STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Kristi Lea Harrington, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROBERT WILSON,

APPELLANT

APPELLATE CASE NO. 2016-000088

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in prohibiting Appellant from cross-examining a witness about lying to the police?

STATEMENT OF THE CASE

In April of 2015, the Charleston County Grand Jury indicted Appellant Wilson for two counts of armed robbery, indictments #2015-GS-10-17671769.[1] On January 6, 2016, Appellant proceeded to jury trial before the Honorable Kristi L. Harrington. Russell D. Hilton represented Appellant at trial. David L. Osborne prosecuted the case. The jury returned with verdicts of guilty. Judge Harrington sentenced Appellant to two concurrent thirteen (13) year sentences. A timely notice of intent to appeal was filed on January 13, 2016. This appeal follows.

[1]It is unclear who testified before the grand jury as the witness is listed as the Charleston City Police Department. (R. p. 351 indictments).

STATEMENT OF FACTS

On October 7, 2014, at 2:51 AM Denelle Great, aka "D" and Ulysis Great, aka "Big T", robbed the BP Kangaroo Gas Station on Ashley River Road in Charleston. (R. p. 197, ll. 7-8; p. 228, ll. 1-14). Based on video surveillance from the gas station, police became suspicious about a white Ford Taurus with a sunroof and a dent above the driver's side wheel well. (R. p. 201, ll. 19 – p. 202, 203, ll.1-24). A search revealed that Appellant was the registered owner of a vehicle matching the description of the car seen in the surveillance tape. (R. p. 204, ll. 1-2). The police questioned Appellant and, after providing several statements to the police, Appellant admitted that D and Big T gave him five dollars to drive them around on the morning of the robbery. (R. p. 224, ll. 6-13). Appellant admitted that he dropped D and Big T off at the CVS pharmacy across from the Kangaroo Gas Station and waited for them to return but denied knowing that they robbed the Kangaroo. (R. pp. 229-230). Neither D nor Big T testified at trial.

Thomas Young testified that on the morning of the robbery he was driving around looking for scrap metal when he drove by the Kangaroo Gas Station and observed two males, one skinny and one heavy set, dressed in black, wearing masks. (R. p. 67, ll. 1-16; p. 69, ll. 3-19). Young testified that one of the two men may have had a gun. (R. p. 68, ll. 10-19). Young called 911. (R.p. 69, line 21). Young also claimed to have seen the white Ford Taurus leave from near the gas station. (R. pp. 87-88).

The prosecution argued that Appellant was the getaway driver for D and Big T. (R. p. 51, ll. 21-23). Appellant argued that he had no idea that D and Big T were going to rob the gas station. (R. p. 54, ll. 14-19). The trial judge charged the jury that the "hand of one is the hand of all." (R. pp. 334-335). The jury found Appellant guilty.

ARGUMENT

The trial judge erred in prohibiting Appellant from cross-examining a witness about lying to the police.

State's witness Thomas Young had eight prior burglary convictions and a grand larceny conviction. (R. p. 30, ll. 4-13). Prior to trial the State and the Defense stipulated that rather than questioning Young about the eight burglary convictions, the parties simply agreed that Young was a convicted felon. (R. p. 34, ll. 13-25). In addition to the stipulation, Appellant moved, pre-trial, to be able to question Young about his arrest for grand larceny on February 18, 2015, after the robbery took place at the Kangaroo Gas Station on October 7, 2014. (R. p. 35, ll. 4-8). The grand larceny case was later remanded and on May 15, 2015, Young pled guilty to petit larceny in the City of Charleston Municipal Court. (R. p. 40, ll. 17-25). The police report in reference to the petit larceny charge indicated that Young lied to the police and later apologized for lying to the police. (R.p. 44, ll.5-19). The judge properly ruled, pursuant to Rule 609(a)(2), that Appellant should be able to question Young about the petit larceny conviction. (R. p. 44, ll. 20-21).

