THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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

S. JACKSON KIMBALL, II, Special Circuit Court Judge

Appellate Case No. 2017-001530

City of Rock Hill, Appellant,

v.

Nathan Morgan, Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE TRIAL COURT CONDUCTED AN ANALYSIS OF RESPONDENTS PRIOR CONVICTIONS PURSUANT TO RULE 609 OF THE SOUTH CAROLINA RULES OF EVIDENCE.

Respondent's initial argument that the trial court did not conduct an analysis to determine the admissibility of the Respondent's prior convictions is misplaced. Respondent's own notice of appeal and the Municipal Court's return to appeal reflect that the trial court initially ruled following a pre-trial motion in limine by the Respondent that his prior convictions would not be admissible, if he decided to testify, as they fell outside of the ten year time limit under SCRE 609(b). (ROA, page 49, 55 & 62)

A. The Trial Court Revisited it's Pre-Trial Ruling After Finding that the Defendant Opened the Door.

Following the close of the City's case the Respondent presented his case. The Respondent called one witness, Mike Agurs who "testified that the victim grabbed the defendant's black leather jacket trying to get his attention or something and then [the] defendant hit him with the cane." (ROA, page 63)

Next, the Respondent took the stand and testified on his own behalf. On direct examination Respondent admitted swinging his cane at the victim but denied striking him in the head. (ROA, page 63)

On cross examination Respondent was questioned about his anger over the accusation of stealing the victim's chainsaw. "At that time the defendant blurted out in court, I don't steal!" (ROA, page 63) The City argued that the Respondent had opened the door and moved to be allowed to impeach the Respondent on his prior convictions that the trial court had initially excluded per SCRE 609(b). Counsel for the Respondent objected and argued that Respondent "did not open the door, that it would be inflammatory and confusing to the jury and that the

prejudicial harm outweighed the probative value. (ROA, page 63) The trial court "allowed the impeachment with the prior convictions as they were crimes of moral turpitude, the defendant clearly opened the door and there was nothing confusing about it. The prejudicial value [sic] was not outweighed by the probative harm [sic]." (ROA, page 63)

It was entirely appropriate for the trial court to revisit the court's earlier pre-trial ruling based on the Respondent's statement "I don't steal." In South Carolina a "pre-trial evidentiary ruling is not final because [it is] subject to change based on developments at trial." State v. Taylor, 333 S.C. 159, 174, 508 S.E.2d 870, 877 (1998).

In this case, evidence in the record supports the finding that the trial court conducted a balancing test in allowing the admission of Respondent's prior convictions, even though it is not required where the trial court found that Respondent opened the door. "Since appellant opened the door to this evidence, he cannot complain of prejudice from its admission." State v. Robinson, 305 S.C. 469, 474, 409 S.E.2d 404, 408 (1991).

"In a criminal case, the State may not attack the character of the accused unless he first places his character in issue. However, where one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though [the] latter evidence would be incompetent or irrelevant had it been offered initially." State v. Taylor, 333 S.C. 159, 174, 508 S.E.2d 870, 877-78 (1998).

Respondent placed his character directly at issue with the blanket statement "I don't steal." The trial court's finding that Respondent opened the door and the court's subsequent determination to allow Respondent to be impeached with his prior criminal convictions is addressed to the sound discretion of the court. "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 trial judge." State v. Heyward, Op. No. 5537 (S.C. Ct. App. filed Feb. 14, 2018) (Shearouse Adv.Sh. No. 7 at 19). "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. Parvin, 413 S.C. 497, 503, 777 S.E.2d 1, 4 (Ct. App. 2015). The trial court did not abuse its discretion in this case where the record demonstrates there is evidence that the Respondent opened the door with his statement "I don't steal" and as the trial court stated in the return to appeal "there is nothing confusing about it." (ROA, page 63)

II. THE CIRCUIT COURT ERRED IN CONDUCTING A DE NOVO REVIEW OF THE TRIAL COURTS ADMISSIBILITY DETERMINATION

Respondent argues that "implicitly, the Circuit Court found that the Respondent did not open the door to the prior conviction." (Respondent's Brief page 10) Respondent's argument only highlights the critical error the circuit court made on the initial appeal hearing, namely that the circuit court conducted a de novo review of the trials court's decision to admit Respondent's prior convictions versus the appropriate determination on appeal of whether there was evidence in the record to support the trial court's determination that the Respondent opened the door when he stated "I don't steal." "In criminal appeals from magistrate or municipal court, the circuit court does not conduct a *de novo* review, but instead reviews for preserved error raised to it by appropriate exception. In reviewing criminal cases, the court of appeals may review errors of law only." Rogers v. State, 358 S.C. 266, 269, 594 S.E.2d 278, 279 (Ct. App. 2004).

