

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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May 18 2020

SC Court of Appeals

Appeal from Colleton County
The Honorable Steven H. John, Circuit Court Judge

Appellate Case No. 2019-001052

THE STATE,

Respondent,

v.

KELVIN GANTT,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial judge abused his discretion by allowing the State to impeach Appellant with evidence of his 2017 conviction for possession of cocaine when the trial judge properly weighed the State v. Colf factors and determined the probative value of the prior conviction outweighed its prejudicial effect to Appellant? And if the trial judge erred in allowing evidence of Appellant's prior conviction, whether any error was harmless in light of the evidence against Appellant?

STATEMENT OF THE CASE

In October 2017, the Colleton County Grand Jury indicted Appellant for one count of attempted murder and one count of possession of a weapon during the commission of a violent crime. On June 17-19, 2019, a jury trial was held in the Colleton County Court of General Sessions with the Honorable Steven H. John presiding. Appellant was represented by Helen Dovell, Esquire. The State was represented by Assistant Solicitors Ceth Utsey and Katherine Orville of the Fourteenth Circuit Solicitor's Office. At the conclusion of trial, the jury convicted Appellant of both counts. The trial judge sentenced Appellant to a term of twenty years' imprisonment for attempted murder and a term of five years' imprisonment for possession of a weapon during the commission of a violent crime. The sentences were run concurrently with each other. Appellant filed a timely notice of appeal and an initial brief.

STATEMENT OF FACTS

On June 24, 2017, Herbert Brown went to the community store in the town of Ruffin that was owned by his long-time girlfriend, Karen Holmes. (R. 106). At approximately 9:30 PM, Holmes and Brown were inside the store when they heard nine to ten gun shots coming from outside. (R. 24, 108). Holmes called the police. (R. 24). Law enforcement arrived at the store and began to search for shell casings. (R. 61). Several shell casings were located nearby the store. (R. 43-44). After locating the shell casings, law enforcement attempted to speak with a large group of people who had gathered at a nearby residence. (R. 45). Appellant was among the individuals gathered at the residence. (R. 60). Law enforcement left the residence when no one would cooperate with the investigation. (R. 61). About twenty minutes after the police left the area, Appellant and a man named Mo came to the store and began to argue with Holmes and Brown for calling the police. (R. 25-28, 110-12). Brown testified that he knew Appellant for about twenty years while Holmes had known Appellant since he was a child. (R. 23, 111). According to Holmes, Mo eventually left the store, but Appellant remained and continued to argue with Brown. (R. 27-28). Appellant eventually left the store after Holmes asked him to go home. (R. 28).

Brown and Holmes remained inside the store for approximately ten minutes after Appellant left. (R. 112). Brown eventually went back outside and saw Appellant approaching him. Brown testified that Appellant got close enough to him that the two men were able to “look at each other dead in the eyes.” (R. 115, lines 10-11). Appellant then shot Brown. (R. 115-16). Brown suffered gunshot wounds to his stomach and his buttocks. (R. 135). After hearing a gunshot, Holmes exited the store and saw Appellant walking away from the scene. (R. 31-32). Holmes called 911. (R. 32). Lieutenant Jerry Polk was the first police officer to arrive. (R. 46).

At trial, Polk's body camera was played for the jury. (R. 92). Polk spoke to Brown as soon as he arrived. Brown told Polk that he was shot by Appellant. (State's Exhibit #6). Brown was transported in an ambulance to the Colleton County hospital and then transported by helicopter to the Trident Medical Center in North Charleston. (R. 118-19). Once he arrived at Trident, Brown underwent emergency surgery. (R. 135-37). Brown was discharged from Trident approximately two weeks later. (R. 137).

Appellant testified in his own defense at trial. According to Appellant, he was at Ruben Boatwright's house on the night of the shooting. (R. 168). Appellant estimated that Boatwright's house was approximately a quarter of a mile from Holmes' store. (R. 168). Appellant claimed he was at Boatwright's house from 5:00 PM until 11:30 PM. (R. 169, 172). Appellant denied shooting Brown and denied ever going to Holmes' store the night of the shooting. (R. 167, 176, 180). However, Appellant admitted that he knew Holmes for approximately twenty years and knew Brown for five years. (R. 175). At the conclusion of trial, Appellant was convicted of both counts.

STANDARD OF REVIEW

“The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court’s] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law.” State v. Dunlap, 346 S.C. 312, 324 550 S.E.2d 889, 896 (Ct. App. 2001). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” State v. McDonald, 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000).

ARGUMENT

I.

