STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CALVIN CARROLL COCHRAN,

APPELLANT

APPELLATE CASE NO. 2020-001554

INITIAL BRIEF OF APPELLANT

TAYLOR D GILLIAM
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Jurisdictions

Statutes

Other Authorities

Rules

STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred by admitting evidence of Mr. Cochran's prior convictions for failure to register, where the state offered said evidence in reply after an expert witness testified that Mr. Cochran suffered from dementia, where the prior convictions did not fall under Rule 404(b), SCRE because Mr. Cochran's diagnosis of dementia was not being used to show accident or mistake, and where the prejudice of the of the prior convictions grossly outweighed their probative value?

STATEMENT OF THE CASE

Mr. Cochran was indicted on June 15, 2020 by an Oconee County grand jury for failure to register, third offense, under S.C. Code Ann. § 23-3-470(B)(3). Represented by Joseph Holland, Mr. Cochran proceeded to trial before the Honorable R. Lawton McIntosh and a jury on November 16, 2020. Tr. 1. William Stolarski appeared on behalf of the state.

The jury found Mr. Cochran guilty as indicted. Tr. 108, ll. 7 – 12. The trial judge sentenced him to five years, the mandatory term under the statute. Tr. 114, ll. 16 – 23. The sentence was suspended to three years' active time with two years of probation. Id.

This appeal follows.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001).

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477–78, 716 S.E.2d 91, 93 (2011) (citation omitted). To warrant reversal, an error must result in prejudice to the appealing party. State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011).

ARGUMENT

The trial court erred by admitting evidence of Mr. Cochran's prior convictions for failure to register, where the state offered said evidence in reply after an expert witness testified that Mr. Cochran suffered from dementia, where the prior convictions did not fall under Rule 404(b), SCRE because Mr. Cochran's diagnosis of dementia was not being used to show accident or mistake, and where the prejudice of the of the prior convictions grossly outweighed their probative value.

Relevant facts

The state pursued this charge against an elderly, homeless man who suffers from a progressive brain disorder. When evidence was presented of his dementia, the state doubled down on its efforts to convict him. The trial judge erred in admitting prior convictions, because they were not offered to prove the absence of mistake or absence.

Justin Pelfrey, an officer in Oconee County, was the state's first witness. Tr. 36, ll. 11 – 18. He testified that on December 27, 2019, he met with Mr. Cochran. Tr. 36, l. 17 – 37, l. 16. Pelfrey supposedly advised Mr. Cochran that he needed to go see another officer, Kelly Winchester, by the end of the year, four days later, in order to register as an offender. Tr. 37 ll. 17 – 25. Pelfrey claims to have memorialized this conversation on paper. Tr. 38, l. 1 – 39, l. 19; R. __ (State's Exhibit 1).

Following his conversation with Mr. Cochran, Pelfrey dropped him off at a hospital in Oconee County. Id. Mr. Cochran was homeless at that time. Tr. 41, ll. 6 – 7. This was the only time Pelfrey met with Mr. Cochran on this matter. Tr. 40, ll. 19 – 21. Winchester testified that Mr. Cochran did not register in December 2019 as required. Tr. 49, ll. 21 – 23.

Mr. Cochran suffers from dementia. Dr. Richard Frierson, an uncontested expert in forensic psychiatry at trial, testified that he evaluated Mr. Cochran three times.[1] Tr. 59, l. 14 – 59, l. 18. At the third evaluation, the most recent before trial, Dr. Frierson diagnosed Mr. Cochran with "major neurocognitive disorder" or dementia. Tr. 660, l. 24 – 61, l. 5. In no uncertain terms, Dr. Frierson spoke about Mr. Cochran's tenuous mental health:

> He has dementia. His mother had Alzheimer's disease, he has an older brother with dementia. He displays signs and symptoms of memory impairment, other cognitive impairments, and he, on testing that we did, falls into the category of dementia, as well as, you know, the brother said his short-term memory is shot.
>
> The nurse in the detention center says he has memory problems. So these are all consistent with dementia or what we now call major neurocognitive disorder.

Tr. 61, ll. 5 – 13.

Dr. Frierson testified that he first saw Mr. Cochran sometime in 2018. Tr. 61, l. 14 – 64, l. 1. At that time, Mr. Cochran only had mild neurocognitive disorder which included some memory problems but not ones that affected daily living. Id.

