RECEIVED
Sep 16 2024
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Daniel D. Hall, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES J. PATTERSON, III

APPELLANT

APPELLATE CASE NO. 2023-001474

INITIAL BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

Whether the court erred, by not conducting a Rule 403 balancing analysis, and by allowing defense witness Tamare Howell to be impeached with the fact that he had been convicted of a crime that carried more than one year's imprisonment in 2016, 2018, and 2019 where the underlying convictions were strong arm robbery and possession of less than one gram of methamphetamine or cocaine base in 2016, failure to stop for blue lights in 2018, and possession with intent to distribute- first offense in 2019, as these were not crimes of dishonesty and they should have been excluded under Rule 609 (a)(1), SCRE using a Rule 403, SCRE, analysis given that their probative value was substantially outweighed by their danger of undue prejudice even in the vague but prejudicial manner they were conveyed to the jury?

STATEMENT OF THE CASE

Appellant was indicted at the September 2022 term of the Lexington County grand jury for the offenses of murder and possession of a weapon during the commission of a violent crime. R. p. *. His case was called to trial on September 5, 2023, before the Honorable Daniel D. Hall and a jury. James M. Ervin represented appellant. Kinli Abee and Joel Kozak prosecuted the case for the Attorney General's Office. Tr. 1.

On September 7, 2023, the jury found appellant guilty of murder. Tr. 401, ll. 19-25. Judge Hall sentenced appellant to thirty-years' imprisonment for murder and a concurrent five-year term for the possession of a weapon during the commission of a violent crime. Tr. 412, ll. 13-23

This appeal follows.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "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). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

ARGUMENT

The court erred, by not conducting a Rule 403 balancing analysis, and by allowing defense witness Tamare Howell to be impeached with the fact that he had been convicted of a crime that carried more than one year's imprisonment in 2016, 2018, and 2019 where the underlying convictions were strong arm robbery and possession of less than one gram of methamphetamine or cocaine base in 2016, failure to stop for blue lights in 2018, and possession with intent to distribute- first offense in 2019, as these were not crimes of dishonesty and they should have been excluded under Rule 609 (a)(1), SCRE using a Rule 403, SCRE, analysis given their probative value was substantially outweighed by their danger of undue prejudice even in the vague but prejudicial manner they were conveyed to the jury

Introduction

Two state's witnesses, Kenyatta Strother and Albert Clark testified they saw appellant shooting on the night the decedent William Clark was shot and killed after the dice gambling game at Clark's house. Conversely, Tamare Howell testified he was present when the shooting occurred, and that Albert Clark was the shooter. Appellant also testified that Albert Clark was the shooter that evening, and not him.

Relevant facts

Kenyatta Strother was the long-time girlfriend of the decedent William Clark. The decedent was also the father of the youngest of her three children. Tr. 64, l. 11 - 65, l. 12. On November 9, 2020, "we had broken up but we were close." Strother was at the decedent's house on South Hampton Road in Red Bank that day and evening. There were "a lot of people there." Tr. 65, l. 4 - 71, l. 9.

Strother remembered that there was a lot of noise that evening because the men were playing dice and gambling. Strother maintained she stayed in the decedent's bedroom outside of the room where they were gambling. Tr. 71, ll. 4-22.

Strother maintained that she knew appellant was angry about someone allegedly having cheated him out of money during the dice game. She offered that appellant thought another man cheated him out of forty dollars. Tr. 72, l. 1 - 73, l. 14. Strother claimed that appellant walked up to a white Crown Vic outside of the house and that someone handed him a gun. Strother testified that appellant came back inside the house with the gun. "I see him just standing there nobody was around him. Like they had basically let it go. Nobody was around him and all of a sudden, he said 'don't push me...' nobody was around him when he said don't push me, that's when everybody jumped up like what are you talking about...he pulled the gun out and he shot it in the house." Tr. 75, l. 1 - 76, l. 9.

