STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable William P. Keesley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

WILLIAM TIAY CHANDLER,

APPELLANT

APPELLATE CASE NO 2018-000455

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

After Appellant admitted on direct examination that he had been on probation but also testified that he "would have no record" and that this was his first time being in trouble, did the trial judge err in allowing the State to question Appellant about the specific conviction for which Appellant was on probation, unlawful carrying of a weapon, because the prosecutor earlier indicated to the judge that he did not intend to ask Appellant about his prior criminal record, the judge failed to warn Appellant that the prior conviction could be admitted if Appellant "opened the door" to the admission and the probative value in admitting the specific conviction was substantially outweighed by the danger of unfair prejudice in the trial for burglary and possession of weapon during the commission of a violent crime?

STATEMENT OF THE CASE

In October of 2016, the Aiken County Grand Jury indicted Appellant, William Tiay Chandler, with two counts of burglary first degree and two counts of possession of a weapon during the commission of a violent crime, indictments #2016-GS-02-2054-2057. In 2018, the Aiken County Grand Jury additionally indicted Appellant for failure to stop for a blue light and siren, indictment #2018-GS-02-0508. On February 26, 2018, Appellant proceeded to jury trial before the Honorable William P. Keesley. Michael W. Chesser represented Appellant at trial. J. William Weeks and Cassie W. Hall prosecuted the case. The jury found Appellant not guilty of failure to stop for a blue light but guilty of the other charges. Judge Keesley sentenced Appellant to twenty-one (21) years concurrent for the burglary charges and five (5) years concurrent for the weapons charges. A timely notice of intent to appeal was filed on March 10, 2018. This appeal follows.

STANDARD OF REVIEW

"In criminal cases, the appellate court sits to review errors of law only." State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). This court is "bound by the trial court's factual findings unless they are clearly erroneous." Id. at 6, 545 S.E.2d at 829. As to evidentiary issues, "we are limited to determining whether the trial judge abused his discretion." Id. "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." State v. Black, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012) (quoting State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011)). "To warrant reversal, an error must result in prejudice to the appealing party." Id. at 16–17, 732 S.E.2d at 884.

ARGUMENT

After Appellant admitted on direct examination that he had been on probation but also testified that he "would have no record" and that this was his first time being in trouble, the trial judge erred in allowing the State to question Appellant about the specific conviction for which Appellant was on probation, unlawful carrying of a weapon, because the prosecutor earlier indicated to the judge that he did not intend to ask Appellant about his prior criminal record, the judge failed to warn Appellant that the prior conviction could be admitted if Appellant "opened the door" to the admission and the probative value in admitting the specific conviction was substantially outweighed by the danger of unfair prejudice in the trial for burglary and possession of weapon during the commission of a violent crime.

Appellant drove while other co-defendants burglarized two homes. Prior to trial the State agreed to redact portions of Appellant's statement that referenced the fact that at the time of the burglaries Appellant was on probation. (Tr. p. 85, lines 16-18). Prior to Appellant testifying, the judge asked the prosecutor if Appellant had any prior criminal record that the State intended to use for impeachment purposes. (Tr. p. 321, lines 7-8). The prosecutor answered, "No." (Tr. p. 321, line 10).

Although the State agreed to redact the reference to probation, during direct examination Appellant testified, "What happened after that, I had advised them, when they started talking about kicking – kicking doors in, advised them that I was still – I – I told them I couldn't do it because I was on probation." (Tr. p. 338, lines 20-23). Appellant also testified, "I would have no prior record. This is my first time being in trouble." (Tr. p. 345, lines 2-3).

On cross-examination the prosecutor asked Appellant, "What were you on probation for?" (Tr. p. 356, line 21). Appellant objected. (Tr. p. 356, line 23). Outside of the presence of the jury Appellant testified that he was on probation for unlawful carrying of a weapon. (Tr. p. 357, lines 6-7). Counsel for Appellant objected citing Rule 404(b). (Tr. p. 357, lines 10-11). At

the time of the burglaries Appellant was seventeen years old and the pistol charge was part of his juvenile record. (Tr. p. 325, lines 5-6; p. 358, line 25 – p. 359, line 1). The judge noted:

> Under Rule 609 of the South Carolina Rules of Evidence, evidence that an accused has been convicted of a crime is subject to being admitted if it was punishable by imprisonment in excess of a year. I'm assuming, if it was unlawful possession of a pistol, it's a year, but not in excess of a year. And it – where it's an accused, the Court has to make a finding that the probative value of admitting the evidence outweighs its prejudicial effect.

