



The Supreme Court of South Carolina

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July 24, 2015

The Honorable Jeanette W. McBride
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REMITTITUR

Re: The State v. Christopher Broadnax
Lower Court Case No. 2009GS4004541, 2009GS4004539,
2009GS4004542, 2009GS4004540
Appellate Case No. 2013-000615

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

CLERK

cc: Mary Shannon Williams, Esquire
LaNelle Cantey DuRant, Esquire

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

The State, Petitioner,

v.

Christopher Broadnax, Respondent.

Appellate Case No. 2013-000615

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27545
Heard February 4, 2015 – Filed July 8, 2015

REVERSED IN PART, AFFIRMED IN PART

Attorney General Alan McCrory Wilson, Assistant
Attorney General Julie Kate Keeney and Assistant
Attorney General Mary Shannon Williams, all of
Columbia, for Petitioner.

Appellate Defender LaNelle Cantey DuRant, of
Columbia, for Respondent.

CHIEF JUSTICE TOAL: The State of South Carolina appeals the court of appeals' decision reversing Christopher Broadnax's (Respondent) convictions for armed robbery and kidnapping, and remanding for a new trial. We reverse in part and affirm in part the decision of the court of appeals.

FACTUAL/PROCEDURAL HISTORY

At 5:30 p.m. on May 24, 2009, a masked gunman entered Church's Chicken on Two Notch Road in Columbia. He held one of the employees at gunpoint while the employee emptied the cash registers. Three other employees locked themselves in the kitchen. The gunman was wearing a striped shirt, had a distinctive "lazy eye," and carried a clear plastic bag.

After the employee filled the bag with money from the registers, the gunman calmly exited the store, climbed into a "gray Dodge old model truck" driven by an accomplice, and left the scene. One of the employees chased the gunman outside and saw him riding in the passenger seat of the gray truck as the driver pulled out of the parking lot onto Two Notch Road.

Police responded to the scene within approximately three minutes, and based on the employees' descriptions of the getaway vehicle, stopped the driver a short distance from the Church's Chicken on Two Notch Road.¹ When officers approached the vehicle, they found Respondent crouched down on the floorboard of the passenger side. Officers immediately noticed that Respondent had a "lazy eye." The police officers found a gun and a bag full of money (matching the employees' descriptions) jammed under the truck's passenger seat, adjacent to Respondent. Further, one of the employees identified Respondent as the gunman in a "show-up" identification, and testified that he recognized Respondent's distinctive facial features, build, and clothing.²

¹ A testifying officer stated that the truck was distinctive because it was in poor condition and "had a number of dents and pings and so forth."

² Several of the employees also made in-court identifications of Respondent as the perpetrator of the crimes. Furthermore, Respondent's accomplice testified against him at trial.

Respondent was charged with one count of armed robbery and four counts of kidnapping.

After the State rested, Respondent indicated that he would testify in his own defense. Consequently, the State moved to admit Respondent's prior criminal record for purposes of impeachment. The trial court heard arguments and conducted an inquiry into which of Respondent's prior convictions should be admitted. Pursuant to Rule 609(a)(2), SCRE, and the court of appeals' opinion in *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003), the trial court admitted three of Respondent's four prior armed robbery convictions.³

During his testimony, Respondent denied any involvement in the robbery. However, Respondent's counsel elicited testimony regarding Respondent's prior convictions for armed robbery.⁴ The State likewise questioned Respondent about his prior convictions.

The trial judge then instructed the jury:

You've heard evidence that the defendant was convicted of a crime other than the one for which the defendant is now on trial. This evidence may be considered by you if you can conclude it is true only in deciding whether the defendant's testimony is believable and for no other purpose. You must not consider the defendant's prior record as any evidence of the defendant's guilt of the charge that we are trying here today.

The jury found Respondent guilty of armed robbery and four counts of kidnapping, and the trial judge sentenced Respondent to a mandatory minimum sentence of life imprisonment without the possibility of parole based on Respondent's prior armed robbery convictions.

On appeal to the court of appeals, Respondent argued, *inter alia*, that the

³ The trial court also admitted Respondent's prior convictions for transaction card theft, grand larceny, and petit larceny.

⁴ The trial court permitted Respondent's counsel to elicit the prior conviction testimony during his direct examination without waiving his objection to the admission of that testimony.

trial court erred in admitting his prior armed robbery conviction for impeachment purposes. *See State v. Broadnax*, 401 S.C. 238, 241, 736 S.E.2d 688, 689 (Ct. App. 2013). The court of appeals reversed and remanded the case to the trial court for a new trial. *Id.* Specifically, the court of appeals found: (1) Respondent's prior armed robbery convictions, without more, did not constitute crimes of dishonesty, and therefore, the trial court should have conducted a balancing test prior to admitting testimony regarding Respondent's prior armed robbery convictions; and (2) such error was not harmless beyond a reasonable doubt. *Id.* at 244–48, 736 S.E.2d at 691–93.

