STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Spartanburg County

J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LANCE ANTONIO BREWTON,

APPELLANT

APPELLATE CASE NO. 2018-001572

INITIAL BRIEF OF APPELLANT

ADAM SINCLAIR RUFFIN
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

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2.

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STATEMENT OF THE CASE

Appellant was indicted by the Spartanburg County Grand Jury for murder and possession of a weapon during the commission of a violent crime. R. *. Appellant's jury trial was held before the Honorable J. Derham Cole from August 20, 2018 through August 22, 2018. Tr. 1.

Appellant was represented by Clay Allen and Monier Abusaft of the Spartanburg County Public Defender's Office. The state was represented by Solicitor Barry Barnette and Assistant Solicitor Jennifer Wells. Tr. 1.

The jury found Appellant guilty as charged, and he was sentenced to life imprisonment without the possibility of parole.

This appeal follows.

STANDARD OF REVIEW

"In criminal cases an appellate court sits to review errors of law only." State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000).

"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 trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." Id.

STATEMENT OF FACTS

On the morning of September 25, 2017, Natalie Niemitalo was at her house with her friend, Kevin Schuerman, and Appellant. Tr. 184, ll. 14 – 24. Natalie and Appellant had been in an off and on relationship for "a while." Tr. 185, ll. 17 – 22. Kevin recalled: "We talked for a little bit, and then it was decided we were going to go to the gas station to go get some drinks and stuff like that." Tr. 187, ll. 6 – 8.

The three of them got into a black Honda Civic that was parked in the driveway which belonged to Natalie's mother. Tr. 189, ll. 15 – 23. Natalie was in the driver's seat, Kevin was in the front passenger seat and Appellant was in the back seat. Tr. 190, ll. 1 – 3. Appellant then asked Kevin to let him out of the car, so Kevin slid his seat forward so that Appellant could get out. Tr. 190, ll. 7 – 25. Appellant walked around to the driver's side of the car and he and Natalie got into a short argument about who was going to drive. Tr. 191, ll. 1 – 7.

While Kevin was sitting in the front passenger seat and Appellant was standing at the driver's side door, Kevin heard a gunshot. Tr. 191, ll. 11 – 13. Kevin thought he had been shot so he got out of the car and ran behind a garage next to Natalie's house. Tr. 191, ll. 14 – 24. After Kevin realized that he had not been shot, he went back to the vehicle and saw Natalie on the ground of the driveway and Appellant getting in the driver's seat of the car and driving away. Tr. 191, l. 25 – 192, l. 21. Kevin called 9-1-1 and held on to Natalie until law enforcement arrived. Tr. 193, ll. 5 – 8.

Kevin testified that he never saw Appellant with a gun and that the argument between Appellant and Natalie was not out of the ordinary. Tr. 202, ll. 9 – 16; tr. 201, ll. 9 – 14. In fact, Kevin stated that he had seen Natalie and Appellant in worse arguments before and he had never seen Appellant be violent towards Natalie. Tr. 201, l. 18 – 202, l. 1.

While law enforcement officers were on the scene attempting to treat Natalie and gather information, South Carolina Highway Patrolman Christian Stewart observed Appellant drive by Natalie's house in the black Honda Civic. Tr. 209, ll. 5 – 14. Trooper Stewart initiated a traffic stop on Appellant who did not stop but drove back to his residence, which was approximately twenty-three miles away. Tr. 209, l. 17 – 210, l. 11. Once Appellant stopped at his residence, he was taken into custody by the officers. Tr. 268, l. 20 – 269, l. 16.

Natalie died from a single gunshot wound which entered her left chest and exited her back. Tr. 332, l. 22 – 333, l. 11.

ARGUMENT

1.

The court erred in refusing to instruct the jury on the lesser included offense of involuntary manslaughter because Appellant testified that the shooting was unintentional and there was sufficient evidence Appellant acted recklessly in the handling of a loaded firearm.

Relevant Facts for Issues 1 and 2

Appellant testified in his own defense before the jury. Tr. 385 – 418. His testimony was largely consistent with Kevin Schuerman's regarding the incident. Appellant testified that when he, Kevin and Natalie got into the car to go to the store that he initially sat in the back seat. Tr. 390, ll. 13 – 19. After sitting in the car for about five minutes while Natalie was doing her makeup, Appellant grew impatient, and asked Kevin to let him out of the car so that he could drive. Tr. 390, l. 22 – 391, l. 2.

