

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Edward B. Cottingham, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JEREMY FLEMING,

APPELLANT

APPELLATE CASE NO. 2013-001126

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by allowing appellant to be impeached with his convictions for assault and battery of a high and aggravated nature and possession of cocaine with intent to distribute where the court did not determine the probative value of admitting this evidence outweighed its prejudicial effect to appellant as required by Rule 609(a)(1), SCRE, particularly since the allegations in this case concerned similar crimes involving violence and drugs?

STATEMENT OF THE CASE

Appellant was indicted by the Horry County Grand Jury for the offenses of attempted murder and burglary in the first degree. R. 341-344. His case was called to trial on May 14, 2013 before the Honorable Edward B. Cottingham, and a jury. Eric Fox represented appellant. Joshua Holford and Brad Richardson were the assistant solicitors. R. 1.

The conclusion of the trial on May 15, 2013, the jury found appellant guilty on both counts. R. 330, ll. 13-20. Judge Cottingham sentenced appellant to twenty years imprisonment for attempted murder, and twenty years imprisonment, consecutive, for burglary in the first degree. R. 338, ll. 18-24.

This appeal follows.

ARGUMENT

The court erred by allowing appellant to be impeached with his convictions for assault and battery of a high and aggravated nature and possession of cocaine with intent to distribute where the court did not determine the probative value of admitting this evidence outweighed its prejudicial effect to appellant as required by Rule 609(a)(1), SCRE, particularly since the allegations in this case concerned similar crimes involving violence and drugs.

Relevant Facts

Eric Collins and David Moran were roommates in their apartment at Ivystone Apartments in Myrtle Beach. R. 52 l.9 – 53, l. 13. Collins admitted he had a prior conviction in 2012 for possession of marijuana with intent to distribute. R. 53, l. 14 – 54, l. 5.

Collins testified that he was asleep in his bedroom on the night of October 16, 2011 when he heard a “popping sound” like “a light bulb cracked.” Collins said he grabbed his .22 rifle next to his door frame. He walked down the hallway towards the noise with his pit bull. Collins said he saw a man standing over Moran with a gun. Moran had been shot. The man looked at Collins, and ran out of the apartment. Collins maintained another man ran away with the shooter. R. 54, l. 12 – 55, l. 18. Collins testified he was “pretty positive” the gun that was being pointed at Moran was a silver revolver. R.57, ll. 5-6.

Tyler Topolski testified on October 16, 2011 he got a text message from appellant stating he needed to pick up some money. R. 63, l. 16 - 64, l.2. Tyler ultimately rode with appellant, a man named “freak,” and some other young people in a car driven by Taylor Smith to the Ivystone Apartment complex that night. Tyler never got out of the car. He heard a loud “bang,” and he maintained that he saw Freak and appellant run out of the

apartment with wearing masks. R. 64, l. 2- 65, l. 22. As will be seen infra, appellant acknowledged he went to the apartment to purchase marijuana, and he testified that Freak unexpectedly pulled a gun just before the man answered the door. Appellant immediately ran when Freak pulled the gun -- he never entered the apartment -- and he made it back to the car before Freak.

Samantha Topolski was involved in a relationship with appellant at the time. R. 77, ll. 5- 15. She recalled that appellant sent a text message to her brother asking him to pick up Freak from the Olive Garden where Freak worked in Myrtle Beach. After they brought Freak back to the mobile home as appellant requested she received a text message from appellant. He requested a ride to pick up some money he was owed. The state's witnesses who rode in the car that night denied knowing that the real purpose of going to the apartments was to purchase marijuana. R. 77, l. 3 - 79, l. 20.

Taylor Smith drove them rode over to the Ivystone Apartments that night. Appellant and Freak went to an apartment and Samantha heard a gunshot. She recalled that everyone started screaming. R. 80, l. 4 – 81, l. 20.