Strother said some of the other men got appellant out of the back door. Tr. 76, ll. 12-16. Strother apparently clarified: "I saw Joseph Patterson pacing back and forth and he jumped in the air, and he started shooting...he was shooting towards like the kitchen window...it was multiple shots." Tr. 79, ll. 6-20. On cross-examination, Strother claimed that only one gun was involved in the shooting that night. The following occurred on cross-examination of Strother:

> Q. You don't recall stating to the prosecutor that there may have been another shooter that was with Mr. Patterson.
>
> A. No.
>
> Q. And you described that person as having wicks in his hair?
>
> A. Hold up. Now I never said he was a shooter. I said he was with him.
>
> Q. Okay. All right.

A. I never said he was a shooter.

Tr. 88, ll. 13-21.

Lexington County crime scene investigator Cody Weyandt testified that a large package was located in the decedent's bedroom which contained marijuana, tobacco, and cell phones wrapped in black tape. Tr. 131, ll. 9-19. There would be other evidence of widespread drug use at the decedent's house that evening.

Dr. Presnell, the pathologist, testified that the decedent died of a gunshot wound to his hip. Tr. 148, ll. 8-12. He had cocaine and marijuana in his bloodstream and a blood alcohol reading of 0.134. Tr. 149, l. 11 - 150, l. 7.

Albert Clark, the decedent's brother, testified that he came to visit the decedent that day and when the decedent decided to go to bed, he started playing dice with the other men in the house. Tr. 161, ll. 3-23. Albert Clark said appellant was one of the men playing dice that evening. At one point, Albert left the decedent's house to go to his nearby home to get more money. Tr. 162, l. 11 - 165, l. 3.

When Albert returned minutes later, he said that he heard gunshots and he claimed he saw appellant "shooting directly across the yard towards my brother and I seen [saw] my brother fall to the ground and I parked my truck and ran up to him and then they were exiting." Tr. 165, l. 4 -167, l. 13. Clark said he picked up the decedent and he and his cousin Donnie Clark drove him to the hospital where they left him. Clark claimed that they spoke to someone at the hospital where they dropped off the decedent before they left to return to the house. Tr. 167, l. 17 - 169, l. 1.

Lexington County deputy Arcadues DuBard testified that he stopped Albert Clark's vehicle that evening after he left the hospital. The vehicle was searched and "we located a

holster, a weapon holster, some type of weapon holster, an empty magazine believed to be a nine-millimeter. We also located a duffle bag that had some clothing in it as well." The firearm was not in the vehicle at that time according to DuBard. Tr. 186, l. 3 - 188, l. 1.

On cross-examination, DuBard said the police received tips about the shooting and one said that: "William Clark was shot by his brother." DuBard said there was no way to "follow up on that information" about Albert Clark being the shooter. Tr. 222, ll. 4-15.

Proposed impeachment

Prior to the testimony of defense witness Tamare Howell, an in-camera hearing was held on the solicitor's desire to impeach Howell pursuant to Rule 609(a)(1), SCRE, with his strong-arm robbery and possession of less than one gram of meth or cocaine base convictions from 2016. In addition, the solicitor sought to impeach Howell with a 2018 conviction for failure to stop for a blue light and a possession with intent to distribute-first offense from 2019. Tr. 274, l. 10 - 275, l. 23.

Defense counsel argued under Rule 403, on the probative and prejudicial effect balancing test, that Howell's prior record amounted to prior bad acts and that they were irrelevant. "We're talking about a drug crime; we're talking about a theft crime that he could have been a co-defendant for. Had it been check fraud, had it been computer hacking, had it been stealing from the government, stealing food stamps, et cetera, I can totally see how that would come in, but under these circumstances, Judge, these are crimes of circumstance." Defense counsel Ervin maintained they were inadmissible after conducting a Rule 403 analysis. Tr. 276, l. 1 - 281, l. 14.

The judge ruled that he was going to allow the state to impeach Howell with these crimes but that the solicitor would only be allowed to ask Howell: "Were you convicted of a crime that

carried more than one year in 2016? Were you convicted of another crime in 2016? Were you convicted of a crime that carried more than one year in 2018?" Tr. 281, l. 15 - 282, l. 20.

The judge repeated that under Rule 609, the convictions carried more than one year and "I find in weighing those that goes to the probative value for the jury to determine his truthfulness." Tr. 283, l. 5 -284, l. 1.

