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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dorchester County

Honorable Maite Murphy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES WINSTON ALMOND,

APPELLANT.

APPELLATE CASE NO. 2020-001397

INITIAL BRIEF OF APPELLANT

JESSICA M. SAXON
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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STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting Appellant's prior convictions for armed robbery and possession of methamphetamine pursuant to Rule 609, SCRE, where the court admitted the convictions without conducting the required, meaningful, on the record analysis of the five factors set forth in State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000)?

STATEMENT OF THE CASE

During the July 2020 term of the Dorchester County grand jury Appellant was indicted for one count of burglary first degree. R. (indictments). A pretrial hearing[1] was held on September 28, 2020, during which the court addressed Appellant's motion to relieve his counsel. The State, represented by Don Sorenson and Mike Spears called the case to trial before the Honorable Maite Murphy and a jury on September 29, 2020. R. 1. Appellant was represented by Ash Chisholm and John Loy. R. 1.

After a two-day trial the jury found Appellant guilty as charged. R. 245. The Court sentenced Appellant to life imprisonment without the possibility of parole pursuant to S.C. Code. Ann. § 17-25-45. R. 250.

This appeal follows.

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1 The pretrial hearing did not concern the admission of Appellant's prior convictions and therefore is not included in the record on appeal.

STANDARD OF REVIEW

In criminal cases, appellate courts sit to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "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. Douglas, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

ARGUMENT

The trial court erred in admitting Appellant's prior convictions for armed robbery and possession of methamphetamine pursuant to Rule 609, SCRE, where the court admitted the convictions without conducting the required, meaningful, on the record analysis of the five factors set forth in *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

Relevant Facts

In the early morning hours of May 25, 2019, Dwight Maxwell was returning home after a night out when he received a call from his ex-girlfriend, Amber Brooke Crissman. Crissman asked Maxwell to meet her and a friend, Nikki Lewis, at Wal-Mart. Maxwell agreed and spent approximately two hours at Wal-Mart with Crissman and Lewis before proceeding home. When Maxwell arrived home, he discovered that the glass door to his enclosed porch and the glass door into his kitchen had been shattered. Maxwell called law enforcement to report the burglary. According to Maxwell his television, PlayStation, Blu-Ray player, electronics, laptop, iPad, and a carton of cigarettes had been stolen. R. 63-65.

Maxwell had Amazon Blink[2] surveillance cameras around his residence, with one by the back door. When Maxwell reviewed the various clips that the cameras had captured, he saw a man throw a rusted paint can through the glass door of the back porch. Maxwell identified the man in the video as Appellant. R. 68, ll. 13-23; R. 71, ll. 1-11. At the time of the incident Appellant was dating Maxwell's ex-girlfriend, Crissman. Appellant and Maxwell had two prior altercations where Maxwell threatened to break Appellant's jaw and kill him. R. 81, ll. 8-21; R.

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2 Amazon Blink cameras do not provide continuous recording or long clip recording. When motion activates the Blink camera, it takes a five second video recording. At the end of that five seconds the camera stops recording. It takes roughly thirty seconds for the camera to reset before it can be reactivated by motion to capture another five second recording. R. 70, ll. 8-17.

164, ll. 2-12. A second individual was also seen on camera and later identified as Danny Ford, Appellant's first cousin and co-defendant. R. 75, ll. 2-5; R. 113, ll. 12-24.

Both Ford and Appellant testified during Appellant's trial, providing differing accounts of the events that transpired on May 25, 2019. Ford testified he and his girlfriend Lewis, were with Appellant and Crissman over the Memorial Day weekend. Ford had been told that some of Crissman's belongings where still at her ex-boyfriend's home and they were going to go pick the items up. He believed they dropped Crissman and Lewis off at the Wal-Mart before going to Maxwell's house because Crissman was uncomfortable being around Maxwell. R. 128, ll. 21-23. He stated Appellant had him park his vehicle on the side of the house and wait, while Appellant made multiple trips to and from the home. R. 119, ll. 2-8.