Samantha remembered that appellant “came running and I let him in the car.” Freak arrived shortly thereafter, and Freak was cussing and screaming for the car to move. Samantha asked appellant if he was okay but appellant did not respond. R. 82, ll. 4 -17. Freak put his gun to the back of Taylor Smith’s head and told her to drive the car out of there quickly. R. 83, ll. 15 - 22.

Taylor testified while driving the car that night that she was under the impression the purpose of going to the Ivystone Apartments was to pick up money appellant was owed. R. 99, l. 14 – 101, l. 11. When they arrived at Ivystone Apartments, appellant and Freak got

out of the car. Taylor maintained when they first got out of the car they were “wearing just hoodies.” However, Taylor claimed when they came out of the apartment, they had “masks on and the hoods over their heads.” R. 101, l. 8 – 102, l. 15. Taylor recalled Freak putting a gun to the back of her head, and he telling her to drive back to the mobile home. R. 103, ll. 15-18.

Detective Allen Large testified the police obtained a search warrant for the mobile home based on information they received which led them to believe Freak and appellant were prime suspects. R. 114, l. 16 – 118, l. 3. Detective Large testified that while they were executing the search warrant, “a person threw a gun out of the window. We retrieved that gun, placed it into evidence.” R. 120, ll. 5-13. The police were never able to determine who the gun belonged to or who threw the gun out of the window. R. 133, l. 23 - 141, l. 10.

David Moran testified that he not know appellant or Freak. He remembered there was a knock on the apartment door at approximately 11:30 P.M that night. When he opened the door he remembered seeing two people wearing masks, hats and hoodies. He could only see their eyes. R. 197, l. 1 - 198, l. 7.

Moran tried to slam the door quickly but the shorter of the two men got his foot in the door, and pushed him backwards. A small silver revolver was pointed close to his head, and “I heard a pop.” Moran was able to stumble to the bathroom where he saw blood everywhere. He recalled that someone called 911. Moran fortunately recovered well from the shot to his forehead. R. 197, l. 12 – 203, l. 23.

Impeachment evidence

After the directed verdict motion was denied, the judge reviewed appellant’s criminal record with the parties. The solicitor noted appellant had a 2008 conviction for

possession of cocaine with intent to distribute. He also had a 2009 conviction for assault and battery of a high and aggravated nature (ABHAN), and a burglary in the second degree conviction. R. 223 ll. 19-23. Defense counsel argued that the probative value of the burglary conviction was outweighed by its prejudicial effect. The judge stated that he would not allow appellant to be impeached with the burglary conviction. However, the other two convictions were admissible impeachment evidence. R. 224, l. 14 – 225, l. 6. Appellant was then impeached with his convictions for ABHAN, and possession with intent to distribute cocaine. R. 262, ll. 16-21.

Appellant testifies

Appellant testified he only went to the apartment to purchase marijuana. Freak pulling out a gun was totally unexpected. “I didn’t even see Mr. Moran open the door, I seen him pull the gun and seen him try to go his way in, that’s whenever I took off down the stairs. While I was taking off and [running] down the stairs. While I was taking off my way down the stairs, I heard a gun pop. When I heard the popping noise, I heard somebody screaming ‘help,’ and Mr. Abbul [Freak] was following me so I ran straight down there and jumped in the car and Mr. Abdul jumped in behind me. As soon as I jumped in the car, Samantha was asking me, are you okay, did you get shot and I told her no. That’s whenever Mr. Abdul put the gun behind the driver and he her to drive the fucking car, take off.” R. 255, ll. 13-24. R. 255, l. 13 - 256, l. 5.

Appellant denied he wore a bandana that night, and he repeated that Freak pulling out the gun when they went to purchase the marijuana was totally unforeseen. R. 267, l. 4 - 269, l. 9. Appellant did not learn until later that Freak actually hit the victim when he shot his gun inside the apartment. R. 269, ll. 10-13

Discussion

Rule 609(a)(1) SCRE, states that “evidence that an accused has been convicted of such a crime [where the penalty is imprisonment in excess of one year] shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused...” The prior drug conviction and the ABHAN conviction did not involve dishonesty or false statement so Rule 609 (a)(2) was inapplicable.

