STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CHRISTOPHER L. SANDERS,

APPELLANT.

APPELLATE CASE NO. 2021-000563

ANDERS BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

In a case with no physical evidence and only the word of a testifying co-defendant to connect Appellant to the crime, did the trial judge err in failing to bifurcate Appellant's first-degree burglary trial to eliminate the danger of unfair prejudice of the jury learning that Appellant was convicted previously of two counts of burglary?

STATEMENT OF THE CASE

On March 30, 2021, an Aiken County grand jury indicted Appellant for burglary in the first degree, armed robbery, possession of a weapon during a violent crime, and grand larceny. R. 12, l. 16 – R. 13, l. 18; R. 344-352. Prior to trial, defense counsel moved to bifurcate the proceedings regarding the burglar first degree charge. R. 71, ll. 2-6; R. 336. Ultimately, the judge denied the motion to bifurcate. R. 79, ll. 21-24. The state, represented by Katie R. Cleveland and Ashley A. Hammack, called Appellant to trial on May 11, 2021, before the Honorable Courtney Clyburn Pope and a jury. R. 1. Brianne P. Steiner and Na'Shima J. Carter represented Appellant. R. 1. The jury acquitted Appellant of grand larceny, but found him guilty of first-degree burglary, armed robbery, and possession of a weapon. R. 313, l. 19 – R. 314, l. 10. Judge Pope sentenced Appellant to nineteen years in prison for burglary and armed robbery and to five years for the weapon. R. 333, ll. 7-24. She ordered all sentences to be served concurrently. R. 333, ll. 23-24.

Appellant served his notice of appeal on May 18, 2021. This brief follows.

STATEMENT OF FACTS

Tommy Taylor lived in Aiken County where he was a landlord. R. 105, ll. 18-22. On October 11, 2019, he was watching television in his home. R. 106, ll. 4-6. According to Taylor, a lady arrived at his front door inquiring about a mobile home. R. 109, ll. 8-13. Suddenly, his door was kicked in and a man holding a gun entered. R. 109, ll. 15-16. Taylor was unable to identify the man because his face was covered. R. 109, ll. 19-24. The man demanded Taylor's wallet and the contents of his safe. R. 110, ll. 3-5. Due to this request, Taylor and Jennifer DeLoach, his live-in girlfriend, went to Taylor's bedroom to open the safe. R. 116, ll. 5-24; R. 143, ll. 1-5. Taylor opened the safe and the man took paperwork from the safe. R. 116, ll. 20-24. Taylor had surreptitiously placed his wallet in the cushion of his recliner prior to going to open the safe, but the woman who arrived at his home saw what he did and got the wallet. R. 117, ll. 2-15. Taylor claimed he had approximately $2,000 in the wallet, but no money in the safe. R. 117, ll. 16-19. Thereafter, the man left. R. 116, ll. 20-24.

Jennifer DeLoach recounted the evening differently from Taylor. Jennifer heard a loud booming noise during the evening of October 11, 2019. R. 143, ll. 15-23. Then, she saw a man wearing a blue bandana and pointing a gun. R. 144, ll. 4-6. Jennifer claimed there was a woman sitting in the living room and a third person behind the man with the gun. R. 145, l. 17 – R. 146, l. 2. According to Jennifer, the man with the gun demanded money, specifically the safe, from Taylor. R. 145, ll. 2-5. When Taylor denied having a safe or money, Jennifer told Taylor to give the man the key. R. 145, ll. 6-11. Thereafter, Jennifer and her daughter led the man to the bedroom where the safe was located. R. 146, ll. 9-12. Jennifer was unable to open the safe. R. 146, ll. 12-13. Likewise, Jennifer's daughter was unable to open the safe. R. 146, ll. 15-16. After many

unsuccessful attempts, Jennifer finally opened the safe. R. 146, ll. 22-24. The safe was empty but for some important documents. R. 147, ll. 2-10; R. 162, ll. 4-6.