Tamare Howell then testified that he was with appellant that evening and that appellant had won one-thousand dollars from Albert Clark during the gambling with dice games. Tr. 288, l. 16 - 289, l. 5. Howell remembered that appellant quit playing the dice game because he was not happy with Albert Clark who he thought had cheated him. Howell said when appellant tried to leave, one of the men pushed him and he bumped into a table. The decedent's .45 caliber pistol fell off of the table and discharged. Tr. 289, l. 4 - 290, l. 8.

Howell said that while the men were leaving the house after the gun discharged, he went inside the house to get a bag that he had forgotten. When he came back outside of the house, he saw Albert Clark was shooting at the burgundy sedan he came to the decedent's house in with appellant. This burgundy car was parked by a fence. Tr. 290, l. 2 - 291, l. 19.

Howell further testified that Albert was the shooter that night, and that while he did not see Albert actually shoot the decedent, he knew that the decedent was shot during that time. period. Tr. 292, l. 4 - 294, l. 22. Howell ran down the street while these shots were being fired and appellant picked him up on the side of the road and took him home. Tr. 294, l. 18 - 296, l. 6. Howell said he was not aware anybody had been definitely shot until later. Tr. 296, ll. 5-6.

The impeachment

The following occurred immediately on cross-examination with Howell:

> Q. All right. Mr. Howell, before we get into what happened that night, I want to go over a couple of things. And without telling us

what they are, you have, in fact, been convicted of a crime in 2016 that carries more than a year imprisonment; is that right?

A. Yes, ma'am.

MR. ERVIN: Objection, Your Honor.

THE COURT: I note your objection. I overruled the objection. [1]

BY MS. ABEE: I'm gonna ask that again. You were, in fact, convicted of a crime in 2016 that carried more than a year imprisonment, right, sir?

A. Yes, ma'am.

Q. Okay. And, again, in 2018, right?

A. 2018? Yes, ma'am.

Q. Okay. And, again, in 2019, right?

A. Yes, ma'am.

Tr. 299, l. 10 - 300, l. 12.

Appellant testifies in his own defense.

Appellant testified that at about noon on November 9, 2020, he borrowed his cousin Stephanie Glover's car. Appellant and Tamare Howell then drove Glover's burgundy Ford to the decedent's house on South Hampton Street in Red Bank. Tr. 316, ll. 3-22. Appellant parked the car on the side of the house by a fence. Appellant remembered Donny Clark's truck being parked there as well as a white Crown Vic. Tr. 317, ll. 13-23.

Appellant testified that a dice game started with two people, and more people then joined in. Albert Clark and Donnie Clark were drinking, snorting cocaine, and smoking marijuana at the time. They were also drinking Jim Beam. Tr. 319, ll. 3-17.

---

1 Defense counsel timely objected to the impeachment although and additional objection was not required since the judge's ruling was not an *in limine* ruling since there was break following the judge's ruling and Howell's testimony.

While appellant did not drink, he admitted to smoking marijuana that night. Appellant said that the decedent was in his bedroom with the door closed when the gambling began. Albert Clark was beside appellant "the whole time. The living room wasn't so big." Tr. 319, l. 16 – 320, l. 7. Appellant identified a photograph of the decedent's bedroom, which had marijuana, cell phones, and tobacco "taped up." Tr. 320, ll. 11-23. Appellant said he was not shooting or rolling the dice, but he was engaged in side-betting with Albert Clark that evening. "We was [were] betting a hundred dollars every roll." Tr. 321, ll. 4-19.

Appellant was not happy about "a call" that he did not think was fair on a side-bet, so he decided he was not going to "side-bet with you [Albert] no more. I can't do it." Tr. 322, ll. 3-17. Appellant remembered getting a phone call from his cousin Stephanie Glover at about ten o'clock that evening that she was getting ready to get off work. Appellant said Albert Clark owed him two-hundred dollars at the time and appellant asked for his money. "I sat back and waited on my money." Tr. 322, l. 18 – 323, l. 5.

Appellant said Donnie Clark tried to give him the money that Albert Clark owed him, but he told Donnie: "I want my money from Albert, it's only fair." Tr. 323, l. 9 - 324, l. 9. Appellant said he was on his way out the door when Donnie Clark grabbed him. This knocked William Clark's gun off the of the table and it discharged. Tr. 324, l. 5 - 325, l. 24.

