

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County

Honorable William P. Keesley, Circuit Court Judge

RECEIVED
DEC 19 2019
SC Court of Appeals

THE STATE,

RESPONDENT,

V.

MARK LORENZO BLAKE, JR.,

APPELLANT.

APPELLATE CASE NO 2018-002091

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUE ON APPEAL.....1

STATEMENT OF THE CASE.....2

STANDARD OF REVIEW.....3

ARGUMENT

The trial court erred in failing to exclude any mention of Appellant having lost his right to carry a firearm following prior convictions, where in a trial for attempted murder the fact that he could not legally carry a firearm was irrelevant and highly prejudicial.4

CONCLUSION.....12

TABLE OF AUTHORITIES

Cases

<u>State v. Brockmeyer</u> , 406 S.C. 324, 751 S.E.2d 645 (2013).....	3
<u>State v. Gilchrist</u> , 329 S.C. 621, 496 S.E.2d 424 (Ct.App.1998).....	9
<u>State v. Gillian</u> , 373 S.C. 601, 646 S.E.2d 872 (2007).....	9
<u>State v. Hatcher</u> , 392 S.C. 86, 708 S.E.2d 750 (2011).....	3
<u>State v. Huckabee</u> , 419 S.C. 414, 798 S.E.2d 584 (Ct. App. 2017).....	3
<u>State v. Lyles</u> , 379 S.C. 328, 665 S.E.2d 201 (Ct.App.2008).....	8
<u>State v. Pagan</u> , 369 S.C. 201, 631 S.E.2d 262 (2006).....	3
<u>States v. Stout</u> , 509 F.3d 796, 804 (6th Cir.2007)	8
<u>United States v. Bonds</u> , 12 F.3d 540, 567 (6th Cir.1993).....	9
<u>United States v. Mohr</u> , 318 F.3d 613, 619–20 (4th Cir.2003).....	9
<u>United States v. Rodriguez–Estrada</u> , 877 F.2d 153, 156 (1st Cir.1989).....	9

Statutes

S.C. Code Ann. § 16-23-30.....	10
S.C. Code Ann. § 16-25-30.....	10
S.C. Code Ann. § 16-3-29.....	11
S.C. Code Ann. § 23-31-1040.....	10
S.C. Code Ann. § 44-23-1080.....	10

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in failing to exclude any mention of Appellant having lost his right to carry a firearm following prior convictions, where in a trial for attempted murder the fact that he could not legally carry a firearm was irrelevant and highly prejudicial?

STATEMENT OF THE CASE

Appellant was indicted on August 5, 2013 by a Charleston County grand jury for attempted murder. R. 588 (Indictment). He proceeded to trial on November 13, 2018 before the Honorable William P. Keesley and a jury. R. 1. Appellant appeared *pro se*, and Jason King served as standby counsel. R. 1. Stephanie Linder appeared on behalf of the state.

The jury found Appellant guilty as indicted. R. 579. ll. 15 – 22. Based upon a previously served notice of life without parole, Judge Keesley sentenced Appellant to life. R. 587, ll. 1 – 16.

This brief follows.

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).

Appellate courts review under the abuse-of-discretion standard a trial court's decision under the rule providing that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, and courts are obligated to give great deference to the trial court's judgment. State v. Huckabee, 419 S.C. 414, 798 S.E.2d 584 (Ct. App. 2017).

ARGUMENT

The trial court erred in failing to exclude any mention of Appellant having lost his right to carry a firearm following prior convictions, where in a trial for attempted murder the fact that he could not legally carry a firearm was irrelevant and highly prejudicial.

Relevant facts

On March 30, 2013, Cory Goldstein, a police officer with the City of Charleston, was driving through West Ashley without a dashcam or body camera. R. 76, l. 12 – R. 77, l. 25. Around 10:30 p.m. that evening, he noticed a red Hyundai Elantra with windows Goldstein characterized as heavily tinted. R. 78, ll. 2 – 24. He could have pulled over the car at this time, but he did not. R. 78, l. 25 – R. 79, l. 11.

Goldstein ran the license plate information and discovered that the car was a rental. R. 79, l. 12 – R. 80, l. 8. The red car drove into the Citadel Mall parking lot; Goldstein followed. R. 80, l. 20 – R. 81, l. 23. According to Goldstein, the driver of the red car failed to stop at stop signs in the parking lot. Id. Again, although Goldstein could have pulled the car over at this time, he did not. R. 82, ll. 2 – 5.