As Appellant was getting out of the car his gun fell out of his pocket onto the back seat. Tr. 391, ll. 7 – 13. Appellant picked his gun up and he walked around to the driver's side of the car. Tr. 392, ll. 8 – 10. Appellant explained that he did not put the gun back in his pocket because he thought Natalie was going to let him drive and that he generally puts his gun in the center console when he is in the car. Tr. 392, ll. 11 – 16. Appellant then testified: "I reach over. I see Natalie. She's still . . . in the mirror doing her makeup. So I reached to grab the keys. When I reached to grab the keys she forced my hand back, and that's when the gun went off." Tr. 392, ll. 22 – 25.

Appellant told the jury that he did not mean to kill Natalie and that he was not mad or angry at her at the time of the incident. Tr. 393, ll. 1 – 11. Appellant testified that he never wanted to hurt Natalie. Tr. 393, ll. 12 – 14. "I regret this every day . . . I'm sorry for the family.

I really am. But I did not mean to kill my girlfriend, honestly." Tr. 393, ll. 23 – 25. Appellant stated that he did not intend for the gun to go off and he did not intentionally shoot it. Tr. 394, ll. 5 – 10.

Chad Smith testified for the state and was qualified as an expert in firearm examination. Tr. 306, ll. 7 – 18. Smith received and reviewed the firearm that was involved in this case. Tr. 309, ll. 10 – 14. Smith testified that the trigger pull weight of the firearm was five and a half pounds. Tr. 310, ll. 3 – 6. Smith admitted that the firearm could discharge accidentally if "it was snagged on something." Tr. 316, ll. 3 – 8. Smith also acknowledged that there was no external safety mechanism on the firearm that would typically be thought of as a "push-button safety." Tr. 318, ll. 3 – 13. In other words, once five and a half pounds of pressure was applied to the trigger, the firearm would discharge. Tr. 318, l. 14 – 319, l. 2.

Smith also testified about the purpose of the trigger guard on the firearm. He stated:

> The trigger guard is here to do just that, to guard that trigger from any kind of unintentional pressure against the trigger. But I suppose if it were possible something that could enter into the trigger guard, being your finger or something else, and enough – and if the firearm was pushed against that object and enough pressure – again, I measure it to be about five and a half pounds – exerted on that trigger, then it could fire.
>
> The trigger guard is there to prevent any sort of – any kind of accidental entry into the trigger, but, you know, it could be with a – microphone could enter there. If some sort of, you know, protrusion were entered into the – the trigger guard and then it possibly could fire.

Tr. 320, ll. 12 – 24. Smith again admitted that the internal "safety" mechanism on this particular firearm would not prevent the gun from discharging once five and a half pounds of pressure was applied to the trigger. Tr. 321, ll. 16 – 24.

At the close of the evidence, defense counsel requested the court to instruct the jury on the lesser included offense of involuntary manslaughter and the defense of accident. Tr. 420, ll. 5 – 8. The solicitor asked the court to deny Appellant's request arguing: "He is not legally able to possess that weapon. He's done an unlawful act with it . . . therefore accident can't apply." Tr. 420, ll. 12 – 14. The solicitor also argued that Appellant was not armed in self-defense and therefore involuntary manslaughter was not applicable and cited to State v. Gibson, 390 S.C. 347, 701 S.E. 2d. 766 (Ct. App. 2010) for support. Tr. 420, ll. 15 – 20.

Defense counsel responded by citing to State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 and State v. Burris, 334 S.C. 256, 513 S.E.2d 104 (1999) and argued that even though Appellant's possession of the gun was unlawful, that unlawful possession was not the proximate cause of Natalie's death. Tr. 421, ll. 9 – 22; tr. 425, ll. 16 – 23.

The court ruled that Appellant was not entitled to either the involuntary manslaughter charge or the accident charge. Tr. 427, ll. 10 – 16. The court reasoned that Appellant was acting unlawfully by illegally carrying a firearm and also by trying to take the car from Natalie. Tr. 426, l. 7 – 427, l. 9. The court further ruled that Appellant was not exercising reasonable care in handling the gun. Tr. 427, ll. 10 – 16.

After the jury was charged, defense counsel renewed his requests for involuntary manslaughter and accident charges, which the court again declined. Tr. 475, l. 15 – 476, l. 2.

Discussion

"Involuntary manslaughter is (1) the unintentional killing of another without malice, but while engaged in an unlawful activity not naturally tending to cause death or great bodily harm or (2) the unintentional killing of another without malice, while engaged in a lawful activity with reckless disregard for the safety of others." State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d

482, 485 (Ct. App. 2010). "If there is *any* evidence warranting a charge on involuntary manslaughter, then the charge *must* be given." State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009) (emphasis added).

