Rel: August 20, 2021

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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2021

1190505 and 1190725

Michael B. Cannon

v.

Zachary D. Lucas

Appeals from Jefferson Circuit Court
(CV-17-900127)

PER CURIAM.

Michael B. Cannon, the defendant below, appeals from a judgment entered by the Jefferson Circuit Court in favor of Zachary D. Lucas, the plaintiff below (case number 1190505). Cannon also separately appeals from an order entered by the trial court refusing to supplement the record

on appeal (case number 1190725). We reverse the judgment and remand the cause in case number 1190505, and we dismiss the appeal as moot in case number 1190725.

Facts and Procedural History

At approximately 10:15 p.m., on November 16, 2015, Cannon and Lucas were involved in a motor-vehicle accident on an unlit portion of Interstate 22 when Cannon's vehicle collided with Lucas and the motorcycle he had been riding. The testimony at trial as to the cause of the accident was conflicting. Lucas testified that he had been working on a motorcycle for a friend, that he had taken it for a test drive, and that it must have run out of gas. Although he did not remember details regarding how he got to the scene of the accident or details from after the accident, he testified that he was sure that he had pulled off onto the shoulder of the highway and that he was starting to check the gas level of the motorcycle when he heard a loud noise. Cannon testified that, at the time of the accident, it was pitch black in the area where the accident occurred; that he heard a noise and scraping sounds and that, very shortly thereafter, saw reflective material to his right; and that he thought that

he had run into an air-conditioning unit. He also testified that he had been driving in the right-hand lane and using cruise control, that he had not seen Lucas or the motorcycle before he hit them, and that he had not braked before the impact. Cannon further testified that he never left his lane of travel.

On January 12, 2017, Lucas filed a complaint against Cannon in the Jefferson Circuit Court, alleging negligence and wantonness/recklessness and seeking damages for the various injuries he allegedly had sustained as a result of that accident. In the complaint, Lucas alleged that the motorcycle he had been operating had become disabled and that he had been forced to push it along the side of the highway; that Cannon had been driving a 1995 Chevrolet Astro van in the same direction; and that Cannon had allowed his van to forcefully collide with Lucas and the motorcycle. On January 25, 2017, Cannon filed an answer to the complaint. He denied most of the material allegations in the complaint and raised some affirmative defenses, including contributory negligence and assumption of the risk.

Lucas proceeded to trial solely on his negligence claim. After a four-day trial that started on November 4, 2019, the jury returned a verdict in favor of Lucas and awarded him $18 million in compensatory damages. Thereafter, the trial court entered a judgment in favor of Lucas and against Cannon in the amount awarded by the jury.

Cannon filed a motion for a judgment as a matter of law, for a new trial, or for a remittitur, asserting, among other things, that the trial court had erred by refusing to permit Cannon to present evidence of Lucas's 2018 conviction for presenting a forged drug prescription. After Lucas responded, the trial court conducted a hearing. Thereafter, the motion was denied by operation of law. These appeals followed.

Standard of Review

"In reviewing a ruling on the admissibility of evidence, ... the standard is whether the trial court exceeded its discretion in excluding the evidence." Woven Treasures, Inc. v. Hudson Capital, L.L.C., 46 So. 3d 905, 911 (Ala. 2009).

Discussion

Cannon argues, as he did in his postjudgment motion, that the trial court erred in granting Lucas's motion in limine to exclude evidence concerning Lucas's 2018 conviction for presenting a forged drug prescription. Before the trial, Lucas filed a motion in limine asking the trial court to exclude any evidence concerning his August 9, 2018, felony conviction for presenting a forged drug prescription. In that same motion, he admitted that "[t]he specific details of [his] conviction are that he pled guilty to presenting a forged prescription for Diazepam."

During a pretrial hearing on the motion in limine to exclude evidence of Lucas's prior convictions, the following occurred:

> "[CANNON'S COUNSEL]: One of the -- my motions or his motion in limine was to keep out two criminal charges of Mr. Lucas. Both involve dishonesty. One from [2018] forged prescription for some [diazepam], and one was a 2013 theft of various TVs and money and such from, a young lady.
>
> "THE COURT: Relevance?
>
> "[CANNON'S COUNSEL]: The relevance is that it goes to his credibility. Caselaw is very clear that the Court has no discretion on issues of dishonesty charges such as these two crimes. And I believe [Lucas's counsel] agrees with me on that, but I'll let him be heard.
>
> "THE COURT: [Lucas's counsel]?

"[LUCAS'S COUNSEL]: We filed an opposition Document 236 to the -- excuse me. A motion [in] limine, which is Document 236 for the record. Our number 9, we move to preclude both of those crimes for the following reasons: First of all, is the 2018 attempt to commit a controlled-substance crime. The date of the incident was August 9th, 2018. So three years after this young man suffered a severe brain injury and has undergone four surgeries, he attempted to --

"THE COURT: Wait, this was -- the conviction was after the accident?

