THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas
Case No. 2016-CP-46-01280

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SC Court of Appeals

S. JACKSON KIMBALL, II, Special Circuit Court Judge

Appellate Case No. 2017-001530

City of Rock Hill, Appellant,

v.

Nathan Morgan, Respondent.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

FACTS 2

ARGUMENT 4

I. THE BALANCING TEST OF RULE 609 OF THE SOUTH CAROLINA RULES OF EVIDENCE DOES NOT APPLY WHEN THE DEFENDANT TESTIFIES AND OPENS THE DOOR 4

A. Standard of Review 4

B. Opening the Door (a/k/a Fighting Fire with Fire) 4

C. Analysis under Rule 609, SCRE is Unnecessary When the Defendant Opens the Door 5

II. THE TRIAL COURT CORRECTLY RULED THAT THE DEFENDANT "OPENED THE DOOR" 9

III. THE CIRCUIT COURT ERRED BY CONDUCTING ITS OWN RULE 609 BALANCING TEST VERSUS REMANDING THE CASE BACK TO THE TRIAL COURT FOR AN ADMISSIBILITY DETERMINATION 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

South Carolina

Martin v. Jennings, 52 S.C. 371, 29 S.E. 807 (1898) 5

State v. Colf, 337 S.C. 622, 633 S.E.2d 246 (2000) .... 10 & 11

State v. Dennis, 402 S.C. 627, 742 S.E.2d 21 (Ct. App. 2013) 4

State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003) 7

State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001) 11

State v. McCray, 413 S.C. 76, 773 S.E.2d 914 (Ct. App. 2015) 10

State v. McFadden, 318 S.C. 404, 458 S.E.2d 61 (Ct. App.1995) 5

State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006) 4

State v. Rice, 375 S.C. 302, 652 S.E.2d 409 (Ct. App. 2007) 6

State v. Stroman, 281 S.C. 508, 316 S.E.2d (1984) .... 5 & 6

State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) 6

State v. Young, 364 S.C. 476, 613 S.E.2d 386 (Ct. App. 2005) .... 5, 6 & 7

Fourth Circuit Court of Appeals

United States v. Leavis, 853 F.2d 215 (4th Cir. 1988) .... 7 & 8

Indiana

Allen v. State, 495 N.E.2d 180 (Ind. 1986) 8

Moffatt v. State, 542 N.E.2d 971 (Ind. 1989) 8

Wales v. State, 768 N.E.2d 513 (Ind. Ct. App. 2002) 8

New Hampshire

State v. Letarte, 169 N.H. 455, 151 A.3d 533 (2016) 8

North Carolina

State v. Thaggard, 168 N.C. App. 263, 608 S.E.2d 774 (2005) 9

Tennessee

State v. Smith, No. E2013-01162-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 1064 (Crim. App. Nov. 24, 2014) 8

OTHER AUTHORITIES

E. Warren Moise, Beyond the Bar: Fifteen Years of Beyond the Bar Written and Unwritten Rules, 28 S. Carolina Lawyer 15 .... 4 & 5

G. Ross Anderson Jr., Opening the Door, S.C. Trial Lawyer Bulletin 7 (Fall 1997) 5

Danny R. Collins, South Carolina Evidence, 2nd Edition (2000) 6

STATEMENT OF THE ISSUES ON APPEAL

I. Does Rule 609 of the South Carolina Rule of Evidence require a balancing test after a party "opens the door"?

II. Is there evidence in the record that supports the trial courts finding that the defendant "opened the door" to the admission of his prior convictions?

III. Did the circuit court err by conducting a SCRE 609 balancing test versus remanding the case back to the trial court for an admissibility determination?

STATEMENT OF THE CASE

Respondent was charged with Assault and Battery third degree in the City of Rock Hill, South Carolina on October 2, 2015 following an incident that occurred on September 25, 2015. Respondent was served with notice of the charge on October 7, 2015. The case proceeded to a jury trial on April 21, 2016 and the jury found Respondent guilty of Assault and Battery third degree. Respondent was sentenced to thirty (30) days or a fine of $1092.50. On April 29, 2016 Respondent filed a timely Notice of Appeal from his conviction in municipal court with the York County Court of Common Pleas.