"To constitute involuntary manslaughter, there must be a finding of criminal negligence, statutorily defined as a reckless disregard of the safety of others." State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003). "Recklessness is a state of mind in which the actor is aware of his or her conduct, yet consciously disregards a risk which his or her conduct is creating." State v. Pittman, 373 S.C. 527, 571, 647 S.E.2d 144, 167 (2007). Negligent handling of a firearm can be sufficient to warrant a charge on involuntary manslaughter. State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008).

Based on the testimony presented to the jury in this case there was ample evidence for it to find that the shooting was unintentional. Appellant testified to the jury that the shooting was unintentional and that he was not angry at Natalie at the time the gun went off. Tr. 393, ll. 1 – 11. Appellant stated that he did not intend for the gun to go off and he did not intentionally shoot Natalie. Tr. 394, ll. 5 – 10.

Kevin Schuerman, the front passenger in the car at the time of the shooting, testified that he never saw Appellant with a gun and that the argument Appellant and Natalie were engaged in was nothing out of the ordinary. Tr. 202, ll. 9 – 16; tr. 201, ll. 9 – 14. Kevin said that he had never seen Appellant be violent towards Natalie. Tr. 201, l. 18 – 202, l. 1.

"[T]he essence of involuntary manslaughter is the involuntary nature of the killing." State v. Gibson, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010). There have been numerous cases in South Carolina in which our courts have found that an involuntary manslaughter instruction was improper on the basis that the defendant intentionally fired a gun.

See, e.g., Douglas v. State, 332 S.C. 67, 504 S.E.2d 307 (1998) (holding that defendant was not entitled to involuntary manslaughter charge when he intentionally shot into a crowd); State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996) (holding that defendant was not entitled to an involuntary manslaughter charge when he admitted that he intentionally shot his gun); State v. Morris, 307 S.C. 480, 415 S.E.2d 819 (Ct. App. 1991) (holding that defendant was not entitled to an involuntary manslaughter charge when there was no evidence that defendant shot his gun unintentionally). Here, the record has ample evidence to suggest that the killing was unintentional which is the "essence of involuntary manslaughter" and therefore the court erred by not instructing the jury on the lesser-included offense of involuntary manslaughter.

The state took the position at trial that because Appellant was unlawfully carrying the pistol and not acting in self-defense that he was precluded from an involuntary manslaughter instruction. This position is incorrect for two reasons.

First, the Supreme Court in State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 (1994) specifically rejected this argument in the context of an accident case while noting that "the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide." Id. at 278, 440 S.E.2d 370 n.1.

When the facts of a case support a finding of an unintentional killing, the defendant cannot be precluded from an involuntary manslaughter charge simply because his possession of the firearm was unlawful. Justice Toal acknowledged this in the context of accident when she wrote: "The unlawful possession of a firearm alone may not in all cases be the proximate cause of the injury." Id. at 282, 440 S.E.2d at 373 (Toal, J., concurring).

In State v. Slater, 373 S.C. 66, 644 S.E.2d 50 (2007), the Supreme Court expounded upon this proximate cause requirement in the context of self-defense. The Slater Court found that the defendant's unlawful possession of a firearm was the proximate cause of the homicide because "Slater was not merely in unlawful possession of a weapon; he carried the cocked weapon, in open view, into an already violent attack in which he had no prior involvement." Id. at 71, 644 S.E.2d at 53. Slater testified that his initial reason for getting his gun was to shoot it in the air "to cause a commotion." Id. at 68, 644 S.E.2d at 51. Then, Slater approached a group of individuals who were attacking and robbing someone with his gun in hand which caused one of the attackers of the third-party victim to point a gun at Slater. Id. Therefore, Slater's unlawful possession of a firearm escalated a robbery into a deadly shooting.

More recently, the Supreme Court again addressed unlawful possession of a pistol in the context of self-defense. State v. Williams, Op. No. 27895 (S.C. Sup. Ct. filed June 19, 2019). In Williams, the Court held that the defendant's unlawful possession of a firearm, *and his bringing it to an illegal drug transaction*, precluded a charge on self-defense because he was not without fault in bringing on the difficulty. The Williams Court noted the significance of the illegal drug transaction in its analysis: "In addition, intentionally bringing a loaded, unlawfully-possessed pistol to an illegal drug transaction is 'calculated to produce a violent occasion.'" Id. The Court continued: "Williams' pistol was not simply a convenience for him so he could protect himself just in case violence arose. Rather, it is well-documented that the mere presence of guns at illegal drug transactions *produces* the violence." Id.

