

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

ORIGINAL

Appeal from Marlboro County

Honorable D. Craig Brown, Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT

RECEIVED

NOV 14 2018

S.C. SUPREME COURT

v.

HARRY JAMES ROLLER,

APPELLANT

APPELLATE CASE NO 2018-000493

BRIEF OF APPELLANT
PURSUANT TO WHITE V. STATE

LANELLE CANTEY DURANT
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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in denying Petitioner Roller's motion for a mistrial after the state said specifically in her opening statement to the jury that Petitioner Roller had prior convictions for the same type charge of shoplifting for which he was on trial which was prejudicial to Petitioner as Petitioner had stipulated to the prior shoplifting convictions pretrial in order for the prior convictions to not go before the jury?

STATEMENT OF THE CASE

On November 29, 2016, the Marlboro County Grand Jury indicted Harry J. Roller on the charge of shoplifting third or subsequent offense. App. 128- App. 129. On December 12, 2016, Roller proceeded to trial before the Honorable D. Craig Brown and a jury. Roller was represented by Michael Stephens, and the state was represented by Elizabeth R. Munnerlyn. App. 1. The jury found Roller guilty as indicted. App. 89, ll. 17 – 25. The judge sentenced Roller to seven years' incarceration. App. 95, ll. 19-25. Roller did not appeal his conviction nor sentence.

On March 15, 2017, Petitioner Roller filed an application for post-conviction relief (PCR). The state filed a return on July 15, 2017. App. 124. Roller filed an amended PCR application on August 22, 2017. Supp. App. 2. An evidentiary hearing was held on January 16, 2018 before the Honorable Roger E. Henderson. Roller was represented by Lance S. Boozer, and the state was represented by Johnny E. James. App. 112.

At the PCR hearing, the state introduced an affidavit from trial counsel that he failed to discuss with Roller his right to appeal the verdict. Trial counsel stated in his affidavit that he did not file a notice of appeal for Roller. This affidavit was admitted as a state's exhibit. App. 122. The state then conceded that Roller was entitled to a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). App. 116, ll. 1 – App. 117, ll. 5.

PCR counsel then stated that Roller would consent to having his remaining PCR allegations dismissed or be allowed to withdraw those other PCR claims. App. 117, ll. 10 – App. 118, ll. 2. After questioning Roller, the PCR judge allowed him to withdraw his PCR application except for those issues that concerned the direct appeal. App. 118, ll. 3 – App. 120, ll. 15.

On February 20, 2018, the PCR judge issued an order granting Roller a belated direct appeal, and denying all other allegations and dismissing them with prejudice. App. 124 – App. 127. Roller’s PCR counsel filed a notice of appeal. This appeal with an initial brief of appellant pursuant to White v. State follows accompanied by a petition for a writ of certiorari.

STANDARD OF REVIEW

“The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion.” State v. Hatcher, 392 S.C. 86, 91, 708 S.E.2d 750, 753 (2011) (quoting State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006)). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id.; see also State v. Brockmeyer, 406 S.C. 324, 340, 751 S.E.2d 645, 653 (2013.)

ARGUMENT

The trial court erred in denying Petitioner Roller's motion for a mistrial after the state said specifically in her opening statement to the jury that Petitioner Roller had prior convictions for the same type charge of shoplifting for which he was on trial which was prejudicial to Petitioner as Petitioner had stipulated to the prior shoplifting convictions pretrial in order for the prior convictions to not go before the jury.

Relevant Facts

On October 3, 2016, in McColl, Shameika Clark was working at the Dollar General. She had taken her break and was sitting in her car outside the store when she saw a man come out of the store "walking funny." Then she saw a bunch of Gamecock tee shirts hanging out of the side of the man. She had just folded those tee shirts, so she recognized them. When she spoke to the man, he started running away. The cashier came out of the store and told Ms. Clark that that man had stolen those tee shirts. Ms. Clark then called 911. App. 55, ll. 1 – 25; App. 56, ll. 1 – App. 59, ll. 6.

On October 3, 2016, Sergeant Billy Stubbs with the McColl Police Department was at the local paint and body shop which was next door to the Dollar General in McColl. He saw a burgundy truck pull up and a man get out, who then walked into the Dollar General. About five or ten minutes later, the same man came running out of the store with an armful of merchandise. App. 42, ll. 7 -App. 43, ll. 25.

