

STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Florence County
The Honorable Thomas A. Russo, Circuit Court Judge

Opinion No. 5060 (S.C. Ct. App. filed 12/12/2012)
Appellate Case No. 2013-000401

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JUN - 6 2013

S.C. Supreme Court

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

LARRY BRADLEY BRAYBOY,

PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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INDEX

INDEX	1
ISSUE PRESENTED	2
STATEMENT OF THE CASE.....	3
ARGUMENT	4
CONCLUSION	11

ISSUE PRESENTED

Assuming the issue was preserved for appellate review, the trial judge committed no error in imposing a proper limitation on Petitioner's impeachment of a co-defendant regarding one of his several prior convictions, where the judge redacted "possession of a sawed-off shotgun" to "possession of a firearm," since the judge concluded that this redaction was necessary to prevent the jury from making an improper propensity inference because the case involved an issue of which of the three co-defendants was wielding a sawed-off shotgun during the armed robbery.

STATEMENT OF THE CASE

Petitioner was indicted in April 2009 in Florence County for armed robbery, kidnapping, and assault and battery of a high and aggravated nature. On August 24-26, 2009, he proceeded to trial before the Honorable Thomas A. Russo. The jury found Petitioner guilty, and Judge Russo sentenced him to eighteen years for armed robbery, eighteen years, concurrent, for kidnapping, and ten years, concurrent, for assault and battery of a high and aggravated nature. A timely notice of appeal was served and filed.

On December 12, 2012, the South Carolina Court of Appeals affirmed Petitioner's convictions. See State v. Brayboy, 401 S.C. 207, 736 S.E.2d 679 (Ct. App. 2012). Petitioner's request for rehearing was denied on January 25, 2013. Brayboy timely submitted a Petition for Writ of Certiorari to the Court of Appeals, and this Return follows.

ARGUMENT

Assuming the issue was preserved for appellate review, the trial judge committed no error in imposing a proper limitation on Petitioner's impeachment of a co-defendant regarding one of his several prior convictions, where the judge redacted "possession of a sawed-off shotgun" to "possession of a firearm," since the judge concluded that this redaction was necessary to prevent the jury from making an improper propensity inference because the case involved an issue of which of the three co-defendants was wielding a sawed-off shotgun during the armed robbery.

Background Facts

On December 6, 2008, around 11:00 pm, three male intruders entered a Pizza Hut in Lake City, South Carolina. One of the men had a pistol, another had a sawed-off shotgun, and the third man was unarmed. The man with the shotgun hit an employee in the head with the gun and ordered him to open the cash register. Meanwhile, the man with the pistol hit another employee on the head with his gun. The employees were required to surrender their wallets, cell phones, and keys. The intruders were unable to open the cash register, and when they realized that police were on the way, they fled. When police arrived they found, among other things, a loaded sawed-off shotgun that had been hidden behind the Pizza Hut. Two of the perpetrators, Brown and Turner, were captured by police as they fled the scene, and they each confessed and informed police that Petitioner was the third person involved in the robbery and that Petitioner's weapon was the sawed-off shotgun. Both Brown and Turner agreed to plead guilty to lesser charges and testify against Petitioner. After receiving a tip about Petitioner's location, police found Petitioner hiding under a bed in a friend's house and he was arrested. Petitioner was subsequently indicted for armed robbery, kidnapping, and assault and battery of a high and aggravated nature. (R. p. 11-78; p. 86-134; p. 166-241).

How the Issue Arose Below

Just before co-defendant Turner's testimony, Petitioner indicated he wanted to impeach Turner with several prior convictions, including a prior conviction from 1998 regarding possession of a sawed-off shotgun. (See R. p. 138-45). The trial judge first determined that this conviction fell within the ten-year time frame contemplated by Rule 609(b), SCRE, and was therefore generally admissible under section (a)(1) of that rule. (See R. p. 138; 142-43; p. 146, lines 14-15). However, the judge pointed out that, because Petitioner's trial involved one of the robbers having a sawed-off shotgun, the admission of Turner's prior conviction involving that same weapon carried the danger of misleading the jury into concluding that since Turner had a shotgun in 1998, he was the robber with the shotgun in this case.² (See R. p. 107, lines 2-17; p. 145, lines 14-25; p. 150-51). For that reason, Turner's conviction for a sawed-off shotgun would be "highly prejudicial" to the jurors since they were supposed to use the prior conviction solely to determine Turner's credibility and believability. (See R. p. 151, lines 10-22). The judge reiterated that the whole purpose of admitting a witness's prior convictions was to impeach the witness's credibility. (See R. p. 150-54; p. 159-160). The judge stated that the jury should decide Petitioner's case based upon the facts and not based upon an improper propensity inference. (See R. p. 150-51).