In Williams, the Court went on to clarify its prior holding in Slater regarding the requirement of proximate cause: "In Slater, we said the question was whether 'the weapon is the proximate cause of the killing.' We should have said the question is whether it is the proximate

cause of the 'difficulty' or 'occasion' that led to the killing." Id. at n.4 (internal citations omitted).

In this case, Appellant's mere possession of a firearm was not the proximate cause of Natalie's death, nor was it the proximate cause of the "difficulty" or "occasion" which led to her death. Rather the gun was merely incidental to the shooting. Natalie, Kevin and Appellant were getting ready to drive to the store to get drinks when Appellant got into the back seat of Natalie's mother's car. When he decided to get out of the back seat his gun fell out of his pocket onto the seat which he then picked up and held in his hand as he walked around to the driver's side of the vehicle. Appellant did not arm himself with the intention of shooting his gun to cause a commotion like Slater nor did he arm himself for the express purpose of killing someone. Furthermore, unlike in Williams, at the time of the incident here, Appellant was not armed in furtherance of an illegal drug transaction.

Appellant carried his gun in his hand around to the driver's seat because he expected Natalie to let him drive and he was planning on putting his gun in the center console of the car. Appellant's possession of the firearm did not escalate the situation between him and Natalie. Kevin testified that the argument was not out of the ordinary and that he was not afraid or worried that anything violent was about to happen. Therefore, Appellant's mere unlawful possession of the firearm was not the proximate cause of Natalie's death.

The second problem with the state's position that unlawful possession of a firearm alone precludes a charge on involuntary manslaughter is that it is untenable to suggest that a person who carries a firearm unlawfully is automatically precluded as a factual and legal matter from unintentionally killing another person. If this Court were to accept the state's position taken at trial, it would lead to the absurd result that an individual cannot, as a legal matter, unintentionally

kill another person simply because they are unlawfully armed. In other words, an unintentional killing would become murder or not guilty on the sole basis that the defendant was in unlawful possession of a firearm.

Additionally, it should be noted here that at Appellant's trial the court suggested that part of its reason for refusing to charge involuntary manslaughter was because Appellant "attempted to take control of her vehicle when he had no ownership interest or possessory interest in the vehicle" which the court found to be unlawful conduct. Tr. 426, ll. 20 – 23. This ruling is without evidentiary support because there is no testimony in the record that suggests Appellant was not permitted to drive Natalie's mother's vehicle. Appellant testified that he expected Natalie to let him drive when he walked around to the driver's side door and there is nothing in the record to suggest that it would have been unlawful for him to drive the car.

Lastly, whether Appellant acted recklessly at the time of the shooting was a quintessential jury question for which there was evidentiary support. Appellant testified that he had his gun in his hand while standing at the driver's side door arguing with Natalie. He further testified that while he was holding his gun that he reached over Natalie to try to get the keys from the ignition which a jury could have determined was reckless.

Therefore, the trial court erred in not instructing the jury on the lesser included offense of involuntary manslaughter and Appellant's conviction should be reversed. See State v. Brayboy, 387 S.C. 174, 180, 691 S.E.2d 482, 485 (Ct. App. 2010); State v. Mekler, 379 S.C. 12, 15, 664 S.E.2d 477, 478 (2008); State v. Crosby, 355 S.C. 47, 52, 584 S.E.2d 110, 112 (2003).

2.

The court erred in refusing to instruct the jury on the defense of accident because Appellant testified that the shooting was unintentional and there was sufficient evidence Appellant used due care in the handling of a loaded firearm.

Discussion

"For a homicide to be excusable on the ground of accident, it must be shown the killing was unintentional, the defendant was acting lawfully, and due care was exercised in the handling of the weapon." State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999). In State v. Goodson, the Supreme Court rejected the state's argument that unlawful possession of a firearm precludes the defense of accident. State v. Goodson, 312 S.C. 278, 440 S.E.2d 370 n.1 (1994). The Court stated that "the burden rests upon the State to prove beyond a reasonable doubt that the unlawful act in which the accused was engaged was at least the proximate cause of the homicide." Id.

In this case, the argument in favor of charging the jury on the defense of accident only differs in one respect from that made in Issue 1 of this brief. For Appellant to be entitled to a jury instruction on accident there must be evidence in the record that could support a jury finding that Appellant was exercising due care in the handling of the firearm. Burriss, 334 S.C. at 259, 513 S.E.2d at 106.

Involuntary manslaughter and accident are factually, mutually, exclusive. However, there was evidence in the record to support both jury instructions.

In this case, there is evidence in the record that Appellant was exercising due care in his handling of the firearm. Kevin Schuerman testified that he never saw Appellant with a gun, which at least created an inference that Appellant was not wielding the gun in a violent manner.