"[LUCAS'S COUNSEL]: Three and a half years after the accident.

"THE COURT: After the accident?

"[LUCAS'S COUNSEL]: Yes, sir.

"THE COURT: Was any conviction before the accident?

"[LUCAS'S COUNSEL]: The misdemeanor theft of property conviction from 2013 that they've offered where he was -- pled guilty to stealing less than $500 worth of stuff is the other one that they move to admit. And while I acknowledge that it is a crime that involves, you know, the old standard --

"THE COURT: Moral turpitude.

"[LUCAS'S COUNSEL]: -- moral turpitude or dishonesty, we'd argue that that has the prejudicial value associated with that theft of property conviction coming in, again, it overwhelms and, I guess, outweighs in probative value that that evidence may have had.

"THE COURT: I'll allow the misdemeanor conviction. I won't allow anything that happened after the accident.

"[CANNON'S COUNSEL]: Your Honor, it still goes to his credibility.

"THE COURT: Not after the accident. ...

"[CANNON'S COUNSEL]: If you're a thief and you're dishonest, it doesn't matter when it happens, Your Honor. This is not like driving history or anything like that.

"THE COURT: Yeah. But we're talking about an accident that occurred -- when does the accident occur?

"[LUCAS'S COUNSEL]: November of 2015.

"THE COURT: Right. You know, have you been dishonest since then? That's irrelevant.

"....

"THE COURT: I'll allow the misdemeanor that he pled guilty to before the accident but not after."

Shortly thereafter, the following discussion occurred:

"[CANNON'S COUNSEL]: Just so the record's clear, the subsequent conviction that you're not going to allow in is a felony under Section 13A-12-212 and 13A-12-203, [Ala. Code 1975,] which involves obtaining a prescription by forgery, fraud, deceit, or misrepresentation. That's the claim that I was wanting to get in, which you denied. I just want to make sure the record was clear.

"THE COURT: Okay. So noted."

Cannon specifically contends that the trial court "had no basis for writing a novel 'after the accident' exception into Rule 609," Ala. R. Evid., and that evidence of Lucas's 2018 conviction for presenting a forged drug prescription was automatically admissible under Rule 609(a)(2), Ala. R. Evid.

Before we reach the merits of Cannon's argument, we must determine whether this issue is properly before this Court.

> "This Court has previously recognized two types of motions in limine, 'prohibitive preliminary' and 'prohibitive absolute.' Keller v. Goodyear Tire & Rubber Co., 521 So. 2d 1312 (Ala. 1988). Preliminary motions in limine seek only to prohibit the opposing party from offering or mentioning certain evidence without first obtaining a ruling from the judge during trial. Id. at 1313. With a preliminary motion in limine, the nonmoving party must make an offer of proof and indicate why the evidence should be admitted, in order to preserve for review any error in the court's ruling. Id. However, with an absolute motion in limine, no such offer of proof need be made at trial in order to preserve for review any alleged error in the trial court's order granting such a motion. Id. The motion in limine in this case was an absolute motion in limine."

Phelps v. Dempsey, 656 So. 2d 377, 381 n.1 (Ala. 1995). See also Higgs v. Higgs, 270 So. 3d 280, 286 n.3 (Ala. Civ. App. 2018)("[B]ecause the trial

court's ruling on the former wife's motion in limine, which sought an unconditional bar to economic-condition evidence pertaining to her, was absolute rather than preliminary, no offer of proof was necessary in order to preserve that ruling for review."). Likewise, the motion in limine in this case was an absolute motion in limine, rather than a preliminary motion in limine, and no subsequent offer of proof was required to preserve the issue for appellate review. Therefore, although Cannon did not make an offer of proof at trial, this issue is, nevertheless, properly before this Court.

Initially, Cannon argues that the trial court "had no basis for writing a novel 'after the accident' exception into Rule 609." With regard to impeachment by evidence of prior convictions, Rule 609 provides, in relevant part:

> "(a) General Rule. For the purpose of attacking the credibility of a witness,
>
> > "(1)(A) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, [Ala. R. Evid.,] if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and

> "(B) evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> "(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
>
> "(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction, more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence."

By its plain language, Rule 609 does not impose any requirement that a conviction that is to be used for impeachment purposes must have occurred before the incident that provides the basis for the current proceeding. Therefore, to the extent that the trial court found that Cannon could not introduce evidence of Lucas's 2018 conviction merely

because it occurred after the accident in this case, that finding was erroneous.

Cannon also argues that Lucas's 2018 conviction for presenting a forged drug prescription was automatically admissible under Rule 609(a)(2). By its plain language, Rule 609(a)(2) provides that "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." (Emphasis added.)