By contrast, in December 2019, during the time he was required to register, Mr. Cochran was diagnosed with major neurocognitive disorder, or dementia. Id. Dr. Frierson's testimony illustrated the life of an elderly man who was suffering from a significant impairment:

> However, the next time I saw him, which was in 2019, December 2nd, **it was clear that his memory problems had progressed**. He was given another cognitive test called a MoCA, or Montreal Cognitive Assessment. This is the same test you remember hearing about President Trump taking and making a perfect score.
>
> He, Mr. Cochran, scored at that time in 2019, 16 out of 30. He couldn't - - I actually have it in front of me - - **he couldn't draw a clock accurately, he couldn't copy a Q**. He couldn't remember five words after five minutes. He had trouble with verbal fluency. We ask people to name as many words as you can that start with the letter F in one minute, and he couldn't name 11.

---

1 The dates of the three visits were March 15, 2018, December 2, 2019, and October 8, 2020. Tr. 67, ll. 11 – 15.

> So, you know, it progressed at that point, and we also had some evidence that he had to leave himself notes to try to remember things. He lost his checkbook and couldn't find it. There were other clinical signs of memory impairment.
>
> So in 2019, **the diagnosis has changed from minor neurocognitive disorder, or pre-dementia, to major neurocognitive disorder, or dementia.**

Tr. 62, ll. 1 – 21 (emphasis added).

When Dr. Frierson evaluated Mr. Cochran in October 2020, Mr. Cochran could not recall initially the job he had done for thirteen years—an ophthalmic photographer. Tr. 63, ll. 2 – 20. Dr. Frierson remarked on how this revelation impacted his understanding of dementia in Mr. Cochran's life:

> But that is something that - - not to remember something you did for 13 years initially, he could do that before. So this is - - I think it is a progressive disorder. Dementia gets worse over time. There are many types of dementia, he probably has Alzheimer's given the family genetic history.

Tr. 63, l. 21 – 64, l. 1.

The symptoms of dementia, explained Dr. Frierson, generally revolve around the individual's memory. Tr. 64, ll. 2 – 23.

> Memory becomes - - initially it's impairment of short-term memory. They might not remember what they did yesterday, they might talk to family members and say something they said 10, 15 minutes ago, not realize they've already told the family member that.
>
> Most of us who have family members that do it to them, they say, Grandma is getting forgetful, what have you. But then that progresses over time to they might forget more important things. And then the severe form is it progresses further. People get to the point they don't remember or aren't able to recognize family members.
>
> And I can see an elderly, severely demented person that - - let's say it's your mother or your father and they raised you your whole life, and they mat not at the very end stages recognize who you are. **So it is a progressive disease.**

Tr. 64, ll. 8 – 23 (emphasis added).

Dr. Frierson outright stated that in his expert opinion, Mr. Cochran did not possess "the sufficient capacity to conform his conduct to the requirements of the law." Tr. 65, ll. 11 – 14. Dr. Frierson elaborated on this conclusion:

> Mr. Cochran, in my opinion, lacked the ability to conform his conduct because he can't remember he's supposed to register. Even if you tell him three days before, three days later, that conversation might not have - - might as well not have happened.
>
> So his ability to remember to go register is what is impaired. If you had gone to him right at that time and say, Mr. Cochran, is it wrong not to register, I think he would say yes. But he forgets that he's still supposed to go register.

Tr. 65, ll. 16 – 25.

Dr. Frierson was the defense's only witness. After the defense rested, the state indicated its intent to offer reply testimony. Tr. 69, l. 23 – 70, l. 14. The solicitor suggested that he planned on introducing some of Mr. Cochran's prior convictions:

> I don't want to go down the line of questions on this if it's going to get suppressed. I would be admitting for basically absence of mistake or accident, which is mistake or accident that he failed to register. I would like to submit his prior failure to register convictions.

Tr. 70, ll. 6 – 11.

A discussion occurred in the trial judge's chambers off the record. Tr. 70, l. 20. Following that conversation, the state continued with its proposal to have the prior convictions admitted and the trial judge summarized the chambers discussions. Tr. 70, l. 21 – 73, l. 14. According to the solicitor, a generic case captioned State v. Smith and Rule 404, SCRE, supported the state's position. Id. The two convictions the state sought to introduce were dated September 10, 2018 and December 19, 2019. Tr. 73, ll. 10 – 14. The trial judge remarked that he believed the prior convictions were admissible. Tr. 73, ll. 15 – 20.