Respondent's appeal was heard by the Honorable S. Jackson Kimball, II, on May 11, 2017. By order dated May 22, 2017 and filed May 23, 2017, Judge Kimball reversed the ruling of the trial court and ordered a new trial in the matter. Appellant filed a motion to alter or amend judgment pursuant to Rule 59(e), SCRCP, on May 31, 2017. On June 15, 2017 a hearing was held on the motion to alter or amend judgment and Judge Kimball issued an order denying the motion on June 28, 2017 and filed on June 30, 2017.

On July 12, 2017, Appellant filed a timely Notice of Appeal from the rulings of the circuit court. This appeal follows.

STATEMENT OF FACTS

On September 25, 2015, the victim, Cornelius McCleod was assaulted following a confrontation between himself and the Respondent in the 1100 block of Flint Street Extension in the City of Rock Hill, South Carolina. Mr. McCleod testified that he had known the Respondent since the eighth grade and that they had often worked together and for each other over the years. (ROA, page 63)

In June 2015, Respondent approached Mr. McCleod and asked to borrow his chainsaw. Mr. McCleod was leaving for a three week job in Georgia the next day and testified that he said "yes, reluctantly, because it [the chainsaw] was new." Upon his return from Georgia, Mr. McCleod discovered he was missing two chainsaws and a weed eater and had not seen them again. (ROA, page 63)

Mr. McCleod later confronted the Respondent who claimed he already had a chainsaw. Mr. McCleod asked why he needed to borrow one and the Respondent became irate. On the date of the incident, Mr. McCleod testified that he was hanging out with friends at a fish fry with lots of drinking. He had been at the fish fry for about five minutes when the Respondent arrived and asked "Do you need to talk to me?" The Respondent started talking about the chainsaws, then "he stood, turned his cane upside down and back [and] swung it at me. It would've hit my face, but I blocked it with my elbow." Then three or four guys grabbed him [Respondent] and escorted him away. Mr. McCleod then contacted the police "because this had gotten out of hand." (ROA, page 63)

The defense called two witnesses, Mike Agurs and the Respondent. Mr. Agurs testified that the victim [Mr. McCleod] grabbed the Respondent's black leather jacket trying to get his attention or something and then the Respondent hit Mr. McCleod with his cane. (ROA, page 63)

Next, the Respondent testified that he sat with the victim at the picnic table. Respondent testified that the victim would not stop talking about the chainsaws and that he kept accusing him saying, “You got it, you got it.” Respondent went on to testify that the victim cursed at him and grabbed him by the coat, so he “swung the stick and got him off me. He threw his hands up. I did not hit him. I didn’t hit his head.” (ROA, page 63)

On cross examination when questioned about being angry over being accused by the victim of stealing his chainsaws and weed eater, the Respondent blurted out “I don’t steal.” Following Respondent’s statement the solicitor moved to impeach the Respondent with his prior convictions from 1984 for retail theft, from 1995 for burglary second degree and from 1996 for theft of cable. (ROA, page 63) The trial court “allowed the impeachment with the prior convictions as they were crimes of moral turpitude, finding that “the defendant clearly opened the door and there was nothing confusing about it.” (ROA, page 63)

The case was submitted to the jury which found Respondent guilty of Assault and Battery third degree.

ARGUMENT

I. The Balancing Test of Rule 609 of the South Carolina Rules of Evidence Does Not Apply When the Defendant Testifies and Opens the Door.

A. Standard of Review

"The admission or exclusion of evidence is a matter within the trial court's sound discretion, and an appellate court may disturb a ruling admitting or excluding evidence only upon a showing of a manifest abuse of discretion accompanied by probable prejudice." State v. Dennis, 402 S.C. 627, 635, 742 S.E.2d 21, 25 (Ct. App. 2013).

"An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006).

B. Opening the Door (a/k/a Fighting Fire with Fire)

In the May 2017 edition of the South Carolina Lawyer, Warren Moise in his monthly Beyond the Bar article warned as follows:

> Beware of the opened-door rule of evidence! You won't find it in the federal or South Carolina Rules of Evidence, but it can destroy, or win, your case. Under this rule, if you introduce evidence about a matter, even if the matter is otherwise inadmissible, the other party is entitled to go into it. G. Ross Anderson Jr., Opening the Door, in S.C. Trial Lawyer Bulletin 7 (Fall 1997). If you wait and keep your ears open, you might be surprised how often your adversary will open the door into inadmissible evidence that favors your case.
>
> The classic example is the accused who has a long (but otherwise inadmissible) criminal record. At some point after being sworn in, the client pops off with something like, "I ay

never been in no trouble with the law." Ouch. Beyond the Bar: Fifteen Years of Beyond the Bar: Written and Unwritten Rules, 28 S. Carolina Lawyer 15, 16.