Goldstein then followed the car to a Best Buy parking lot where Goldstein testified that he attempted to pull over the red car. R. 83, ll. 6 – 22. The driver of the red car stopped, and Goldstein got out of his car. R. 84, ll. 2 – 25. The driver of the red car then allegedly drove off, and Goldstein gave chase. R. 85, ll. 1 – 22. While doing so, Goldstein turned his blue lights and siren off. R. 87, ll. 17 – 25.

The red car crashed while on the Interstate 526 ramp, and the driver got out of the car and ran. R. 88, l. 1 – R. 88, l. 14. Goldstein gave chase on foot. Id. A shootout occurred wherein both men were injured. R. 93, l. 4 – R. 97, l. 15. Notably, a witness never heard Goldstein

identify himself as a police officer. R. 294, ll. 8 – 10. Goldstein identified Appellant as the driver of the red car who he pursued. R. 94, ll. 7 – 25. The only item found and seized from the car was a rental agreement. R. 46, ll. 5 – 17.

At the outset of Appellant's trial, the state indicated that it would not be proceeding on a failure to stop for blue lights indictment, as that was a city charge. R. 11, ll. 19 – 22. It was not dismissed, but it was going to be tried during a different term. R. 12, ll. 1 – 4. Prior to jury qualification, Appellant made a number of pretrial motions. R. 12, l. 15 – R. 21, l. 8. Additional legal challenges were made after the jury was selected, including a motion in limine to suppress and exclude any reference to the possible illegality of Appellant carrying a gun. R. 27, l. – R. 57, l. 8. In particular, Appellant made a detailed and thorough request to prevent the jury from learning about how he acquired the gun and whether it was lawful for him to be carrying it:

[A] motion in limine ... to both bar and prohibit the usage of the following particulars within trial by whole or in part: Any/every material regarding unlawful carrying of a firearm, nor stolen firearm, nor anything in connection regarding stolen firearm, such as burglary whatsoever, including but not limited to: Documents, notes, articles, transcripts, reports, photographs, video recordings, audio recordings, verbal testimony, statements, nor both the present/admittance as tangible evidence of a stolen firearm.

R. 36, l. 20 – R. 37, l. 22. In response, the state noted that the firearm supposedly used to shoot at Goldstein was stolen. R. 40, ll. 2 – 15. Appellant was not suspected as the thief; therefore, the state agreed to avoid mentioning the burglary. Id. However, the state still hoped to inquire about the facts that Appellant allegedly possessed a stolen firearm, that he was prohibited from having a firearm in the first place, and that he failed to have a concealed weapons permit. Id. Appellant was never charged with a firearms violation. R. 47, l. 24 – R. 48, l. 17. The state remarked that it did not intend to ask about prior convictions that categorized Appellant as a felon. R. 48, ll. 12 – 17.

The state conceded that it was unaware whether Appellant knew the gun was stolen. R. 42, l. 23 – R. 43, l. 8. Appellant noted that he was on trial for attempted murder and that evidence regarding extraneous matters were irrelevant and highly prejudicial. R. 44, l. 10 – R. 45, l. 4. The trial judge ruled that evidence regarding the rental car and Appellant's failure to stop for blue lights was confusing to the jury and unfairly prejudicial. R. 47, ll. 5 – 7. After further discussion, the trial judge offered a detailed ruling:

He's made a motion in limine to exclude references to him having a stolen firearm under Rule 403. Even if the evidence is relevant on the issue of him fleeing, for example, it can still be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues or misleading a jury or other considerations like delay, waste of time or needless presentation of evidence.

The ruling of the court in limine is that the State is not to go into the firearm being stolen under Rule 403. However, the ... unlawful carrying of a pistol and not having a permit, if there's evidence to support that, then that is relevant and it is not barred under Rule 403. That's the in limine ruling of the Court.

R. 49, ll. 11 – 24. Before introducing the case to the jury and proceeding with opening statements, the trial judge explained in limine rulings to Appellant. R. 50, l. 20 – R. 51, l. 19.