Appellant was not pointing the gun at anyone or waiving it around in the air. Furthermore, Appellant testified that the only reason he still had the gun in his hand was because he was anticipating Natalie letting him get in the car to drive and his plan was to place the gun in the center console.

A jury could have reasonably concluded that Appellant's handling of the firearm was with due care. Under the any evidence standard, the court should have instructed the jury on the defense of accident. State v. Wharton, 381 S.C. 209, 216, 672 S.E.2d 786, 789 (2009). Because the court refused to instruct the jury on a defense that was supported by the evidence Appellant's convictions should be reversed. See Tisdale v. State, 378 S.C. 122, 662 S.E.2d 410 (2008); State v. Burriss, 334 S.C. 256, 259, 513 S.E.2d 104, 106 (1999).

3.

The court erred by prohibiting Appellant from testifying as to his belief that the decedent's mother put him under a spell that caused him to hear voices which told him that a cement truck was going to bury his family which caused him to flee the scene after the shooting because this evidence was relevant to rebut the state's argument that Appellant fled the scene because he had a guilty conscience.

Relevant Facts

The state made a motion in limine to prevent Appellant from introducing any testimony that he had any kind of mental illness or that he was "hearing voices." Tr. 18, l. 4 – 19, l. 9. Defense counsel responded to the state's motion arguing: "Your Honor, under due process, under a res gestae theory I think he has . . . the right to tell the jury what was going on in his mind that day, why he was doing some of those things. Not as an excuse, not as a legal excuse, but as . . . an explanation." Tr. 19, l. 25 – 20, l. 5.

Defense counsel argued that if the state was going to be permitted to introduce evidence of his flight from the scene and ask the jury to infer a guilty conscience on that basis that Appellant should be permitted to rebut that inference by giving an alternative explanation for his flight. Tr. 20, ll. 6 – 18. Counsel agreed that he was not planning on presenting a not guilty by reason of insanity or guilty but mentally ill defense. Tr. 21, l. 9 – 22, l. 9. However, counsel contended that Appellant had a right to testify, including to explain why he fled the scene, and that his hearing voices was part of his narrative as to what happened the day of this incident. Tr. 26, ll. 2 – 11.

The court indicated that it was not inclined to allow the testimony because it was not relevant and would confuse or mislead the jury. Tr. 30, ll. 5 – 12. The court did not make a

ruling at that time though and stated that if Appellant decided to testify, the court would allow him to proffer his testimony and rule at that time. Tr. 30, ll. 13 – 17.

After the state rested its case, Appellant sought to proffer his testimony. Tr. 357, ll. 16 – 17. Appellant testified in detail about the events of the incident date.[1] Appellant testified that he believed Natalie's mother practiced witchcraft and that "she put it on her friend Aaron." Tr. 358, l. 23 – 359, l. 3. Appellant's understanding was that Aaron also was a practicing warlock, or the male version of a witch. Tr. 359, ll. 6 – 13.

Appellant testified that he believed that either Aaron or Natalie's mother had put him under a spell that was causing him to hear voices. Tr. 360, ll. 4 – 7. Appellant stated that on the day of the incident he was hearing voices that were telling him that his family was being murdered and that he needed to look for them in construction sites. Tr. 362, ll. 2 – 16. Appellant testified that there were several construction sites near Natalie's home that he walked to so that he could look for his family. Tr. 362, ll. 2 – 16.

When Kevin arrived at the house, Appellant said that he told Kevin he thought Natalie's mom "put a curse on [him]" because he was experiencing "all of these crazy things." Tr. 362, l. 24 – 363, l. 5. When the three of them got in the car to go to the store Appellant stated that he got in the back seat because voices in his head told him that people were trying to kill him. Tr. 364, ll. 1 – 5. Appellant said that the voices in his head did not have anything to do with the gun "going off." Tr. 364, ll. 9 – 11.

When Appellant was asked why he left Natalie's house after the gun went off, he said: "The only reason I left the scene, because the voices was telling me that cement truck that had just went down the road was going to bury my family alive." Tr. 365, ll. 2 – 4. Appellant said

[1] The state only objected to certain portions of Appellant's proffered testimony which will be the focus of this section of the brief.

that while he was in the back seat of the car, he saw a cement truck drive down the street and the reason he wanted to get out and drive was because Natalie was not moving fast enough, and he wanted to follow the cement truck. Tr. 365, ll. 5 – 13.

