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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

Honorable Jocelyn J. Newman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHASE MICHAEL MILAM,

APPELLANT.

APPELLATE CASE NO. 2021-001490

FINAL BRIEF OF APPELLANT

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STATEMENT OF 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?

STATEMENT OF THE CASE

Appellant Chase Michael Milam was indicted in Richland County for second-degree burglary and possession of burglary tools. On December 6, 2021, appellant was tried before the Honorable Jocelyn Newman and a jury. R. 1. Christopher Dale Scott and Bret L. West represented the State. R. 1. James R. Snell, Jr. represented appellant. R. 1. The jury acquitted appellant of possession of burglary tools. R. 212, l. 18 – 22. The jury convicted appellant of second-degree burglary. R. 212, l. 23 – 213, l. 1. Judge Newman sentenced appellant to seven years' imprisonment. R. 226, l. 16 – 20. This appeal follows.

STANDARD OF REVIEW

The admission of prior convictions is governed by the abuse of discretion standard. State v. Robinson, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (internal quotations omitted).

ARGUMENT

The trial court erred 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.

Donald Ballentine, Jr. ("Ballentine") was cleaning out his deceased father's house and had a dumpster delivered on October 28, 2020. R. 29, l. 9 – 30, l. 24. Ballentine locked up the house after working on October 28. R. 31, l. 4 – 10. When Ballentine returned the next morning, he saw that the house had been broken into and items were missing. R. 31, l. 15 – 33, l. 2. A gun case was in the yard and a pistol was gone. R. 31, l. 15 – 33, l. 2. Ballentine also saw a number of boxes stacked on a hand truck. R. 31, l. 15 – 33, l. 2. He surmised that the culprit was "coming back for this." R. 31, l. 15 – 33, l. 2.

Ballentine and his son, Wells, decided they would stake the house out that night and attempt to catch the thief. R. 33, l. 8 – 16. They waited in the edge of the woods. R. 35, l. 12 – 18. About 10:45 PM, Ballentine saw a man with a flashlight walk down the driveway and look in the windows of the house. R. 36, l. 21 – 37, l. 20. The man walked around to the back of the house and entered a door that led under the house. R. 37, l. 9 – 38, l. 16. Ballentine called 911. R. 37, l. 9 – 38, l. 16.

The man came back out and circled around to the front of the house. R. 40, l. 18 – 22. Ballentine identified Milam as the person he saw go under the house, even though there was a light drizzle and the moon was not quite full. R. 37, l. 2 – 8. R. 49, l. 8 – 50, l. 21. Ballentine's son also identified Milam. R. 64, l. 1 – 65, l. 22. But as pointed out by defense counsel, during Ballentine's real-time 911 call during the incident, he told the operator that he could not see the

man and he could only see the flashlight he held. (Def. Ex. 1) He also asked the dispatcher several times whether the man he saw could be a police officer because he asked the police to drive by the house earlier that day when he reported the previous night's break-in. (Def. Ex. 1). When the man went to the front of the house, Ballentine lost sight of him. R. 58, l. 23 – 59, l. 1. On the 911 call, Ballentine told the operator he did not know where the man went. (Def. Ex. 1). He hung up when he heard a police siren. (Def. Ex. 1).

Officer Joshua Peeples responded to the residence "as a burglary in progress." R. 68, l. 21 – 22. Officer Peeples got out of his truck and saw something at the corner of the house. R. 70, l. 8 – 15. When he shined his flashlight, he saw appellant. R. 70, l. 8 – 15. Appellant ran and Officer Peeples apprehended him after a short chase. R. 70, l. 8 – 71, l. 24. Officer Peeples' dash camera catches the beginning of the chase. (State's Ex. 9). Appellant is seen near the dumpster at the front corner of the house when the chase starts. (State's Ex. 9). During the chase, Ballentine held a shotgun on Milam and Milam continued to run until giving himself up to Officer Peeples. R. 71, l. 14 – 24. R. 46, l. 14 – 50, l. 21.

During the defense case, Milam's father, Ray Milam ("Ray"), was the first witness. R. 116, l. 20 – 22. Ray testified that a friend of Milam's Chad Harper ("Harper") was staying with them at the time of the incident. R. 118, l. 5 – 9. Harper and Milam left together at 10:00 that night to go "dumpster diving." R. 118, l. 12 – 22. Milam frequently went dumpster diving to find broken items that he could repair and sell. R. 119, l. 11 – 16. Harper came back and told Ray that Milam had been arrested. R. 119, l. 20 – 120, l. 3. Both Milam and Ray testified that Milam was afraid of Harper. R. 121, l. 14 – 17. R. 147, l. 13 – 21.

Milam testified that he and Harper went to the house to look through the dumpster. R. 127, l. 1 – 17. Milam never went to the back of the house. R. 127, l. 18 – 20. Milam denied ever going

under the house or going inside of the house. R. 123, l. 25 – 124, l. 15. He ran from the police because he "panicked." R. 138, l. 15 – 18.

Before the defense case began, appellant told Judge Newman he intended to testify. R. 112, l. 16 – 113, l. 1. The State said it would impeach appellant with three prior convictions. R. 113, l. 5 – 17. The State wanted to use a 2017 conviction for shoplifting, a 2019 conviction for petit larceny that was a thirty-day misdemeanor, and another 2019 petit larceny that was enhanced and carried up to ten years. R. 113, l. 5 – 17.