Appellant then left through the side door and walked towards his car. He sat in the car with the door open counting his money. Appellant remembered Howell telling him that Albert Clark was getting ready to shoot, and then he heard six gunshots, and he dove to the ground. Tr. 326, l. 11 - 327, l. 21. Appellant described how he crawled to the back of the car to shield himself from the bullets. Tr. 327, l. 22 – 328, l. 15.

Appellant testified that he saw Albert Clark with a gun when he heard the gunshots, and when the shooting stopped, he jumped in his car and drove away. He picked up Howell on a nearby dirt road. Appellant described there were at least two bullet holes in his cousin's car that occurred before he was able to drive away. Tr. 330, l. 2 - 331, l. 12. Appellant testified he never had a gun that evening. Tr. 333, ll. 12-13.

The borrowed car witness

Stephanie Glover, appellant's cousin, testified that she worked at Prisma Health Baptist Hospital. Stephanie acknowledged she often allowed appellant to drive her vehicle, a burgundy Ford Focus. Tr. 347, ll. 8-24.

She let appellant to borrow the car again on November 9, 202. Stephanie remembered when appellant returned the car that it had a bullet hole in it. She could only remember one bullet hole, but she said "he was definitely honest when he brought the car back. He told me about it, and I was more concerned to make sure he was safe, if anything." Tr. 348, l. 15 - 349, l. 7; 350, ll. 22-24.

Closing arguments

In her closing argument, the solicitor said that Kenyatta Strother had testified that she saw appellant with a gun when the shooting began, and she also offered that Albert Clark said appellant was the shooter. The solicitor acknowledged the differing testimony of Tamare Howell about Albert Clark being the shooter and appellant's testimony also stating that Albert was the shooter. The solicitor urged the defense testimony was not credible. Tr. 359, l. 18 - 375, l. 19.

Defense counsel acknowledged that the jury had heard "two theories of this case" and that appellant was not guilty since the state had failed to prove his guilt beyond a reasonable doubt. Tr. 377, l. 18 - 383, l. 7.

Discussion

None of the underlying convictions that led to key defense witness Howell being impeached were crimes of dishonesty pursuant to Rule 609(a)(2), SCRE. Consequently, under Rule 609 (a)(1), SCRE, the underlying crimes were only admissible for impeachment if they involved a criminal sentence of longer than one year, and after conducting a Rule 403, SCRE analysis, the trial judge found that their probative value was not substantially outweighed by their danger of undue prejudice. The judge conducted no Rule 403, SCRE analysis in this case. He only stated: "I find in weighing those that goes to the probative value for the jury to determine his truthfulness." Tr. 283, l. 5 -284, l. 1. That respectfully was not a weighing analysis, and appellant's conviction should be reversed for that reason.

"Although Colf[2] focused on the admission of prior convictions more than ten years old under Rule 609(b), our courts have also consistently applied these factors for purposes of a Rule 609(a)(1) analysis. See *e.g.*, Bryant, 369 S.C. at 517 n.1, 633 S.E.2d at 155 n.1." State v. Robinson, 426 S.C 579, 594, 828 S.E.2d 203, 211 (2019). While the judge here conducted no analysis the underlying crimes had no impeachment value since they were not indicative of Howell's believability, and Howell's testimony was very important in this case.

Further, drug convictions, a failure to stop for a blue light conviction, and a strong-arm robbery conviction did not reflect upon Howell's credibility in any way. These convictions did not aid the jury in discerning the truth as to whether Howell should be believed because of his

---

[2] State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

past convictions. As our Supreme Court held in State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155-56 (2006): "Violations of narcotics laws are generally not probative of truthfulness. See State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 S.C. (2001) (citing State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000)). Furthermore, a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness. United States v. Smith, 181 F.Supp.2d 904 (N.D.Ill.2002)." Similarly, appellant submits, a conviction for failure to stop for a blue light is not probative of Howell's credibility or his believability as a witness.

