THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
Case No. 2016-CP-01280

S. Jackson Kimball, II, Special Circuit Court Judge

Case No. 2017-CP-00-1530

Nathan Morgan,

Respondent,

v.

City of Rock Hill,

Appellant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT PROPERLY HELD THAT THE TRIAL COURT'S FAILURE TO CONDUCT A RULE 609 BALANCING TEST WAS AN ABUSE OF DISCRETION.

2. WHETHER THE TRIAL COURT ERRED WHEN IT FOUND THAT RESPONDENT OPENED THE DOOR TO THE ADMISSION OF PRIOR REMOTE CONVICTIONS.

STATEMENT OF THE CASE

On September 25, 2015 Nathan Morgan ("Respondent") was involved in an altercation with Cornelius McCleod. On the date of the incident, officers declined to issue an arrest warrant. However, on October 2, 2015, Mr. McCleod requested the issuance of a Courtesy Summons by the Rock Hill Police Department. Respondent was served with the Courtesy Summons on October 7, 2015.

On April 21, 2016, after a jury trial, Respondent was convicted of Assault and Battery 3rd degree. He was sentenced to 30 days or a fine of $1,092.50. On April 29, 2016 Respondent filed a Notice of Appeal with the Court of Common Pleas in York County.

On May 11, 2017, Respondent appeared before Court of Common pleas. Arguments were heard from both Respondent and the City of Rock Hill ("Appellant"). On May 22, 2017, the Circuit Court issued an Order reversing Respondent's conviction and remanding the case for a new trial. On May 31, 2017, Appellant filed a Motion to Alter or Amend the Judgment. On June 15, 2017 a hearing was held. On June 28, 2017, the Circuit Court issued an order denying Appellant's Motion to Alter of Amend the Judgment. On July 12, 2017, Appellant filed a Notice of Appeal from the ruling of the Circuit Court.

STATEMENT OF FACTS

On October 2, 2015, Cornelious McCleod requested the issuance of a Courtesy Summons for Assault and Battery 3rd Degree against Nathan Morgan ("Respondent"). On September 25, a week prior, Mr. McCleod and Respondent attended a fish fray held by a mutual friend.(Return to Appeal p. 2) At the event, words were exchanged between Mr. McCleod and Respondent, and a physical altercation ensued. (Return to Appeal p.2)

The altercation began after a discussion over a missing chainsaw. (Return to Appeal p. 2) Mr. McCleod accused Respondent of failing to return a chainsaw he borrowed previously. (Return to Appeal p. 2) Specifically, Mr. McCleod said "You got it, you a Morgan and you got it. All you Morgan's steal...." (Return to Appeal p. 2) At this juncture, Respondent and Mr. McCleod the sequence of events become unclear.

At trial, on April 21, 2016, Respondent asserted a claim of self-defense. In support of this claim Mike Agurs, a mutual friend, and Respondent testified. (Return to Appeal p. 2) Respondent and Mr. Agurs stated that Mr. McCleod aggressively grabbed Respondent's jacket from behind and in response, Respondent used his walking cane to end the unwanted contact. (Return to Appeal p. 2) Respondent categorically denied the theft of the chainsaw. (Return to Appeal p. 2) In support of its case, the City of Rock Hill ("Appellant") called Mr. McCleod to testify. (Return to Appeal p. 2) Appellant alleged that the disagreement, rather than physical contact on the part of Mr. McCleod, precipitated the physical altercation between the two men. (Return to Appeal p. 2) Appellant's direct examination of Mr. McCleod and cross-examination of Respondent focused largely on the missing chainsaw.