Judge G. Ross Anderson, Jr., in an article approximately twenty years earlier put it quite succinctly. "The Gods of Litigation have decreed that the doctrine of opening the door has its foundation based on the concept of "fairness", "substantial justice" or "the quest to uphold the truth of the judicial process." . . . Some judges and scholars have assigned different names to this legal concept, but they all mean practically the same thing. The more sophisticated call it the doctrine of "curative admissibility." Others dub it "opening the door." Some less sophisticated label it "fighting fire with fire." The most workable definitions of this doctrine can be stated as follows: "when improper evidence invites retaliation with other improper evidence", or "when fairness requires retaliation with otherwise inadmissible evidence." G. Ross Anderson Jr., Opening the Door, in S.C. Trial Lawyer Bulletin 7 (Fall 1997).

C. Analysis under Rule 609, SCRE is Unnecessary When the Defendant Opens the Door

When a defendant introduces evidence on a matter that the government would not be allowed to raise initially, the government is allowed to go into the matter because the defendant has opened the door to what would otherwise have been protected. See, State v. Stroman, 281 S.C. 508, 316 S.E.2d (1984) and State v. McFadden, 318 S.C. 404, 458 S.E.2d 61 (Ct. App.1995). South Carolina recognized the evidentiary concept of "opening the door" as early as 1898. In Martin v. Jennings, 52 S.C. 371, 29 S.E. 807 (1898) the South Carolina Supreme Court found that the door was opened where the representative of the estate asked about matters otherwise excluded by the dead man's statute. Following recognition of the "opening the door" concept in 1898, it has grown to the point where "the jurisprudence of this State contains a plethora of enlightening cases establishing and explicating the proposition that a defendant may open the door to what would

otherwise be improper evidence." State v. Young, 364 S.C. 476, 485, 613 S.E.2d 386, 391 (Ct. App. 2005). South Carolina precedent has firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel "opens the door" to that evidence. State v. Rice, 375 S.C. 302, 329, 652 S.E.2d 409, 422 (Ct. App. 2007).

"In South Carolina, the doctrine of curative admissibility has been applied to admit: (1) evidence of the defendant's participation in other crimes when the defendant raised the issue while cross-examining an accomplice who testified for the prosecution, State v. Stroman, 281 S.C. 508, 316 S.E.2d (1984)." South Carolina Evidence, 2nd Edition, Danny R. Collins, page 38.

South Carolina recognizes a number of ways a litigant can "open the door." In State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 (1998) the South Carolina Supreme Court found that the defendant on trial for the murder of his wife opened the door to his prior conviction for domestic violence after his testimony regarding their good relationship. "[B]ecause appellant "opened the door" about his relationship with his wife, the solicitor was entitled to cross-examine him about the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction." Id. at 176. See also, "State v. Stroman, (since defendant questioned accomplice about his prior robberies, the State was permitted to inquire into facts of prior robberies, including whether defendant had participated in the robberies); State v. Allen, (**where defendant testified he had not previously harmed anyone with a deadly weapon, prosecutor was permitted to inquire into extent of previous assaults**); State v. Faulkner, 274 S.C. 619, 621, 266 S.E.2d 420, 421 (1980) ("while State may not attack a criminal defendant's character unless he has placed it at issue, relevant evidence admissible for other purposes need not be excluded merely because it incidentally reflects upon the defendant's reputation.") Id. (emphasis added).

The South Carolina Court of Appeals in State v. Young, 364 S.C. 476, 613 S.E.2d 386 (Ct. App. 2003) found that the defendant in that case had opened the door to his convictions for criminal domestic violence and criminal sexual conduct following his testimony where he expressed concern for the victim's safety and chastity.

In South Carolina the admissibility determination normally required by SCRE 609 is not applicable when a party opens the door to otherwise inadmissible evidence. In State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003) the defense counsel's opening argument created the impression that the defendant was merely a drug user and had no prior involvement with the sale of illegal drugs. The South Carolina Supreme Court on appeal found "that counsel opened the door to the admission of petitioner's prior drug record." Id. at 541. Since the door had been opened the Dunlap Court went on to find that "we need not reach the issue whether these convictions were admissible to impeach petitioner's credibility under Rule 609, [SCRE]." Id. 541-542. See also, State v. Young, 364 S.C. 476, 613 S.E.2d 386 (Ct. App. 2003) analysis under Rule 609, SCRE is unnecessary where the defendant opened the door.