The man ran down the street into an apartment complex, although the officer had told him not to run. The man did not get back into the vehicle. Sergeant Stubbs then went into the apartment of Wayne Taylor, as residents of the complex had pointed to Taylor's apartment as the one the man ran into. When Sergeant Stubbs checked that apartment, he found Roller in a small

pantry on the back side of the kitchen. The tee shirts were found in the same pantry. App. 44, ll. 1 – App. 46, ll. 25.

Sergeant Stubbs talked to the man who denied taking the shirts until Sergeant Stubbs told him what he had seen. The officer then placed the man under arrest and took possession of the tee shirts. Roller was charged with shoplifting, and the shirts were returned to Dollar General. App. 47, ll. 1 – 24. The value of the shirts was estimated to be \$225. App. 48, ll. 1.

On November 29, 2016, the Marlboro County Grand jury indicted Roller on the charge of shoplifting as a third or subsequent offense. App. 128 – App. 129. On December 12, 2016, Roller proceeded to trial before the Honorable D. Craig Brown and a jury. Roller was represented by Michael Stephens, and the state was represented by Elizabeth R. Munnerlyn. App. 1.

In a pretrial motion, defense counsel told the court that he was stipulating that this shoplifting charge was a greater than third shoplifting charge for Roller. Counsel said specifically:

Yes, we stipulate in order for it not to come up before the jury.

App. 18, ll. 20 -21.

The state then told the court that she would like for that stipulation to include the dates of the three prior convictions for shoplifting. The solicitor then listed the prior dates as November 17, 2011; November 20, 2014; June 23, 2015. Defense counsel agreed with those dates. The judge then said that the prior shopliftings had been stipulated to. App. 19, ll. 1 – 25.

In her opening statement to the jury, the solicitor told the jury:

As you have also heard the offense was actually shoplifting of a value of goods or merchandise of a value of less than \$2000 with an enhancement which is he has these prior convictions for the same type of a charge as shoplifting. There will be a stipulation in this case.

App. 34, ll. 16 – 21.

Defense counsel immediately objected. The judge called both attorneys to the bench where a bench conference was held. App. 34, ll. 22 – App. 35, ll. 5. Following the opening statements, defense counsel moved for a mistrial because the solicitor said in her opening statement that this was more than a third or fourth offense which counsel argued was prejudicial to Roller. Counsel argued that it prejudiced his client to the jury. The judge agreed and told the state that that information was not supposed to go before the jury. He said that the stipulation was for jurisdictional purposes only. He said that defense counsel was right. App. 39, ll. 1 – 25.

The judge decided that the state's comment was "only an inadvertent vague mention of appellant's prior record....and was not evidence in this case." App. 40, ll. 19 – App. 41, ll. 13.

Later, the judge said he wanted to put on the record what happened at the sidebar. The judge said that at the side bar, defense counsel moved for a mistrial following the state's statement about the prior convictions for shoplifting. The judge denied the motion and asked if counsel wanted a curative instruction which counsel declined. App. 63, ll. 1 – App. 64, ll. 3.

The judge explained that he denied the mistrial motion because he told the jury "at the outset in his opening remarks" that what the attorneys told them in opening statements was not evidence in this case. He said he would tell them again before closing arguments. App. 64, ll. 1 – 12. Defense counsel renewed his motion for a mistrial and objected for the record. App. 65, ll. 8 – 13.

The jury returned a verdict of guilty. App. 88, ll. 24 – App. 89, ll. 24. The judge sentenced Roller to seven years' incarceration. App. 95, ll. 19 – 25. Roller did not file an appeal for his conviction nor sentence. App. 125. On February 20, 2018, the PCR judge issued an order

granting Roller a belated direct appeal, and denying all other allegations and dismissing them with prejudice. App. 124 – App. 12

Discussion

In State v. Wilson, 389 S.C. 579, 698 S.E.2d 862 (Ct. App. 2010), the Court of Appeals held that the decision to grant or deny a mistrial was within the sound discretion of the trial court. The Court also held that when an objection has been overruled, the objecting party has suffered an adverse ruling which can be appealed without any further allegation of error. Citing City of Columbia v. Myers, 278 S.C. 288, 294 S.E.2d 787 (1982).

