STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

Roger L. Couch, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ISAAC GLENARD LYLES,

APPELLANT.

APPELLATE CASE NO. 2013-002639

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. The Trial Court erred in refusing to allow Appellant to attack the credibility of the State's star witness with his prior convictions of armed robbery and third degree burglary where the Trial Court incorrectly ruled that the convictions were inadmissible under Rule 609 because they were not crimes of dishonesty or false statement. Rule 609 permits the use of any crime punishable by death or imprisonment in excess of one year to attack a witness's credibility regardless of whether the crime involves dishonesty or false statement.

II. The Trial Court erred in allowing the state to qualify an investigator with the narcotics division of the police department as an expert concerning the street value of drugs, the typical habits of a drug user as opposed to a drug dealer, the normal means of packaging and selling certain drugs, typical dosages of street drugs, and opinions concerning avoidance methods persons involved in drug activity use to avoid detection because he was not qualified as an expert under Rule 702.

STATEMENT OF THE CASE

On September 27, 2013, Appellant Issac Glenard Lyles was indicted by the Spartanburg County Grand Jury for (1) possession with intent to distribute marijuana; (2) trafficking in cocaine in an amount more than ten grams; (3) trafficking in cocaine base [crack cocaine] in an amount more than ten grams; (4) possession of a firearm during the commission of or attempt to commit a violent crime; (5) possession with intent to distribute marijuana within proximity of a school; (6) possession with intent to distribute cocaine within proximity of a school; and (7) possession with intent to distribute crack cocaine within proximity of a school. R.* (Indictments).

Appellant was tried before the Honorable Roger L. Couch and a jury on December 4-5, 2013. Tr. 1. Appellant was represented by William S. Bean, IV, and the State was represented by Assistant Solicitor Scott Daniel Spivey. Id.

On December 5, 2013, the jury found Appellant guilty on all charges. Tr. 297, l. 15 – 298, l. 8. Pursuant to S.C. CODE ANN. § 17-25-45, Judge Couch sentenced Appellant to life without parole for the two trafficking offenses and the proximity charges. Judge Couch sentenced Appellant to ten years for the possession with intent to distribute marijuana offense and five years for the possession of a firearm offense with the sentences ordered to run concurrently to the other sentences. Tr. 303, l. 18 – 304, l. 13; * (Sentencing Sheets).

Appellant timely filed and served his Notice of Appeal on December 12, 2013.

STATEMENT OF FACTS

On October 9, 2012, Investigator Michael Secrest of the Spartanburg City Police Department participated in the execution of a search warrant at a duplex on North Forest Street. He drove the tactical truck for the SWAT team members, and after he arrived on the scene, Investigator Secrest took position for the perimeter on the right side of the duplex at a side door. Tr. 76, l. 25-80, l. 13. According to Investigator Secret, a fence ran along side of a wooded area next to the duplex. Tr. 80, l. 14 – 81, l. 1. He testified that no one was outside of the residence when he arrived and no one was near the fence. Tr. 83, ll. 9-15.

After the perimeter of the duplex was secured, the tactical team made entry through the front door of the targeted residence. As soon as that entry was made, people ran out of the side door. One of those persons was Appellant. Investigator Secrest caught Appellant, and the two of them fell to the ground. Investigator Secrest claimed that while they were falling, money fell out of Appellant's pockets onto the ground. Investigator Secret further testified that he noticed Appellant's hand "kinda went down toward his waistline." Investigator Secrest looked down, grabbed Appellant's hand, and detained him. He noticed a purple bag on Appellant's right pocket. When Investigator Secrest felt the bag, he felt the butt of a handgun and he secured the weapon. Tr. 82, l. 20 – 83, l. 8.

Investigator Secrest testified that other people were present at the targeted residence, although he could not recall all of them. He knew that one person was Edward Wesson and another was Harvey Rainey, but he could not recall anyone else. Tr. 83, ll. 16 – 21. Edward Wesson had exited the same side door as Appellant immediately prior to Appellant exiting. Investigator Secret believed that Wesson was stopped near the front corner of the house by other officers. Tr. 83, l. 25 – 84, l. 2.

