STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

PETITIONER,

V.

CHRISTOPHER BROADNAX,

RESPONDENT

APPELLATE CASE NO. 2013-000615

RETURN TO PETITION FOR WRIT OF CERTIORARI

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR RESPONDENT

INDEX

QUESTION PRESENTED

1. The Court of Appeals correctly held that armed robbery is not a crime of dishonesty pursuant to Rule 609(a)(2), SCRE.

2. The Court of Appeals correctly performed the necessary balancing test under rule 609, SCRE.

3. The Court of Appeals was correct in not applying the harmless error standard because the admission of Broadnax's prior armed robberies was not harmless as the evidence of guilt was not overwhelming, and the prior convictions were prejudicial.

STATEMENT OF THE CASE

In November 2009, the Richland County Grand Jury indicted Christopher Broadnax on the charges of armed robbery and four counts of kidnapping. On June 10, 14 – 16, 2010, Broadnax proceeded to trial before the Honorable G. Thomas Cooper, Jr., and a jury. He was represented by James May and Charles Cochran. The state was represented by Kathryn Luck Campbell. The jury returned verdicts of guilty as indicted on all charges. Judge Cooper sentenced Broadnax to the mandatory sentence of life without the possibility of parole (LWOP) as the state had served a notice they were seeking LWOP based on three prior armed robbery convictions.

Broadnax's attorney filed a notice of appeal. The Court of Appeals reversed Broadnax's conviction and sentence and remanded the case for a new trial on January 9, 2013. State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013). App. 1 – 10.

The state filed a petition for rehearing which the Court of Appeals denied on February 22, 2013. App. 30. The state then filed a petition for writ of certiorari to the Court of Appeals on March 25, 2013. This return to the petition for writ of certiorari follows.

QUESTION

I.

The Court of Appeals correctly held that armed robbery is not a crime of dishonesty pursuant to Rule 609(a)(2), SCRE.

On May 24, 2009, a gunman entered the restaurant, Church's Fried Chicken at 2436 Taylor Street in Columbia, and held four employees at gunpoint as one of the employees took the money from a cash register and gave it to the gunman. One of the employees, Arthur Haynes, followed the gunman from the restaurant. Haynes saw an old Dodge Ram pick-up leave the scene with an older man driving. No one else was seen in the truck. R. 77, ll. 8 – 25; R. 78, ll. 1 – 25; R. 79, ll. 1 – 25; R. 80, ll. 1 – 11.

The police were called and the truck was seen on Two Notch Road. The police followed the truck to where it stopped at Chestnut and Two Notch which was only minutes from the scene of the robbery. R. 80, ll.11 – 19.

As the police approached the truck, they apprehended the driver, Charles Green, and found Broadnax crouching down in the floorboard of the passenger's side along with a bag containing a gun and money. R. 81, ll. 1 – 18. The police took Arthur Haynes to view the two men, and he identified the truck, and Broadnax as the robber. R. 105, ll. 1 – 25; R. 106, ll. 1 – 25; R. 107, ll. 1 – 25; R. 108, ll. 1 – 25; R. 108, ll. 1 – 25. Broadnax was arrested and charged with armed robbery. R. 192 – 197.

Broadnax told the judge that he was going to testify. The judge then proceeded to settle Broadnax's prior record to determine which parts could be used for impeachment purposes. R. 286, ll. 1 – 25; R. 287, ll. 1 – 13. The state said that they wanted to introduce the three counts of armed robbery for which Broadnax was convicted in 1991. R. 288, ll. 1 – 25; R. 289, ll. 1 – 25; R. 289, ll.

1 – 18. The state also wanted to be able to introduce a prior financial transaction card theft; a prior receiving stolen goods; a prior burglary third degree; a prior grand larceny; and prior petit larceny. R. 290 – 292.

Defense counsel argued that any testimony must "meet the 403 hurdle." He argued that the admission of the armed robberies was "highly prejudicial' and cumulative and violated Broadnax's due process rights under the Fourteenth Amendment. R. 299, ll. 1 – 25. He said that the state's only reason to admit them was to say that Broadnax was an armed robber, so therefore he must have committed this robbery. R. 293, ll. 23 – 25; R. 294, ll. 1 – 25.