Ford testified Appellant eventually for help retrieving the items from home to "speed the process of getting out of there faster." R. 119, l. 23-R.120, l. 2. Ford went onto the back porch and saw the glass door was broken. He claimed Appellant "was carrying out some firearms," and it was then he "realized this is probably not Brooke's [Crissman] stuff, and I kind of freaked out and told him I was leaving and proceeded back to the vehicle." R. 120, ll. 4-9. Ford went back to his vehicle but instead of leaving waited for Appellant to finish collecting items from the home. They pair then left, went to Wal-Mart to pick up Crissman and Lewis, and then went to Ford's house where the vehicle was unloaded. Ford stated they unloaded a television, a DVD player, a "surround sound thing," and four shotguns. After unloading the vehicle, Ford told Appellant to find a ride, take the stuff and leave. Ford claimed that an iPad was accidentally left at his house. He admitted he did not call the police to report the incident. R. 120, l. 15-R. 121, l. 22; R. 133, ll. 1-5.

Appellant testified that the relationship between Maxwell and Crissman had not ended well. Maxwell had some of Crissman's property that he had not returned, and the items had become a point of conflict. 165, l. 8-166, l. 6. Crissman had previously gone to Maxwell's to get her property back. However, Maxwell, instead of returning her property, would "lure her [Crissman] into the house and kind of hold her there." R. 167, ll. 15-20. On the day of the incident Crissman and Maxwell had been arguing about her property again when Appellant overheard Maxwell state that Crissman's property was on his back porch. R. 167, ll. 9-14; R. 170, ll. 17-22. Wanting to put an end to the quarreling, the group decided to get Maxwell away from his home so that Appellant could retrieve Crissman's property from the back porch without incident. R. 170, ll. 2-5; 175, ll. 20-23.

When Appellant and Ford arrived at Maxwell's home, Appellant discovered that the back porch was enclosed, and the glass door was locked. R. 176, l. 18-24. Appellant admitted to taking the paint can and breaking the porch glass door, but adamantly denied breaking the internal door that lead into the kitchen. R. 171, ll. 18-24. Appellant stated he took the items from the porch that he believed belonged to Crissman, including clothing, makeup, mail, a children's video game system, photographs, personal mementos, and a television. Appellant did not take any other items from the home and never went into main house. Appellant was clear that he only entered onto the enclosed porch to get Crissman's property. R. 168, ll. 14-23; R. 177, ll. 1-6. Appellant contended he never asked Ford to help him carry anything. He confirmed Ford went into home without him at some point during the evening. R. 186, ll. 5-23.

Prior to Appellant testifying, Counsel Chisholm requested that the court determine which of Appellant's prior convictions would be admissible for impeachment purposes. R. 154, ll. 22-25. The State sought to introduce an armed robbery conviction from 2007, two 2018 shoplifting

convictions, and two possession of methamphetamine convictions from 2018 and 2019, respectively. R. 155, ll. 4-11. Counsel Chisholm objected to the introduction of the armed robbery and possession of methamphetamine charges, citing to State v. Robinson[3] and State v. Colf[4]. R. 155, ll. 13-21; R. 157, ll. 5-11.

Counsel Chisholm argued that the first four factors from Colf weighed in Appellant's favor, such that the prior convictions should not be admitted. Specifically, he contended that the armed robbery conviction had no impeachment value because armed robbery was not a crime of truthfulness, the prior conviction was remote in time, the prior conviction was similar to the burglary first charge Appellant was facing, and Appellant's testimony was not cumulative but critical to the case. Counsel Chisholm conceded that the final Colf factor, that credibility was central to the case, weighed in favor of admitting the prior conviction R. 159, l.7-R. 160, l. 19.

The State argued in broad terms that the prior conviction had impeachment value, were "obviously" within the last ten years, and were not similar to the charged crime. In addition, the State argued that credibility was central to the case stating, "[T]hey were able to impeach a State's -- his co-defendant on his prior record. And I think it would be disingenuous for him to take the stand and have it come across that he does not have a prior record also. So, I do think it is important in that regard." R. 157, l. 18-158, l. 12.