During direct examination the State asked Young, "And in 2015, is it true that you were convicted for petit larceny?" (R. p. 61, ll. 7-8). Young answered, "Yes, sir." (R. p. 61, line 9). During cross examination counsel for Appellant asked Young, "All right. And you've been untruthful with law enforcement in the past, have you not?" (R. p. 85, ll. 3-4). The State objected. (R.p. 85, line 5). When the judge asked the State for a basis for the objection the State responded, "Relevance." (R. p. 85, ll. 6-7). After an off the record bench conference, the judge sustained the State's objection. (R. p. 85, ll. 8-11). The trial judge erred.

Later, outside the presence of the jury, counsel for Appellant proffered the proposed questioning of Young as follows:

Q. I think the question I asked you was you've been untruthful to law enforcement in the past, have you not?.

A. Yes, sir, I have.

Q. And back in 2000 – I'm sorry – 2015, back in February, that was in regard to that petit larceny charge; is that correct?

A. Yes, sir, it is.

Q. And with regard to you being untruthful, why were you lying to police?

A. Because I committed a crime. I committed a crime on my personal behalf, and I was afraid to suffer the consequences.

(R. p. 95, ll. 3-14). The trial judge erred in not allowing counsel for Appellant to question the witness about lying to the police. The evidence of Young lying to the police was relevant, contrary to the State's objection as irrelevant, and admissible pursuant to Rule 608(b) SCRE.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. The evidence of Young lying to the police is relevant because it is probative of Young's truthfulness in his testimony at Appellant's trial.

In State v. Kelsey, 331 S.C. 50, 75, 502 S.E.2d 63, 75–76 (1998), the South Carolina Supreme Court wrote:

> Under Rule 608(b), SCRE, specific instances of the conduct of a witness may be inquired into on cross-examination if probative of the witness's character for truthfulness or untruthfulness. South Carolina's Rule is identical to the Federal rule. The inquiry under Rule 608(b) is limited to those specific instances of misconduct which are clearly probative of truthfulness or untruthfulness such as forgery, bribery, false pretenses, and embezzlement. See Weinstein's Federal Evidence, Character and Conduct of Witness § 608.12(4)(a-b) (1998). However, the cross-examiner may not go on a "fishing expedition" in the hopes of finding some misconduct. State v. McGuire, 272 S.C. 547, 253 S.E.2d 103 (1979).

The fact that Young lied to police is clearly probative of untruthfulness. The proposed questioning about lying to the police was not a fishing expedition in the hopes of finding some misconduct. A police report indicated that Young lied to the police and the trial judge relied on the report in properly admitting the petit larceny conviction pursuant to Rule 609(a)(2), SCRE. The specific instance of lying to the police should have been admitted pursuant to Rule 608(b).

In Wilder v. State, 388 S.C. 282, 285, 696 S.E.2d 587, 588–89 (2010), the South Carolina Supreme Court wrote:

> Under Rule 608(b)(1), a trial judge may allow a witness to be cross-examined about "specific instances of [that witness's] conduct" if the trial judge, in his discretion, finds these instances probative of the witness's credibility. An abuse of discretion occurs when the trial court's ruling lacks evidentiary support or where it is controlled by an error of law. E.g., State v. McDonald, 343 S.C. 319, 540 S.E.2d 464 (2000). Here, the trial judge committed such an error when he held that preparing false tax returns was not conduct probative of Murdaugh's credibility. Compare In re Hamer, 342 S.C. 437, 537 S.E.2d 552 (2000) (filing false tax returns is a "serious crime" adversely reflecting on a judge's honesty and trustworthiness).

The trial judge in the present case abused her discretion in refusing to allow Appellant to question Young about lying to the police. The error is not harmless. As argued by the State in closing, Young's testimony created an important timeline between Young seeing the masked men dressed in black and the white Ford Taurus leaving the scene near the gas station robbery. (R. p. 303, line 25 – p. 304, ll. 1-13).

CONCLUSION

Based on the above argument, this Court should reverse the sentence and conviction and remand for a new trial.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

This 20th day of December, 2016.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 20, 2016

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