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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
The Honorable Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No. 2021-001272

THE STATE,

Respondent,

v.

ISAIAH DESHAUN BUTLER,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

The trial judge did not abuse his discretion in admitting Appellant's conviction for possession of a stolen vehicle under Rule 609, SCRE.

STATEMENT OF THE CASE

Appellant was indicted for two counts of attempted murder by the Lexington County grand jury. Appellant proceeded to trial on August 23, 2021, before the Honorable Walton J. McLeod, IV. On the third day of trial, the judge granted a mistrial due to juror misconduct. Appellant's case was again called to trial on October 11, 2021, before Judge McLeod. Appellant was represented by Jason S. Chehoski, Esquire and Jean M. Popowski, Esquire. The State chose to go forward on one count of attempted murder and one count of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN). Appellant was found guilty on both counts. Appellant was sentenced to twenty-eight years for attempted murder and twenty years concurrent for assault and battery of a high and aggravated nature. This appeal follows.

STATEMENT OF FACTS

In August 2018, Appellant, Appellant's then girlfriend, Keanna, her brother Isaiah¹, and a friend Tomiah, lived together in an apartment. (Tr. 72). At the time the power in their apartment had been turned off due to past due bills. Frequently they went to their friend Areauna's apartment, in the same complex to shower, charge their phones and to be somewhere with air conditioning. (Tr. 147).

On August 29, 2018, Keanna and Isaiah began arguing due to stress from the power being shut off, conversations about evicting Tomiah, and Keanna's urge to go back to school. (Tr. 147-148). The argument escalated to a physical altercation, in which Isaiah struck Keanna. (Tr. 148). After this encounter, Isaiah decided to move out and stayed at Areauna's apartment that night. (Tr. 148-149). While Isaiah was gone, Keanna threw all his belongings out of the apartment. (Tr. 149). On August 30, the following day, Keanna called the police to report the assault by Isaiah. (Tr. 149). The police arrived on scene but did not make an arrest because the report was not timely. (Tr. 149).

Later that afternoon Keanna brought her and Isaiah's little brother over to Areauna's to shower. (Tr. 150). Isaiah helped his little brother shower and when he came back to the living room, Keanna and Isaiah's phone were gone. (Tr. 150). Isaiah suspected Keanna had taken his phone and he attempted to file a police report for the theft. (Tr. 151). The police told Isaiah there was nothing that they could do because Isaiah did not actually see her take the phone. (Tr. 152). When Iyana arrived at Areauna's and Isaiah told her about Keanna taking the phone, Isaiah, Iyana, and Ebony, another friend of Iyana and Isaiah, decided to go over to Keanna's to get Isaiah's phone and other

¹ At trial, Isaiah preferred to go by "Zariah", but for the purposes of this brief will be referred to as "he" and "Isaiah." Appellant's name is also Isaiah and is sometimes referred to as "Ike" at trial, but for purposes of this brief will be referred to as Appellant.

items that belonged to him. (Tr. 79). When they arrived at the apartment Appellant and Keanna were outside. (Tr. 79)

Isaiah went into the apartment to grab his belongings and look for his phone. Keanna followed him inside where they could be heard yelling and arguing. (Tr. 80). When Isaiah exited the apartment, Keanna was following him and busted a glass table over his head. (Tr. 80). Isaiah and Keanna then began physically fighting. (Tr. 80). Everyone began arguing back and forth. There was testimony that there was a lot of yelling and cursing. (Tr. 82). Isaiah, Ebony, and Iyana testified that during the altercation, Appellant threatened to shoot them. (Tr. 83, 152, 400). Appellant testified at trial that although he did threaten them, it was because they had threatened him first. (Tr. 554).

The fight deescalated and Ebony, Iyana, and Isaiah went back to Areauna's apartment. (Tr. 86). On the way back to the apartment, Isaiah again called police to report the theft of his phone since he had seen it during the altercation. (Tr. 152). During the altercation, Isaiah had taken Keanna's wallet in exchange for his phone, but Keanna told him that Appellant had the phone and was not there anymore. (Tr. 155). Everyone then waited outside Areauna's apartment for Appellant to bring the phone back so that they could make the exchange, but during the wait a black SUV pulled up and began firing shots. (Tr. 158). There was testimony that the vehicle from which the shots were fired was the same car Appellant drove and was associated with earlier in the day. (Tr. 102, 154-158, 400-410). Ebony suffered a graze wound to her head, while her mother, Larresia Thompson, was shot in the arm, chest, and abdomen. (Tr. 342). Both women survived their injuries.

STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is left to the sound discretion of the trial court, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008); State v. Howard, 396 S.C. 173, 177, 720 S.E.2d 511, 514 (Ct. App. 2011); State v. Swafford, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct. App. 2007). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012); Howard at 178, 720 S.E.2d at 514. To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); Howard at 178, 720 S.E.2d at 514. “The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court’s] discretion provided the [trial court] conducts the analysis mandated by the evidence rules and case law.” State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001).