> "Convictions for the following listed crimes are eligible for impeachment in that each offense satisfies either Alabama's narrow or broad interpretation of the 'dishonesty or false statement' standard set forth in Rule 609(a)(2). Crimes satisfying the narrow interpretation, which require some element of fraud, deceit or misrepresentation of fact, include such crimes as perjury, subornation of perjury, false statement, criminal fraud, embezzlement or false pretense. Crimes satisfying the broader Huffman [v. State, 706 So. 2d 808 (Ala. Crim. App. 1997),] interpretation -- illustrated by burglary, robbery and larceny -- involve dishonesty (meaning breach of honesty or trust, as lying, deceiving, cheating, stealing, or defrauding) and bear directly on the capacity of a witness to testify truthfully at trial.
>
> "....

> "(g) Forgery -- Robinson v. State, 735 So. 2d 208, 211 (Miss. 1999). See Ala. R. Evid. 609(a) advisory committee notes.
>
> "(h) False prescription -- See Ala. R. Evid. 609(a) advisory committee's notes; United States v. Tracy, 36 F.3d 187, 192 (1st Cir. 1994), cert. denied, 514 U.S. 1074 (1995)."

II Charles W. Gamble et al., McElroy's Alabama Evidence § 145.01(9) at 1015-16 (7th ed. 2020). The crime at issue in this case involved forgery -- specifically, presenting a forged drug prescription. Therefore, we must determine whether presenting a forged drug prescription involves dishonesty or false statement so that evidence of a conviction for that offense is automatically admissible for impeachment purposes pursuant to Rule 609(a)(2).

In United States v. Tracy, 36 F.3d 187, 192 (1st Cir. 1994), the United States Court of Appeals for the First Circuit explained:

> "The Government insists that under Fed. R. Evid. 609(a)(2) the district court had no discretion to exclude the evidence of Tracy's conviction for uttering a false prescription, as this was a crime of dishonesty offered to impeach Tracy's credibility as a witness. The Government is correct. A conviction for uttering a false prescription plainly involves dishonesty or false statement. See Fed. R. Evid. 609 notes of conference committee, H.R. No. 93-1597 ('By the phrase "dishonesty and false statement" the Conference means crimes

> such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.'). Moreover, '[t]he admission of prior convictions involving dishonesty and false statement is not within the discretion of the [district] [c]ourt.' Id.; e.g., United States v. Morrow, 977 F.2d 222, 228 (6th Cir. 1992) ('Rule 609(a)(2) ... clearly limits the discretion of the court by mandating the admission of crimes involving dishonesty or false statements.'), cert. denied, 508 U.S. 975, 113 S. Ct. 2969, 125 L. Ed. 2d 668 (1993); United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981) ('[E]vidence offered under Rule 609(a)(2) is not subject to the general balancing provision of Rule 403.'). Hence, we find no error in the admission of evidence of the prior conviction for uttering a false prescription."

In Jones v. State, 846 So. 2d 1041 (Miss. Ct. App. 2002), the Mississippi Court of Appeals held:

> "Jones testified that on the day of the robbery, she was at her doctor's office getting her prescription filled. Introduced into evidence was her prescription receipt and her doctor's patient chart to confirm the date. The State sought to attack her truthfulness by producing evidence of a prior misdemeanor conviction for prescription forgery. The State reasoned that this evidence was relevant to show the defendant's propensity for untruthfulness. By a rule of evidence, proof of a prior conviction is readily admissible to attack the credibility of a witness when the conviction involved a dishonest or false statement. [Miss. R. Evid.] 609(a)(2).

> "Jones asserts that the admission of this evidence was reversible error. When the prior conviction is of a crime that directly involves untruthfulness, such evidence is automatically admissible without the added requirement of undertaking a balancing that is required for proof of convictions of other kinds of crimes. Id.; Adams v. State, 772 So. 2d 1010 (¶ 56) (Miss. 2000). Forgery is the kind of crime covered by Rule 609(a)(2).
>
> "There was no error in the State using this prior conviction for impeachment."

846 So. 2d at 1046-47.

Also, in Allen v. Kaplan, 439 Pa. Super. 263, 653 A.2d 1249 (1995), the Superior Court of Pennsylvania held:

> "Appellant was convicted, essentially, of writing prescriptions for a controlled substance to himself, knowing he had a chemical dependency problem. The crime itself involves making a false statement because it necessarily involves the falsification of a prescription by a practitioner representing that it is not for a person who is chemically dependent. Because of the very nature of the offense committed, we must find that the crime is crimen falsi and, because the conviction is admitted to have occurred within ten (10) years of the matter involved, evidence concerning it should have been admitted at trial. It was error, therefore, for the trial court to have excluded the evidence. Likewise, it was error, under Russell v. Hubicz, [425 Pa. Super. 120, 624 A.2d 175 (1993)], and Commonwealth v. Randall, [515 Pa. 410, 528 A.2d 1326 (1987)], for the court to have found that the crime was not crimen falsi and to have therefore performed a balance

> between probative value and prejudicial effect. The evidence was automatically admissible."