Unable to get any money from the safe, the man requested Taylor's wallet, but Taylor insisted he did not have his wallet. R. 147, l. 11 – R. 148, l. 10. Jennifer told Taylor to give the man his wallet. R. 148, ll. 10-11. At this, Taylor started walking to his bedroom where he kept a "dummy wallet." R. 148, ll. 18-22. Jennifer heard a loud noise from the bedroom area, which made her start yelling. R. 149, ll. 22-25. She then heard a voice coming from outside urge the man on the inside to "come on." R. 150, ll. 5-9. The man with the gun then left out the door, and the woman remained inside. R. 149, l. 12 – R. 150, l. 9.

Kayle DeLoach, Jennifer's daughter, remembered the night differently. After noting the woman and two men arrived, Kayle said she and her mother went to the safe, but were unable to open it. R. 162, l. 23 – R. 165, l. 5. Contrary to Jennifer's claim that she opened the safe, Kayle said that the two had to get Taylor to open it. R. 165, ll. 8-9.

Tearren DeLoach, Jennifer's son, was in a back bedroom in Taylor's house on October 11, 2019. R. 192, ll. 16-22. His brother, Evan, was on the back porch. R. 192, ll. 4-5. Tearren heard Taylor's loud and angry voice, but he did not leave the bedroom. R. 194, ll. 8-9. When Tearren heard Taylor's voice get even louder, Tearren went toward the living room. R. 194, ll. 12-14. Tearren claimed he could see a man standing in front of the door. R. 195, ll. 1-3. Tearren could not see a gun. R. 195, ll. 5-7. As soon as Tearren saw the man, Tearren dropped down to the floor and crawled back to the bedroom. R. 197, ll. 12-24; R. 199, ll. 5-9. The man with the gun followed him to the bedroom, but the man quickly returned to the living room. R. 199, ll. 10-17. Tearren tried to climb out a window, but there was "already another person … right at the front porch." R. 199, ll. 17-20. This person could see Tearren trying to leave; therefore, the person quickly ran

from the porch to the back window and told Tearren to stop. R. 199, ll. 19-25. Tearren stopped and went back into the bedroom. R. 201, ll. 1-6. Tearren could not see the faces of the man in the house or the man on the porch because both men had their faces covered. R. 200, ll. 8-22.

The police believed Charlene Harshaw was involved based on information gained through their investigation. R. 173, l. 1; R. 184, l. 15 – R. 185, l. 23. Based upon Tearren identifying Harshaw from a photographic line-up, the police arrested Harshaw, charging her with burglary in the first degree, grand larceny, and armed robbery. R. 173, ll. 13-25; R. 209, ll. 6-16. Using information provided by Harshaw, the police then arrested Appellant. R. 174, ll. 18-20. The police had no evidence, other than Harshaw's testimony, linking Appellant to the offenses.

At trial, Harshaw told the jurors that she knew Appellant because he was dating her mother-in-law. R. 210, ll. 21-23. On October 11, 2019, Harshaw needed a new place to stay so she wanted to ask Taylor about renting. R. 211, ll. 11-16. Harshaw and her wife were at Harshaw's mother-in-law's home waiting for Taylor to get home so Harshaw could ask him about a rental. R. 212, l. 23 – R. 213, l. 9. When Harshaw prepared to leave, Appellant asked her for a ride to the store and Harshaw consented. R. 214, ll. 2-14. She took Appellant to the store, where Appellant entered the store and returned to her car. R. 214, ll. 17-20. Two individuals, DaQuon and Richard, also got into Harshaw's car. R. 214, ll. 18-20. Harshaw alleged that Appellant then suggested they rob Taylor. R. 215, l. 1 – R. 216, l. 19.

Harshaw and the three men went to Taylor's house. R. 219, ll. 1-9. Taylor's door was open, but his screen door was closed. R. 219, ll. 18-24. Harshaw approached the screen door, and Taylor told her to enter. R. 219, ll. 23-24. As Harshaw was asking Taylor about a rental, DaQuon and Appellant busted in the door. R. 220, ll. 1-8. She further claimed Appellant had a gun. R. 220, ll. 9-12. DaQuon snatched the gun from Appellant and forced Taylor to get up. R. 220, ll.