ARGUMENT

The trial judge did not abuse his discretion in admitting Appellant's conviction for possession of a stolen vehicle under Rule 609, SCRE.

Before Appellant testified, the State expressed its intention to impeach Appellant with his prior conviction for possession of a stolen vehicle. (Tr. 500). Appellant pled guilty to the offense in 2020. (Tr. 500). Defense counsel objected to the introduction of this conviction pursuant to Rule 609, SCRE, and Rule 403, SCRE. (Tr. 500). The State argued that it was a crime of dishonesty and would go directly toward impeaching Appellant. (Tr. 501). The trial judge ruled that it was a crime of dishonesty and that it “certainly had a tendency to go towards the credibility of a witness.” (Tr. 501). The judge further ruled that “while all evidence has the tendency to be prejudicial, I don’t think it’s unfairly prejudicial under the circumstances and the impeachment will be allowed of that conviction.” (Tr. 502).

Appellant contends the trial court erred in admitting Appellant’s prior conviction for possession of a stolen vehicle pursuant to Rule 609, SCRE. Specifically, Appellant argues that the prior conviction was not a crime of dishonesty or false statement, the probative value of the conviction did not outweigh the prejudicial effect, particularly where it was alleged that the vehicle involved in the drive by shooting was stolen. Appellant’s argument is without merit. The trial court acted well within its broad discretion in admitting the conviction.

Rule 609, SCRE

Pursuant to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year’s imprisonment “shall be admitted” for impeaching the credibility of a defendant who testifies if “the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” Under Rule 609(a)(2), SCRE, if a crime is viewed as one involving dishonesty, the court must admit the prior conviction because, prior convictions involving dishonesty or false

statement must be admitted regardless of their probative value or prejudicial effect. State v. Bryant, 369 S.C. 511, 633 S.E. 2D 152, 155 (2006). “For impeachment purposes, crimes of ‘dishonesty or false statement’ are crimes in the nature of *crimen falsi* ‘that bear upon a witness’s propensity to testify truthfully.’” State v. Broadnax, 414 S.C. 468, 476, 779 S.E.2d 789, 793 (2015). “The Federal Rules of Evidence specifically identify *crimena falsi* in Rule 609(a)(2), Fed. R. Evid., as crimes which by their very nature permit the impeachment of a witness convicted of a crime of dishonesty or false statement.” Broadnax. at 477. Here, the trial judge ruled that Appellant’s conviction of possession of a stolen vehicle as a crime of dishonesty that was automatically admitted. (Tr. 501). The State agrees that possession of a stolen vehicle is questionable as to whether it is a crime of dishonesty, however other states have held possession of a stolen vehicle is a crime of dishonesty.² (See State v. Robinson, 426 S.C. 579, 600, 828 S.E.2d 203, 214 (2019)).

Further, this court has held in State v. Shaw that shoplifting was a crime of dishonesty. State v. Shaw, 328 S.C. 454, 492 S.E.2d 402 (Ct. App. 1997). “Common sense tells us that anyone who, in violation of the shoplifting statute, takes and carries away a storekeeper’s merchandise with intent to deprive the owner of its possession without paying for it, or alters or removes a label or price tag in an attempt to buy a product at less than its value, or transfers merchandise from its proper container for the purpose of depriving a storekeeper of its value acts dishonestly.” Id. at 457, 492 S.E.2d at 404. Similarly possession of a stolen vehicle is depriving an owner of its possession without paying for it. Even if this court finds it is not, the trial judge did not abuse his discretion because he still properly conducted a balancing test to weigh the probative value of impeachment of prior convictions against the prejudice of the accused.

² State v. Vargas, 991 A.2d 1056, (R.I. 2010)., State v. McKinsey, 116 Wash.2d 911, 810 P.2d 907 (1991).

Colf Factors

The South Carolina Supreme Court has approved the five-factor analysis generally employed by the federal courts for weighing the probative value of impeachment of prior convictions against the prejudice to the accused. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (1999). Rule 609(b) provides: “Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” Rule 609(b), SCRE.

The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness’s subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant’s testimony; and (5) the centrality of the credibility issue. Colf, at 627, 525 S.E.2d at 248. In regard to the prior convictions, the trial court acted within its discretion in concluding that they were properly admitted after conducting a careful balancing of the factors set forth in Colf.³

(1) Impeachment Value of Prior Convictions

“The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand- the witness’s propensity for truthfulness, or credibility.” State v. Black, 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012). “The tendency to impact credibility ... determines the impeachment value of the prior conviction. Impeachment value refers

³ The parties agreed that the fifth Colf factor regarding the centrality of credibility to the case was not in dispute and will not be discussed. (Tr. 160, Brief of Appellant pg. 12).