ISSUES PRESENTED

- I. Whether the court of appeals erred in finding that Respondent's prior armed robbery convictions were not crimes of dishonesty, and were therefore inadmissible under Rule 609(a)(2), SCRE?
- II. Whether the court of appeals erred in refusing to find any error in the admission of Respondent's prior criminal record harmless beyond a reasonable doubt?

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission or exclusion of evidence rests in the sound discretion of the trial judge, and will not be reversed on appeal absent an abuse of discretion. *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) (citation omitted); *see also State v. Kelly*, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995) ("A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." (citation omitted)). "An abuse of discretion occurs where the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. McDonald*, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000) (citation omitted).

LAW/ANALYSIS

I. Prior Armed Robbery Convictions

The State argues that the court of appeals erred in reversing the trial court

because armed robbery is a "crime of dishonesty or false statement" such that it is automatically admissible under Rule 609(a)(2), SCRE. We disagree.

Rule 609(a), SCRE, provides:

For the purpose of attacking the credibility of a witness,

(1) 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, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(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.

In *State v. Al-Amin*, the court of appeals considered the question of whether the appellant was entitled to a new trial after the trial court admitted his prior armed robbery conviction without first weighing the probative value and prejudicial effects of the admission. 353 S.C. at 408–09, 414, 578 S.E.2d at 34, 37. Noting that "[t]here is disagreement among federal circuit courts and state courts construing Rule 609(a)(2) as to which crimes are included," the court of appeals explained that "[t]he disagreement revolves around whether convictions for theft crimes, such as larceny, robbery, and shoplifting, should be admitted under the rule as involving dishonesty or false statement." *Id.* at 415, 578 S.E.2d at 37. The court of appeals acknowledged that a majority of federal courts has adopted a narrow approach to the question, but declined to follow federal precedent, instead adopting an expansive approach to determining what constitutes a "crime of dishonesty or false statement." *Id.* at 416, 578 S.E.2d at 38. The court of appeals reasoned:

"An essential element of robbery is that the perpetrator of the offense steals the goods and chattels of another or, in the case of an attempt to commit robbery, intends to steal the goods or chattels of the person assaulted. If this element is not present, the crime is not robbery or an attempted robbery. Stealing is defined in law as larceny. Larceny

involves dishonesty. The fact that the perpetrator of the crime manifests or declares his dishonesty by brazenly committing the crime does not make him an honest person."

Id. at 421, 578 S.E.2d at 40–41 (quoting *State v. Goad*, 692 S.W.2d 32, 37 (Tenn. Crim. App. 1985)). Thus, the court of appeals concluded, "It is the larcenous element of taking property of another which makes the action dishonest. Larceny is a lesser-included offense of armed robbery." *Id.* at 425, 578 S.E.2d at 43 (citations omitted). The court of appeals, citing several dictionary definitions, found further,

To restrict the application of Rule 609(a)(2) only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact would be to ignore the plain meaning of the word "dishonesty." "Dishonesty" is, by definition, a "disposition to lie, cheat, or **steal**." "To be dishonest means to deceive, defraud 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. (internal citations omitted).

More recently, however, we decided *State v. Bryant*, in which we held that the trial court erroneously admitted the petitioner's prior firearms convictions under Rule 609 without weighing the probative value and prejudicial effects of their admission because the firearms offenses were not crimes involving dishonesty. 369 S.C. 511, 517, 633 S.E.2d 152, 155–56 (2006). In so holding, we stated:

Violations of narcotics laws are generally not probative of truthfulness. *See State v. Cheeseboro*, 346 S.C. 526, 552 S.E.2d 300 (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).⁵ Likewise, firearms violations also are not generally probative

⁵ In *Smith*, the court stated:

[E]vidence that any witness has been convicted of a crime involving dishonesty or false statement is admissible without regard to its

of truthfulness. Accordingly, Petitioner's prior firearms convictions do not involve dishonesty and their probative value should have been weighed against their prejudicial effect prior to their admission pursuant to Rule 609(a)(1).

Id. (emphasis added).

Here, the State argues that because *Bryant* involved convictions for firearms offenses, and not explicitly a prior armed robbery conviction, the above language is merely dicta. Therefore, the State relies on earlier precedents from our courts—namely *Al-Amin*—and points to other states' precedents to support its argument that armed robbery is a crime of dishonesty, such that no balancing test is required.