Defense counsel in this case noted that the convictions were more suited to simply get Howell's "prior bad acts" before the jury which would certainly be an improper reason for allowing them for impeachment. As this Court stated in State v. Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015), "ultimately the rule was designed to help the jury discern the truth. It is not a tool for the state to bolster its case against the criminal defendant for the mere fact that the defendant has engaged in prior criminal activity."

In State v. Broadnax, our Supreme Court held that the crime of armed robbery required a Rule 403, SCRE balancing test pursuant to Rule 609 (a)(1), SCRE before it could be used for impeachment. Howell's convictions for strong arm robbery, failure to stop for a blue light, and possession of methamphetamine or cocaine and another drug offense also mandated a Rule 403, balancing test that was not conducted on the record by the trial court.

In State v. Robinson, 426 S.C. 579, 597, 828 S.E.2d 203, 212 (2019), our Supreme Court noted that a strong-arm robbery conviction was not a crime of dishonesty or a false statement under Rule 609 (a)(2), SCRE, and therefore the trial court was required to conduct an analysis under Rule 609 (a)(1), SCRE.

Although the convictions in this case were not more than ten years old, none of the convictions had a tendency to prove or show the witness's propensity for truthfulness or credibility. See State v. Black, 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012). Again, the purpose of impeachment is not to show the witness is a bad person, but rather to show background facts which indicate the witness's credibility is likely lacking. State v. Black, 400 S.C. at 22, 732 S.E.2d at 887.

In this case, the trial judge ruled that the state would be allowed to impeach Howell by asking whether he had been convicted of a crime that carried more than one year's imprisonment in 2016, 2018, and 2019. Appellant submits that procedure was equally if not more prejudicial to the defense than allowing impeachment of Howell with his underlying drug convictions, common law robbery, and failure to stop for a blue light conviction which were certainly not indicative of Howell's tendency or predictability to perjure himself or make false statements. Further, strong arm robbery under the reasoning of State v. Robinson also was not a crime of dishonesty or a false statement.

All of the underlying convictions should have been found to be unduly prejudicial after a proper Rule 403 analysis -- since their probative value was substantially outweighed by their unduly prejudicial effect -- and they only tended to show he was a criminal or a bad person which was impermissible under Rule 609(a)(1), SCRE by way of a Rule 403, SCRE analysis.

Again, however, the jury in this case was left to guess what the underlying crimes and convictions were that Howell was being impeached with given the manner of impeachment ordered by the trial court after deciding impeachment was proper. The jury was left to assume or guess that Howell had convicted of a violent offense or a criminal offense involving dishonesty or false statement. Permitting the jury to engage in such speculation about Howell's prior

convictions from 2016, 2018, and 2019 was equally if not more prejudicial than improper impeachment for the underlying convictions would have been.

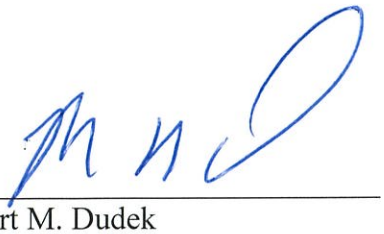
Regardless, however, none of the underlying convictions in this case were proper for impeachment. They did not aid the jury in assessing Howell's credibility. They consequently were gratuitous and unduly prejudicial.

Howell was unquestionably a critical witness for the defense. He testified that appellant was not the shooter in this case and that Albert Clark was the shooter. This also corroborated appellant's testimony. The solicitor in her closing argument chose to turn this case into a swearing contest between the decedent's girlfriend and the other suspect in this case, Albert Clark, against the testimony of Howell and appellant. The testimony of the decedent's girlfriend was strange, particularly where she claimed appellant "jumped in the air, and he started shooting..." Tr. 79, ll. 6-20.

Howell being improperly impeachment under these circumstances impermissibly harmed a critical part of appellant's defense. Error is only harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); State v. Bryant, supra. In cannot be said with any confidence that the evidence of appellant's guilt was overwhelming in this case or that this improper impeachment did not affect or contribute to the verdict, and appellant should therefore be granted a new trial.

CONCLUSION

By reason of the foregoing argument, appellant's convictions should be reversed, and this case remanded to the Lexington County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of September, 2024.