to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness.” Id. at 21-22, 732 S.E.2d at 887. The purpose of the impeachment is not to show the witness is a bad person, but rather to show background facts which impact the witness's credibility. Id. at 22, 732 S.E.2d at 887. Our Supreme Court held in State v. Robinson, that the trial court did not abuse its discretion in finding that Robinson’s convictions for strong arm robbery and breaking and entering automobiles had impeachment value. State v. Robinson, 426 S.C. 579, 600, 828 S.E.2d 203, 214 (2019). “Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1). If the Court of Appeals' conclusion regarding this factor is carried to its logical extreme, no convictions would ever have impeachment value under Rule 609 unless they were crimes of dishonesty or false statement admitted under Rule 609(a)(2). Rule 609(a)(2) would inevitably swallow Rule 609(a)(1).” Id. at 599, 828 S.E.2d at 213. “It was within the trial court’s discretion to conclude that because Robinson has prior convictions for such offenses, he legitimately might not be considered credible. Id. at 600, 828 S.E.2d at 214. “Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility of the witness.” State v. Black, 400 S.C. 21, 22, 732 S.E.2d 880, 887 (2012).

Here the trial judge stated:

“I think 403 is always out there on any evidence if its unduly prejudicial, but I think under the circumstances, you know, it is a crime of dishonesty and it certainly – certainly has a tendency to go towards the credibility of a witness, which under these circumstances I think its important.”

(Tr. 501). The trial judge conducted an analysis properly concluding that Appellant's prior convictions went to the credibility of the witness and had impeachment value therefore weighing in favor of admissibility.

(2) Point in Time of Prior Convictions and Subsequent History

Appellant's conviction for possession of a stolen vehicle was from 2020. Appellant's trial was conducted in 2021, the temporal proximity of conviction and the time of trial is important in showing that there is a continuing pattern of criminal behavior. This factor weighs in favor of admissibility.

(3) Similarity between Past Crimes and the Charged Crime

Here Appellant argues that although possession of a stolen vehicle is not similar to the offenses for which Appellant was being tried, attempted murder and assault and battery of a high and aggravated nature, there were underlying allegations concerning a stolen vehicle. (Initial Brief of Appellant pg. 17.) Appellant refers to one vague reference. Nikki Rodgers, the chief of communications at Lexington County 911, testified that one of the callers reported to 911 after the shooting that "the shooter has left the scene. Shooter is a black male in a black Range Rover, stolen vehicle, three black males, light skin." (Tr. 196). This is the only mention in the entire trial of a vehicle being stolen. Nothing in the statement ties Appellant to being the one who stole the vehicle. Further, the statement about the vehicle being stolen was not admitted for the truth that the vehicle was stolen, but for the purpose of the type of vehicle in which the shooter was seen.

"Evidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions." Colf at 628, 525 S.E.2d at 249. "When the prior offense is 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.” State v. Bryant, 369 S.C. 511, 517-518, 633 S.E.2d 152, 156 (2006). Here, Appellant admits that the possession of the stolen vehicle is not similar to the offenses for which Appellant was being tried. Therefore Appellant’s prejudice is very minimal and this factor rules in favor of admissibility.

(4) Importance of Appellant’s Testimony

The court in State v. Robinson held “given the fact that the Defendant’s testimony was entirely cumulative to the testimony of the other two defense witnesses, it was not necessary for the Defendant to take the stand in his defense. In fact the only thing the Defendant testified to that his other witnesses did not confirm was that he [Robinson] bought marijuana from Mr. Williams at the home prior to the date of the burglary.” State v. Robinson, 426 S.C. 579, 603, 828 S.E.2d 203, 215 (2019). Similarly, Appellant in his brief admits that his testimony “corroborated Monee Anderson’s testimony and established a complete alibi for the timeframe of the shooting.” (Initial Brief of Appellant pg. 18). Anderson testified in Appellant’s defense stating that he was with her at the time of the shooting, so it was not necessary for Appellant to take the stand. This factor weighs in favor of admitting Appellant’s conviction.

(5) Centrality of the Credibility Issue

In Robinson, our Supreme Court held “when credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate.” Robinson at 603, 828 S.E.2d at 215. “If a jury must choose between the defendant’s credibility and that of another witness, there would be a high probative value in admitting evidence of prior convictions to impeach the defendant’s credibility.” Id. Appellant’s credibility was extremely important in this case because the case hinged on whether the jury believed Appellant’s alibi. This factor weighs in favor of admitting Appellant’s prior conviction.

Here the probative value of impeachment of Appellant outweighed the prejudicial effect of Appellant's prior conviction and therefore the trial judge did not abuse his discretion in admitting the conviction for possession of a stolen vehicle.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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Good afternoon, Ms. Caudy.

Attached to this email is the State's Initial Brief Of Respondent and Designation Of Matter. We will be filing this brief with the Court later this afternoon.

If you would, please confirm your receipt of the brief by return email.

Thank you for your cooperation.

Sincerely,

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