We take this opportunity to overrule *Al-Amin*, and reaffirm the rule as formulated in *Bryant* that armed robbery is not a crime of dishonesty or false statement for purposes of impeachment under Rule 609(a)(2). While many states have adopted a broader interpretation of the Rule, we find the analysis to be more nuanced than that undertaken by the *Al-Amin* court.⁶ Under *Al-Amin*'s and the

prejudicial effect. Fed. R. Evid. 609(a)(2). Smith's forgery conviction is admissible under Rule 609(a)(2). However, his convictions for robbery, burglary, theft, and drug possession convictions are not, as the government has not shown that any of them involved false statements or acts of deceit beyond the basic crime itself, and as to the theft convictions has not shown that it involved items of significant value.

181 F. Supp. 2d at 909 (internal citations omitted).

⁶ See Stuart P. Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of Crimen Falsi*, 90 J. Crim. L. & Criminology 1087, 1119 (2000) ("The problem with [a broad reading of the term 'crime of dishonesty'] . . . is that it blurs the moral distinction between stealing and lying. A person who steals is certainly dishonest; she rejects the idea of making an honest living; she cheats; she takes something to which she is not entitled; she disobeys the rules. But there is no particular reason to think that she is deceitful. Indeed, what little empirical evidence there is indicates that a prior conviction for larceny (stealing by stealth) says little or nothing about a witness'[s] propensity to lie." (footnote omitted)).

concurrence's rationale, the exception contained in Rule 609(a)(2), which permits the automatic admission of certain prior convictions, swallows the rule contained in Rule 609(a)(1), in which discretion regarding the admission of prior convictions rests with the trial judge. We think this interpretation is contrary to the intent of the Rule.

Thus, we hold that for impeachment purposes, crimes of "dishonesty or false statement" are crimes in the nature of *crimen falsi* "that bear upon a witness's propensity to testify truthfully." *Adams v. State*, 644 S.E.2d 426, 431–32 (Ga. Ct. App. 2007) (footnote omitted) (surveying federal and state treatment of the issue, and adopting the more narrow federal definition); *see also United States v. Smith*, 551 F.2d 348, 362–63 (D.C. Cir. 1976) ("[I]n its broadest sense, the term '*crimen falsi*' has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth." (emphasis added)). Armed robbery, therefore, is not per se probative of truthfulness.

The Federal Rules of Evidence specifically identify *crimena falsi* in Rule 609(a)(2), FRE, as crimes which by their very nature permit the impeachment of a witness convicted of a crime of "dishonesty or false statement." Green, *supra* note 6, at 1090. In fact,

[t]he original Conference Report makes the link between Rule 609(a)(2) and the *crimena falsi* explicit, defining the phrase "crimes involving dishonesty or false statement" as "crimes such as perjury, subornation of perjury, false statements, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully."

Id. at 1090–91 (emphasis added) (footnote omitted) (quoting H.R. Conf. Rep. No. 93-1037, at 9 (1975)). While the State emphasizes that South Carolina did not adopt this explanatory language when it adopted Federal Rule 609, the notion of *crimen falsi* in the evidentiary context is long-established in the common law of South Carolina. *See, e.g., State v. Peterson*, 35 S.C. 279, 282, 14 S.E. 617, 618 (1892) ("The old, well-settled rule was that one who had been convicted of a crime belonging to the class known as the '*crimen falsi*' was said to be infamous, and incompetent to testify."). Thus, the State's argument is unavailing. *Cf. Williams v. Condon*, 347 S.C. 227, 247, 553 S.E.2d 496, 507 (Ct. App. 2001) ("A strong

presumption . . . exists that the General Assembly does not intend to supplant common law principles when enacting legislation." (citations omitted)).⁷

Here, the trial judge felt constrained by *Al-Amin* to forgo a balancing test, even though he noted that *Al-Amin* was a "significant departure" from what he understood the law to be, especially because the State sought to admit *three* prior convictions identical to the one for which Respondent was currently on trial. We agree with the trial judge that the prejudicial effect of admitting prior convictions for the exact same offense is often very high. *See State v. Scriven*, 339 S.C. 333, 343–44, 529 S.E.2d 71, 76–77 (Ct. App. 2000) (stating that because the prior convictions were "similar or identical to charged offenses, . . . the likelihood of a high degree of prejudice to the accused [was] inescapable"). For this reason, a rule that places discretion with the trial judge is even more desirable, and unlike the concurrence, we think the trial judge is the best arbiter of whether a very prejudicial piece of evidence should be admitted in this situation—unless of course the prior crime specifically relates to a defendant's penchant to tell the truth on the witness stand. Importantly, our holding today does not preclude the admission of prior convictions for armed robbery; rather, it merely enables a trial judge to conduct a balancing test pursuant to Rule 609(a)(1) when the State seeks prior convictions for armed robbery to impeach a criminal defendant's testimony.

Ultimately, the Rule is 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. The balance we strike today cuts to the heart of our system's conceptions of fair trial and fair play.

