during voir dire).

[29] *Ex parte Citizens Bank*, 879 So. 2d 535, 538-39 (Ala. 2003) ("[F]ailure to use due diligence in testing jurors as to qualifications or grounds of challenge is an effective waiver of grounds of challenge; a defendant cannot sit back and invite error based on a juror's disqualification.")

[30] *Compare Ex parte Toyota*, 684 So. 2d at 136-137 (provided the moving party exercised due diligence to have disqualified jurors removed from the jury pool, a juror's failure to respond to a question concerning a statutory ground for disqualification requires the grant of a new trial; however, plaintiff was not entitled to a new trial because juror had been convicted of burglary where plaintiff did not attend judge's initial qualifying session, juror could have misunderstood term "moral turpitude" and plaintiff did not inquire about criminal convictions or loss of right to vote); *Watters*, 551 So. 2d 1011 (defendant was not entitled to a new trial on the ground that two jurors did not reside in the jurisdiction, as required for service on a jury, where the two jurors specifically stated during voir dire the cities in which they resided, thereby revealing that they did not live in the jurisdiction, and the defendant failed to challenge the jurors' service until after trial); *McBride v. Sheppard,* 624 So. 2d 1069, 1072 (Ala. 1993) (trial court did not exceed its discretion in denying motion for new trial where juror allegedly could not read, write, understand and follow instructions in English language where plaintiff failed to question the prospective jurors during voir dire regarding their ability to read, speak or understand the English language); with *Noble Trucking Co. v. Payne*, 664 So. 2d 202 (Ala. 1995) (where trial court asked jurors in the presence of counsel whether any of them were convicted felons whose voting rights had not been restored, parties and their counsel had the right to rely on the juror's response to the court's question; due diligence did not require counsel to repeat that same question).

[31] 681 So. 2d 1373, 1374 (Ala. 1996) (quoting *Pogue v. State*, 429 So.2d 1159, 1161 (Ala.Crim.App. 1983)).

[32] *Holland v. Brandenberg*, 627 So. 2d 867, 870 (Ala. 1993) (where trial court learned during *in camera* interview with prospective juror he had been convicted of a crime involving moral turpitude, but did not advise the parties, and defendant failed to inquire about the subject during voir dire, the court held that defendant's failure to use due diligence in testing jurors was an effective waiver, noting "a defendant cannot sit back and invite error based on a juror's qualifications."); *Parkinson v. Hudson*, 265 Ala. 4, 88 So.2d 793, 797 (1956) ("the failure of a party to test prospective jurors, as to matters which might disqualify them, operates as a waiver of the peremptory right to a new trial on that account."). *But see Ex parte Benford*, 935 So. 2d 421 (Ala. 2006) (no waiver found where trial court, in counsels' presence, asked a specific and understandable question concerning a statutory qualification requirement and juror who was disqualified on that ground failed to respond); *Noble Trucking*, 664 So.2d 202 (new trial was required where juror convicted of felony involving moral turpitude served on jury; plaintiff had a right to rely on the juror's response to qualifying questions by the court).

[33] *Pearson v. State*, 343 So. 2d 538, 542 (Ala. Crim. App. 1977).

[34] See, e.g., *Continental Eagle Corp. v. Mokrzycki*, 611 So. 2d 313, 318 (Ala. 1992) (juror's failure to state that she was the secretary of a lawyer who handled a similar case was not a false answer to the Court's inquiry whether any prospective juror had any reason they should not be selected to serve as a juror in the case; the juror was not required to respond to such a general question); *Alfa Mutual Fire Ins. Co. v. Payton,* 742 So. 2d 1228, 1235 (Ala. 1997) (trial court exceeded its discretion in ordering new trial based on juror's failure to respond to question whether anyone knew the plaintiff where the juror testified that he recognized the plaintiff's face, but did not know her name until trial); Jones *v. State,* 753 So. 2d 1174, 1201-02 (Ala. Crim. App.), *cert. denied* (1999) (juror's failure to respond did not constitute juror misconduct where the question asked left room for interpretation);

[35] 343 So. 2d 538 (Ala. Crim. App. 1977).

[36] 343 So. 2d at 541-542.

[37] 411 So. 2d 109, 111 (Ala. 1982).

[38] 411 So. 2d at 111.

[39] 139 So. 3d 153 (Ala. 2013).

[40] 139 So. 3d at 158.