23-25. Immediately before getting up, Taylor put his wallet in his seat cushion. R. 221, ll. 15-17. Thereafter, DaQuon forced Taylor to the backroom to open the safe. R. 221, ll. 1-3. Harshaw pointed out the location of the wallet to Appellant, who grabbed it. R. 221, ll. 21-25.

Harshaw claimed she did not leave with the men because she was concerned about Taylor and she "instantly felt guilty." R. 222, ll. 1-6. However, she soon left on foot. R. 222, ll. 7-10. Eventually, Appellant arrived in her car and picked her up on the side of the road. R. 224, ll. 18-25. Harshaw claimed she received nothing from the robbery. R. 225, ll. 3-5.

STANDARD OF REVIEW

In criminal cases, appellate courts review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The appellate court reviews a trial [court's] ruling on admissibility of evidence pursuant to an abuse of discretion standard and gives great deference to the trial court." State v. Torres, 390 S.C. 618, 625, 703 S.E.2d 226, 230 (2010). "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). "[T]he conduct of a trial is largely within the discretion of the presiding judge, to the end that a fair and impartial trial may be had." State v. Heath, 232 S.C. 384, 391, 102 S.E.2d 268, 272 (1958).

ARGUMENT

In a case with no physical evidence and only the word of a testifying co-defendant to connect Appellant to the crime, the trial judge erred in failing to bifurcate Appellant's first-degree burglary trial to eliminate the danger of unfair prejudice of the jury learning that Appellant was convicted previously of two counts of burglary.

Relevant facts

Prior to trial, defense counsel moved to bifurcate the trial on the burglary offense. R. 71, ll. 2-6; R. 336. She asked "to have the trial essentially proceed in two parts and have the state prove all of the elements except ... for the prior convictions and have the jury deliberate and determine whether or not [Appellant] is guilty or not guilty on the burglary first and then if they find that he is guilty on it, then they can hear the prior convictions and then go forward with determining guilt, again, based upon the prior convictions." R. 71, ll. 8-17. Relying upon State v. Cross, 427 S.C. 465, 832 S.E.2d 281 (2019), defense counsel argued for the trial judge to exercise her discretion to bifurcate the proceedings to allow the jury to consider first the state's evidence regarding the burglary without consideration of the prior convictions, and then if the jury were to find Appellant guilty of the offense, the jury would be allowed to consider the aggravating circumstance of the prior convictions. R. 72, l. 5 – R. 73, l. 3. Candidly, defense counsel admitted the prior convictions were relevant as they formed elements of the offense, but the convictions were not probative of anything else in the case. R. 72, ll. 14-16. Most importantly, as defense counsel argued, the danger of unfair prejudice should the prior convictions be admitted was extremely high. R. 72, ll. 17-18. Just as the Supreme Court held in Cross, supra, the jury learning of a prior conviction for the same offense for which the defendant stood trial presents a significant

danger that the jury will use that evidence as propensity and convict based on the prior conviction alone. R. 72, ll. 18-25.

Without any explanation or reasoning offered, the trial judge denied the motion to bifurcate. R. 79, ll. 21-25.

In line with the trial judge's ruling, the state submitted certified copies of Appellant's prior convictions for burglary. R. 230, ll. 20-25. Specifically, Appellant was convicted of burglary in the second degree on May 9, 1994. R. 230, ll. 20-22; R. 337. Appellant was also convicted of burglary in the third degree on June 7, 1999. R. 230, ll. 23-25; R. 341. This was the last thing the jurors heard before the state rested its case. R. 231, ll. 3-4.

Due to the judge's ruling allowing the state to admit evidence of Appellant's prior convictions, Appellant had to address those convictions when he testified. Importantly, Appellant denied participating in the burglary. R. 239, ll. 12-13. Of course, Appellant admitted he had been a burglar in the past. R. 240, ll. 1-2. He explained he had "learned [his] lesson from that." R. 240, l. 2. He also remarked upon the passage of time since those prior offenses. R. 240, l. 3.

The solicitor emphasized the prior convictions in her closing argument. After describing the primary elements of burglary, the solicitor informed the jurors that "burglary first requires an additional element." R. 266, ll. 24-25. According to the solicitor, that additional element in this case included "the defendant has two prior convictions for burglary." R. 267, ll. 8-9. She then reminded the jurors that "[t]he last thing [the state] did before [the state] sat down yesterday was read you those two prior convictions that this defendant has for burglary." R. 267, ll. 9-11.