Immediately after the gun went off, Appellant got in the driver's seat and began to drive to look for the cement truck. Tr. 366, ll. 6 – 12. When he could not find it, he went back to Natalie's house to check on her. Tr. 365, ll. 17 – 20. Appellant stated that the first time he went back by the house he saw that EMS was already on the scene giving Natalie medical attention, so he kept driving to look for the cement truck some more. Tr. 367, ll. 2 – 5. Appellant still could not find the cement truck, so he went back to the scene a second time to check on Natalie and it was at that point he saw police were on the scene. Tr. 367, ll. 5 – 9. When the police attempted to stop Appellant, he ran because he had drugs on him. Tr. 365, ll. 19 – 21.

After Appellant finished his proffer the state argued that Appellant had been examined by a doctor and that the "psychosis was drug related." Tr. 369, ll. 4 – 9. The state also argued that Appellant's testimony was replete with hearsay. Tr. 369, ll. 10 – 15. Further, the state argued that the testimony was not relevant and was "highly prejudicial." Tr. 369, ll. 16 – 17.

Defense counsel agreed that there was some hearsay that Appellant testified to during his proffer that would not be admissible in front of the jury but still argued:

> He has the absolute right to testify. . . . [A]nd he must testify truthfully. He can't make up reasons that would be more convenient for the defense or easier for the state . . . and so we think that limiting his testimony, especially to these essential factors, would be violating his due process rights and his right to testify in his own trial.
>
> Also, Your Honor, I don't believe the state gets to have it both ways in that they . . . have introduced evidence that they didn't have to about flight, which is an inference they want the state [jury] to draw. They want the jury to draw that he was guilty because he had flight.

> This gives an alternative reason for why he left the scene. It is the reason that he left the scene. And . . . since the state has went [gone] down that road, largely, they have opened the door for this testimony.

Tr. 371, l. 11 – 372, l. 1.

The court ruled that Appellant would not be permitted to testify about anything relating to witchcraft or hearing voices in his head about a cement truck burying his family. Tr. 374, ll. 3 – 9. The court reasoned that this testimony would confuse the jury by suggesting to them that Appellant was raising a mental illness defense which he was not in fact raising. Tr. 373, ll. 2 – 24. The court also ruled that "what he's testifying to is based largely upon hearsay." Tr. 373, ll. 13 – 14.

Defense counsel argued that Appellant's testimony about witchcraft was not hearsay because he was testifying about his own knowledge of Natalie's mother being a witch and her casting a spell on him. Tr. 374, l. 10 – 375, l. 5. Counsel also further clarified his position on Appellant's right to testify by arguing that the court was in effect precluding Appellant from testifying by "stopping him from testifying to something that is so intermingled among his testimony that it is . . . a de facto prevention of his right to testify." Tr. 375, ll. 8 – 14.

The court ruled that Appellant would be allowed to testify but that the voices involved were not relevant to the murder and he would not be allowed to testify about that specifically. Tr. 375, l. 15 – 376, l. 5. Ultimately, Appellant chose to testify in front of the jury but was not permitted to explain why he got into the back seat of the car, why he decided he wanted to drive the car, and why he fled from the scene immediately after the gun went off. Tr. 385 – 418.

Discussion

A criminal defendant has a fundamental right to testify in his own defense. Rock v. Arkansas, 483 U.S. 44 (1987). "[F]undamental to a personal defense . . . is an accused's right to present his own version of the events *in his own words.*" Rock v. Arkansas, 483 U.S. 44, 52 (1987) (emphasis added). The right of a criminal defendant to testify in his own defense is not unlimited, but any restrictions on his right to testify cannot be "arbitrary or disproportionate to the purposes they are designed to serve." Rock at 55-56.

In State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013), the Supreme Court held: "[T]he right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify is either respected or denied; its deprivation cannot be harmless." Rivera at 249, 741 S.E.2d at 707 (internal quotations omitted).

Appellant was prohibited from testifying to matters that were critical in refuting the state's theory of the case. Appellant was prevented from telling the jury *in his own words* why he got into the back seat of the car instead of the front. The state relied on Appellant's flight from the scene which he was not able to adequately explain to the jury. Appellant was limited in only testifying that he fled the scene because he had drugs on him. However, this does not adequately explain Appellant's initial urgency in getting out of the back seat and into the driver's seat and fleeing the scene immediately after the gun went off. Appellant explained this conduct in his proffer by the spell he believed Natalie's mother had put him under and the voices he heard about him and his family being in danger.