(Tr. p. 359, lines 2-10). The judge discussed the fact that the rules did not make an exception for a juvenile adjudication. (Tr. p. 359, lines 11-21). The judge then said, "The central issue is that he got on the stand and said – he brought up the probation and he said that he had no prior record and this was his first time with being in trouble. So that goes more in line with a general ability to attack his credibility for saying something that was arguably untrue. Anything that's relevant, the Court still has to review under Rule 403." (Tr. p. 359, line 22 – p. 360, lines 1-4).

The State argued, "Your Honor, if I don't ask him anything and he stood on that stand under oath and said he has no prior record, it's like letting him get away with a lie in front of this Court." (Tr. p. 360, lines 15-18). The judge then noted, "And – and had he – you know, I – I appreciate the fact that you said you didn't intend to ask him anything about his prior criminal record. Had he had a prior criminal record, I would – I typically would've covered this: that if he opens the door in some sort of way – now, I don't know if that would've stopped him form opening the door anyway because I – I don't know what – whether he would've gone ahead and said it. But that -- that's something we'll never know." (Tr. p. 360, line 21 – p. 361, lines 1-4).

Counsel for Appellant again objected stating, "I would just – as the Court indicated, it seems like 403 is – is a grounds apart from 404(b), and so we would move to exclude it on 403 as well." (Tr. p. 361, lines 13-16). The judge ruled, "Well, I – I just got to make a call. And I don't think I can just let it lie there. The objection is overruled." (Tr. p. 361, lines 19-21). The

jury returned and the prosecutor asked Appellant, "What were you on probation for?" (Tr. p. 362, lines 11). Appellant answered, "Unlawful carrying of a weapon." The judge erred in allowing the prosecutor to ask Appellant about the specific offense for which Appellant had been on probation. Appellant testifying about the fact that he was on probation at the time of the burglaries did not open the door to allow the State to ask about the specific offense for which Appellant was on probation. Importantly, Appellant did not deny that he had been on probation at the time of the burglaries.

The judge then gave the jury a limiting instruction. (Tr. p. 362, line 13 – p. 363, lines 1-15). After the limiting instruction the prosecutor then asked Appellant, "So, Mr. Chandler, when you said you had no prior record, you would agree that's not true, wouldn't you?" (Tr. p. 363, lines 17-18). Appellant answered, "Yes, sir. I did say that I have no prior record." (Tr. p. 363, line 19). Appellant did not clarify to the jury that his prior criminal record consisted only of juvenile adjudications and he had no prior adult criminal record. Trial counsel failed to confirm that Appellant's only record consisted of juvenile adjudications[1]. (Tr. p. 371, lines 23-24). The cross examination of Appellant should have been limited to challenging his credibility in regard to testifying about not having a prior record without reference to a specific offense. The cross examination was particularly prejudicial because Appellant had been on probation for unlawful carrying of a weapon and was on trial for possession of a weapon during the commission of a violent crime.

The State did not seek to admit the prior conviction pursuant to Rule 404(b). Instead, the State sought to impeach Appellant's credibility by challenging his statement that he had no prior record. The prior conviction was not admissible pursuant to Rule 609, SCRE, however, because,

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[1] Trial counsel's failure to clarify that Appellant's only criminal record consisted of juvenile adjudications may need to be addressed in post-conviction relief.

as correctly noted by the trial judge, the offense was not punishable by imprisonment in excess of one year. Rule 609(a)(1), SCRE; S.C. Code §16-23-20. Additionally, the offense did not involve dishonesty or false statement. Rule 609(a)(2), SCRE. Pursuant to Rule 607, SCRE, the State could impeach Appellant's credibility based on the fact that he testified that this was his first time in trouble and that he had no prior record. The cross examination, however, should have been limited to asking Appellant if he had a prior record and had been on probation. The probative value of allowing the State to ask Appellant about the specific offense for which Appellant had been on probation is substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE. The State should not have been allowed to ask Appellant about the specific offense.

In State v. Young, 378 S.C. 101, 661 S.E.2d 387 (2008), the trial judge, in a trial for kidnapping and criminal sexual conduct, allowed the State to introduce evidence of the defendant's convictions for third-degree burglary and for possession of a stolen vehicle as general impeachment evidence under Rule 609(a)(1) and (a)(2) for the purpose of attacking Young's credibility as a witness. The trial court did not allow the State to refer specifically to the prior CSC conviction, but instead allowed the State to impeach the defendant's credibility by referring to a prior CSC conviction as "another felony for which he has been convicted." The trial court also acknowledged that the defendant could open the door, via his testimony, to the admissibility of other prior convictions, including specific reference to the third-degree CSC conviction. After the defendant testified the State moved to admit the prior conviction for CSC arguing that the defendant opened the door by introducing evidence of his good character by stating that he hated to see a woman cry. The trial judge ruled that the defendant placed a

character trait in issue and admitted the prior CSC. On appeal the South Carolina Supreme Court disagreed writing:

> We find that Young's testimony that he hated to see a woman cry did not open the door for the admission of his prior CDV and CSC convictions. Reading Young's testimony in its proper context, Young was not offering evidence of a specific character trait towards women in general. Rather, the isolated statement used to justify admission of the prior CDV and CSC convictions was simply part of Young's narrative recounting his version of the events that occurred on the night in question. For this reason, the State was limited to presenting evidence admissible under Rule 609, SCRE, to impeach Young's credibility. Pursuant to Rule 609(a)(1), such evidence is limited to prior convictions for crimes punishable by imprisonment in excess of one year, subject to Rule 403. Additionally, Rule 609(a)(2) permits evidence of convictions for crimes involving dishonesty.

Young, 378 S.C. at 106, 661 S.E.2d at 389.

The Court then analyzed the admission of the prior CSC pursuant to Rule 609, SCRE and wrote:

> In this case, questioning Young generally on "another felony for which he ha [d] been convicted," as the trial court properly permitted in the first instance pursuant to Rule 609, SCRE, was entirely sufficient to impeach Young's credibility. We find that the State's use of a specific prior conviction for the same offense that Young was currently standing trial for was only a thinly-veiled attempt to show propensity, rather than a sincere attempt at impeachment of Young's credibility. For this reason, we hold that the trial court erred in admitting Young's prior CDV and CSC convictions to impeach Young. State v. Dunlap, 353 S.C. 539, 542, 579 S.E.2d 318, 320 (2003) (ruling that when a prior crime is similar to the one for which the defendant is being tried, the danger of unfair prejudice to the defendant from impeachment by the prior offense weighs against its admission); Green v. State, 338 S.C. 428, 433-34, 527 S.E.2d 98, 101 (2000) (finding that in admitting evidence pursuant to Rule 609, the trial court must consider the impeachment value of the prior crime, the timing of the prior crime, the similarity between the past crime and the charged crime, the importance of the defendant's testimony, and the centrality of the credibility issue).

Young, 378 S.C. at 106–07, 661 S.E.2d at 389–90.

While the analysis as to the admission of the specific offense for which Appellant in the present case was on probation is pursuant to Rule 403, SCRE, the Court's Rule 609 analysis in Young is useful. First, Appellant did not open the door to admission of the specific offense.

Appellant did not reference the specific offense for which he was on probation. Instead, he testified that he was on probation and did not have a prior record. Although, unlike in Young, the trial judge in the present case did not warn Appellant about possibly opening the door, Appellant only opened the door to allow the State to ask if he was on probation and if he had a prior record. The State should not have been allowed to question Appellant about being on probation for the specific offense of unlawful possession of a weapon.

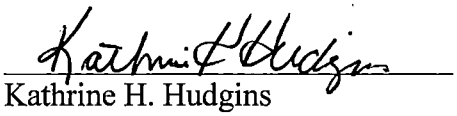
Second, like the general questioning about another felony in Young, the general questioning about being on probation and having a prior record was sufficient to impeach Appellant's credibility, making the impeachment value of the specific offense very low. Additionally, the State initially did not intend to introduce any of Appellant's prior juvenile record. The prior unlawful possession of a weapon was similar to the possession of a weapon during the commission of a violent crime for which Appellant was being tried. While credibility was a central issue to be determined by the jury, the State was able to impeach without reference to the specific prior conviction.

Rule 403, SCRE, provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In the present case the trial judge mentioned Rule 403, SCRE, (Tr. p. 360, lines 3-10), but failed to conduct an on-the-record 403 balancing test with regard to allowing the State to question Appellant about the specific conviction for which Appellant was on probation, unlawful carrying of a weapon. As discussed above, the record supports the fact that the probative value of allowing the State to ask Appellant about the specific offense for which Appellant had been on probation is substantially outweighed by the danger of unfair

prejudice pursuant to Rule 403, SCRE. The limiting instruction to the jury did not render the error harmless. This Court should reverse the convictions and remand for a new trial. Alternatively, based on the trial court's failure to conduct an on-the-record 403 balancing test, this Court should remand the case to the trial court with instructions to conduct the balancing test. See State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013).

CONCLUSION

Based on the above argument, this Court should reverse the convictions and remand for a new trial. Alternatively, this Court should remand the case to the trial court to conduct an on-the-record 403 balancing test as to allowing the State to question Appellant about the specific conviction for which Appellant was on probation, unlawful carrying of a weapon.



Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 5th day of March, 2019.

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WILLIAM TIAY CHANDLER,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on William Tiay Chandler, #375742, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 5th day of March, 2019.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 5th day of March, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.