Thus, we affirm the court of appeals' finding that armed robbery is not a crime of "dishonesty or false statement," rendering it admissible pursuant to Rule

⁷ While the concurrence criticizes our reliance on the federal interpretation of the Rules, we note that we routinely look to the federal interpretation of the Rules of Evidence to guide us in our interpretation of our own Rules of Evidence. *See, e.g., Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 594, 748 S.E.2d 781, 786 (2013) ("Because our appellate courts have not definitively addressed Rule 60(b)(5), we have looked to the federal courts' interpretation as our rule is similar to the federal rule."); *Laffitte v. Bridgestone Corp.*, 381 S.C. 460, 474 n.10, 674 S.E.2d 154, 162 n.10 (2009) ("The language of Rule 26(c), SCRPC, mirrors that of federal Rule 26(c). Because there is no South Carolina precedent construing this rule, federal interpretation of Rule 26(c) is persuasive authority." (citation omitted)).

609(a)(2), SCRE.⁸

II. Harmless Error

Next, the State argues that any error in admitting the prior armed robbery convictions was harmless beyond a reasonable doubt. We agree.

While we agree with the court of appeals that in many instances, the admission of identical prior convictions for impeachment purposes enhances its prejudicial nature, it does not conclusively render the error so prejudicial that it is not subject to a harmless error analysis. Rather,

[w]hether the improper introduction of this evidence is harmless requires us to look at the other evidence admitted at trial to determine whether the defendant's "guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached."

State v. Brooks, 341 S.C. 57, 62–63, 533 S.E.2d 325, 328 (2000) (quoting *State v. Parker*, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993)).

Here, the other evidence implicating Respondent in these crimes was overwhelming. Respondent was positively identified by several employees who recalled Respondent's distinctive facial features and clothing. Furthermore, one of the employees watched as Respondent's accomplice drove him away from the scene in a dented gray truck, which the police stopped a only a short distance away within minutes after the employees reported the robbery. Inside the getaway vehicle, police found Respondent crouching in the floorboard area, sitting adjacent to a gun and a bag of money matching the employees' descriptions.

Therefore, in spite of the error in admitting Respondent's prior convictions for armed robbery, we find such error was harmless beyond a reasonable doubt, and we reverse the part of the court of appeals' decision finding otherwise. *See, e.g., State v. Mizzell*, 349 S.C. 326, 334, 563 S.E.2d 315, 319 (2002) ("Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did

⁸ We note that—contrary to the concurrence's assertion—whether or not shoplifting is a crime of dishonesty has never been decided by *this* Court and is not before us at this time.

not contribute to the verdict beyond a reasonable doubt.").⁹

CONCLUSION

For the foregoing reasons, the decision of the court of appeals is

REVERSED IN PART, AFFIRMED IN PART.

KITTREDGE and BEATTY, JJ., concur. HEARN, J., concurring in a separate opinion in which PLEICONES, J., concurs.

⁹ The State also contends that the court of appeals erred in refusing to remand the case to the trial court, and in conducting the Rule 609(a)(1) balancing test itself. Our harmless error analysis renders the remand issue moot.

JUSTICE HEARN: I concur in the result reached by the majority. However, I would reverse the court of appeals' opinion and hold the trial court did not err in admitting Broadnax's prior convictions because armed robbery is a crime involving dishonesty under Rule 609(a)(2) of the South Carolina Rules of Evidence.

I appreciate the majority's discussion of the similar federal rule and its accompanying legislative history. As the majority correctly asserts, the federal rule has been interpreted to limit the application of Rule 609(a)(2), FRE to those prior convictions of crimes whose central elements involve *crimen falsi*. See *United States v. Smith*, 551 F.2d 348, 362–63 (D.C. Cir. 1976) ("[I]n its broadest sense, the term 'crimen falsi' has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court's ascertainment of truth.").

However, the majority's analysis ignores that neither our rule nor its commentary, both of which were promulgated by this Court, contain any reference to *crimen falsi*. Cf. Rule 609 note ("Subsection (a) does change the law in South Carolina."). Further, I disagree with the majority that the common law somehow contains and thus preserves the concept that *crimen falsi* is the operative standard. Curiously, the sole case the majority cites to support this proposition, *State v. Peterson*, 35 S.C. 279, 14 S.E. 617 (1892), affirmed the trial court's admission of a prior conviction for the exact crime at issue today: robbery. *Id.* at 281, 14 S.E. at 618.

Accordingly, this Court's interpretation of Rule 609(a)(2), SCRE must be limited to its plain language. The Rule states:

For the purpose of attacking the credibility of a witness,

(1) 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, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(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.

Rule 609(a), SCRE (emphasis added). As our court of appeals succinctly noted in *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003), the operative word for this analysis is "dishonesty." As elucidated by that court:

To restrict the application of Rule 609(a)(2) only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact would be to ignore the plain meaning of the word "dishonesty." "Dishonesty" is, by definition, a "disposition to lie, cheat, or **steal**." "To be dishonest means to deceive, defraud 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 425, 578 S.E.2d at 43 (internal citations omitted). Restricting our analysis—as we must—to the plain language of 609(a)(2), SCRE there is no doubt armed robbery constitutes a crime involving dishonesty. Stealing, even more so when done at gunpoint, is essentially the type of behavior reflecting adversely on one's character for truthfulness envisioned by Rule 609(a)(2).