The state argued that although the Rule 403 provided that a 403 analysis should be done, that the case law as in State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003), made no reference to a 403 balancing. She argued that Al-Amin, id., ruled that these crimes were automatically admissible for impeachment purposes because they "have the greatest probative value on the issue of truth and veracity." R. 295, ll. 1 – 25; R. 296, ll. 1 – 25.

Defense counsel then argued that the Federal Rules of Evidence provide that robbery was not a crime of dishonesty, and that the rules of evidence were procedural due process. He argued that South Carolina cannot provide more limitations on due process than the federal government. Counsel argued that a more "constrictive" interpretation of Rule 609 (a) (2) would violate appellant's due process rights. R. 297, ll. 1 – 25; R. 298, ll. 1 – 25.

The judge ruled that the armed robberies, the transaction card theft, the grand larceny, and the petit larceny were admissible for impeachment under Rule 609 (a) (2). R. 298, ll. 1 – 25. Defense counsel told the court that due to the court's ruling admitting those prior offenses, Broadnax was not waiving his objection to their admission but that defense counsel wanted to bring those offenses out during direct instead of leaving it to the solicitor to do for the first time during

cross examination. The trial court responded that they were not waiving the objection. R. 301, ll. 25; R. 302, ll. 1 – 25; R. 303, ll. 1 – 12.

On appeal, the state argued in their petition for certiorari, that Broadnax waived his right to challenge the admissibility of his prior convictions because he introduced then during his testimony. This is incorrect as the trial judge assured defense counsel prior to the admission that her objection was protected.

In State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995), the Court of Appeals held that if a party has obtained a final ruling on the admissibility of impeachment evidence, that party does not lose his right to challenge the admissibility of the evidence by eliciting the evidence during direct examination.

In State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), the Supreme Court held that the evidence of the defendant's prior convictions for the unlawful possession of a weapon by a convicted felon and pointing and presenting a firearm were inadmissible for impeachment purposes in his trial for murder and the unlawful possession of a weapon by a convicted felon as the prior convictions had nothing to do with the defendant's credibility, and the evidence was more prejudicial than probative in light of his charged offenses. The Court cited State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) which listed five factors a trial judge should consider in deciding whether to admit prior convictions:

(1) The impeachment value of the prior crime;

(2) The point in time of the past crime and the charged crime;

(3) The similarity of the past crime and the charged crime;

(4) The importance of the defendant's testimony;

(5) The centrality of the credibility issue.

The Supreme Court also wrote in State v. Bryant, *supra*, that when the prior offense was similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission.

The Court stated:

> Furthermore, a conviction for **robbery** [emphasis added], burglary, theft, and drug possession beyond the basic crime itself, is not probative of truthfulness.

Citing United State v. Smith, 181 F. Supp.2d 904 (N.D.Ill.2002).

On appeal, the state argued that the Supreme Court's ruling in Bryant, that robbery is not a crime of dishonesty was mere dicta. This is in error. The Court had ruled that the defendant's prior conviction for pointing and presenting a firearm was not admissible for impeachment purposes because it had nothing to do with the defendant's credibility. The Court then went on to list other crimes that were not probative of truthfulness which included robbery.

The Court of Appeals was correct in holding that the trial court erred in admitting Broadnax's prior armed robberies for impeachment as they were more prejudicial than probative. They were the same crime for which he was on trial; they occurred in 1991 R. 287, ll. 3 – 23.

QUESTION

2

The Court of Appeals correctly performed the necessary balancing test under rule 609, SCRE.

The state relied on the case of State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000), for the proposition that the trial court must conduct the balancing test to determine if the probative value outweighed the prejudicial impact of the prior convictions for impeachment purposes. However, the Supreme Court wrote in Colf, id. :

> The balancing test required by Rule 609(b), SCRE, must be conducted by the trial court.

Colf is distinguished from Broadnax because the rule at issue in Broadnax was Rule 609(a), SCRE which concerns prior crimes and crimes of dishonesty. The issue in Colf concerned a prior conviction more than ten years old which is governed by Rule 609(b), SCRE.