Appellant should have been allowed to tell the jury what happened on the day of the incident in his own words. It is Appellant's right to present a complete and full defense which includes explaining conduct that the state has relied upon to infer his guilt. Just as Appellant's

counsel argued at trial, the state wanted to have it both ways by introducing evidence of Appellant's flight from the scene to infer guilt but then asking the Court to prevent Appellant from fully explaining his flight to the jury. This violated Appellant's fundamental right to testify in his own defense and in his own words. It is immaterial whether or not it was a story that the jury would believe because it was Appellant's story to tell and he was denied his right to tell his story fully. See State v. Blurton 342 S.C. 500, 537 S.E.2d 291 (Ct. App. 2000) (overruled on other grounds) (holding that audio tapes of telephone conversations between defendant and another individual were admissible to show that the defendant "had been led to believe the robbery was staged and that his actions were sanctioned by the CIA").

The denial of Appellant's right to fully and completely testify in his own defense to matters that were specifically raised by the state and relied upon by the state in asking the jury to find Appellant guilty was an abuse of discretion. As the Supreme Court held in Rivera, such error is structural and requires reversal without conducting a harmless error analysis. Because the Court erred in its refusal to allow Appellant to testify fully in his own defense, Appellant's convictions should be reversed. See Rock v. Arkansas, 483 U.S. 44 (1987); State v. Rivera, 402 S.C. 225, 741 S.E.2d 694 (2013).

4.

The court erred in allowing Appellant to be impeached with his strong-arm robbery conviction from 1999, because that sentence expired in 2004, and the trial took place in 2018, since this conviction was remote, and the court did not properly conduct the requisite *State v. Colf* analysis.

Relevant Facts

Before Appellant testified, the court addressed the admissibility of certain of Appellant's prior convictions. Tr. 379, l. 24 – 380, l. 21. Appellant had two convictions for strong-arm robbery. The first was a 1999 conviction for which the sentence expired in 2004 and the second was a conviction from 2008 for which the sentence expired in 2011. Tr. 379, l. 24 – 380, l. 10.

The court ruled that both convictions were admissible "based upon the continuous course of conduct and based upon there has not been a passage of ten years in between the date of today at which he will testify and the time that those convictions took place." Tr. 380, ll. 11 – 14. Defense Counsel argued that the rules of evidence do not allow for connecting the two offenses as being one course of conduct. Tr. 381, ll. 7 – 10.

Defense counsel correctly pointed out to the judge that the strong-arm robbery conviction from 1999 had a sentence that expired in 2004 and the trial was taking place in 2018 and was therefore well outside the ten-year limit. Tr. 381, l. 22 – 382, l. 8. The state agreed to refer to Appellant's convictions only as "crimes of dishonesty" rather than referring to them as strong-arm robbery convictions. Tr. 382, ll. 12 – 19.

When Appellant testified he admitted when asked by his attorney that he had "two convictions for crimes of dishonesty." Tr. 397, ll. 2 – 4. In the state's closing argument while discussing Appellant's testimony, the solicitor stated: "And here's a man that's been convicted of

dishonesty *twice, crimes of dishonesty*. And you'll hear the judge do that. That could be used to weigh his credibility as a witness." Tr. 432, ll. 18 – 21 (emphasis added).

Discussion

Pursuant to Rule 609, SCRE, evidence that a criminal defendant who testifies in his own defense is admissible if the crime was punishable by more than one year and its probative value outweighs its prejudicial effect to the defendant. Rule 609(a)(1), SCRE. Criminal convictions for "crimes of dishonesty" are admissible regardless of the possible punishment. Rule 609(a)(2), SCRE. However, criminal convictions are not admissible if either the conviction or the release of the witness from confinement for the sentence imposed, whichever is later, was more than ten years ago, unless the court determines that "the probative value of the conviction supported by specific facts and circumstances substantially outweigh its prejudicial effect." Rule 609(b), SCRE.

Under Rule 609(b), SCRE there is a presumption against the admissibility of these remote convictions. State v. Colf, 337 S.C. 622, 626, 525 S.E.2d 246, 248 (2000). "The State bears the burden of establishing sufficient facts and circumstances to overcome the presumption against the admissibility of remote convictions." State v. Black, 400 S.C. 10, 18, 732 S.E.2d 880, 885 (2012). Remote convictions should only be admitted in exceptional circumstances. Id. at 19, 732 S.E.2d at 885.

"In performing the balancing test required by Rule 609(b), SCRE, the trial court shall determine whether the probative value of the conviction substantially outweighs the prejudice of its admission after carefully balancing the interests involved and articulating for the record the specific facts and circumstances supporting its decision." State v. Black, 400 S.C. 10, 19, 732 S.E.2d 880, 885 (2012). This means that the trial court is required to articulate on the record

why the probative value of the remote conviction substantially outweighs its prejudicial effect. Id., citing State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006).