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. Shaw*, 328 S.C. 454, 492 S.E.2d 402 (Ct. App. 1997), but armed robbery is not.¹⁰ Further, it comports with the outcome a majority of states have reached on the same issue. See Jane M. Draper, Annotation, *What Constitutes Crime Involving "Dishonesty or False Statement" Under Rule 609(a)(2) of Uniform Rules of*

¹⁰ I do not believe the result in this case is dictated by stare decisis. As the majority points out, the Court's decision in *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155–56 (2006), dealt only with the question of whether prior firearm convictions involve dishonesty. Thus, the Court was not required to reach the same issue that is before us today. See generally *State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) (Sanders, C.J.) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.").

Evidence or Similar State Rule—Crimes Involving Violence or Potential for Violence, 83 A.L.R. 277 (2000) (compiling decisions from other jurisdictions); *see, e.g., Alexander v. State*, 611 P.2d 469, 476 n.18 (Alaska 1980) ("It is the larceny element of robbery which makes such a conviction admissible as impeachment of a witness.").

Accordingly, I would hold the trial court did not err by allowing in evidence of Broadnax's prior convictions pursuant to 609(a)(2) because armed robbery is a crime involving dishonesty, and would reverse the contrary decision of the court of appeals.

PLEICONES, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Christopher Broadnax, Appellant.

Appellate Case No. 2010-166606

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Published Opinion No. 5071
Heard May 8, 2012 – Filed January 9, 2013

REVERSED AND REMANDED

Appellate Defender LaNelle C. Durant, of Columbia, for
Appellant.

Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, and Senior Assistant
Attorney General Harold M. Coombs, Jr., all of
Columbia, for the State.

LOCKEMY, J.: In this appeal from his criminal conviction, Christopher Broadnax contends the trial court erred in: (1) admitting his three prior armed robbery convictions for impeachment purposes; (2) denying his motion to withdraw the life without parole (LWOP) notice based on the arbitrary use of the prosecution's discretion in the plea bargaining process; (3) denying his motion to withdraw the LWOP notice based on the lack of any standards to guide solicitors

regarding when they should seek a sentence of LWOP; and (4) denying his motion that the jury be informed he was facing the mandatory sentence of LWOP. We reverse and remand to the trial court.

FACTS

On May 24, 2009, Broadnax entered a Church's Fried Chicken (Church's) around 5:00 p.m. He pointed a gun at three of the employees and forced one to remove all the register's money. Broadnax then placed the money into a bag and fled the scene. An employee followed Broadnax outside and observed him getting into a truck that subsequently drove away. The police responded, and they were able to track a similar truck several blocks away from the Church's. The police stopped the truck and removed the driver. Broadnax was found inside, crouched down in the passenger seat. A gun and a bag of clothing were located underneath the passenger seat. On November 19, 2009, a grand jury indicted Broadnax for armed robbery, and on June 10, 2010, the case was called to trial before a jury.

In a pre-trial hearing, Broadnax admitted he was convicted of armed robbery in 1979 and 1991.¹ The State had served him with notice of LWOP on May 18, 2010, based on those previous armed robbery charges. Broadnax argued he was not adequately informed of the possibility of LWOP at the time of his prior convictions; thus, it was a violation of his Sixth Amendment rights. Further, he maintained he relinquished his right to go to trial in 1991 in reliance on the representation and assurance of his attorney, who did not inform him of the subsequent possibility of LWOP; thus, his rights under the Fifth and Fourteenth Amendments as well as all the South Carolina constitutional equivalent provisions were violated. The trial court withheld ruling on the issue to allow the State to submit case law on the issues. At the end of the pre-trial hearing, the State submitted case law, but there was no ruling made from the bench on the issue.²

Broadnax further objected to the solicitor's total discretion in noticing LWOP sentences under section 17-25-45 of the South Carolina Code (Supp. 2011), and maintained the unfettered discretion violated his substantive due process rights. Broadnax stated he had been willing to plead guilty to his current charge, but the solicitor had "it out for him." Broadnax stated that in the interest of judicial

¹ Broadnax had three armed robbery convictions from 1991, but only one armed robbery conviction from 1979.