The court in Colf also stated that it was impossible for the appellate court to balance the "interest at stake when the record does not contain the specific facts and circumstances necessary to a decision." Again, this is distinguished form Broadnax in that the Court of Appeals had a detailed record sufficient to show that the prior convictions of Broadnax were the same as the current conviction at issue. The record indicated that there were three prior convictions of armed robbery that were the same as the armed robbery conviction at issue.

Thus the Court of Appeals had the specific facts and circumstances to show that the prejudicial impact far outweighed the probative value.

The state also cites State v. Howard, 384 S.C. 2121, 682 S.E.2d 42 (Ct. App. 2009), which does involve a prior conviction pursuant to Rule 609(a), SCRE. However, the Court of Appeals relied on the holding in State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) for the holding that when the prior offense was similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission.

In State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984), the Supreme Court held that when the previous alleged bad act was strikingly similar to the one for which the appellant was being tried, the danger of prejudice was enhanced.

This was sufficient for a finding of high prejudice by the Court of Appeals. It would be pointless and a waste of judicial economy to remand Broadnax's case for a balancing test when the record clearly shows the prejudice outweighs the probative value.

QUESTION

3.

The Court of Appeals was correct in not applying the harmless error standard because the admission of Broadnax's prior armed robberies was not harmless as the evidence of guilt was not overwhelming, and the prior convictions were prejudicial.

The harmless error standard was not appropriate to Broadnax's case as the admisison of the three prior armed robbery convictions was highly prejudicial, especially in light of the fact that he was on trial for armed robbery. The evidence was not overwhelming because the victims testified that the robber put on a mask when he entered the building. R. p. 122; R. p. 151.

Broadnax testified that he did not commit this armed robbery at Church's Chicken on May 24, 2009. He admitted that he had a drug problem, and said that he and Charles Green, the co-defendant, frequently got high together. On the day of the robbery, he had just bought drugs, and saw Green driving down Two Notch. Broadnax flagged him down just moments before they heard the police sirens and were stopped by the police. Broadnax ate the crack when they were pulled over by the police. R. 305, ll. 18 – 25; R. 306, ll. 1 – 25; R. 307, ll. 1 – 25; R. 308, ll. 1 – 25; R. 309, ll. 1 – 25; R. 310, ll. 1 – 25.

In State v. Morris, 289 S.C. 294, 345 S.E.2d 477 (1986), the Supreme Court wrote that they recognized that where a trial court error is harmless beyond a reasonable doubt, it does not constitute grounds for reversible error. The Court continued to write, however, that "it is a doctrine which should be employed guardedly on a case by case basis."

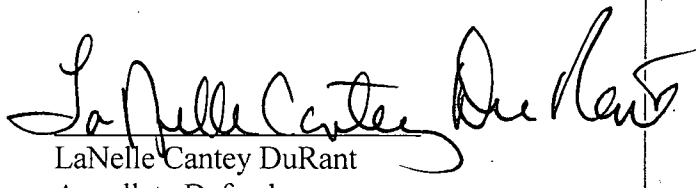
In State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) the Supreme Court wrote that an error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained. The court continued to write from Pagan , Id. that an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached.

The evidence in Broadnax's case was not sufficient to apply the harmless error standard and was not sufficient to overcome the prejudice from the admission of his three prior armed robbery convictions.

CONCLUSION

Based on the above, the state's petition for a writ of certiorari should be denied and the decision of the Court of Appeals affirmed.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT.

This 21st day of May, 2013

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

G. Thomas Cooper, Circuit Court Judge

THE STATE,

PETITIONER,

V.

CHRISTOPHER BROADNAX,

RESPONDENT

APPELLATE CASE NO. 2013-000615

CERTIFICATE OF SERVICE

I certify that a true copy of the return to petition for writ of certiorari in this case have been served on Julie Kate Keeney, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201this 21st day of May, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR RESPONDENT

SWORN TO BEFORE ME this 21st day of May, 2013.

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022.