While the jury was hearing testimony from Goldstein regarding the facts giving rise to Appellant's crash, the trial judge gave a limiting instruction:

Ladies and gentlemen of the jury, please give me your attention. There's been admitted into the trial of this case evidence related to alleged wrongs or acts that the State maintains were done by Mr. Blake in operating the vehicle. At this point, I'm going to give you what is known as a limiting instruction, which means that this evidence was admitted for a limited purpose. And if you use evidence, this evidence, for any purpose, you can only consider it within the limited purpose for which it was admitted. I charge you that evidence of other crimes, wrongs or acts, is not admitted to prove the character of an accused in order to show an action in conformity with that character. In other words, the fact that someone may have been involved in a prior bad act cannot be used to prove that he had the character to commit another bad act. This evidence was admitted for a limited purpose. And if you conclude it to be true, you can only use it for the limited purpose it was admitted and that the rules of evidence allow.

It may only be used, if at all, in assessing the following issues, the defendant's motive or the defendant's intent. Evidence of alleged bad driving is not to be used for any other purpose.

R. 88, l. 19 – R. 89, l. 15. Goldstein was the state's first witness, and his testimony ran through the end of the first day of trial.

Before the start of the second day of trial, the assistant solicitor sought clarification from the trial judge regarding the mention of the firearm. The trial judge clarified:

My ruling would prevent you from asking any question about him possessing a weapon that was stolen. You may ask him about possession of a weapon. If he had a permit for it. With regard to whether he had a right to possess the weapon, I would allow you to ask that question, but not go into any specifics about why he had no right to possess the weapon.

R. 147, ll. 12 – 18.

Ryan Kelly, the state's third witness, was employed by SLED at the time of Appellant's arrest. R. 206, ll. 1 – 25. The assistant solicitor questioned Kelly as to whether Appellant was allowed to have a gun, prompting an objection by Appellant. R. 212, ll. 1 – 10. The objection was overruled subject to the previous objection. *Id.* A similar objection was lodged when Kelly began discussing whether Appellant was an authorized driver per the rental agreement; it was also overruled. R. 212, l. 12 – R. 213, l. 1.

While cross-examining Kelly, Appellant inquired as to whether Kelly had "any documentation showing that [Appellant] signed any type of document saying that [he] would never, ever in [the] state of South Carolina bear arms?" R. 250, l. 10 – R. 254, l. 4. The jury was excused, and testimony was proffered from Kelly in response to the question. *Id.* The trial court remarked on the possibility that the door may be opened to that matter if the question was answered before the jury. *Id.* Therefore, when testimony resumed in front of the jury, Appellant

simply reiterated that the trial was about attempted murder and not a firearms violation. R. 154, ll. 7 – 14.

This matter was largely left undisturbed until Appellant testified. At that time, the assistant solicitor asked outright on cross-examination whether Appellant was allowed to have a firearm. R. 469, l. 2 – R. 470, l. 10. The state remarked upon that fact repeatedly. R. 472, l. 23 – R. 473, l. 12; R. 499, ll. 3 – 20; R. 500, ll. 12 – 18. This was again discussed during the state’s closing argument. R. 543, ll. 7 – 22; R. 552, l. 24 – R. 599, l. 8. In fact, the state claimed without evidence that was the reason Appellant allegedly elected to evade Goldstein. Id.

Discussion

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.

Rule 403, SCRE.

“Probative” means “[t]ending to prove or disprove.” Black's Law Dictionary 1323 (9th ed.2009). “Probative value” is the measure of the importance of that tendency to the outcome of a case. It is the weight that a piece of relevant evidence will carry in helping the trier of fact decide the issues. “[T]he more essential the evidence, the greater its probative value.” United States v. Stout, 509 F.3d 796, 804 (6th Cir.2007) (internal quotation marks omitted). Thus, a court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates. The evaluation of probative value cannot be made in the abstract, but should be made in the practical context of the issues at stake in the trial of each case. See State v. Lyles, 379 S.C. 328, 338, 665 S.E.2d 201, 206 (Ct.App.2008) (“When [balancing the danger of unfair prejudice] against the probative value, the determination must be

based on the entire record and will turn on the facts of each case.” (citing State v. Gillian, 373 S.C. 601, 609, 646 S.E.2d 872, 876 (2007))).

