STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Honorable Jocelyn J. Newman, Circuit Court Judge

STATE OF SOUTH CAROLINA,

Respondent,

vs.

CHASE MICHAEL MILAM,

Appellant.

Appellate Case No. 2021-001490

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF THE ISSUE ON APPEAL

Did the trial court err in admitting Appellant's prior convictions for petit larceny and shoplifting as crimes of dishonesty and failing to conduct the on-the-record balancing test required by State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000), which would have shown that the unfair prejudice of admitting the prior convictions outweighed any probative value?

RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

Appellant never argued that shoplifting and larceny were not crimes of dishonesty so the issue is not preserved. Shoplifting and petit larceny are crimes of dishonesty which are admissible without undertaking probative value/prejudicial effect balancing, and any error was harmless since Appellant was caught red-handed and his testimony suffered severe credibility lapses.

STATEMENT OF THE CASE

The grand jury indicted Appellant Milam for second degree burglary and possession of burglary tools. The petit jury convicted Appellant of the burglary charge, but acquitted Appellant of possession of burglary tools. The Honorable Jocelyn Newman sentenced Appellant to seven years' imprisonment.

STATEMENT OF FACTS

Donald Ballentine, Jr., and his son, Wells Ballentine, were cleaning out Donald's father's house. Donald's father passed away five or six years ago and was a "pack rat," so there was a lot to clean out. They returned to the house on October 28 to find it was unlocked, a pistol was missing, and some items were gathered up as if the burglar(s) were coming back to take those items. R. pp. 30-62. Donald and Wells decided to stake out the house that night – armed and dressed in camouflage. Despite it being a rainy night, they saw someone walk into the yard and go through a

door in the walk-in underneath the house. They saw the individual go underneath because the individual carried a flashlight. R. pp. 36-38. Donald called 911 and tried to speak with the operator in a hushed voice while also keeping an eye on the house. It was hard to hear the operator. R. pp. 43-44.

They heard a siren in the distance and then the burglar began running with the flashlight and attempted to jump the neighbor's fence. When the burglar fell down, they pointed a gun at him, but undaunted, the burglar kept running. He was detained by the responding officer on the other side on the yard. Donald testified he was 100% sure the person falling to the ground after jumping the fence was Appellant and this was the same person under the house. R. pp. 47-50. Wells, who testified similarly, said he got a good look at Appellant after he fell over the fence. R. pp. 64-65.

Appellant's father, Ray Milam, testified for the defense, claiming the night of the burglary, Appellant left with his friend Chad Harper. The Milam's lived about half a mile from the Ballentine's house and they told Ray they were going dumpster-diving, leaving about 10 p.m. Chad came back and told Ray that Appellant was arrested. Someone picked up Chad that night and Ray never saw him again. R. pp. 117-20. It is problematic that Ray never told anyone about Chad Harper until the day of trial. His excuse was no one asked him and he did not think of it. R. pp. 121-22.

Appellant claimed he was never inside or underneath the Ballentine house. He also claimed he was not the person in the backyard with the flashlight. R. pp. 123-24. Appellant testified it was trash night and he and Chad were going to look for stuff left out that he could take and fix up to sell. R. p. 125. Appellant testified he and Chad saw the dumpster in front of the yard and Appellant opened the dumpster with a screwdriver. He was looking inside the dumpster but became aware that

Chad was no longer by his side, but did not look for him. Then Appellant heard a siren, panicked, and ran. He did not know where Chad was during this time. Appellant tripped over the fence and someone pointed a gun at him. He kept running but realized while he was running he had no reason to run because he did not do anything wrong. R. pp. 126-27. Appellant never saw Chad again. R. p. 129.

Prejudicial to Appellant's defense was the prosecution's cross-examination of Appellant on the subject of trash night:

> Q: Okay, and so was that something you and Chad were accustomed to doing, walking around at night and looking in people's trash cans?
>
> A: That's what I did. Every single trash night in my neighborhood I did it, every ---
>
> Q: Every single trash night?
>
> A: Every Sunday night.
>
> Q: Okay. Sunday is trash night?
>
> A: Yes, sir.
>
> Q: Okay. Did you ever look at the calendar and realize this was a Thursday night?
>
> A: I did not.
>
> Q: Okay. So, it wasn't trash night.
>
> A: I guess not. I thought it was.
>
> Q: Huh.
>
> A: Hm.
>
> Q: Okay. So, then we need to think back, and I guess we weren't going around looking in trash cans that night.