During cross-examination of Respondent, Appellant began a line of questioning that relayed the exchange between Mr. McCleod and Respondent. (Return to Appeal p. 2) Appellant

alleged that Respondent became angry when Mr. McCelod accused him of stealing. (Return to Appeal p. 2) To which, Respondent repeatedly denied. (Return to Appeal) Finally, Appellant alleged that Mr. McCleod said "[y]ou got it, you a Morgan and you got it. All you Morgan's steal...." (Return to Appeal p. 2) At that, Respondent replied, "I don't steal." (Return to Appeal p. 2)

Immediately thereafter, a bench conference was held as to whether Respondent's statement opened the door to prior convictions of 1984 Retail Theft, 1993 Burglary 2nd Degree, and 1996 Theft of Cable. (Return to Appeal p. 2) Respondent objected to the introduction of prior convictions and argued that the door had not been opened. (Return to Appeal p. 2) The trial court disagreed and allowed the introduction of the prior convictions after finding "prejudicial value [sic] was not outweighed by probative harm [sic]." (Return to Appeal p. 2)

At the conclusion of the trial, the jury found Respondent guilty and the Court sentenced him to thirty days imprisonment or a fine of $1,092.50. (Return to Appeal p. 3)

I. THE CIRCUIT COURT PROPERLY HELD THAT THE TRIAL COURT FAILED TO CONDUCT A SCRE 609 BALANCING AND THE FAILURE TO CONDUCT SUCH A TEST WAS AN ABUSE OF DISCRETION.

South Carolina law creates a presumption against the admission of remote prior convictions for dishonesty of a criminal defendant. Rule 609(b), SCRE. Under Rule 609(a)(2), "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment." However, South Carolina law prohibits the admission of such convictions, if 10 years or more have elapsed since conviction or release, whichever is later. Rule 609(b), SCRE. This prohibition may be overcome if the Court determines, in the interest of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. Rule 609(b), SCRE. The State bears the burden to overcome this prohibition. *State v. Bryant*, 369 S.C. 511, 516, 633 S.E.2d 152, 156 (2006) (citing *State v. Colf*, 337 S.C. 622, 626, 525 S.E.2d 246, 248 (2000)).

Prior to the admission of such convictions a trial court must conduct a balancing test and it should consider the following factors: (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. *Id.* "After the trial court conducts the balancing test, the judge must make a determination and articulate, on the record, the specific reasons for his ruling." *Id.* "Specifically, the trial judge must articulate why the probative value of the prior conviction outweighs its prejudicial effect." *Id* (citing *State v. Johnson*, 363 S.C. 53, 59-60, 609 S.E.2d 520 (2005)).

The trial court's failure to conduct such a balancing test and articulate the specific reasons behind its ruling is an abuse of discretion. See *State v. Colf*, 337 S.C. 622 (2000); *See also State v. Black*, 400 S.C. 10, 732 S.E.2d 880 (2012). In *Colf*, the trial court admitted prior remote convictions of a defendant for attempted breaking and entering, attempted larceny, breaking and entering, larceny, and larceny of a vehicle. *Id.* at 625. In that case, the trial court failed to articulate any specific facts and circumstances to support the admission of the prior convictions. The South Carolina Supreme Court declared that "[w]hether the probative value of the evidence substantially outweighs [the prejudicial effect of the prior convictions] is a determination the trial court should make after carefully balancing the interests involved and articulating for the record the specific facts and circumstances supporting its decision." *Id.* at 629.

In *Black*, the Court reiterated that "the trial court must state not only whether the probative value of the prior [remote] conviction substantially outweighs the prejudicial effect, but also why." *State v. Black*, 400 S.C. 10, 19, 732 S.E.2d 880, 885 (2012) (citing *State v. Bryant*, 369 S.C. at 516-17, 633 S.E.2d 152 (2006)). In that case, the trial court allowed the admission of the witness's two prior remote manslaughter convictions. The trial court attempted to conduct the required balancing test, but it failed to describe any specific facts and circumstances "other than the mere existence of the convictions." *Id.* at 24. The Supreme Court found that the trial court's failure to articulate specific facts and circumstances in support of the convictions admission was error. *Id.* at 27. In addition, the Court explained that the ten year provision in Rule 609(b) was based on the principle that "the probative value of the conviction with respect to a person's credibility has diminished to the point where it should no longer be

admissible." *Id.* at 26. The Court noted that such convictions are only admissible where exceptional circumstances have been demonstrated. *Id.*