On cross-examination, Investigator Secrest admitted that tactical team threw a flash grenade into the residence prior to Wesson and Appellant leaving the side door and acknowledged that people would likely run out of the door of a place where a flash grenade was thrown because it could be a frightening experience. Tr. 90, l. 14 – 91, l. 3.

Investigator Secrest also confirmed that Edward Wesson and Appellant were the two people that exited the side door and that Wesson exited first. Investigator Secrest did not immediately stop Wesson right outside the door and let him keep going. Investigator Secrest stated he did not immediately stop Wesson as he did Appellant because Wesson was not the target of the search warrant. Tr. 91, l. 19 – 92, l. 17.

Investigator Josh Bagwell of the Spartanburg City Police Department testified that on October 9, 2012, he acted as the return officer for the execution of the search warrant and wrote down anything taken from the scene. Tr. 93, l. 6 – 94, l. 3. When Investigator Bagwell arrived, he observed Investigator Secrest running down the side of the residence, and he assisted Investigator Secrest. Investigator Bagwell saw Appellant and another individual come out of the side door. Tr. 94, l. 4 – 95, l. 17.

Investigator Bagwell recovered the firearm from Appellant's person. He also recovered a small clear plastic bag of green plant material in the right pocket of Appellant's coveralls, a small jar of green plant material from Appellant's coveralls, and a small bag containing a white rock or white powder substance. Tr. 95, l. 18 – 98, l. 5. Investigator Bagwell also recovered $1281 from the ground near where Appellant was lying. Tr. 99, ll. 6-18.

In addition, Investigator Bagwell recovered a black tote bag that was hanging on the fence which ran along the side of the residence. Tr. 101, l. 18 – 102, l. 25. This bag was

found hanging on the side of the fence that was opposite of the residence. Tr. 105, ll. 16-19. The bag contained a set of goggles, digital scales, a plant material, three separate bags of a white rock substance, and a big bottle of crystalline powder. Tr. 106, ll. 13-19.

Investigator Bagwell did not actually spot the black tote bag hanging on the fence. While he was sitting inside the residence doing the return, he was informed by another officer that a bag was hanging over the fence. Investigator Bagwell then went outside to recover the bag. He did not see how the bag got on the fence and had no idea how long the bag had been on the fence. Tr. 114, l. 23 – 115, l. 13.

Edward Wesson lived at the targeted residence on North Forest Street. He had five previous convictions for fraudulent checks. Tr. 141, l. 17 – 142, l. 21. At trial, Wesson claimed that Appellant had approached him in the summer of 2012 and asked to use his apartment to sell drugs. Tr. 142, l. 22 – 144, l. 6. Wesson further alleged that from the summer of 2012 until October 9, 2012, Appellant would sell drugs out of the apartment every day and would always carry a black backpack with him. Wesson contended at trial that the black bag found on the fence by law enforcement belonged to Appellant. Tr. 144, l. 7 – 146, l. 15. Wesson also claimed that Appellant drove a moped and wore goggles and that the goggles found in the black tote bag belonged to Appellant. Tr. 147, ll. 1-22.

Wesson testified that he let Appellant use his apartment to sell drugs because he was addicted to drugs and Appellant would pay him with drugs for the use of the apartment. Wesson admitted that he himself had touched the black tote bag because he would retrieve the bag for Appellant when Appellant was allegedly selling drugs to someone. Tr. 148, l. 7 – 149, l. 4. Wesson claimed Appellant kept the bag hanging on the fence most of the time

but that he had no idea why Appellant would want to keep the bag there. Tr. 149, l. 23 – 150, l. 6.

The amount of drugs found were the following: (1) 5.8 grams of marijuana found on Appellant's person; (2) 1.06 grams of cocaine found on Appellant's person; (3) 25.87 grams of cocaine found in the black tote bag; (4) 18.04 grams of crack cocaine found in the black tote bag; (5) 6.27 grams of crack cocaine found in the black tote bag; and (6) 63 grams of marijuana found in the black tote bag. Tr. 209, ll. 1-7; 217, ll. 17-22; 225, ll. 13-14; 226, l. 24 – 227, l. 4; 241, ll. 6-10.