² This issue was not raised on appeal; thus, it is not preserved.

economy, the prosecution sometimes uses the threat of LWOP as a method to induce a plea, and they will choose not to go forward with LWOP when a defendant will plea. He requested to proffer testimony from Investigator A. L. Thomas to show the prosecution's arbitrary and capricious actions. However, instead of proffering Investigator Thomas's testimony, Broadnax proffered testimony from a law clerk, Jacob Taylor Bell, who could testify to the same evidence. Bell stated he was present for a conversation regarding plea offers between Investigator Thomas and Broadnax's counsel. In that conversation, Broadnax indicated he was willing to plead to twenty years, but Bell testified Investigator Thomas "explicitly said [the prosecutor] had her fangs out for Broadnax." The trial court explained that "when you've got the notice that lists three or four different armed robbery offenses, I fail to see that there is any arbitrariness in the use of the life without parole notice," and denied Broadnax's motion.

Broadnax then argued section 17-25-45 violated the Equal Protection Clause and maintained the statutory discretion given to solicitors in deciding whether to notice LWOP was capricious and arbitrary. He contended it would depend on the county, "[o]r even less, it [would] depend[] on which solicitor a defendant draws as to whether or not they will get LWOP when they are willing to plead to something." He contended that with no defined standard to guide prosecutors, a situation is created where similarly situated defendants are treated differently depending on the county jurisdiction. In support of his argument, Broadnax cited *Bush v. Gore*, 531 U.S. 98 (2000). The trial court denied that motion as well.

During the trial, Broadnax decided to testify in his own defense, and the trial court conducted an inquiry into his prior record to determine which convictions could be admitted into evidence. The trial court found three out of his four prior armed robbery convictions were admissible, in addition to prior convictions for transaction card theft, grand larceny, and petit larceny, pursuant to Rule 609(a)(2), SCRE.³ The trial court noted *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003) supported its decision that the armed robbery convictions were crimes of dishonesty. However, the trial court also stated *Al-Amin* involved a defendant on trial for murder, whereas Broadnax was charged with armed robbery, noting the difference had the potential to increase the prejudicial impact of admitting the prior armed robbery convictions. Despite that distinction, the trial court followed the

³ No issue was raised relating to the time element established in Rule 609(b), SCRE.

court in *Al-Amin*, and determined that case made it clear no Rule 403 analysis applied to any convictions admitted for impeachment purposes under Rule 609(a)(2). Defense counsel then requested permission to elicit testimony from Broadnax on direct examination about the prior convictions without having waived his objection to that same testimony. He did not want to be "hamstrung" and wished to avoid the prior convictions being exploited by the State on cross-examination. "[I]t [was defense counsel's] understanding that this [was] only for impeachment purposes and it's not for [] propensity. And if such an objection arises, [he] would of course make it on the record." The trial court agreed to Broadnax's strategy of eliciting testimony about the prior convictions on direct examination but not waiving his objection to that testimony.

After the jury returned with a guilty verdict, Broadnax renewed all his objections. He also moved for a new trial based on violations of the Fourteenth Amendment. Specifically, Broadnax contended the State denied him his due process right to a fair trial by eliciting testimony of his three prior convictions for armed robbery and by misusing the word "innocent" so as to improperly shift the burden to the defendant.⁴ The trial court denied all his motions, and this appeal followed.

ISSUES ON APPEAL

Did the trial court err in admitting Broadnax's three prior armed robbery convictions for impeachment purposes pursuant to Rule 609(a)(2)?

Did the trial court err in denying Broadnax's motion to withdraw the notice of LWOP based on the arbitrary use of the prosecution's discretion in the plea bargaining process?

Did the trial court err in denying Broadnax's motion to withdraw the notice of LWOP based on the lack of standards guiding solicitors in when they should seek a sentence of LWOP?

Did the trial court err in denying Broadnax's motion that the jury be instructed Broadnax was facing a mandatory sentence of LWOP?

⁴ Broadnax did not raise the issue of the State's alleged misuse of "innocent" on appeal.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) (citing *State v. Wilson*, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001)). "This [c]ourt is bound by the trial court's factual findings unless they are clearly erroneous." *Id.* (citing *State v. Quattlebaum*, 338 S.C. 441, 452, 527 S.E.2d 105, 111 (2000)).

LAW/ANALYSIS

Prior Convictions

Broadnax argues the trial court erred in admitting the prior armed robbery convictions into evidence for purposes of impeachment under Rule 609(a)(2). Specifically, Broadnax maintains that since the armed robberies should not have been admitted for impeachment purposes pursuant to Rule 609(a)(2), the trial court should have analyzed them pursuant to Rule 609(a)(1); thus, a balancing test was necessary. We agree.

As a threshold matter, we address the State's argument that Broadnax did not preserve this issue for our review. *See State v. Liverman*, 386 S.C. 223, 243, 687 S.E.2d 70, 80 (Ct. App. 2009) (holding issues must be raised to and ruled upon by trial court to be preserved for review); *see also State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994) ("A contemporaneous objection is required to properly preserve an error for appellate review."); *State v. Burton*, 326 S.C. 605, 609, 486 S.E.2d 762, 764 (Ct. App. 1997) ("Failure to object when the evidence is offered constitutes a waiver of the right to object."). We disagree.