In this case, the Circuit Court correctly concluded that the trial court failed to conduct the balancing test required under Rule 609(b). In the Return on Appeal, the trial court explained the admission of the prior convictions for 1984 Retail Theft, 1993 Burglary 2nd Degree, and 1996 Theft of Cable because "[t]he prejudicial value was not outweighed by the probative harm." Such a declaration does not include any of the factors outlined in *Colf* and it misstates the balancing test outlined under Rule 609(b). In contravention of *Black*, the trial court failed to outline why the probative value of the remote convictions substantially outweighed their prejudicial effect. As outline in *Colf*, the trial court's failure to conduct such a balancing test is an abuse of discretion and requires the appellate court to remand the case for a new trial.

Significantly, Appellant does not contend that the trial court properly conducted the balancing test required under Rule 609(b). Nor does Appellant state that the trial court provided any specific facts and circumstances to support its ruling. Instead, Appellants alleges the introduction of the remote convictions was not error because Respondent purportedly "opened the door" to the introduction of the convictions.

II. THE TRIAL COURT ERRED WHEN IT FOUND THE RESPONDENT OPENED THE DOOR TO PRIOR REMOTE CONVICTIONS AND THAT ERROR WAS NOT HARMLESS.

Under certain circumstances, South Carolina law allows for the admission of otherwise improper evidence, if a defendant opens the door to such evidence. *State v. Young*, 364 S.C. 476, 485, 613 S.E.2d 386, 391 (Ct. App. 2005). The South Carolina Supreme Court has found a defendant opened the door in a number of circumstances. However, in each instance, the appellate court reviewed the record and determined whether the door to the improper evidence

had indeed been opened. *See State v. Taylor*, 333 S.C. 159, 508 S.E.2d 870 (1998); *State v. Dunlap*, 353 S.C. 539, 579 S.E.2d 318 (2003); *see also State v. McIntosh*, 358 S.C. 432, 595 S.E.2d 484 (2004); *State v. Hill*, 360 S.C. 13, 598 S.E.2d 732 (Ct. App. 2004). For instance, "[a]n 'accused may be cross-examined as to all matters which he himself has brought up on direct examination.'" *State v. Taylor*, 333 S.C. 159, 174, 508 S.E.2d 870, 885 (1998) (citing 98 C.J.S. Witnesses § 378 at 134-135)). In Taylor, the defendant was charged and convicted of murder. 333 S.C. 159, 508 S.E.2d 870 (1998). The victim was his wife. *Id.* On direct examination, the defendant testified that his relationship with his wife had "been rough the last couple of years." *Id.* at 173. In fact, the defendant had been convicted of criminal domestic violence eight years prior. The South Carolina Supreme Court found the defendant opened the door to this prior conviction because his statement on direct examination "implied [he] and his wife a had a good relationship until recent years...." *Id.* at 175.

In *State v. Dunlap*, the South Carolina Supreme Court similarly found defense counsel opened the door to prior remote convictions during his opening statement. 353 S.C. 539, 579 S.E.2d 318 (2003). In that case, the defendant was charged with distribution of crack cocaine. *Id.* In his opening statement, defense counsel declared that the defendant was hooked on drugs and "had a problem with it. He never sold it, but he used it." *Id.* at 541. Yet, he had been convicted of distributing an imitation drug and conspiracy to possession with intent to distribution crack cocaine in 1994 and 1997, respectively. *Id.* The Supreme Court found that defense counsel opened the door to the prior convictions and because of that finding, a Rule 609 analysis was not necessary. *Id.* at 541-42. However, the Supreme Court has not always found the trial court correctly found the defendant opened the door to improper evidence.