439 Pa. Super. at 272, 653 A.2d at 1254 (footnote omitted).

Based on the comments in McElroy's Alabama Evidence and the holdings in Tracy, supra, Jones, supra, and Allen, supra, each of which interpreted a ruled of evidence substantially similar to our Rule 609(a)(2), we conclude that presenting a forged drug prescription is a crime involving "dishonesty or false statement" and that evidence concerning a conviction for that offense is automatically admissible for impeachment purposes pursuant to Rule 609(a)(2). Therefore, to the extent that the trial court found that Cannon could not introduce evidence of Lucas's 2018 conviction because it was irrelevant and because the danger of unfair prejudice to Lucas substantially outweighed the probative value of the evidence, those findings were erroneous.

Conclusion

For the above-stated reasons, we conclude that the trial court erred in granting Lucas's motion in limine to exclude evidence regarding his 2018 conviction for presenting a forged drug prescription. Because the

trial court erred in ruling that Cannon could not present such evidence at trial, we must conclude that it also erred in denying Cannon's motion for a new trial. Accordingly, in case number 1190505, we reverse the trial court's judgment based on the jury verdict, and we remand this case for that court to grant Cannon's motion for a new trial.[1] We determine that the issue raised in case number 1190725 concerning supplementation of the record on appeal is moot; therefore, we dismiss that appeal.

1190505 -- REVERSED AND REMANDED.

1190725 -- APPEAL DISMISSED.

Bolin, Shaw, Bryan, and Sellers, JJ., concur.

Mendheim and Stewart, JJ., concur in the result.

Parker, C.J., dissents.

Wise and Mitchell, JJ., recuse themselves.

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[1]Based on our disposition of this issue, we pretermit discussion of the remaining issues raised by Cannon in case number 1190505.

PARKER, Chief Justice (dissenting).

I agree with the main opinion's application of Rule 609, Ala. R. Evid., concluding that the circuit court erred by excluding Zachary Lucas's postaccident conviction, but I dissent because Michael Cannon did not demonstrate that the error harmed him and because I believe the circuit court's error was harmless.

Rule 45, Ala. R. App. P., prohibits an appellate court from reversing a judgment because of an erroneous evidentiary ruling if the error probably did not harm the losing party:

> "No judgment may be reversed or set aside, nor new trial granted in any civil or criminal case on the ground of ... the improper admission or rejection of evidence ..., unless in the opinion of the court to which the appeal is taken ..., after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

Thus, "the mere showing of error is not sufficient to warrant a reversal; it must appear that the appellant was prejudiced by that error." City of Birmingham v. Moore, 631 So. 2d 972, 973-74 (Ala. 1994). The appellant bears the burden of showing that an erroneous ruling was prejudicial. Middleton v. Lightfoot, 885 So. 2d 111 (Ala. 2003).

The main opinion contains no harmless-error analysis. And, in fact, Cannon has not made any cognizable argument showing that the exclusion of Lucas's postaccident conviction probably harmed him. In his opening brief, Cannon baldly asserts that the error made the trial "unfair," but he cites no authority in support of that assertion. In his reply brief, Cannon insists that, "[i]n an $18 million case that turned almost entirely on the jury's evaluation of who was more credible, the exclusion of Lucas's [2018] conviction for [a] crime involving dishonesty is reason by itself to reverse." However, he again fails to cite any supporting authority. Because Cannon did not timely argue that the erroneous ruling harmed him and, in violation of Rule 28(a)(10), Ala. R. App. P., has never cited authority on that point, Cannon has failed to meet his appellate burden of showing that the exclusion of Lucas's 2018 conviction warrants reversal.

Additionally, the error was not probably prejudicial, because there was ample evidence from which the jury could have found that Cannon was negligent, regardless of Lucas's credibility. There were physical "gouge" marks off the roadway caused by the accident. The wrecked

motorcycle was found off the road. Cannon testified that he never saw Lucas before hitting him even though nothing obstructed his vision. Cannon's van was dented on the right front and his right front tire was popped, consistent with his hitting the motorcycle near or off the right shoulder. A driver who stopped at the scene testified that, although the area was dark and he was driving with only his low beams on, he had no difficulty seeing the wrecked motorcycle off the road. Thus, even without Lucas's testimony, the evidence strongly supported a conclusion that Cannon was negligent in failing to see and avoid Lucas and the motorcycle.

For these reasons, I would not reverse the judgment based on the circuit court's erroneously excluding Rule 609 impeachment evidence.