Broadnax raised his objection directly prior to taking the stand in his own defense. After the trial court issued its ruling on admissibility, Broadnax stated he would be eliciting the challenged testimony in order to avoid having the State exploit it. Thus, we believe this issue was properly preserved for our review. *See State v. Mueller*, 319 S.C. 266 at 267-69, 460 S.E.2d 409, 410-11 (Ct. App. 1995) (finding that because no evidence was presented between the ruling on impeachment evidence and the defendant's testimony, there was no basis for the trial court to change its ruling, and "if a party has obtained a final ruling on the admissibility of impeachment evidence, that party does not lose his right to challenge on appeal the admissibility of the evidence by eliciting the evidence during direct examination"). We continue now to the merits of Broadnax's argument.

Rule 609(a), SCRE provides that for the purpose of attacking the credibility of a witness:

(1) 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, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(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.

"Under Rule 609(a)(2), SCRE, if a crime is viewed as one involving dishonesty, the court must admit the prior conviction because, prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect." *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006); see *State v. Al-Amin*, 353 S.C. 405, 425-27, 578 S.E.2d 32, 43-44 (Ct. App. 2003) (stating crimes involving dishonesty or false statements are "automatically admissible for impeachment purposes because they have the greatest probative value on the issue of truth and veracity").

Our supreme court held in *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006) that "a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." See *United States v. Smith*, 181 F.Supp.2d 904 (N.D. Ill. 2002) (stating that since the government did not show that any of the convictions of robbery, burglary, theft, or drug possession involved any false statements or acts of deceit beyond the basic crime itself, they were not admissible under the Federal Rule of Evidence 609(a)(1)). Unlike in *Al-Amin*, our supreme court has stated stealing is not always a crime of dishonesty if there are no additional affirmative false statements or acts of deceit beyond the crime itself.

If the crime of armed robbery is not considered a crime of dishonesty under 609(a)(2), it may still be admitted under Rule 609(a)(1), but it would be subject to

a balancing test. Under Rule 609(a)(1), the trial court must determine if the probative value of admitting the evidence outweighs its prejudicial effect to the accused. Moreover, our supreme court laid out other various factors to consider when determining whether to admit prior convictions under 609(a)(1): (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity of the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Bryant*, 369 S.C. at 517 n.1, 633 S.E.2d at 155 n.1 (citing *State v. Martin*, 347 S.C. 522, 530-31, 556 S.E.2d 706, 710-11 (Ct. App. 2001)).

After careful consideration of previous case law, we take this opportunity to follow *Bryant* in deciding these prior armed robberies, without more, are not crimes of dishonesty.⁵ We are not ruling that the prior armed robberies are *per se* inadmissible; however, as the court in *Bryant* stated, to be admissible under Rule 609(a)(2), there simply must be something beyond the basic crime. In the present case, the State did not show any further affirmative false statements or acts of deceit beyond the basic crime itself. Accordingly, we find the trial court erred in admitting Broadnax's prior convictions of armed robbery pursuant to Rule 609(a)(2), SCRE, and the probative value of Broadnax's prior armed robbery convictions should have been weighed against their prejudicial effect prior to their admission pursuant to Rule 609(a)(1).

"Error is harmless where it could not reasonably have affected the result of the trial." *Bryant*, 369 S.C. at 518, 633 S.E.2d at 156 (citing *In re Harvey*, 355 S.C. 53, 63, 584 S.E.2d 893, 897-98 (2003)). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." *Id.* (citing *State v. Sherard*, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991)). "Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." *Id.* (citing *State v. Bailey*, 298 S.C. 1, 4-5, 377 S.E.2d 581, 583-84 (1989)). "The circumstances of each individual case are to be considered." *Id.*

⁵ We recognize this court held in *Al-Amin* that armed robbery was a crime of dishonesty pursuant to Rule 609(a)(2). *State v. Al-Amin*, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003). However, since *Al-Amin*, our supreme court has decided *Bryant*.

Because Broadnax's prior convictions were the identical charge as the offense in the present case, we cannot conclude Broadnax was not prejudiced by the admission of those prior convictions. *See State v. Howard*, 396 S.C. 173, 180-81, 720 S.E.2d 511, 515-16 (Ct. App. 2011); *see also Bryant*, 369 S.C. at 517-18, 633 S.E.2d at 156 (holding that when a prior offense is similar to the charged offense the "danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission"); *State v. Scriven*, 339 S.C. 333, 343-44, 529 S.E.2d 71, 76-77 (Ct. App. 2000) (holding that the prior convictions are "similar or identical to charged offenses, and the likelihood of a high degree of prejudice to the accused is inescapable"). Because we find the admission of Broadnax's prior armed robberies created such a high degree of prejudice in this case, we reverse and remand for a new trial.