In this case, the court did not weigh the probative value of these convictions against their prejudicial affect. The only discussion concerned the prior burglary conviction.

Attempted murder is obviously a violent crime. So is ABHAN. The fact that appellant had already been convicted of inflicting injury upon another person by means of violence -- a similar crime -- was clearly going to be high prejudicial if allowed in this case. The prior cocaine crime was also very prejudicial in that it signaled to the jury that appellant was not just a drug user but a convicted drug dealer. Drug dealers are very despised by many in the public, including jurors.

In State v. Scriven, 339 S.C. 333, 529 S.E.2d 71 (Ct App. 2000), the trial court allowed the defendant to be impeached with his prior drug convictions. As in this case, the trial court in Scriven did not weigh the probative value of admitting the convictions against their prejudicial effect. That was clearly error. This Court reversed the defendant's convictions since the prejudicial effect of these convictions was obvious from the record.

In State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013) this Court held that the trial court was required to conduct a balancing test before admitting evidence of the defendant's prior armed robbery convictions. This Court determined that armed robbery convictions, without more, did not constitute crimes of dishonesty. The erroneous

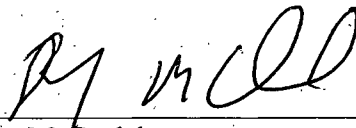
admission of the impeachment evidence pertaining to the armed robbery convictions without the required balancing test was not harmless.

In this case the prior ABHAN conviction was similar to the violent crime charged in this case. Therefore the danger of unfair prejudice to appellant from the impeachment in evidence was greatly enhanced. See State v. Bryant, 369 S.C. 511, 517 518 633 S.E.2d 152, 156 (2006). The prejudice from the prior cocaine distribution charge was also great. The judge erred by failing to engage in the proper probative value versus the prejudicial effect analysis as to the ABHAN and prior drug conviction, and the resulting prejudice from this impermissible impeachment evidence entitles appellant to a new trial.

CONCLUSION

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R. M. Dudek', is written over a horizontal line.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 27th day of February, 2014.

STATE OF SOUTH CAROLINA

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THE STATE,

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APPELLATE CASE NO. 2013-001126

PETITION TO BE RELIEVED AS COUNSEL

Counsel for Jeremy Fleming states:

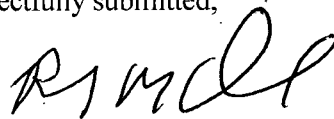
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge Edward B. Cottingham, which was held on May 14-15, 2013, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Jeremy Fleming.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

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FEB 27 2014

This 27th day of February, 2014.

SC Court of Appeals

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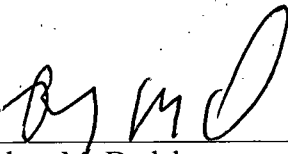
**DESIGNATION OF MATTER TO BE
INCLUDED IN RECORD ON APPEAL**

Appellant proposes the following be included in the Record on Appeal:

- (1) True-billed indictments;
- (2) Trial Transcript

I certify that this designation contains no matter which is irrelevant to this appeal.

February 27th, 2014


Robert M. Dudek
Chief Appellate Defender

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Attorney for Appellant

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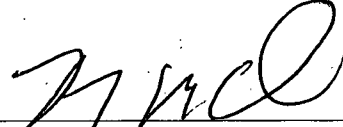
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SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

February 27, 2014



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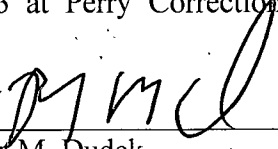
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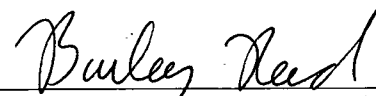
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter and Record on Appeal have been served on Jeremy Fleming, #333153 at Perry Correctional Institution, this 27th day of February, 2014.


Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 27th day of February, 2014.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: October 24, 2021

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SC Court of Appeals