The judge concluded that the jury could determine Turner's credibility in the same manner by hearing he had a conviction for possession of a "weapon" rather than possession of a "sawed-off shotgun," but without being misled into an improper propensity inference. (See R. p. 151; p. 159-60). Petitioner's counsel agreed with the

² Co-defendant Turner and co-defendant Brown both testified that Petitioner had the shotgun and Turner had the pistol, while Brown was not armed. (See R. p. 181-82; p. 216-220).

judge's comments and balancing test, but requested that the court allow her to refer to the 1998 conviction as a "firearm" conviction rather than a "weapon" conviction so that the jury would understand that the weapon involved was a gun. (See R. p. 156, line 13 – p. 157, line 6). The judge agreed and said he would permit her to do so. (R. p. 158, line 19 – p. 160, line 13; see p. 193, lines 4-5). No further exceptions were raised. (See R. p. 157-60).

Thereafter, before the jury, Petitioner's counsel impeached Turner with the following prior convictions: unlawful possession of a firearm, common law robbery, possession of stolen goods, possession or receiving stolen goods, and possession of a stolen vehicle. (R. p. 193, lines 1-15). Turner also admitted that he had a pending federal charge for possession of a firearm, and further admitted that in exchange for his testimony at Petitioner's trial, he was receiving a plea agreement regarding the federal charge and dismissal of all state charges. (R. p. 190-92; p. 191, lines 2-13; see also p. 194, line 21 – p. 195, line 13). Upon further questioning by Petitioner's counsel, he acknowledged that he "always" carried an unlicensed gun. (R. p. 197, lines 1-21). He also acknowledged that he had previously lied to the police numerous times regarding the facts of this case. (See R. p. 197-201).

Discussion

Initially, the State maintains its position that the issue raised on appeal was not properly preserved for appellate review. Petitioner's counsel agreed with the judge's reasoning regarding the limitation on Turner's impeachment, agreed it was "a discretionary situation for [the judge] to balance," and then received what she requested - to be allowed to use the conviction for impeachment and refer to it as a "firearm"

conviction. (See App. p. 156, line 13 – p. 157, line 6; see p. 155-60). Therefore, the issue is not preserved. See State v. Mitchell, 330 S.C. 189, 195, 498 S.E.2d 642, 645 (1998) (where counsel acquiesced in the judge's limitation of his cross-examination, he could not complain on appeal); State v. Sinclair, 275 S.C. 608, 610, 274 S.E.2d 411, 412 (1981) (there is no issue for the appellate court to decide when the defendant receives the relief he sought); State v. Benton, 338 S.C. 151, 157, 526 S.E.2d 228, 231 (2000), *cert. denied*, 530 U.S. 1209 (2000) (holding issue not preserved for appellate consideration where appellant conceded the issue at trial); State v. Patterson, 324 S.C. 5, 16, 482 S.E.2d 760, 765 (1997) (no issue is preserved where the party accepts the judge's ruling and does not contemporaneously make an additional objection) (citation omitted).

Assuming the issue was preserved, the State submits that the trial judge did not commit error by redacting Turner's prior conviction. The admission or exclusion of evidence falls within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). Rule 609(a)(1), SCRE, states that, for the purpose of attacking credibility, evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by more than a year. Rule 403, SCRE, states that even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.

Here, co-defendant Turner's conviction for possession of a "sawed-off shotgun" had a very low probative value on the issue of his truthfulness. See State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 156 (2006) (firearms violations are not generally

probative of truthfulness). This is especially true considering that Turner had other prior convictions that were much more probative on the issue of Turner's truthfulness, including common law robbery, possession of stolen goods, possession or receiving stolen goods, and possession of a stolen vehicle. (See R. p. 193, lines 1-15). In contrast, the sawed-off shotgun conviction was highly prejudicial because it would likely mislead the jury into making an improper "propensity" inference with respect to a disputed issue at trial; that is, which of the defendants possessed the sawed-off shotgun during the robbery in question. The trial judge properly concluded that the prejudice and potential danger to mislead stemming from the prior conviction could be remedied, while still retaining the *same impeachment value*, by substituting the word "firearm" for "sawed-off shotgun."³ (See R. p. 158-60).

Contrary to Petitioner's assertions, the trial judge plainly *did* recognize Rule 609's distinction between a defendant and a witness. (See R. p. 144-46; p. 150-53; p. 159-60). The judge also properly recognized that admission of the prior conviction was mandatory under Rule 609(a)(1) unless exclusion was warranted following a Rule 403 analysis. (See R. p. 146, lines 14-21). Further, the Court of Appeals correctly found that, although the trial judge did not *specifically* cite to Rule 403 in his analysis, he nevertheless clearly indicated his consideration of whether the probative value of the conviction was substantially outweighed by the danger of unfair prejudice, particularly where the solicitor specifically referenced Rule 403, and its balancing test, in his argument to the court.⁴ (See R. p. 154, lines 12-15; see p. 145-60). See State v. King, 349 S.C. 142, 157,

³ Indeed, the *type* of unlawful firearm Turner possessed could not have had any bearing on his credibility as a witness. See Bryant at 517, 633 S.E.2d at 156.