"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 trial judge." State v. Page, 378 S.C. 476, 483, 663 S.E.2d 357, 360 (Ct. App. 2008). The evidence in the record from the

trial court's return to appeal, supports the trial courts determination to admit Respondent's prior convictions, as there was evidence in the record that he opened the door to the admissibility of the prior convictions.[1] The fact that the circuit court sitting in an appellate capacity disagreed with that trial court's determination is not the appropriate standard of review. The question is whether the trial court abused its discretion in admitting the evidence of Respondent's prior convictions following a determination that he opened the door. There was no abuse of discretion in this case as the conclusions of the trial court had evidentiary support, nor were they controlled by an error of law.

A. The Trial Court Was in the Best Position to Judge the Actions of the Respondent and Determine the Respondent Opened the Door

On appeal the circuit court was preoccupied in determining the tense in which the Respondent made the statement "I don't steal." (ROA, page 1, footnote 1) This again highlights the de novo nature of the circuit courts review in this case. Sitting in an appellate capacity the circuit court did not give appropriate deference to the trial court's ruling that Respondent "clearly opened the door and there was nothing confusing about it". (ROA, page 63) "The credibility of testimony is a matter for the finder of fact to judge. Because the appellate court lacks the opportunity for direct observation of the witnesses, it should accord great deference to trial court findings where matters of credibility are involved." Menne v. Keowee Key Prop. Owners' Ass'n, 368 S.C. 557, 567, 629 S.E.2d 690, 696 (Ct. App. 2006) In this case, the circuit court afforded no deference to the trial courts finding that Respondent opened the door and this only compounded the error of the circuit court's applying a de novo standard of review.

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[1] The trial court's return to appeal states that the trial court "allowed the impeachment with the prior convictions as they were crimes of moral turpitude, the defendant clearly opened the door and there was nothing confusing about it. The prejudicial value was not outweighed by the probative harm [sic]." (ROA, page 63)

Had the circuit court applied a deferential standard of review it could have noted that the use of don't in "I don't steal" is a contraction of does not, added to the irregular verb steal. The current usage of don't is disfavored and by using the term don't, Respondent transformed the irregular verb steal, as in "I steal" from a simple or indefinite present tense into an awkward and improper past tense. The forms of the verb steal are the infinitive steal, the present particle stealing, the past tense stole and the past participle stolen. None of the other forms of the verb steal are appropriate for the use of the contraction don't. According to Merriam Webster dialect surveys find that the use of the contraction don't is "more common in the speech of the less educated than in that of the educated." See, www.merriam-webster.com/dictionary/don't. The circuit court erred by not properly applying the deferential standard to the trial court's determination where the trial court was present to view the Respondent as he "blurted out in court I don't steal." (ROA, page 63) An appellate court should "give great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses." Drayton v. Evatt, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993)

On November 17, 1973 at a news conference before the Associated Press managing editors annual meeting in Orlando, Florida, President Nixon defended himself against numerous accusations. Some questions focused on reports of a break-in at the Watergate hotel, while others related to the propriety of his tax returns. On November 18, 1973 the New York Times reported in part that President Nixon "seemed composed and on top of the subject throughout the session, faltering perceptibly only during the discussion of his taxes." See, New York Times, November 18, 1973 Nixon Declares He Didn't Profit From Public Life by R.W. Apple, Jr. At the news conference President Nixon famously declared that "I am not a crook." President Nixon's statement was in the present tense, however, "the news conference did little to end

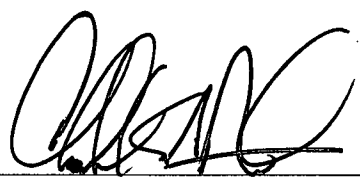
questions over Mr. Nixon's honesty. His declaration "I'm not a crook" was used against him – and the line would forever be associated with the Watergate era." See, https://learning.blogs.nytimes.com/2011/11/17/nov-18-1973-nixon-declares-i-am-not-a-crook/

Common sense dictates that stating "I don't steal" exposes oneself to instances where you have in fact stolen or engaged in similar misdeeds, just as stating "I am not a crook" exposed President Nixon to attacks on his honesty. The same is true today for the Respondent as it was back in 1973 for President Nixon.

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.

Respectfully submitted,



May 17, 2018

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