Defense counsel argued that under Rules 403 and 404, SCRE, the evidence was inadmissible. Tr. 73, l. 22 – 74 l. 4. In particular, counsel pointed out how dementia was not tantamount to mistake or accident. Id. Rather, the dementia prevented Mr. Cochran from having the requisite intent. Id. The trial judge noted the objection but denied it. Id.

As a result, the Oconee County Clerk of Court, Beverly Whitfield, was used to authenticate and admit sentencing sheets for Mr. Cochran's prior failure to register convictions.[2] Tr. 74, l. 23 – 78, l. 9. Counsel renewed his objection at this time. Id. Winchester was also called to advise the jury of her involvement in one of the trials giving rise to the prior conviction. Tr. 80, ll. 5 – 14.

The state relied on this evidence in its closing argument: "And he's failed to register twice already in a running stream going back to 2018. This is not a person who keeps forgetting, this is a person who just doesn't want to register." Tr. 86, l. 19 – 23. The jury found Mr. Cochran guilty. Tr. 108, ll. 7 – 12. The trial judge sentenced Mr. Cochran to five years, suspended to three years' incarceration and two years of probation. Tr. 114, ll. 16 – 23.

---

2 Whitfield, a witness for the state in this case, took the jurors' lunch order at trial instead of having a different staff member who did not testify handle that task. Tr. 107, ll. 10 – 13.

Discussion

The South Carolina Rules of Evidence were improperly applied in Mr. Cochran's case. Dementia is not tantamount to mistake or accident, and the prior convictions should not have been introduced. Rule 404(b) of the South Carolina Rules of Evidence provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identify, the existence of a common scheme or plan, the absence of mistake or accident, or intent.

Rule 404, SCRE.

> The rule is often stated in terms of "propensity."
>
> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. ... The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.

Michelson v. United States, 335 U.S. 469, 475, 69 S. Ct. 213, 218, 93 L. Ed. 168, 173-74 (1948); see also 3 Michael H. Graham, HANDBOOK OF FEDERAL EVIDENCE § 404:5 (8th ed. 2018) (stating "evidence of the commission of crimes, wrongs or other acts by [the defendant] is inadmissible for the purpose of showing a disposition or propensity to commit crimes"); James F. Dreher, A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA 35 (South Carolina Bar 1967) ("It is in criminal cases that the law must be the most sternly on guard against allowing the doing of an act to be proved by a propensity to do it."); State v. Fletcher, 379 S.C. 17, 26, 664 S.E.2d 480, 484 (2008) (Toal, C.J., dissenting) (stating "evidence of other crimes, wrongs, or acts is not admissible for purposes of proving that the defendant possesses a criminal character or has a propensity to commit the charged crime"). Thus, Rule 404(b) prevents the State from introducing evidence of a defendant's other crimes for the purpose of

proving his propensity to commit the crime for which he is currently on trial. State v. Perry, 430 S.C. 24, 29 – 30, 842 S.E.2d 654, 657 (2020).

In any criminal case evidence the defendant committed similar criminal acts has the inherent tendency to show this propensity. In the words of Rule 404(b), it "prove[s] the character of [the] person" and "shows[s] action in conformity" with that character. This Court discussed this tendency in State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). That opinion stated, "Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty," and, "Its effect is to predispose the mind of the juror to believe the prisoner guilty." 125 S.C. at 416, 118 S.E. at 807. This type of evidence was described as having "the inevitable tendency ... to raise a legally spurious presumption of guilt in the minds of the jurors." 125 S.C. at 417, 118 S.E. at 807; see also 125 S.C. at 420, 118 S.E. at 808 (stating "such evidence strongly tends to induce the jury to believe that, merely because the defendant was guilty of the former crimes, he was also guilty of the latter"). Thus, evidence of a defendant's other crimes serves the prohibited purpose of showing he has a propensity to engage in criminal behavior.

As set forth in Perry, "[t]he question for a trial court, and for this Court on appeal from [a] conviction, is whether the evidence also serves some legitimate purpose that is not prohibited by Rule 404(b)." 430 S.C. 24, 30, 842 S.E.2d 654, 657. In Mr. Cochran's case, the answer to that question is no. Further, the prior conviction succumbed to a Rule 403 balancing test which should have precluded their admission. The trial court has a duty to balance—pursuant to Rule 403—the probative value of the evidence for its legitimate purpose against the unfair prejudice that results from its tendency to serve the improper purpose. See State v. Clasby, 385 S.C. 148, 155-56, 682 S.E.2d 892, 896 (2009) ("Even if prior bad act evidence ... falls within an exception,

it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant." (quoting State v. Gaines, 380 S.C. 23, 29, 667 S.E.2d 728, 731 (2008)) (citing Rule 403, SCRE)).