The jury convicted Appellant on all indicted counts.

ARGUMENT

I. The Trial Court erred in refusing to allow Appellant to attack the credibility of the State's star witness with his prior convictions of armed robbery and third degree burglary where the Trial Court incorrectly ruled that the convictions were inadmissible under Rule 609 because they were not crimes of dishonesty or false statement. Rule 609 permits the use of any crime punishable by death or imprisonment in excess of one year to attack a witness's credibility regardless of whether the crime involves dishonesty or false statement.

The only evidence the State presented at trial linking Appellant to the black tote bag containing the 25.87 grams of cocaine, the 18.04 grams of crack cocaine, the 6.27 grams of crack cocaine, and the 63 grams of marijuana was the testimony of Edward Wesson who claimed Appellant sold drugs out of Wesson's apartment and owned the black tote bag found hanging on the fence outside of the apartment. The State presented no physical evidence, such as fingerprints, linking Appellant to the black tote bag. None of the witnesses at trial saw Appellant place the bag on the fence before he was detained by officers and none of the witnesses knew how long the bag had been hanging on the fence.

Wesson's testimony was therefore crucial to the State's case, and the only way the jury could have convicted Appellant of possession and trafficking of the drugs found in the black tote bag is if the jury believed Wesson's testimony. Wesson's credibility was central to the case.

While the Trial Court admitted Wesson's convictions for fraudulent checks, the Trial Court excluded Wesson's prior convictions for armed robbery and third degree burglary, ruling that per this Court's holding in State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013), armed robbery and burglary were not crimes of dishonesty or false statement and therefore inadmissible under Rule 609, SCRE. Tr. 139, l. 17 – 140, l. 7.

The Trial Court erred in relying solely upon Rule 609(a)(2) and Broadnax in excluding Wesson's convictions for armed robbery and third degree burglary. Rule 609(a)(1) provides "evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted." This provision allows for the admission of any type of crime, not just crimes of dishonesty or false statement. The Trial Court erred by hinging its analysis on whether the prior armed robbery and burglary convictions were crimes of dishonesty or false statements.

Rule 609(a)(2) provides that prior convictions for crimes of dishonesty and false statement shall be admitted regardless of the punishment. Therefore, for crimes which involve dishonesty and false statement, the crimes can be admitted even if the punishment was not by death or imprisonment in excess of one year. However, Rule 609(a)(1) makes it clear that a prior conviction does not have to involve a crime of dishonesty or false statement to be admissible if the punishment was by death or imprisonment in excess of one year. The difference is that the court should perform a Rule 403 analysis before admitting the impeachment evidence which did not occur here due to the Trial Court's erroneous application of Rule 609.

Here, Wesson's armed robbery and third degree burglary convictions were punishable by imprisonment in excess of one year. S.C. CODE ANN. § 16-11-313; 16-11-330. The crimes were admissible under Rule 609(a)(1) to attack Wesson's credibility which was crucial to the State's case against Appellant.

In addition, the Trial Court's reliance upon Broadnax for its holding that prior armed robbery convictions, without more, did not constitute crimes of dishonesty is in error based

on Wesson's admission during his proffered testimony that his taking of money from an elderly woman at gunpoint and his breaking in at a construction site to find a place to sleep were wrongful and criminal actions. Tr. 127, l. 18 – 135, l. 16; 139, ll. 4-16. With respect to the armed robbery conviction, Wesson's testimony revealed that he went to the parking lot planning to rob someone, hid in the parking lot while waiting on someone to rob, and then carried out that plan. Tr. 131, l. 21 – 132, l. 21. Appellant showed acts of deceit beyond the basic crimes themselves, and therefore Wesson's crimes of armed robbery and burglary were admissible under Broadnax.

Finally, the South Carolina Supreme Court granted certiorari in Broadnax on June 12, 2014. Should the Supreme Court hold that armed robbery and related crimes constitute crimes of dishonesty that can be used to impeach an accused, certainly these types of crimes should be allowed to impeach a witness. See State v. Al-Amin, 353 S.C. 405, 414-25, 578 S.E.2d 32, 37-43 (Ct. App. 2003) (holding armed robbery is a crime of dishonesty and recognizing that by definition, dishonesty is a "disposition to lie, cheat, or steal.").