The Supreme Court "has enumerated at least five factors that a trial court should consider in determining, in the interests of justice, whether the probative value of a prior conviction substantially outweighs its prejudicial effect" and they are as follows:

(1) the impeachment value of the prior crime,

(2) the point in time of the conviction and the witness' subsequent history,

(3) the similarity between the past crime and the charged crime,

(4) the importance of the defendant's testimony, and

(5) the centrality of the credibility issue.

Black, 400 S.C. at 19, 732 S.E.2d at 885, citing State v. Colf, 337 S.C. 622, 626, 525 S.E.2d 246, 248 (2000).

In determining whether to admit a remote conviction pursuant to Rule 609(b), SCRE the trial court must begin in determining the probative value of the convictions, i.e. whether they tend to prove the witness' propensity for truthfulness. Black, 400 S.C. at 21, 732 S.E.2d at 886. Any probative value that a remote conviction might have primarily rests on whether the nature of the conviction might impact whether jurors would believe the witness' testimony. Id. at 22, 732 S.E.2d at 887. "A rule of thumb is that convictions that rest on dishonest conduct relate to credibility, whereas crimes of violence, which may result from a myriad of causes, generally do not." Id. citing Gordon v. United States, 383 F.2d 936, 940 (D.C.Cir. 1967).

In this case, the court abandoned its duty to conduct a full analysis on the issue of admitting Appellant's remote conviction for strong-arm robbery. Instead of upholding the rule

of presumptive prejudice under Rule 609(b), SCRE and requiring the state to prove that the probative value of the remote conviction substantially outweighed its prejudicial effect, the court simply stated: "[M]y determination is they're not too remote. But if they are the probative value substantially outweighs any danger of unfair prejudice." Tr. 380, ll. 19 – 21.

The court apparently based its conclusion that the convictions were not too remote on the fact that Appellant had a "continuous criminal history" because he was again convicted of strong-arm robbery in 2008, four years after the expiration date of the sentence imposed from the 1999 conviction. Tr. 381, ll. 12 – 19. However, there is no such exception to the ten-year time limit imposed under Rule 609(b), SCRE. The court's insinuation to the contrary appears to either be a misunderstanding or a misapplication of the law regarding the admissibility of remote convictions.

The court also never made the threshold determination as to whether Appellant's strong-arm robbery conviction was probative of his propensity for truthfulness, nor did the court articulate a single reason for its opinion that the probative value substantially outweighed its prejudicial effect. We know from the Supreme Court's ruling in State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015) that armed robbery is not a crime of dishonesty under the parameters of Rule 609(a)(2), SCRE. The logic in Broadnax would presumably extend to the offense of strong-arm robbery as well because it is a lesser included offense of armed robbery. See State v. Drayton, 293 S.C. 417, 361 S.E.2d 329 (1987). This significantly diminishes the probative value of Appellant's remote conviction for strong-arm robbery.

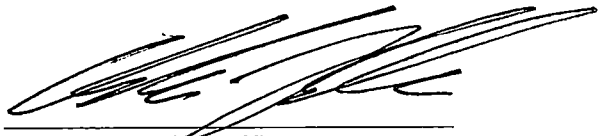
Appellant's 1999 strong-arm robbery conviction was nineteen years prior to his trial and the sentence expired in 2004, or fourteen years prior to his trial. This conviction was well outside the ten-year limit under Rule 609(b), SCRE, and therefore should have been subjected to

the heightened scrutiny of that rule. The court, however, completely failed to explain what the probative value of this conviction was or conduct any meaningful analysis under the Supreme Court's framework laid out in State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012) and State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Furthermore, the court did not require the state to explain why the remote conviction was probative or to give any particular facts and circumstances that would overcome the presumption against admission of the conviction. The solicitor then capitalized on the court's error by arguing to the jury in his closing that Appellant should not be believed because he had been convicted *twice* for "crimes of dishonesty."

The court erred in allowing Appellant to be impeached with his strong-arm robbery conviction from 1999 which fell well outside of the ten-year limit under SCRE 609(b) and therefore, Appellant's convictions should be reversed. See State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012); State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

CONCLUSION

By reason of the foregoing argument, Appellant's conviction should be reversed, and this case remanded to the Spartanburg County Court of General Sessions for a new trial.



Adam Sinclair Ruffin
Appellate Defender

ATTORNEY FOR APPELLANT

This 23rd day of August, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED

AUG 23 2019

SC Court of Appeals

Appeal from Spartanburg County

Honorable J. Derham Cole, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

LANCE ANTONIO BREWTON,

APPELLANT

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 Melody J. Brown, 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 Lance Antonio Brewton, #272849, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 23rd day of August, 2019.

Adam Sinclair Ruffin
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 23rd day of August, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.