For example, in *McIntosh*, the defendant was charged and convicted of murder, criminal sexual conduct, first degree, and criminal conspiracy, but the Supreme Court reversed those convictions because lower courts improperly found that defendant opened the door to otherwise incompetent evidence. 358 S.C. 432, 595 S.E.2d 484 (2004). In that case, the defendant presented an alibi defense and at the time of his arrest his remained silent, rather than explaining his alibi to law enforcement. The State contended that during the defense presentation, the defendant opened the door to cross-examination on his silence "by trying to convince the jury he had fully cooperated with police." *Id.* at 445. The Supreme Court disagreed. *Id.* Instead, the Court found he had not opened the door, the trial court erred in admitting the improper evidence, and that error required a reversal of the conviction and a new trial. *Id.*

Similarly, in *Hill*, the defendant was charged and convicted of murder. 360 S.C. 13, 598 S.E.2d 732 (Ct. App. 2004). However, the South Carolina Court of Appeals reversed the conviction and remanded the case for a new trial because it found the trial court erred when it found the defendant opened the door to otherwise improper evidence. *Id.* Again, in that case, the State attempted to cross-examine the defendant on post-Miranda warning silence because it argued the defendant opened the door. The State alleged the defendant opened the door when the defendant testified that he turned himself into police so he could come to trial and present his self-defense claim. *Id.* at 16. The Court of Appeals disagreed. The Court cited *McIntosh* for the proposition that the defendant "did not explicitly or implicitly assert he cooperated with police." Id. at 17 (*citing McIntosh*, 358 S.C. at 446). As a result, the trial court erred when it found the defendant opened the door.

In this case, the Circuit Court's ruling follows the analysis dictated by *Hill* and *McIntosh*. In footnote 1, the Circuit Court notes that the Respondent's

statement was made in the present tense, and that it was made in the context of an accusation of a recent theft. It would be unfair to equate the statement to a claim of never having been guilty of theft, especially in view of remoteness of the convictions used to impeach Appellant.

Thus, implicitly, the Circuit Court found that the Respondent did not open the door to the prior convictions.

At time of the statement, Appellant extensively cross-examined Respondent on the purported theft of chainsaws that precipitated the altercation. During questioning, Appellant relayed the alleged victim's out of court statement, "[y]ou got it, you a Morgan and you got it. All you Morgan's steal...." (Return to Appeal, p. 2) In response, Respondent stated, "I don't steal." (Return to Appeal p. 2) The trial court found that statement opened the door to convictions for 1984 Retail Theft, 1993 Burglary 2nd Degree, and 1996 Theft of Cable.

However, when reviewed through the lenses of *Hill* and *McIntosh*, Respondent did not "explicitly or implicitly" assert that he had never stolen. In fact, he asserted that he had not stolen the missing chainsaw. As the Circuit Court noted, the statement was made in the present tense. And when considered in the line of questioning referenced the allegation of theft that was central to Appellant's version of facts. Significantly, his statement was elicited through cross-examination, rather than direct examination, opening statement, or closing argument. Respondent's declaration was presented to support his theory of self-defense, but rather to defend himself from an uncharged allegation.

In conclusion, the Circuit Court properly reversed Respondent's conviction because the trial court erred when it found Respondent opened the door to prior remote convictions and that error was an abuse of discretion because it failed to conduct the required 609 balancing test.

CONCLUSION

For the reasons stated, this Court should affirm the Order of the circuit court.

Respectfully submitted,

February 7, 2018

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM YORK COUNTY
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The Honorable S. Jackson Kimball, II, Special Circuit Court Judge

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Nathan Morgan,

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Appellant.

CERTIFICATE OF SERVICE

I certify that I have served a copy of Initial Brief of Respondent on opposing counsel by mailing a copy via regular U.S. Mail on the 7th of February, 2018 to Christopher E. A. Barton, Attorney for Appellant 201 E. Main St., 3rd Floor Rock Hill, South Carolina 29730.

February 7, 2018

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