The trial judge did not abuse his discretion by allowing the State to impeach Appellant with evidence of his 2017 conviction for possession of cocaine when the trial judge properly weighed the State v. Colf factors and determined the probative value of the prior conviction outweighed its prejudicial effect to Appellant. Even if the trial judge erred in allowing evidence of Appellant’s prior conviction, any error was harmless in light of the evidence against Appellant.

Appellant argues the trial judge abused his discretion by not properly evaluating the State v. Colf¹ factors when he ruled the State was allowed to impeach Appellant with evidence of his 2017 conviction for possession of cocaine. Specifically, Appellant argues that, while the trial judge correctly identified the Colf factors when making his ruling, he only articulated his findings in regard to the factor of credibility. On the contrary, the trial judge correctly articulated each of the Colf factors in making his ruling and articulated the balancing test he performed to determine the probative value of admitting the evidence outweighed its prejudicial effect to Appellant. While the trial judge did not make a specific ruling on each of the Colf factors, his identification of each factor in making his ruling indicates that he correctly weighed the appropriate factors. Therefore, the trial judge did not abuse his discretion in allowing the State to ask Appellant about his prior possession of cocaine conviction². However, even if the trial judge abused his discretion in admitting Appellant’s prior conviction, any error was entirely harmless in light of the evidence against Appellant.

Rule 609(a)(1) of the South Carolina Rules of Evidence provides that when a party attacks the credibility of the accused, the evidence shall be admitted “if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.”

¹ State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000)

² The State did not ask Appellant about his conviction on cross examination because Appellant admitted he had a prior conviction on direct examination. (R. 174, 175-81).

Rule 609(a)(1) SCRE. Rule 609(b) states that evidence of a conviction under this rule is not admissible if a period of more than ten years has passed from the date of the conviction or the witnesses' release from confinement as a result of that conviction. Rule 609(b) SCRE.

The South Carolina Supreme Court enumerated five factors that our state's trial judges must consider in determining the admissibility of a witness's prior conviction. The five factors are: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's 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. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). "These factors are not exclusive; trial courts should exercise their discretion in light of the facts and circumstances of each particular case." Id. More recently in State v. Robinson, our Supreme Court sought to clarify the procedure to be used when a trial court determines the admissibility of a witness's prior conviction. In regard to the procedure to be used when the witness is the accused, the Supreme Court wrote "the trial court must balance the Colf factors and determine whether the probative value of the conviction outweighs its prejudicial effect to the accused." State v. Robinson, 426 S.C. 579, 595, 828 S.E.2d 203, 211 (2019). Also in Robinson, the Supreme Court highlighted a very deferential standard of review for appellate courts:

In any given case involving the same indicted charges, two different trial courts could examine the same prior conviction(s), evaluate the same five Colf factors, and perhaps reach opposite conclusions as to the admissibility of the prior convictions. In such an instance, it is conceivable that under our standard of review, both trial courts would be affirmed.

Robinson, 426 S.C. at 607, 828 S.E.2d at 217.

Here, after Appellant was advised of his right to testify by the trial judge, the State informed Appellant and the trial judge of their intent to impeach Appellant with evidence of a

2017 possession of cocaine conviction. (R. 155). Appellant objected. The trial judge made the following ruling:

The Court: All right. First, under 609, I do find that this is evidence, that the accused has been convicted of a crime that is proper under 609. Now as to the – and it fits the time limit; it fits the requirements regarding the statutory penalty. Now as to whether or not under 403 that it would be inadmissible, an analysis on whether or not the probative value would outweigh its prejudicial effect. The jury is called upon to examine the evidence. And in looking at 609, I have to look at the impeachment value of this prior crime, the point in time of the conviction, and where we are in regards to this case, if there is any similarity that might call for a cautionary instruction from the Court, if it was some other kind of possession of a weapon during the commission of a violent crime or something like that. The importance of the testimony, as you indicated, credibility and believability and, you know, whether or not the credibility is important to this particular case. I do find in this particular case that it is an important factor for the jury’s determination regarding this particular matter. I find it to be proper, and I will allow the State to ask if he has been convicted of this crime in the past.

(R. 156, line 13 – R. 157, line 11).