The trial court found the convictions admissible pursuant to Rule 609, SCRE. In analyzing the Colf factors, as well as the probative value versus the potential prejudice to Appellant, the trial court stated,

> All right, sir. As far as the armed robbery and the possession -- the two counts of possession of meth, considering the circumstances regarding Rule 609, certainly it

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3 426 S.C 579, 828 S.E.2d 203 (2019)

4 337 S.C 622, 525 S.E.2d 246 (2000)

is that you fall within the parameters of what is considered within 609 to attack the credibility of the Defendant. And, certainly, I do find that the probative value does outweigh the prejudicial effect of these crimes against the Defendant. They're different in nature than from what the Defendant is charged it, [sic] so certainly no issue as far as prejudice is concerned on that. So, it's not like a like crime that they would consider that an acting conformity thereof. The point in time in the conviction certainly are -- Solicitor, you said those were in '19? ...

...So that would fall within the adequate period of time for it to be admissible within 609. The importance of the Defendant's testimony certainly is a central issue in this case. Obviously, there's direct and circumstantial evidence from the State with some important testimony. He can certainly testify maybe it wasn't him in the video. I'm not certain what his testimony is going to be, or whether, you know, he had a reason to be there, and so the credibility is certainly a central issue in the case. And I find that the probative value does outweigh the prejudicial effect on the Defendant, and I believe that it will be admissible....

...And I agree as far as the credibility issue. The jury must choose between the Defendant's credibility and another witness, certainly credibility is a central issue for the Court to consider. And I think I touched on the other factors that were in the case as far as impeachment value of prior crimes, again goes to credibility. The point in time, I think, certainly falls within the parameters of 609 and would be admissible under that. The similarity, I don't think there's a prejudicial effect because they're not similar in nature. They're different types of crimes. And, again, the centrality of the credibility issue before the jury I think is paramount and that would cause the convictions to have probative value that outweighs the prejudicial effect....

...And just to address the armed robbery, as far as the similarity because of being armed with a deadly weapon, I think that's clearly distinguishable in this case because it's not alleged that he entered the home with a deadly weapon, but became armed with a deadly weapon due to having taken firearms from the home or immediately therefrom. So, I think that those facts are distinguishable from an armed robbery, and that would be a factor for me to consider as well.

R. 155, l. 22- R. 156, l. 11; R. 156, l. 17-R. 157, l. 4; R. 158, l. 13-R. 159, l. 3; R. 160, l. 20-R. 161, l. 4.

Both the State and the defense repeatedly addressed the credibility of the witnesses during their respective closing arguments. R. 193-228. Additionally, the trial court instructed the jury that it could only consider Appellant's prior convictions as they related to

his credibility and the prior convictions could not be considered evidence of guilt. R. 245, ll. 5-13.

Discussion

Pursuant to Rule 609(a)(1), SCRE, a defendant's prior conviction can be admitted to impeach his or her credibility if the prior conviction is for a crime that was punishable by death or imprisonment in excess of one year, *and* the court determines that the probative value of admitting the prior conviction outweighs its prejudicial effect to the accused. Pursuant to Rule 609(a)(2), SCRE, prior convictions for crimes involving dishonesty or false statements are admissible, regardless of the punishment and regardless of the probative value or prejudicial effect.

Rule 609(b), SCRE, places a ten-year time limit on the use of prior convictions. Remote in time convictions may only be introduced when the court determines the probative value of the conviction *substantially* outweighs its prejudicial effect to the accused. The burden is on the State to convince the trial court the prior convictions should be admitted. State v. Robinson, 426 S.C. 579, 587, 828 S.E.2d 203, 208 (2019).

In State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000), the South Carolina Supreme Court adopted the five factors the federal courts applied when determining whether the probative value of a prior conviction outweighs its prejudicial effect. Along with the requirements of Rule 609, SCRE, a trial court must consider:

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.

Colf at 627, 525 S.E.2d 248. The court is required to conduct a *meaningful*, on the record analysis of these five factors. Robinson at 587, 828 S.E.2d at 207; See Also State v. Scriven, 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct. App. 2000)(providing a trial court *must* conduct "a meaningful analysis to balance the impeachment value of [a defendant's] prior convictions, if any, against the prejudicial impact, as clearly required under Rule 609(a)(1)") (emphasis added).