The solicitor told the judge that shoplifting was "a crime of dishonesty." R. 113, l. 5 – 17. He told the court that petit larceny was "likewise a crime of dishonesty." R. 113, l. 5 – 17. The solicitor further stated his reasons for introducing these convictions—that they were "highly probative to a state's case where he is alleged to have gone to [the residence] with intent to commit a burglary. **So, a pattern and a history of theft and thievery, I believe, is probative.**" R. 113, l. 5 – 17 (emphasis added). Appellant objected that the prejudice outweighed the probative value. R. 113, l. 20 – 23.

The trial court ruled that the state could use all three convictions. R. 113, l. 24 – 114, l. 10. The court first made a conclusory finding that the prejudicial effect did not outweigh the probative value and noted that "they are not the same crime charged. R. 113, l. 24 – 114, l. 10. The court also ruled "they are certainly crimes involving dishonesty and are appropriate for purposes of attacking the . . . defendant's credibility." R. 113, l. 24 – 114, l. 10. Defense counsel asked Milam about the convictions on direct examination to take the sting out of the court's ruling. R. 126, l. 1 – 13.

The trial judge erred in admitting these prior convictions as crimes of dishonesty. Rule 609(a)(2) provides that crimes involving dishonesty or false statement can be used to impeach a

witness regardless of the punishment. Rule 609(a)(2), SCRE. The South Carolina Supreme Court explained what type of crimes fall under Rule 609(a)(2) in State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015). The Court held in Broadnax that "crimes of 'dishonesty or false statement' are crimes in the nature of *crimen falsi* 'that bear upon a witness's propensity to testify truthfully.'" Broadnax at 476, 779 S.E.2d at 793. The Broadnax Court quoted with approval its statement in State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155-56 (2006) that "a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." Id. The Court ruled that armed robbery was not automatically a crime of dishonesty, overruling State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003).

The Supreme Court revisited Rule 609 in State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019). In Robinson, the Court held that strong arm robbery and breaking and entering into automobiles were not "automatically admissible as crimes of dishonesty or false statement under Rule 609(a)(2)." Id. at 597, 828 S.E.2d at 212. The Robinson Court again quoted the statement from Bryant that convictions for robbery and theft are not, by themselves, probative of truthfulness. Id. at 596, 828 S.E.2d at 211-212.

Under Broadnax and Robinson, the trial court erred in finding that shoplifting and petit larceny were automatically admissible as crimes of dishonesty. The Broadnax Court cited the federal rules of evidence as support for its ruling regarding *crimen falsi*. Broadnax at 477-78, 779 S.E.2d at 793. The federal rule would not support the admission of larceny or shoplifting convictions. "Most courts have held that convictions for larceny or robbery, without more, cannot come in under Rule 609(a)(2)." United States v. Carroll, 663 F.Supp. 210, 214 (D. Md. 1986). See also United States v. Dunson, 142 F.3d 1213, 1215-16 (10th Cir. 1998) (holding that shoplifting was not automatically a crime of dishonesty).

As the Robinson Court explained, when prior convictions are not automatically admissible as crimes of dishonesty, the trial court must conduct an on-the-record analysis of Rule 609(a)(1) and the five factor test from State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Robinson at 597, 828 S.E.2d at 212. Aside from a passing mention that shoplifting and petit larceny were not the same crimes as second-degree burglary, the trial court conducted no such analysis. R. 113, l. 24 – 114, l. 7. These errors together require reversal of appellant's conviction.

Had the court conducted an analysis under Rule 609(a)(1), neither the shoplifting nor one of the petit larceny convictions could qualify because the convictions did not carry a sentence in excess of one year. Therefore, regardless of any Colf analysis, these convictions were erroneously admitted and this error warrants reversal. The solicitor plainly stated his reasons for wanting these convictions was for the improper purpose of showing "a pattern and a history of theft and thievery" instead of impeaching appellant's credibility. R. 113, l. 5 – 17. Hearing about appellant's supposed propensity to steal could not have been ignored by the jury.

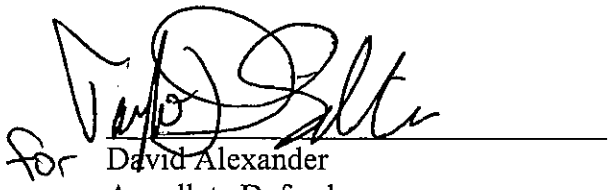
On remand, the trial court should be instructed to conduct a full Colf analysis if the State still seeks admission of the enhanced petit larceny crime. No facts were provided regarding this crime other than the fact of conviction. Therefore, it is extremely difficult for this Court, in an appeal, to conduct an analysis in the first instance of the first three Colf factors.

However, the fourth and fifth Colf factors are readily apparent. Milam's testimony was crucial. He denied being the person who went into the home and said he only went to the residence to look in the dumpster. He identified Harper as the person the Ballentines likely saw go under the house. Milam's credibility was extremely important because the Ballentines claimed they could identify Milam as the person who went under the house. The Ballentines' testimony was called into question by the statements Ballentine made on the real-time 911 call when he wanted

to know whether the person he saw was a police officer. Ballentine conceded that he lost sight of the person who went under the house before the police arrived. The jury could have believed Milam that he never went to the back of the house. The jury acquitted Milam of possession of burglary tools and asked several questions during its deliberations. The error in this case caused substantial prejudice and requires reversal.

CONCLUSION

For the foregoing reasons, appellant's convictions should be reversed and this case remanded to the trial court.



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This 27th day of February, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this final brief of appellant 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."

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This 27th day of February, 2023.