⁴ In any event, Petitioner failed to preserve any argument regarding the judge's purported failure to properly consider Rule 403 since Petitioner never raised such an argument below or requested clarification

561 S.E.2d 640, 647 (Ct. R. 2002); Hunter v. Staples, 335 S.C. 93, 102, 515 S.E.2d 261, 266 (Ct. App. 1999). Importantly, also contrary to Petitioner's arguments, the fact that the trial judge relied on State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (Ct. App. 2006) and United States v. Boyce, 611 F.2d 530 (4th Cir. 1979) as *persuasive* authority - because there were no cases directly on point - does not at all indicate that he erred or failed to take into account the difference between a witness and the accused. (See R. p. 159-60; see also p. 152-54).

In sum, the trial judge did not err in his Rule 403 analysis, and his ruling should be upheld. See State v. Myers, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004) ("This Court reviews 403 rulings pursuant to the abuse of discretion standard, and gives great deference to the trial judge's decision.") (citation omitted); see also State v. Stephens, 398 S.C. 314, 319-20, 728 S.E.2d 68, 71 (Ct. App. 2012) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.' We review a trial court's decision regarding Rule 403 pursuant to the abuse of discretion standard and are obligated to give great deference to the trial court's judgment. A trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence. If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.") (citation omitted).

of the trial judge's ruling. (See R. p. 138-60). See, e.g., State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011) (arguments regarding an improper Rule 404(b) or Rule 403 analysis was not preserved because these arguments were never presented to the trial judge).

In any event, the Court of Appeals properly concluded that, even if the trial court erred, Turner was thoroughly impeached with other, more damaging matters such that the redaction regarding the sawed-off shotgun conviction was harmless. See State v. Cooper, 312 S.C. 90, 92, 439 S.E.2d 276, 277 (1994); State v. Tillman, 304 S.C. 512, 520, 405 S.E.2d 607, 612 (Ct. App. 1991); State v. Williams, 380 S.C. 336, 345, 669 S.E.2d 640, 645 (Ct. App. 2008) (any error in exclusion of a prior conviction for impeachment is harmless where the witness was already thoroughly impeached with other convictions and where his credibility was clearly called into question through other admissions). Turner was impeached with several other convictions which were more probative on the issue of his credibility, as well as a pending federal firearm conviction, and he admitted that he always carried a gun and had no qualms about lying to police. (See R. p. 189-201). Significantly, he also admitted that he was receiving dismissal of all of his state charges in exchange for his testimony at Petitioner's trial, and admitted this was a "big benefit." (R. p. 167, lines 5-25; p. 191-92). The judge's redaction regarding Turner's 1998 prior conviction could not possibly have affected the outcome of the case, especially considering that *firearm convictions are not generally probative on the issue of truthfulness* in any event. State v. Bryant, 369 S.C. at 517, 633 S.E.2d at 156; see also State v. Ferguson, 300 S.C. 408, 411, 388 S.E.2d 642, 644 (1990) (refusal to allow certain impeachment evidence is not reversible error when the particular evidence would not have had a meaningful impact on the witness's credibility). Moreover, Turner was not the only witness linking Petitioner to the crime since the other co-defendant also implicated Petitioner as the third perpetrator. (See R. p. 205-32). For all of these

reasons, any error with respect to the judge's treatment of this issue was harmless beyond a reasonable doubt.

CONCLUSION

For the reasons discussed above, Respondent submits that this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent asks permission under the rules to fully brief the issues.

Respectfully submitted,

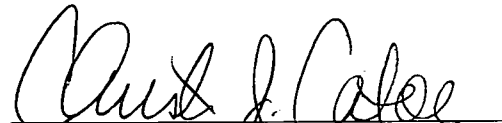
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June 6, 2013

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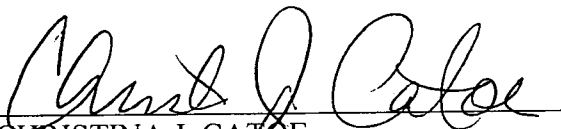
v.

LARRY BRADLEY BRAYBOY,

PETITIONER.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the **Return to Petition for Writ of Certiorari** in the above-referenced case has been served upon **KATHRINE H. HUDGINS**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **6th day of June, 2013**.


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