The undersigned is unsure which Smith case the solicitor was referencing at Mr. Cochran's trial. Tr. 72, ll. 8 – 9. The "Notes of Decisions" on Westlaw for Rule 404(b) list two different cases by that name, State v. Smith, 337 S.C. 27, 522 S.E.2d 598 (1999) and 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011). Although both will be analyzed below, neither represents favorable authority to the state in this case.

In the 1999 case, following a shooting, Derrick Smith was convicted of murder and assault and battery with intent to kill. 337 S.C. 27, 522 S.E.2d 598 (1999). One of the victims was Tammy, Smith's girlfriend. Smith claimed the shooting was an accident. Id. This Court's opinion outlined how the issue of prior convictions being admitted arose:

> Prior to trial, the solicitor moved to be allowed to introduce evidence of the ongoing abusive relationship between appellant and Tammy. Specifically the solicitor moved to introduce appellant's four criminal domestic violence convictions in order to establish appellant's state of mind at the time of the shooting and to rebut his claim of accident. Appellant argued there was no similarity between the prior convictions and the current charge and therefore, the convictions were inadmissible. The trial judge ruled the July 1996 criminal domestic violence conviction was admissible and that he would determine whether the other convictions were admissible.

Id. at 31-2, 522 S.E.2d at 600 (footnote omitted).

Tammy was the victim in each of the four incidents. Id. at n. 3. This Court held:

> The solicitor properly offered appellant's July 1996 criminal domestic violence conviction to establish appellant's intent to kill and the absence of mistake or accident. The prior conviction was logically relevant to appellant's intent and absence of mistake or accident at the time of the shooting.

Id. at 33, 522 S.E.2d at 601 (footnote omitted).

The 1999 Smith case is wholly inapplicable to the matter *sub judice*. Mr. Cochran did not claim that he accidentally failed to register. Rather, he "lacked the ability to conform his conduct because he can't remember he's supposed to register." Tr. 65, ll. 15 – 25. As testified by Dr. Richardson, Mr. Cochran did not possess the sufficient capacity to conform his conduct to the requirements of the law. Tr. 65, ll. 11 – 14. Mr. Cochran's previous convictions were not logically relevant to his "intent and absence of mistake or accident" as in the 1999 Smith case. Instead, this propensity evidence greatly prejudiced Mr. Cochran and convinced the jury that because he failed to register before, his progressive dementia would not have prevented him from remembering to register in 2019.

The other Smith case was decided approximately twelve years later. In 2011, the South Carolina Court of Appeals decided State v. Smith, 391 S.C. 353, 705 S.E.2d 491 (Ct. App. 2011) (reversed by State v. Smith, 406 S.C. 215, 750 S.E.2d 612 (2013)). In that case, Wesley Smith was convicted of aiding and abetting homicide by child abuse against his four-month-old daughter. Id. at 357, 705 S.E.2d at 493.

At trial, Smith objected to the admission of evidence regarding a broken femur the child suffered three months before her death. Id. at 358, 705 S.E.2d at 494. A pathologist described the fracture as "abusive in that this is an inflicted fracture. This is not an accidental fracture." Id. at 359, 705 S.E.2d at 494. The same pathologist also testified "there's no way that this occurred accidentally or naturally, no way whatsoever." Id. at 358, 705 S.E.2d at 493.

Throughout the opinion, then-Chief Judge Few explained the history of Rule 404(b), SCRE. Id. at 360, 705 S.E.2d at 495. Citing State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008) and State v. Pagan, 369 S.C. 201, 631 S.E.2d 262 (2006), the Court of Appeals decision walked through what the state must prove in order for the evidence to be admitted properly:

> The second element of the foundation requires the State to articulate the logical connection between the other act and at least one of the five purposes listed as exceptions in the rule. In order to meet this element, the State must explain how the evidence of the other act will assist the judge or the jury in understanding some material issue in the case related to one or more of the Rule 404(b) exceptions. When the State adequately explains how the evidence of the other act logically connects to an issue in the case, it demonstrates how the judge or jury can use the evidence without using it for the prohibited purpose of inferring guilt from the defendant's propensity to commit the crime.