The determination of this issue is dispositive, and thus, we decline to address Broadnax's remaining arguments relating to a solicitor's discretion in noticing LWOP and the trial court's denial of his request to inform the jury of his potential LWOP sentence. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that if an appellate court's ruling on a particular issue is dispositive of an appeal, rulings on remaining issues are unnecessary).

CONCLUSION

For the foregoing reasons, we reverse and remand for a new trial.

REVERSED AND REMANDED.

WILLIAMS, J., concurs.

THOMAS, J. (concurring in part and dissenting in part): I agree with the majority that Broadnax's prior armed robbery convictions, without more, were not admissible under Rule 609(a)(2) for impeachment purposes, but would remand on the issue of whether or not they could have been admitted under Rule 609(a)(1).

As the majority notes, the South Carolina Supreme Court held in *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006), that "a conviction for robbery, burglary, theft, and drug possession, *beyond the basic crime itself*, is not probative of truthfulness." (emphasis added). By including the phrase "beyond the basic crime itself," the court has declined thus far to hold that such crimes are never

probative of truthfulness. Rather, in qualifying its ruling, it allowed for the possibility that upon a proper showing, a witness could be impeached by a conviction for not only one of these crimes, but convictions for other crimes that are rarely if ever recognized as crimes involving dishonesty or false statement. *See id.* (noting violations of narcotics laws as well as firearms violations, "are generally not probative of truthfulness" (emphasis added)). Therefore, our supreme court has not completely prohibited the admission of convictions for robbery, burglary, theft, drug possession or other narcotics violations, and firearms violations under Rule 609(a)(2) if the proponent can show through evidence such as prior plea colloquies, indictments, or other reliable information from previous proceedings that the witness to be impeached gave a false statement or otherwise behaved dishonestly when committing the offense leading to the conviction sought to be admitted. If so, the conviction at issue could be admitted in trial courts of this State under Rule 609(a)(2) even though the underlying offense itself is not "in the nature of *crimen falsi*, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." *State v. Shaw*, 328 S.C. 454, 457 n.4, 492 S.E.2d 402, 404 n.4 (Ct. App. 1997) (quoting Notes of Conference Report, H.R. No. 93-1597, reprinted in 3 *Weinsteins's Evidence* 609-39 (1976), quoted in *United States v. Ortega*, 561 F.2d 803, 806 (9th Cir. 1977)).

Here, the trial judge, relying on *State v. Al-Amin*, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003), admitted Broadnax's prior armed robbery convictions for impeachment purposes under Rule 609(a)(2) as crimes "involv[ing] dishonesty or false statement." *See* Rule 609(a)(2), SCRE. I agree with the majority that *Bryant*, which was issued by the South Carolina Supreme Court after this court decided *Al-Amin*, gives guidance to this court. Armed robbery, absent presentation of facts and circumstances by the State to demonstrate an act of dishonesty or false statement was involved in the crime, is not *per se* a crime that "involved dishonesty or false statement" that would be admissible under Rule 609(a)(2). As the majority points out, the State did not show any false statements or dishonest conduct beyond the convictions themselves. Under *Bryant*, without this additional information, the corresponding armed robbery convictions would not be probative of Broadnax's truthfulness as a witness and would therefore be inadmissible under Rule 609(a)(2).

As the majority has done, I agree it would then be appropriate to inquire whether Broadnax's prior armed robbery convictions could have been admitted under Rule

609(a)(1).⁶ Under Rule 609(a)(1), evidence of these convictions "shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." However, I am reluctant to have this court make this determination without first giving the trial court the opportunity to rule on the issue. *See State v. Scriven*, 339 S.C. 333, 340, 529 S.E.2d 71, 74 (Ct. App. 2000) ("[Rule 609(a)(1)] requires *the trial judge* to balance the probative value of the evidence for impeachment purposes against the prejudice to the accused." (emphasis added)). We have followed this practice even when the similarity between the prior offenses and the offense on which the accused was tried raised a potential for prejudice. *See id.* at 340-44, 529 S.E.2d at 74-77 (holding the trial court must conduct a balancing test under Rule 609(a)(1) to determine whether an accused facing trial on charges for distributing cocaine and marijuana could be impeached with his prior drug convictions).

Therefore, I agree with the majority that the trial court erred in holding Broadnax's prior convictions for armed robbery were admissible for impeachment purposes pursuant to Rule 609(a)(2), but would remand for a determination by the trial court of their admissibility for impeachment purposes pursuant to Rule 609(a)(1).

⁶ The record indicates a reference was made to Rule 609(a)(1), SCRE, when counsel presented their arguments as to whether Broadnax's convictions were admissible to impeach his credibility, thus indicating that if the trial court determined they were not admissible under Rule 609(a)(2), the State was prepared to argue that they could be admitted under Rule 609(a)(1).