South Carolina's view of the doctrine of "opening the door" is consistent with the federal court's view. Evidence of a conviction offered to contradict specific statements made by a witness rather than solely for Rule 609 purposes may be allowed. United States v. Leavis, 853 F.2d 215 (4th Cir. 1988). In Leavis the defendant testified and denied he had any prior contact with drugs. The defendant in Leavis objected to the district court's admission of evidence of his 1973 felony conviction for possession of marijuana, arguing that that evidence was barred by Fed. R. Evid. 609(b) as it was over ten years old. The 4th Circuit Court of Appeals found that "[t]he evidence to which Leavis objects, however, was not introduced on the general Rule 609 theory "that people who do certain bad things are not to be trusted to tell the truth." United States v. Johnson, 542 F.2d

230, 235 (5th Cir. 1976). Rather, it was introduced to contradict specific statements made by Leavis on direct examination. This is not the type of situation to which Rule 609(b) was meant to apply. United States v. Babbitt, 683 F.2d 21, 25 (1st Cir. 1982); Johnson, 542 F.2d at 234-35. Instead, admission is analyzed under Fed. R. Evid. 403 and subject to the broad exercise of the district court's discretion." United States v. Leavis, 853 F.2d 215, 220 (4th Cir. 1988).

Many other states follow South Carolina's view of the "opening the door" doctrine as barring review of the admission of such evidence under the Rule 609 balancing test. In Tennessee '[i]rrespective of admissibility under Rule 609 of Tennessee Rules of Evidence, a conviction may be used to contradict a witness who "opens the door" and testifies on direct examination that he or she has never been convicted of a crime, or to counter some other facet of direct testimony.'" State v. Smith, No. E2013-01162-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 1064, at *17-18 (Crim. App. Nov. 24, 2014).

Similarly, Indiana follows the "opening the door" doctrine. "It is well settled that a defendant may open the door to questions otherwise not admissible under Rule 609. Moffatt v. State, 542 N.E.2d 971, 974 (Ind. 1989); Allen v. State, 495 N.E.2d 180, 181 (Ind. 1986). In addition, a defendant who, through direct testimony, leaves the trier of fact with a false or incomplete impression of his criminal record may open the door to inquiries into his complete criminal history." Wales v. State, 768 N.E.2d 513, 519 (Ind. Ct. App. 2002).

New Hampshire likewise follows the "opening the door" doctrine. "The opening-the-door doctrine is an exception to the general ban on the use of extrinsic evidence to impeach a witness's testimony on a collateral matter. See id. at 665; see also Jones v. Southern Pacific R.R., 962 F.2d 447, 450 (5th Cir. 1992). Thus, when a witness "opens the door" to a collateral issue, extrinsic

evidence may be admissible to impeach her by contradiction." State v. Letarte, 169 N.H. 455, 465, 151 A.3d 533, 541 (2016).

Lastly, North Carolina, our sister state follows the "opening the door" doctrine. "[A] trial court may permit otherwise inadmissible evidence to be admitted if the opposing party opens the door through cross-examination of the witness. Baymon, 336 N.C. at 752, 446 S.E.2d at 3. "Opening the door" is the principle where one party introduces evidence of a particular fact and the opposing party may introduce evidence to explain or rebut it, even though the rebuttal evidence would be incompetent or irrelevant, if offered initially." State v. Thaggard, 168 N.C. App. 263, 273, 608 S.E.2d 774, 782 (2005).

II. The Trial Court Correctly Ruled that the Defendant "Opened the Door"

In this case the Respondent "opened the door" when he stated, "I don't steal". The trial court properly found that Respondent could be impeached with his prior convictions to counter his assertion that would leave the trier of fact with a false or incomplete impression of the Respondent. Both South Carolina and the Fourth Circuit Court of Appeals recognize and apply the "opening the door" doctrine. In applying the "opening the door" doctrine there is no balancing test to be applied per SCRE 609. The trial court did not abuse its discretion in finding that "the defendant clearly opened the door and there was nothing confusing about it." (ROA, page 63)

Assuming that the SCRE 609 balancing test applies, there is evidence in the record that the trial court properly found that the prejudicial harm was outweighed by the probative value and Appellant's conviction should be affirmed. The trial court found that the Respondent opened the door when he testified that he didn't steal and went on to apply a balancing test to determine the admissibility of the prior convictions. "The prejudicial value (sic) [harm] was not outweighed by

the probative harm (sic) [value]." (ROA, page 63). Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the circuit [trial] court." State v. McCray, 413 S.C. 76, 92-93, 773 S.E.2d 914, 923 (Ct. App. 2015).