Id. at 361-62, 705 S.E.2d at 495.

Additionally, the trial judge must consider Rule 403, SCRE. State v. Stokes, 381 S.C. 390, 404, 673 S.E.2d 434, 441 (2009). "[T]he trial just must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendence of the evidence to show propensity, or by some other form of unfair prejudice." State v. Smith, 391 S.C. 353, 362, 705 S.E.2d 491, 496 (2011).

In the 2011 Smith case, the Court of Appeals was "satisfied the judge acted within his discretion in ruling the evidence was clear and convincing that Smith committed child abuse in connection with [the child's] broken leg." Id. In particular, the Court of Appeals noted how "[t]hree treating physicians along with the pathologist testified that [the child's] fracture was the result of child abuse, not accident." Id. "Moreover, the State presented evidence that Smith lied to ... the doctors, and investigators from the Department of Social Services about how the child's injury occurred in order to conceal his involvement in the injury." Id.

In Mr. Cochran's case, the state never suggested, much less proved, that the failure to register was not accidental. Accidental suggests that Mr. Cochran simply forgot or otherwise neglected to register. It does not account for a progressing disorder that affects the performance of Mr. Cochran's brain. To the contrary, Dr. Richardson's testimony unequivocally showed how

Mr. Cochran's dementia prevented him from conforming his conduct such that he would remember to register. Simply put, Mr. Cochran did not accidentally or mistakenly forget to register; his brain suffers from a debilitating disorder that completely alters his ability to think, rationalize, and remember.

This is not an instance of Mr. Cochran registering in the wrong county, such that prior convictions could be used to show that he should have been aware of where to register. The two prior convictions, both of which occurred at a time when his dementia was not quite as severe, cannot be used to show that his failure to register in December 2019 was intentional. Mr. Cochran's defense at trial was that he has been diagnosed with dementia, not that he mistakenly or accidentally failed to register. The Rule 404(b) exception should not have been utilized as a means of admitting the prior convictions in this case involving an elderly, homeless man with dementia.

In State v. Brooks, this Court held that prior bad acts in a forgery case were not admissible to prove intent or accident of mistake. 341 S.C. 57, 533 S.E.2d 325 (2000). In that case, Brooks was charged with forgery after presenting a check in the name of a deceased man at a Winn Dixie grocery store. Id. at 60, 533 S.E.2d at 327. The state introduced evidence that Brooks had committed a prior forgery by writing a check on a closed account fourteen months prior. Id. The state "claimed the prior forgery evidence was admissible as an exception to Rule 404(b), SCRE, to show absence of mistake or accident and intent in the current forgery." Id. at 60-1, 533 S.E.2d at 327. The trial court allowed the evidence to be admitted. Id. at 61, 533 S.E.2d at 327.

This Court held that the evidence should not have been admitted:

> We do not see how evidence of Brooks's prior conviction has any logical relevance to the forgery charge in this case. Brooks's defense at trial was that [the drawer of the check] had given her mother the check and that she had attempted to cash it. The introduction of the facts of the prior conviction does not disprove that Thomas gave Brooks's mother the check or that Brooks forged this check or knew it was forged. The State should not have been allowed to offer this evidence to prove absence of mistake or intent. We find the State introduced the prior act to demonstrate that Brooks acted in conformity with her propensity to commit crimes which is in direct contravention of Lyle.

Id. at 62, 533 S.E.2d at 328.

This Court held that the admission of the prior bad act evidence was erroneous, and the error was not harmless. Id. "When the prior bad acts are similar to the one for which the appellant is being tried, the danger of prejudice is enhanced." Id. (citing State v. Gore, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984)).

The Brooks rationale controls in Mr. Cochran's case. The evidence of his prior convictions has no logical connection to this case. The defense at trial was that Mr. Cochran suffers from dementia. The introduction of the prior convictions does not disprove the fact that Mr. Cochran was diagnosed by a credible expert witness. The state did not call an expert witness to rebut Dr. Frierson's testimony. The state should not have been allowed to offer this evidence to prove absence of mistake or intent. The prior convictions were introduced to demonstrate that Mr. Cochran acted in conformity with his propensity to commit crimes which is in direct contravention of State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923).