In Robinson, *supra*, the South Carolina Supreme Court outlined four impeachment scenarios under Rule 609(a), SCRE. Relevant to Appellant's case, the Court stated that "under Rule 609(a)(1), if the witness is the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court *must* balance the Colf factors and determine whether the probative value of the conviction outweighs its prejudicial effect to the accused." Robinson at 595, 828 S.E.2d at 211 (emphasis added). The Court also held that the burden of establishing admissibility is upon the State as the proponent of the evidence. Id. Importantly, the Court has held that "a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, *is not probative of truthfulness*." State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155-56 (2006) (emphasis added).

Appellant's prior convictions for armed robbery and possession of methamphetamine were not automatically admissible under Rule 609(a)(2). Therefore, both the State and the trial court had separate burdens and responsibilities that had to be met prior to the admission of Appellant's prior convictions. The State had the burden of establishing the probative value of the prior conviction pursuant to Rule 609(a)(1). Instead of meeting its burden, the State merely informed the trial court that the prior convictions it sought to admit were within the ten-year time frame and carried a penalty of one year or more.

While the State provided the technical information required pursuant to Rule 609, SCRE, the only argument offered in support of the alleged probative value of admitting the prior convictions was that "they [the defense] were able to impeach a State's – his co-defendant on his prior record. And I think it would be disingenuous for him to take the stand and have it come across that he does not have a prior record also." Essentially, the State argued that because the defense impeached a State's witness with prior convictions, the State was entitled to impeach Appellant with his prior convictions. R. 158, ll. 3-6.

Notably, the State was automatically able to introduce Appellant's prior convictions for shoplifting pursuant to Rule 609(a)(2). Thus, there was no potential that the jury would think Appellant did not have a prior record. Notwithstanding the "tit for tat" argument, the State failed to prove how the armed robbery and narcotics convictions were more probative than prejudicial. The failure of the State to articulate any valid reason the convictions were probative of Appellant's credibility should have precluded the trial court from admitting the convictions.

Additionally, the armed robbery conviction was from 2007. The State did not offer any proof that the armed robbery conviction was within the time limit set out in Rule 609(b), SCRE. Solicitor Sorenson simply speculated that with the sentence Appellant received he "would have just gotten off of any kind of supervision within the last, you know, five years or so of that." R. 156, ll. 12-16. When the State seeks to admit a remote in time conviction it is required to prove to the trial court that the probative value of admitting the remote conviction *substantially* outweighs the prejudicial effect to the accused. Even if the State can establish that the conviction was within the time limit of Rule 609(b), SCRE, it still has the burden of showing that the admission of the conviction has some probative value. In Appellant's case the State failed to meet its burden.

Assuming the State did meet its burden, the duty then fell to the trial court to meaningfully weigh the Colf factors[5], on the record, to determine whether the probative value of the convictions outweighed their prejudicial effect to Appellant. Unfortunately, in Appellant's case the trial court only conducted a cursory review of the Colf factors before issuing a conclusory ruling.

The record reflects that the trial court conducted no analysis regarding three of the five contested Colf factors. As to the first factor, the impeachment value of the prior crime, the trial court ruled "As far as impeachment value of prior crimes, again goes to credibility." R. 158, ll. 18-19. No analysis of the actual impeachment value, which has been defined by our Supreme Court as "how strongly the nature of the conviction bears on the veracity, or credibility of the witness," was performed. State v. Black, 400 S.C. 10, 21-22, 732 S.E.2d 880, 887 (2012). IN Black, the Court held,

> The manslaughter convictions, while crimes of violence, are not particularly probative of the specific trait of truthfulness; consequently, *their impeachment value is limited. ... In this case, the trial court did not relate any specific facts or circumstances, other than the mere existence of the convictions, that made them particularly probative of [the witness's] credibility.*

Black at 23-24, 732 S.E.2d at 887-88 (emphasis added). While Black dealt with the impeachment of a witness other than the accused, the rational is applicable to Appellant's case. The lack of analysis by the trial court indicates that the mere existence of the prior convictions alone made them probative of Appellant's credibility.