At the close of the evidence, the trial judge instructed the jurors regarding Appellant's prior convictions as follows:

> The defendant has a prior record of two or more convictions for burglary and/or housebreaking. Evidence of prior offenses committed by the defendant was not

> offered to prove the defendant has had a bad character or to prove that the defendant committed the burglary [i]n this case. The prior convictions may be considered by you only for the purpose of determining whether or not it satisfies that element of the offense that make it a first degree burglary if he entered the dwelling without consent to commit a crime and you have two prior convictions for burglary and/or housebreaking.

R. 304, l. 25 – R. 305, l. 10. She continued with her instructions:

> Before you can even consider the evidence of a defendant's prior burglary and/or housebreaking conviction, you must first find that the state has proved beyond a reasonable doubt that a burglary was committed by the defendant. If you find beyond a reasonable doubt that the burglary was committed, then you may consider the evidence of the prior conviction as evidence of one of the circumstances which would make the burglary first degree burglary. If you do not find beyond a reasonable doubt that the defendant committed these alleged prior offenses, then you cannot return a verdict of first degree burglary.

R. 305, ll. 11-22.

Discussion

Recently, the South Carolina Supreme Court held a trial court committed an error of law by denying the defendant's motion to bifurcate a criminal sexual conduct trial. State v. Cross, 427 S.C. 465, 482, 832 S.E.2d 281, 290 (2019). Cross was charged with criminal sexual conduct with a minor in the first degree in violation of section 16-3-655(A) of the South Carolina Code. Id. at 469, 832 S.E.2d at 283. Pursuant to that section a person is guilty of CSC with a minor in the first degree if the person engages in a sexual battery with an individual who is less than sixteen years of age and the person has previously been convicted of an offense listed in section 23-3-430(C) of the Code. Id. at 469-470, 832 S.E.2d at 283. Section 23-3-430(C) lists CSC with a minor in the first degree as a triggering offense. Id. at 470, 832 S.E.2d at 283. Cross had a prior conviction for first degree criminal sexual conduct with a minor from 1992. Id. at 470, 832 S.E.2d at 284.

Prior to his trial, Cross moved to bifurcate the proceedings to prohibit the jury from learning of his prior offense unless the jury found him guilty of the other elements. Id. The trial judge

refused to bifurcate the trial. Id. at 471, 832 S.E.2d at 284. Thus, the state introduced the indictment and sentencing sheet establishing Cross's prior conviction. Id. 472, 832 S.E.2d at 285. Contemporaneously, the judge gave a limiting instruction. Id. This instruction was repeated during the judge's charge on the law at the end of the trial. Id. at 473, 832 S.E.2d at 285. The jury convicted Cross of first degree CSC with a minor. Id.

The Court held that although "evidence of Cross's 1992 conviction for first-degree CSC with a minor had insurmountable probative value in proving the prior conviction element of first-degree CSC with a minor," the "evidence of the 1992 conviction was in no way probative of whether Cross committed the underlying sexual battery upon Minor in 2005." Id. at 477, 832 S.E.2d at 287-88. Citing State v. Brooks, 341 S.C. 57, 62, 533 S.E.2d 325, 328 (2000), the Court noted "the danger of unfair prejudice arising from the admission of the 1992 conviction at this stage of the trial was exceedingly high, as Cross was standing trial on charges of first-degree CSC with a minor and committing a lewd act on a minor." Id.

Providing greater insight as to its reasoning pursuant to Rule 403, SCRE, the Supreme Court explained that despite the "undeniable" probative value of the prior conviction as an element of the crime charged, application of Rule 403, SCRE's balancing test required bifurcation. Id. at 479, 832 S.E.2d at 288. In light of the evidence of the 1992 conviction having no probative value on the threshold issue, the Court explained that the question was *when* the evidence should be admitted or *when* its probative value would have its greatest height. Id.