In the preceding ruling, the trial judge properly balanced the Colf factors and evaluated the probative value of the conviction versus its prejudicial effect on Appellant. The trial judge correctly identified the first Colf factor, the impeachment value of the crime, and evaluated it in his ruling. Appellant argues that his prior possession of cocaine had very little impeachment value because violations of narcotics laws are generally not probative of truthfulness. (Initial Brief of Appellant 7). In making his argument, Appellant quotes from our Supreme Court’s opinion in State v. Bryant³ which analyzed the admissibility of a prior conviction under Rule 609(a)(2). However, recently in Robinson, our Supreme Court distinguished between the appropriate analysis for a trial judge to conduct under Rule 609(a)(1) as opposed to Rule 609(a)(2). The Court noted “although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic

³ State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006).

admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1).” Robinson, 426 S.C. at 599, 828 S.E.2d at 213. The Supreme Court upheld the trial judge’s decision to allow evidence of Robinson’s prior convictions and noted “It was within the trial judge’s discretion to conclude that because Robinson has convictions for such offenses, he legitimately might not be considered credible.” Robinson, 426 S.C. at 599-600, 828 S.E.2d at 213. Here, similar to Robinson, the trial judge acted within his discretion to allow evidence of a prior drug possession offense under Rule 609(a)(1) SCRE because the prior conviction had impeachment value.

The trial judge also recognized and weighed the second Colf factor: the point in time of the conviction. Here, Appellant’s conviction occurred just three months prior to the date of offense for which Appellant was on trial and only two years prior to trial. (R. 155). Therefore, the second Colf factor weighs in favor of the trial judge’s decision to allow evidence of Appellant’s prior conviction. The third Colf factor, the similarity between the past crime and the charged crime, also weighs in favor of allowing evidence of the conviction. While attempted murder and possession of a weapon during the commission of a violent crime are not similar to possession of cocaine, their lack of similarity weighs in favor of admitting evidence of the prior crime because there is little chance of any prejudice to Appellant. As the Supreme Court noted in Bryant, “[W]hen the prior offense is similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission.” Bryant, 369 S.C. at 517-18, 633 S.E.2d at 156. Because the offenses that Appellant stood trial for were not similar to his prior conviction, Appellant was unlikely to suffer any unfair prejudice. Therefore, the trial judge properly weighed this factor in his ruling and did

not abuse his discretion in allowing evidence of Appellant's 2017 possession of cocaine conviction.

The fourth Colf factor, the importance of the defendant's testimony, was properly weighed and considered by the trial judge. Appellant's testimony was important to his defense because Appellant offered an alibi defense. As Appellant acknowledges in his brief, the crux of his defense was that he could not have shot Brown because he was at Ruben Boatwright's house at the time of the shooting. (Initial Brief of Appellant 8). Appellant made this assertion during his own testimony and also called Jahleel Dubois as a witness to help establish this alibi. (R. 169, 202-10). Therefore, Appellant's testimony was important, although not essential, to establishing his alibi. However, this factor does not weigh in favor of excluding Appellant's prior conviction. Appellant argues "the trial judge appears to have skipped the fourth factor and went straight to the fifth factor, the centrality of the credibility issue." (Initial Brief of Appellant 8). On the contrary, the trial judge did not skip the fourth factor but recognized that Appellant's credibility was a central issue because of the importance of his testimony. Indeed, as the Supreme Court noted in Robinson, "when credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate." Robinson 426 S.C. at 606, 828 S.E.2d at 217. Appellant acknowledges in his brief that credibility was a central issue in this case and that the fifth Colf factor weighs in favor of admission. (Initial Brief of Appellant 8).

In addition to properly weighing the Colf factors, the trial judge then conducted an analysis of the probative value of Appellant's prior conviction versus the danger of unfair prejudice. While the trial judge did not describe his analysis on the record, he acknowledged the appropriate analysis that he conducted in making his ruling (R. 156). Because Appellant's prior conviction was dissimilar to the offense for which he stood trial, the trial judge did not abuse his

discretion by finding the probative value of the conviction outweighed the prejudicial effect to the accused.

Harmless Error

Even if the trial judge erred in allowing evidence of Appellant's prior conviction, any error was harmless in light of the evidence presented against Appellant. Appellant's admission on direct examination that he had a possession of cocaine conviction could not have possibly influenced the jury's verdict. (R. 174). The jury ultimately determined Appellant's guilt based on the identification of Appellant by the lone eyewitness to the crime, Herbert Brown. (R. 115-16). The jury witnessed Brown identify Appellant as his shooter in court and heard Brown identify Appellant as the shooter in the immediate aftermath of being shot on Lieutenant Polk's body camera. (R. 117, State's Exhibit #6). Furthermore, Holmes testified that she saw Appellant walking away from her store immediately after Brown was shot. (R. 31-32). The jury was either going to believe Brown and Holmes accounts of the shooting or they were going to believe Appellant's alibi. The jury believed Brown and Holmes. Appellant's admission that he had previously been convicted of an unrelated crime had no effect on the jury's decision. Appellant's convictions and sentences should be affirmed.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent 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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