Regarding the second Colf factor, the trial court improperly relieved the State of the its burden of proof. While the narcotics charges were well within the ten-year time limit, there was a legitimate question as to the point in time of the 2007-armed robbery conviction. The trial

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5 The parties agreed that the fifth Colf factor regarding the centrality of credibility to the case was not in dispute. R. 160, ll. 16-19.

court engaged in no analysis, and required nothing from the State in the form of proof that the armed robbery conviction was within the time frame. Moreover, the court did not discuss the "subsequent history" portion of the second Colf factor in any manner. Once again, the court only issued a "broad strokes" ruling finding the prior convictions "would fall within the adequate period of time for it to be admissible within 609." R. 156, ll. 17-19.

On the fourth Colf factor the trial court found "[t]he importance of the Defendant's testimony certainly is a central issue in this case." R. 156, ll. 19-20. Interestingly, the trial court found Appellant's testimony was important even though the trial court had no idea what Appellant's testimony would be. R. 156, ll. 24-25. Again, no explanation was provided as to why the testimony was important and how the importance of Appellant's testimony would militate for or against admission of the prior convictions.

The only Colf factor the trial court expanded upon was factor three, the similarity factor. The trial court found that the armed robbery conviction was not similar to the burglary first charge because Appellant was not alleged to have been armed when he broke into Maxwell's home but only became armed as a result of taking firearms. The trial court noted that the crimes were "different in nature than from what the Defendant is charged [with], so certainly no issue as far as prejudice is concerned on that." R. 156, ll. 6-8. However, as Counsel Chisholm pointed out, unlike the defendant's in Robinson and the cases referenced in Robinson, Appellant was alleged to have been armed with a similar weapon in both the prior robbery conviction and in the burglary trial. The court wholly failed to consider this argument in issuing its limited ruling.

The trial court stated multiple times in its ruling that the prior convictions were more probative than prejudicial. Unfortunately, outside of the brief reference to the Colf factors, the trial court did not offer a basis for its findings. South Carolina jurisprudence clearly requires a

trial court to perform a thorough, on the record, analysis of the Colf factors and Rule 609. The failure of the trial court to conduct the requisite analysis was an error of law. Admittedly, the trial court referenced each of the five Colf factors in its ruling. However, the trial court did not articulate any specific facts or circumstances that supported the admission of the prior convictions as probative of Appellant's truthfulness.

CONCLUSION

Based on the foregoing, Appellant respectfully request this Court remand his case to the Dorchester County Court of General Sessions for a hearing to determine the admissibility of his prior convictions pursuant to Rule 609, SCRE, and State v. Colf.

Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

This 3rd day of August, 2021.

RECEIVED
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STATE OF SOUTH CAROLINA

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THE STATE,

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V.

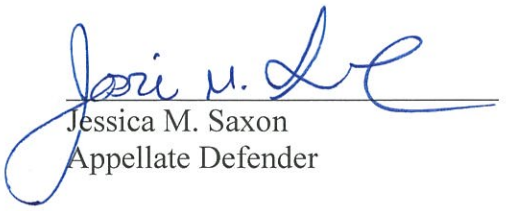
JAMES WINSTON ALMOND,

APPELLANT.

APPELLATE CASE NO. 2020-001397

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 have been served upon William M. Blitch, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and on James Winston Almond, #323232, at Lieber Correctional Institution, PO Box 205, Ridgeville, SC 29472, this 3rd day of August, 2021.



Jessica M. Saxon
Appellate Defender

ATTORNEY FOR APPELLANT

SCCID
SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Post Office Box 11589
Columbia, South Carolina 29211-1589
Telephone: (803) 734-1330
Facsimile: (803) 734-1345

Robert M. Dudek, Chief Appellate Defender
Wanda H. Carter, Deputy Chief Appellate Defender

August 03, 2021

William M. Blitch, Jr., Esquire
Senior Assistant Deputy Attorney General
Rembert Dennis Building
1000 Assembly Street, Room 519
Columbia, SC 29201

Re: The State v. James Winston Almond

VIA EMAIL ONLY

Dear Mr. Blitch, Jr.:

Enclosed are the Initial Brief of Appellant and Designation of Matter in the above entitled case, which I have filed today with the South Carolina Court of Appeals.

Please call me if you have any questions.

Sincerely,

Jessica M. Saxon
Appellate Defender

JMS/kpw

Enclosure