In reviewing a trial court's ruling on the admissibility of evidence, appellate courts recognize that the trial [court] has considerable latitude in this regard and will not disturb such rulings absent a prejudicial abuse of discretion.” State v. Scott, 405 S.C. 489, 497, 748 S.E.2d 236, 241 (Ct. App. 2013). “An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support.” *Id.* (quoting State v. Whitner, 399 S.C. 547, 557, 732 S.E.2d 861, 866 (2012)).

In State v. Lawson, 424 S.C. 51, 817 S.E.2d 509 (Ct. App. 2018) the Court of Appeals held that testimony that defendant's fingerprints were collected at a correctional institution more than 10 years before the crime he was charged with at trial indicated that defendant had a prior criminal record, and such evidence was prejudicial because it could have influenced the jury's verdict.

The Court of Appeals continued to write that the trial court abused its discretion by admitting testimony showing Appellant's ten-print card originated at Kirkland in July 2003 when the reference indicated to the jury Appellant had a prior criminal record. The Court found that the reference was unnecessary to authenticate the fingerprints, and the state could not render

improper character evidence admissible by claiming it is needed to authenticate other evidence. The Court found the trial court's error was not harmless.

In his ruling to deny Roller's motion for a mistrial, the trial judge cited the case of State v. Thompson, 352 S.C. 552, 575 S.E.2d 77 (2003) where the Supreme Court held that the police officer's single reference to warrants that existed against the defendant did not constitute sufficient prejudice to justify a mistrial as there was no indication that the warrants referred to unrelated charges or other bad acts committed by the defendant. The Court ruled that a vague reference to a defendant's prior criminal record was not sufficient to justify a mistrial where there was no attempt by the state to introduce evidence that the accused had been convicted of other crimes.

In Thompson, a deputy testified he was looking for the appellant in a certain location and referenced the appellant "had warrants." 352 S.C. 552, 560, 575 S.E.2d 77, 82 (Ct. App. 2003). The appellant claimed this testimony was improper because it "constituted improper evidence of prior bad acts." *Id.* This Court disagreed and found the reference to warrants could reasonably have been a reference to the warrants related to the crimes for which the appellant was on trial, instead of some prior bad act. *Id.* at 561, 575 S.E.2d at 82.

Roller's case is distinguished from Thompson in that the state's remark in her opening where she told the jury that Roller had prior convictions for shoplifting was not a vague reference to his criminal record. The state did not need to present evidence of past crimes as the state just outright told the jury he had been convicted of shoplifting in the past. This was prejudicial to Roller before the trial even started. The jury heard this, which gave them a mindset

of guilt before they heard the evidence as the court stated in Lawson. The Court in Thompson held that the defendant must show both error and resulting prejudice, which Roller did.

CONCLUSION

Based on the above, the conviction and sentence should be reversed, and the case remanded for a new trial.

A handwritten signature in black ink, appearing to read "LaNelle Cantey DuRant", with a long horizontal flourish extending to the right.

LaNelle Cantey DuRant

Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of November, 2018.

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NOV 14 2018

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S.C. SUPREME COURT

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RESPONDENT

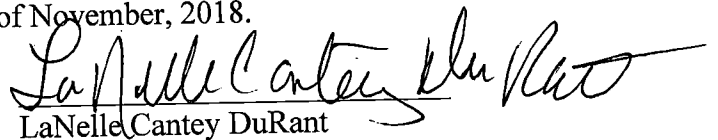
V.

HARRY JAMES ROLLER,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellant pursuant to White v. State in the above referenced case has been served upon Johnny Ellis James, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Brief of Appellant pursuant to White v. State and Designation of Matter have been served on Harry James Roller, #276544, at Allendale Correctional Institution, PO Box 1151, Hwy. 47, Fairfax, SC 29827, this 14th day of November, 2018.



LaNelle Cantey DuRant
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 14th day of November, 2018.

 (L.S)

Notary Public for South Carolina
My Commission Expires: September 27, 2028