The Trial Court erred in not allowing Appellant to attack Wesson's credibility with his crimes of armed robbery and burglary. The error was not harmless. The State's case against Appellant with respect to the drugs found in the black tote bag depended entirely on Wesson's testimony. Without his testimony, the State could not link Appellant to the black tote bag. The State's case against Appellant hinged on Wesson's credibility, and Appellant should have been permitted to fully attack his credibility with his prior convictions. See State v. Pradubsri, 403 S.C. 270, 284, 743 S.E.2d 98, 106 (2013) (holding that where the State could not present evidence amounting to constructive possession of the drugs without the witness's testimony, the witness's testimony was essential to the State's case and the

error in not allowing cross-examination regarding her exact potential sentence was not harmless). Appellant is accordingly entitled to a new trial.

II. The Trial Court erred in allowing the state to qualify an investigator with the narcotics division of the police department as an expert concerning the street value of drugs, the typical habits of a drug user as opposed to a drug dealer, the normal means of packaging and selling certain drugs, typical dosages of street drugs, and opinions concerning avoidance methods persons involved in drug activity use to avoid detection because he was not qualified as an expert under Rule 702.

Investigator Jeff Kirby was assigned to the Narcotics Division with the Spartanburg City Police Department. Tr. 167, l. 15 – 168, l. 5. Over objection and despite the fact that he had never testified as an expert before, Investigator Kirby was allowed to testify as an expert concerning the street value of drugs, the typical habits of a drug user as opposed to a drug dealer, the normal means of packaging and selling certain drugs, typical dosages of street drugs, and opinions concerning avoidance methods persons involved in drug activity use to avoid detection. Tr. 174, ll. 6-7; 181, ll. 2-13; 183, ll. 13-20. Defense counsel argued that Investigator Kirby was not qualified to testify as an expert. Tr. 176, ll. 7-24; 180, ll. 11-16.

Rule 702, SCRE provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Trial Court erred in qualifying Investigator Kirby as an expert because he is not qualified as an expert under Rule 702. The rule is not intended to allow police officers, who are charged with the responsibility of removing criminals from the streets, to essentially testify that they are doing their job correctly and have correctly charged the defendant with drug possession and trafficking. The State was able to elicit Investigator Kirby's expert

testimony that a person who had 1.06 grams of powder cocaine on his person, no drug paraphernalia for drug use, $1200 cash, and a gun on his person – remarkably the same items that Appellant had on his person – was in fact a drug dealer. Tr. 195, l. 19 – 196, l. 5. This testimony usurped the jury's fact finding role and was improper:

> "[I]t is a little too convenient that the Government has found an individual who is expert on precisely those facts that the Government must prove to secure a guilty verdict—even more so when that expert happens to be one of the Government's own investigators . . . When the Government skips the intermediate steps and proceeds directly from internal expertise to trial, and when those officer experts come to court and simply disgorge their factual knowledge to the jury, the experts are no longer aiding the jury in its factfinding; they are instructing the jury on the existence of facts needed to satisfy the elements of the charged offense."

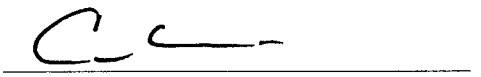
United States v. Mejia, 545 F.3d 179, 191 (2nd Cir. 2008).

Where the Trial Court erred in qualifying Investigator Kirby as an expert, Appellant is entitled to a new trial.

CONCLUSION

For the reasons set forth herein, Appellant Issac Glenard Lyles respectfully requests this Court to reverse his convictions and remand for a new trial.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 12th day of November, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPELLATE CASE NO. 2013-002639

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Salley W. Elliott, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Isaac Lyles, # 209983 at Perry Correctional Institution, this 12th day of November, 2014.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 12th day of November, 2014.

Bailey Reed (L.S.)
Notary Public for South Carolina

My Commission Expires: October 24, 2021.