[41] *See, e.g, Boudreaux v. Pettaway*, 108 So. 3d 486, 492 (Ala. 2012) *overruled in part on other grounds by Gillis v. Frazier*, 2014 Ala. LEXIS 104 * 14 (Case No. 1120292, August 1, 2014) (jurors' alleged failures to disclose litigation history did not entitle defendant to relief on appeal where the failures could be the result of the ambiguous and self-limiting nature of the questions asked by defense counsel and the trial court was clearly within the bounds of his discretion in determining that counsel's questions regarding other litigation were subject to other reasonable interpretations); *Harris v. Whitehead*, 244 So. 2d 603, 606-07 (Ala. Civ. App. 1971) (finding no probable prejudice where juror did not reveal during voir dire that she knew the plaintiff because she thought the question was whether knowing the plaintiff would affect her consideration of the case and the record reflected that the juror had only a casual relationship with the plaintiff).

[42] 562 So. 2d 140 (Ala. 1989).

[43] 562 So. 2d at 149 ("Because of the phrasing of the question asked during voir dire, it is understandable that the cause of the failure to respond was merely a misunderstanding on the part of the jurors.").

[44] Boudreaux, 108 So. 3d at 493.

[45] *Willison v. Ard*, 611 So. 2d 274, 277 (Ala. 1992).

[46] *Ensor v. Wilson*, 519 So. 2d 1244, 1265 (Ala. 1987).

[47] *See, e.g., Boudreaux*, 108 So. 3d at 493-94; *Foremost Ins. Co. v. Parham,* 692 So. 2d 409, 427 (Ala. 1997) (defendant was not entitled to a new trial based on juror's failure to reveal medical condition where counsel failed to inquire about prospective juror's medical conditions or to follow up on the trial court's general inquiry as to whether any prospective juror was physically unable to serve); *Albarran v. State,* 96 So. 3d 131,196 (Ala.Crim. App. 2011) (trial court did not exceed its discretion in denying motion for new trial based on juror's inaccurate response regarding prior victimization where her responses to other questions should have led counsel to ask follow up questions).

[48] *Watters*, 551 So. 2d at 1015 (Ala. 1989) ("Failure to timely challenge a juror for cause may result in a waiver of the right to do so if the fact of disqualification is either known or, through the exercise of due diligence, should be known.")

[49] *Id.* (defendant was not entitled to a new trial on the ground that two jurors did not reside in the jurisdiction, as required for service on a jury, where the two jurors specifically stated during voir dire the cities in which they resided, thereby revealing that they did not live in the jurisdiction, and the defendant failed to challenge the jurors' service until after trial).

[50] 565 So. 2d 183, 185 (Ala. 1990).

[51] *Id. See also Ex parte Citizens Bank*, 879 So. 2d 535 (Ala. 2003) (challenge to juror's statutory qualifications in a 60(b) motion came too late; defendant's investigation of the jurors *after* judgment and an appeal did not demonstrate due diligence.)

[52] *See, e.g.,* ABA Standing Comm. On Ethics & Prof'l Responsibility, Formal Op. 466 (April 24, 2014)(entitled "Lawyer Reviewing Jurors' Internet Presence"); John G. Browning, *As Voir Dire Becomes Voir Google, Where are the Ethical Lines Drawn?* The Jury Expert (May 31, 2013).

[53] Courts do not all agree that research *during voir dire* is appropriate. *See* Federal Judicial Center, *Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management,* pp. 11-14 (May 1, 2014) (providing survey results from federal judges regarding allowed internet research by lawyers in and prior to voir dire).

[54] *Johnson v. McCullough*, 306 S.W. 3d 551 (Mo. 2010) (counsel must "use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and must present to the trial court any relevant information prior to trial.") *See also* Mo.R.Civ.P. 69.025(c) (the trial court "shall give all parties an opportunity to conduct a reasonable investigation as to whether a prospective juror has been a party in litigation").

[55] *See Sluss v. Commonwealth of Kentucky*, 381 S.W.3d 215, 229 (Ky. 2012) (ultimately concluding that counsel's failure to investigate potential jurors' Facebook accounts was excused, since the jurors' potentially false answers during voir dire had given him "little reason to think he needed to investigate" the Facebook accounts).

[56] See Thaddeus Hoffmeister, *Investigating Jurors in the Digital Age: One Click at a Time,* 60 Kan. L. Rev. 611, 630-31 (2012). *See also* C. Kelly and A. Haque, *A Trial Lawyer's Guide to Using Social Media Information During Trial,* For The Defense, p. 22 (Oct. 2013) ("the question is no longer whether attorneys should conduct online research, including reviewing publicly available social media profile data, on potential jurors or whether attorneys should monitor juror social media posts during trial but how to do both ethically and effectively").

[57] *See, e.g., Pogue,* 429 So. 2d at 1161 (movant waived objection to juror who lived outside the county where the jury list gave address that reasonably could have led to the discovery of the juror's nonresidence; "the ground of challenge could have been discovered before trial *just as easily* as it was discovered after trial.")

[58] 108 So. 3d 486 (Ala. 2012) (quoting trial court's order).

[59] 108 So. 3d at 491.