The probative value of the evidence must be balanced against “the danger of unfair prejudice.” Prejudice that is “unfair” is distinguished from the legitimate impact all evidence has on the outcome of a case. “ ‘Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis.’ ” State v. Gilchrist, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct.App.1998) (quoting United States v. Bonds, 12 F.3d 540, 567 (6th Cir.1993)).

“ ‘All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be [scrutinized under Rule 403].’ ” *Id.* (quoting United States v. Rodriguez–Estrada, 877 F.2d 153, 156 (1st Cir.1989)); see also United States v. Mohr, 318 F.3d 613, 619–20 (4th Cir.2003) (“Rule 403 only requires suppression of evidence that results in unfair prejudice—prejudice that damages an opponent for reasons other than its probative value, for instance, an appeal to emotion....”).

There are only a limited number of reasons why an individual would not be allowed to possession a firearm, prior convictions being the chief rationale. In South Carolina, it is unlawful for the following categories of people to possess a handgun:

- (1) a person who has been convicted of a crime of violence in any court of the United States, the several states, commonwealths, territories, possessions, or the District of Columbia or who is a fugitive from justice or a habitual drunkard or a drug addict or who has been adjudicated mentally incompetent;
- (2) a person who is a member of a subversive organization;
- (3) a person under the age of eighteen, but this shall not apply to the issue of handguns to members of the Armed Forces of the United States, active or reserve, National Guard, State Militia, or R. O. T. C., when on duty or training or the

temporary loan of handguns for instructions under the immediate supervision of a parent or adult instructor; or

(4) a person who by order of a circuit judge or county court judge of this State has been adjudged unfit to carry or possess a firearm, such adjudication to be made upon application by any police officer, or by any prosecuting officer of this State, or sua sponte, by the court, but a person who is the subject of such an application is entitled to reasonable notice and a proper hearing prior to any such adjudication.

S.C. Code Ann. § 16-23-30. Furthermore, a person who has been adjudicated as a mental defective or who has been committed to a mental institution to possess a firearm. S.C. Code Ann. § 23-31-1040; S.C. Code Ann. § 44-23-1080. Additionally, South Carolina recently adopted a statute which prevents a person who has been convicted of domestic violence from possession a firearm. S.C. Code Ann. § 16-25-30.

Other reasons why an individual could not legally possess a firearm include if that person is a fugitive, a drug addict, an individual who renounced his U.S. citizenship, the subject of a restraining order, or someone who was dishonorably discharged from the military. All of these categories carry with them a negative aura. While all of those possible reasons may not have been known to the jury, any of them could have caused the jury to reach a verdict in an improper fashion. The fact that Appellant was not allowed to possess a weapon should have been excluded; allowing that evidence to come in before the jury likely caused them to conclude that Appellant was a felon. Withholding the exact reason as to prevent that fact from coming out was illusory; there are no good reasons why an individual would not be allowed to possess a firearm.

Additionally, the evidence was not related to the charged crime. Attempted murder is defined in South Carolina as follows:

A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence

imposed pursuant to this section may not be suspended nor may probation be granted.

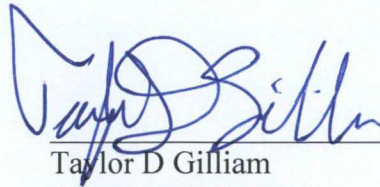
S.C. Code Ann. § 16-3-29. The reason for admitting this irrelevant information was to paint Appellant as a person who could not possession a gun for prior nefarious conduct, a fact that was not relevant to determining whether he intended to kill.

The trial court abused its discretion in failing to exclude the evidence. Any probative value was substantially outweighed by unfair and undue prejudice. The state was unaware whether Appellant knew it had been stolen. The evidence tended to paint Appellant as a previously dangerous or non-law-abiding individual who had probably engaged in illegal conduct such that he lost his right to carry a firearm. Exclusion of this evidence which had little, if any, evidentiary value, was proper. The emotional bias created against Appellant by the mentioning of this matter prejudiced his right to a fair trial.

CONCLUSION

Based upon the foregoing, Appellant respectfully requests that his conviction be reversed and his case remanded for a new trial.

December 19, 2019.



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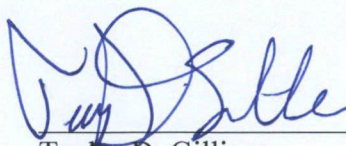
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

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