A: I thought I was.

Q: You thought you were?

A: I thought it was trash night that night, but it was a year ago and . . .

Q: Could you have been wrong about that?

A: I could have.

Q: Okay. So, maybe you were up to something else?

A: No, sir.

R. p. 132, line 24 – p. 133, line 24.

To be clear, Appellant agreed with the prosecutor that "at the very least, it's suspicious to be out on a rainy night at 11 o'clock with a mask around your neck, 2-foot long screwdriver, in somebody's yard[.]" R. p. 137, lines 19-23. Appellant admitted he went back to the dumpster again three days after he bonded out. R. p. 146, lines 13-22. Appellant also assured the prosecutor that Chad Harper is a real person. R. p. 147.

STANDARD OF REVIEW

Trial judges have considerable discretion in ruling on the admission or exclusion of evidence, and an appellate court will not reverse a trial judge's ruling on evidentiary matters absent a clear abuse of that discretion resulting in prejudice to the defendant. State v. Gaster, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002); see State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010) ("The appellate court reviews a trial judge's ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court.").

ARGUMENT

Appellant never argued that shoplifting and larceny were not crimes of dishonesty so the issue is not preserved. Shoplifting and petit larceny are crimes of dishonesty which are admissible without undertaking the probative value/prejudicial effect balancing, and any error was harmless since Appellant was caught red-handed and his testimony suffered severe credibility lapses.

Following the prosecution resting its case, Appellant informed the trial court he intended to testify. The trial court inquired of the prosecution as to whether Appellant had a record and the prosecutor informed the trial court Appellant was convicted of shoplifting in 2017, of petit larceny in 2019, and for an enhanced petit larceny conviction, also in 2019. R. p. 113. The prosecutor argued the convictions were crimes of dishonesty and the convictions were highly probative because the prosecution alleged Appellant went to the residence with intent to commit a burglary. The prosecutor also seems to contemplate an open-the-door scenario during Appellant's testimony: "So, a pattern and a history of theft and thievery, I believe, is probative. And we'll see how his testimony goes to how that – how we use those convictions." R. p. 113, lines 14-17.

In response, Appellant's counsel did not contend the offenses were not crimes of dishonesty,

but instead argued: "Your Honor, we contend that the prejudicial value obviously outweighs anything probative and do not believe that the state should be allowed to introduce those or impeach the defendant with them." R. p. 113, lines 20-23. The trial court ruled that the crimes were admissible as crimes of dishonesty. R. p. 113, line 24 – p. 114, line 10.

For the first time on appeal, Appellant contends that the offenses are not crimes of dishonesty and suggests that the trial court should have conducted the five-factor test from State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). However, the argument is not preserved for appeal.

The argument Appellant did raise is without merit because crimes of dishonesty are admissible for impeachment purposes without a probative value/prejudicial effect analysis by the trial court. Under Rule 609(a) SCRE: "For the purpose of attacking the credibility of a witness, . . . (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." See State v. Robinson, 426 S.C. 579, 593, 828 S.E.2d 203, 210 (2019) ("[U]nder Rule 609(a)(2), if a witness, even an accused, has been convicted of a crime involving dishonesty or false statement, evidence of such a conviction shall be admitted regardless of the maximum punishment and regardless of the probative value or prejudicial effect of the evidence.") (citation omitted).

As for the contention that larceny and shoplifting are not crimes of dishonesty, Appellant did not present that argument to the trial court, so it is not preserved for review. "[I]t is the responsibility of trial counsel to preserve issues for appellate review." Jackson v. Speed, 326 S.C. 289, 486 S.E.2d 750, 759 (1997). To preserve for review an alleged error in admitting evidence, the objection must sufficiently bring into focus the precise nature of the alleged error so the error may be understood by the trial judge. The party may not argue one ground at trial and another on appeal.

State v. Prioleau, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001). The ground raised in support of a claim of error on appeal must be the same ground offered in support of the objection at trial. State v. Smith, 337 S.C. 27, 34, 522 S.E.2d 598, 601 (1999). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373 628 S.E.2d 902, 919 (Ct. App. 2006).