In this case, there is evidence to support the trial courts finding that the Respondent opened the door. The trial court, while not required to, did balance the weight of admitting the remote convictions against their prejudicial effect and found the convictions to be admissible. Had the trial court failed to admit the evidence of Respondent's prior convictions, the jury would have only been provided with the one-sided and false impression that Respondent placed before the jury.

III. The Circuit Court Erred by Conducting Its Own Rule 609 Balancing Test Versus Remanding the Case Back to the Trial Court for an Admissibility Determination

Assuming the Respondent did not "open the door" to the admissibility of his prior convictions, where the record on appeal is absent or provides insufficient details regarding whether the probative value of the evidence substantially outweighed the prejudice effect, the appropriate remedy on appeal is to remand the matter back to the trial court. Upon remand the order should direct the trial court to conduct a hearing on the admissibility of the prior convictions pursuant to the South Carolina Rules of Evidence Rule 609, along with instructions to order a new trial, if the prior convictions are ruled inadmissible on remand.

In State v. Colf, 337 S.C. 622, 633 S.E.2d 246 (2000), the South Carolina Supreme Court found that the appellate court should not conduct a hearing on appeal concerning the issue of the balancing test pursuant to Rule 609 of the South Carolina Rules of Evidence. "The Court of Appeals should not have undertaken the Rule 609(b) balancing test itself, but should have

remanded the question to the trial court. In Cavender, the Fourth Circuit noted that it is precisely this absence of specific facts and circumstances that causes such cases to defy appellate review. 578 F.2d at 531. It is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision." Id. at 629. "The balancing test required by Rule 609(b) must be conducted by the trial court. . . . Whether the probative value of the evidence substantially outweighs that prejudice 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.

In an appeal from York County, the South Carolina Court of Appeals found that the trial court failed to properly weigh the probative value of the defendant's prior convictions against the prejudicial effect of the evidence in admitting prior drug convictions, and the appropriate remedy was to remand the case back to the trial court. "We therefore remand this issue to the trial court for a hearing on the admissibility of each of Martin's prior convictions, with instructions for the trial judge to apply the proper burden of establishing admissibility, and carefully weigh the probative value of the prior convictions for impeachment purposes against their prejudicial effect. See Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000); Scriven, 339 S.C. 333, 344, 529 S.E.2d 71, 77 (2000) (**appellate court should not undertake a rule 609 balancing test, but should remand the issue to the trial court**)." State v. Martin, 347 S.C. 522, 532, 556 S.E.2d 706, 711-12 (Ct. App. 2001) (emphasis added).

In this matter, the circuit court, acting as an appellate court, made a finding "as a matter of law that Rule 609(b) required that the remote convictions not be admitted to impeach Appellant." (ROA, page 3). The circuit went on to find that "the [trial] Court failed to conduct the balancing test required by Rule 609." (ROA, page 3) This finding is precisely in contradiction of the South

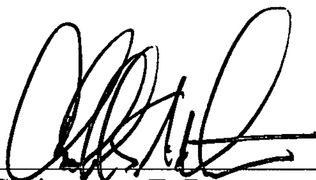
Carolina Supreme Court guidance in Colf that an appellate court not engage in a SCRE 609 balancing test on appeal but instead remand the matter back to the trial court to conduct the balancing test and make an admissibility determination on the record.

Appellant filed a motion to alter or amend judgment arguing that the circuit court erred in both finding that SCRE 609 applied and if SCRE 609 did apply in not remanding the matter back to the trial court for an admissibility hearing. The circuit court denied Appellant's motion finding that "the analysis required under Rule 609 would compel exclusion of the evidence of [the] prior convictions in any event." (ROA page 4) Absent this Court affirming Respondent's conviction and reversing the order of the circuit court based on the argument above, this matter should be remanded back to the trial court for a hearing regarding the admissibility of the evidence versus an outright reversal of his conviction and the granting of a new trial which is an inappropriate remedy per Colf and Martin.

CONCLUSION

For all the foregoing reasons, the Appellant respectfully submits that the decision of the circuit court reversing Respondent's conviction should be overturned and his conviction reinstated or in the alternative that this matter be remanded back to the trial court for an admissibility determination of Respondent's convictions.

Respectfully submitted,



May 17, 2018

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