> In this case, the integrity of Rule 403 and the obligation of the state to introduce necessary evidence are both salvaged by the application of Rule 611(a), SCRE, which provides in pertinent part: "The court *shall exercise reasonable control over the mode and order of* interrogating witnesses and *presenting evidence* so as to (1) make the interrogation and presentation effective for the ascertainment of the truth ...." (emphasis added). Under the facts before us, Rule 611(a) required the trial court to exercise control over the order of presenting evidence in such a way that

(1) allowed the State to prove an element of the crime, and (2) at the same time guarded against a violation of Rule 403.

Id. at 479, 832 S.E.2d at 479 (emphasis in original).

The Supreme Court concluded "the trial court had the authority to grant Cross's motion to bifurcate" and "the trial court's refusal to grant the motion was an error of law." Id. at 482, 832 S.E.2d at 290. Although evidence of Cross's prior conviction was probative, the danger of unfair prejudice substantially outweighed its probative *value at the time it was introduced.* Id. The "prejudice would have been totally eliminated had the trial been bifurcated." Id. Furthermore, "the trial court's limiting instruction did not cure the overwhelming danger of unfair prejudice arising from the introduction of Cross's 1992 conviction." Id. "The outcome in [Cross's] case came down to the jury's evaluation of witness credibility" because there was no physical evidence and Cross testified in his defense denying the allegation, and the Court was "unwilling to assume a jury would have the ability to limit its consideration of such prejudicial evidence to the state's need to prove the prior conviction element of the crime charged." Id. at 483, 832 S.E.2d at 290-291.

Here, like in Cross, the trial judge erred by failing to bifurcate Appellant's trial regarding the charge of burglary in the first degree. Although Appellant's prior convictions for burglary were relevant and probative as they formed an element of the offense, the danger of unfair prejudice substantially outweighed that probative value at the point in time when the convictions were admitted. No physical evidence connected Appellant to the burglary. None of the alleged victims identified Appellant as the burglar. In fact, the state's only evidence against Appellant was the testimony of a co-defendant, Charlene Harshaw. The trial was the very essence of a credibility contest – would the jury believe Appellant or Harshaw? Her credibility was negligible as she had an incentive to shift blame

to Appellant. See State v. Henson, 407 S.C. 154, 167, 754 S.E.2d 508, 515 (2014) (explaining that two testifying co-defendants "had an incentive to downplay their involvement and shift blame to others," and therefore, their testimony did not constitute overwhelming evidence of guilt).

Furthermore, the jury did not hear a limiting instruction contemporaneously with the admission of the offending evidence as the jury did in Cross. If the contemporaneous limiting instruction in Cross could not cure the error there, then the instruction at the conclusion of the trial attempting to limit the jury's use of the prior convictions could not cure the prejudice created by the admission of the prior convictions. Finally, the state presented evidence of the prior convictions as its last bit of evidence so that it would be the most remembered evidence before the jury. See Miller, N., & Campbell, D.T., Recency and Primacy in Persuasion as a Function of the Timing of Speeches and Measurements, The Journal of Abnormal and Social Psychology, 59(1), July 1959 (explaining through empirical study that people remember the first and last things they hear).

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial.

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of January, 2022.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Christopher L. Sanders states:

1. She is an Appellate Defender for the South Carolina Office of Appellate Defense, and she was appointed to represent Appellant.

2. She has reviewed the record of appellant's trial before Judge Courtney Clyburn-Pope, which was held on May 11-14, 2021, and, in her opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. Pursuant to Anders v. California, 386 U.S. 738 (1967), she has briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, she asks the Court to relieve her as counsel for Christopher L. Sanders.

Respectfully Submitted,

Susan B. Hackett

Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 31st day of January, 2022.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

(1) True-billed indictments and sentence sheets;
(2) Trial transcript dated May 11-13th, 14th, 2021;
(3) Motion to Bifurcate;
(4) State's Exhibit #18 (Certified Conviction #1); and
(5) State's Exhibit #19 (Certified Conviction #2)

I certify that this designation contains no matter which is irrelevant to this appeal.

Susan B. Hackett

Susan B. Hackett
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ATTORNEY FOR APPELLANT

January 31, 2022

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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders 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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January 31, 2022.