The Supreme Court found shoplifting was a crime of dishonesty and admissible under Rule 609(a)(2) in State v. Johnson, 334 S.C. 78, 512 S.E.2d 795 (1999). In reaching the holding, the Supreme Court found this Court's opinion in State v. Shaw, 328 S.C. 454, 492 S.E.2d 402 (Ct. App. 1997) persuasive and adopted the reasoning, quoting Shaw as follows:

> 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 87-88, 492 S.E.2d at 800 (citation omitted, emphasis removed).

The Supreme Court found armed robbery was not a crime of dishonesty in State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015). In her concurring opinion, Justice Hearn (joined by then-Justice Pleicones) noted, "'Dishonesty' is by definition, a '"disposition to lie cheat, or steal" "In common human experience [,] acts of deceit, fraud, cheating, or stealing . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity."'" Id. at 481, 779 S.E.2d at 795. Justice Hearn opined that stealing, even at gunpoint in an armed robbery, is behavior reflecting on a person's character for truthfulness as envisioned under Rule 609(a)(2). Id.

Justice Hearn further contended, "Holding that armed robbery is a crime of dishonesty pursuant to Rule 609(a)(2) would avoid the perverse result the majority creates, where shoplifting is a crime of dishonesty pursuant to State v. Johnson, 334 S.C. 78, 87, 512 S.E.2d 795, 800 (1999), but armed robbery is not." Id.

Other courts expressed compelling rationale in keeping with Justice Hearn's view on the meaning of dishonesty. The Washington Supreme Court noted:

> The term "dishonest" implies the act or practice of telling a lie, or of cheating, deceiving, and stealing. Webster's Third New International Dictionary 650 (1981). Crimes of theft involve stealing, and are clearly encompassed within the term dishonest. Moreover, we agree with former Chief Justice Burger's statement when with the United States Circuit Court of Appeals that "[in] common human experience acts of deceit, fraud, cheating, or stealing, . . . are universally regarded as conduct which reflects adversely on a man's honesty and integrity." Gordon v. United States, 383 F.2d 936, 940 (D. C. Cir. 1967) . . . .

State v. Brown, 782 P.2d 1013, 1031 (Wash. 1989).

The Ohio Court of Appeals noted:

> While there is some support for defendant's position in some federal cases, courts of some states have defined "dishonesty" in a much broader sense so as to include theft offenses. . . . Although there is some suggestion of limitation in the Staff Notes to the rule, it is inconceivable that the drafters of the rule would not have been more precise and used more limiting language such as crimen falsi or fraud, had such a limitation been intended, rather than using the much broader term "dishonesty." Clearly and undisputedly, a theft is inherently dishonest. Common sense dictates that stealing is a dishonest act. While dishonesty also includes deceit, it is not limited thereto. . . . [W]e are constrained to the common-sense conclusion that dishonest acts such as receiving stolen property and stealing are included within the meaning of the word "dishonesty" as used in Evid. R. 609(A)(2).

State v. Johnson, 460 N.E.2d 625, 629 (Ohio Ct. App. 1983).

Shoplifting, as described in the Supreme Court's opinion in Johnson and this Court's opinion in Shaw, typically involves theft by stealth or subterfuge, and therefore, it is understandable that shoplifting is a crime of dishonesty. Likewise, larceny is also typically a crime of stealth, committed furtively, separating it from robbery and armed robbery, which are takings by force and therefore the absence of stealth or furtiveness, at least towards the victim. Therefore, in keeping with the rationale of Johnson, which remained untouched by Broadnax, larceny is likewise a crime of dishonesty. Therefore, both petit larceny convictions were admissible under Rule 609(a)(2).

Finally, any error was harmless beyond a reasonable doubt. Errors are considered to be harmless when they could not reasonably have affected the result of the trial. State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003). "It is a rule of practically universal application in appellate procedure that an accused cannot avail himself of error as a ground for reversal where the error has not been prejudicial to him." State v. Hariott, 210 S.C. 290, 298, 42 S.E.2d 385, 388 (1947). When a review of the entire record establishes an error is harmless beyond a reasonable doubt, an appellate court should not reverse a conviction. State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83 (Ct. App. 2003).

Appellant was there, caught red-handed. He admitted he was the guy who fell jumping the fence and therefore, both eyewitnesses were correct in their identifications. There was no evidence of anyone else present. His father never bothered to tell the police about Chad Harper, if he exists. The Ballentines saw only one person, not two. And far more prejudicial to Appellant was his slip-up in which he claimed he was out on trash night when it was not even trash night. Accordingly the conviction and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

Respectfully submitted,

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