Additionally, the prior convictions cannot survive a Rule 403, SCRE balancing test. "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 consideration of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 403, SCRE. The trial judge did not conduct any such test on the record. Tr. 74, ll. 3 – 4. Even if evidence of a prior bad act is admissible under Rule 404, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. State v. King, 424 S.C. 188, 818 S.E.2d 204 (2018). Referencing Brooks, this Court in King held that the admission of an unrelated murder charge was "highly prejudicial" to a defendant currently on trial for murder. Id. at 203, 818 S.E.2d at 212. This Court aptly held that since King was on trial for murder, "it is entirely reasonable to conclude the jury considered the evidence of his unrelated murder charge in reaching its guilty verdict." Id. Similarly, the prior convictions in Mr. Cochran's case likely weighed on the jury's minds as they deliberated. Instead of reaching the conclusion that Mr. Cochran was guilty but mentally ill, the jury most likely found him guilty based upon the prior convictions.[3]

There was no probative value to the prior convictions. The prejudicial value of these prior convictions was exceedingly high, especially when weaponized by the state to suggest that Mr. Cochran willfully and intentionally filed to register a third time. Taking into consideration the progressive nature of dementia, Mr. Cochran's ability to remember things was substantially worse, as noted by Dr. Frierson, in 2019 as compared to just a year prior.

Dementia is a serious disease that affects a person's brain. The undisputed expert testimony showed that Mr. Cochran had significant impairments as a result of dementia—a recognized and significant mental illness. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987) ("DSM–III–R"). The illness is characterized, in part, by impairment in short and long-term memory, associated with impairment in abstract thinking, impaired judgment, other disturbances of higher cortical

---

3 The trial judge did not include not guilty by reason of insanity as a potential verdict, S.C. Code Ann. § 17-24-30 notwithstanding.

function, or personality change. The disturbance is severe enough to interfere significantly with work or usual social activities or relationships with others.

Impaired judgment and impulse control are also commonly observed. Coarse language, inappropriate jokes, neglect of personal appearance and hygiene, and a general disregard for the conventional rules of social conduct are evidence of bad judgment and poor impulse control. Marked impairment of judgment and impulse control is particularly characteristic of certain dementias that affect primarily the frontal lobes. State v. Stuard, 176 Ariz. 589, 609, 863 P.2d 881, 901 (1993).

The state trivialized Mr. Cochran's condition by suggesting that because he failed to register twice before, he therefore intentionally failed to register in 2019. The undisputed testimony from Dr. Frierson confirmed that Mr. Cochran was unable to recall to register. The state had the opportunity to question Dr. Frierson extensively during cross-examination but instead elected to ask less than ten questions. Tr. 66, l. 25 – 68, l. 18. Instead, the evidence before the trial judge was that Mr. Cochran was unable to remember, without prompting, a technical job he had worked at for thirteen years. Tr. 63, ll. 2 – 24. Dr. Frierson's testimony regarding Mr. Cochran's severe memory impairment proved that Mr. Cochran's failure to register was not the result of mistake or accident, nor was that the state's theory. The solicitor contended that Mr. Cochran intentionally failed to register:

> But the thing on this guy is he … refuses to register based on the evidence. He has expressed to people he has come in contact with that he doesn't feel like he should register. He doesn't want to register. He even told the defense witness basically that, you know, I don't want to register. That is just kind of the bottom line. And he's failed to register twice already in a running stream going back to 2018.

Tr. 86, ll. 13 – 21.

Candidly, that argument is not tantamount to a claim that Mr. Cochran mistakenly or accidentally failed to register. The state surmised that Mr. Cochran **intentionally** failed to register, based on the solicitor's words to the jury, above. The state's means of admitting the prior convictions were inconsistent with their trial theory. As a result, the prior convictions should not have been admitted under either Rule 403 or Rule 404, SCRE.

Mr. Cochran's conviction should be reversed.

CONCLUSION

Based on the foregoing, Appellant respectfully requests that this Court reverse his conviction.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of August, 2021.

RECEIVED
Aug 04 2021
SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Oconee County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CALVIN CARROLL COCHRAN,

APPELLANT

APPELLATE CASE NO. 2020-001554

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 Calvin Carroll Cochran, #378588, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210, this 4th day of August, 2021.

Taylor D Gilliam
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 4, 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. Calvin Carroll Cochran

Dear Mr. Blitch, Jr.:

Enclosed are two copies of 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,

Taylor D Gilliam
Appellate Defender

TDG/tg

Enclosure