Rel: 12/21/2007 Laakkonen

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2007-2008

CR-06-0981

Laren Edward Laakkonen, alias

v.

State of Alabama

Appeal from Madison Circuit Court
(CC-04-5056)

WELCH, Judge.

Laren Edward Laakkonen was convicted of possession of a controlled substance, crack cocaine, a violation of § 13A-12-212, Ala. Code 1975. Upon his conviction, Laakkonen was sentenced to four years' imprisonment. The trial court

suspended the sentence and ordered Laakkonen to serve two years' probation. The trial court also fined Laakkonen $500 and ordered him to pay an additional $1,000 assessment pursuant to the Drug Demand Reduction Assessment Act, $100 to the Alabama Crime Victims Compensation Fund and $100 to the Forensic Trust Fund.

The evidence adduced at trial tended to show the following. Madison County Sheriff's Investigator Chad Brooks was investigating a report that a missing 17-year-old girl might be staying at a mobile home in Toney. Brooks went to the mobile home, which, he testified, he recognized as one that had been "under constant scrutiny by our narcotics division as a point of sale for crack cocaine." (R. 75.) The owner of the mobile home gave Brooks permission to search the premises.

Brooks said he went behind the mobile home and saw a pickup truck behind the house next door. Two people were inside the truck -- Laakkonen and a woman, identified as Brenda Mullins, who was seated in the passenger seat. Brooks said he saw Mullins raise a small glass pipe to her lips, then

he saw her light the pipe. He drew his gun, approached the truck, and ordered the two to get out of the truck.

Mullins had in her possession an illegal crack pipe, and Brooks arrested her. Laakkonen was the other person in the truck, which belonged to him. When law-enforcement officials searched the truck, they discovered crack cocaine in a cigarette pack in the glove box. Laakkonen was then arrested for illegal possession of crack cocaine. He admitted he had purchased crack cocaine for other people. Laakkonen did not appear to be under the influence of crack at the time of his arrest.

Laakkonen contends on appeal that his conviction is due to be reversed because, he says, both the State in its closing argument and the trial court in it charge to the jury improperly attributed a prior conviction to Laakkonen that the State did not prove.

Laakkonen argues that the prosecutor improperly argued "in closing argument that Mr. Laakkonen was impeached by a prior conviction." (Laakkonen's brief at p. 18 (citing R. 135).) Laakkonen also argues that the following jury instruction given by the trial court was improper:

> "The credibility of a criminal defendant may be attacked by introducing evidence that the defendant has been convicted of certain crimes. Evidence has been introduced in this case that the defendant has been convicted of giving false information to a law enforcement officer. Evidence of a prior criminal conviction for impeachment purposes only -- is for impeachment purposes only and may not be considered as substantive evidence to prove the defendant's guilty. However, if you are reasonably satisfied from the evidence that the defendant has been convicted of the crime of giving false information to a law enforcement officer, that evidence can be considered by you in determining the credibility of the defendant's testimony; that is, whether or not you believe that this defendant is telling the truth. You may consider the conviction for giving false information to a law enforcement officer, along with all of the other evidence in this case, in determining what weight you will give the defendant's testimony."

(Laakkonen's brief at p. 18 (citing R. 143).)

Laakkonen argues on appeal that "based on the foregoing" declarations of the State and the trial court, the State was erroneously permitted to place before the jury that Laakkonen had been impeached "with a prior conviction without properly introducing authentic documentation thereof when Mr. Laakkonen did not admit to the prior conviction." (Laakkonen's brief at p. 19.)

At trial, Laakkonen testified on his own behalf. The record shows that as the prosecutor began cross-examining Laakkonen, the following colloquy occurred:

> "Q: [BY THE PROSECUTOR]: Your date of birth, please, sir?
>
> "A. [BY LAAKKONEN]: 1/17/64.
>
> "Q.: Uh-huh. (Affirmative.) And is _ _ _-_ _-_ _ _ _ your Social Security number?
>
> "A.: Yes, sir.
>
> "Q.: Could you, please, tell these folks what you were doing in the building on September 27, 2001?
>
> "A.: 2001 I can't remember it.
>
> "Q.: Weren't you in court on that date?
>
> "A.: I may have, but I'm not for sure.
>
> "Q.: Were you not convicted of giving false information to a police officer on that date in this building?
>
> "A.: Not that I recall, I mean.
>
> "Q.: Well, how many times have you been arrested for that, sir?
>
> "A.: Not that I recall, none.
>
> "Q.: Do you have any children with the same name as you?
>
> "A.: No, sir.

> "Q.: Back in that time or in -- have you ever lived at 2401 Huntsville Street, Huntsville, Alabama, 35811?
>
> "A.: Yeah, about ten years ago.
>
> "Q.: But you don't remember September 27, 2001?
>
> "A.: No. Not that I can say.
>
> "Q.: I beg your pardon?
>
> "A.: Not that I can say remember."

(R. 130-31.) A different line of questioning was pursued for a time, then the prosecutor said:

> "Q.: And you don't remember that giving false information to a police officer conviction in 2001?
>
> "A: Not that I remember, sir.
>
> "Q.: Not that you remember. May have happened?
>
> "A: It could, I mean, to be honest with you."

(R. 132.) The prosecutor then changed his line of questioning.

A review of the record shows that the issue whether Laakkonen had ever been convicted for providing a false name to a police officer was not discussed during the remainder of the trial. The State never offered any proof that such a conviction had occurred.

The closing arguments made in this case were not transcribed. However, the record does show that during the prosecutor's closing, Laakkonen's attorney objected, saying, "That was never introduced into evidence properly. Those were just statements made by him. There was no authentication of what he's saying." (R. 135.) The same attorney who represented Laakkonen at trial represents him on appeal. In his appellate brief, the attorney asserts that at the point of his objection, the prosecutor was arguing that Laakkonen had been impeached by a prior conviction. (Laakkonen's brief, p. 18.)

The State contends that because Laakkonen's attorney did not object "to the prosecutor's unsuccessful impeachment effort," the issue is not preserved for appellate review. (State's brief, p. 8.) As the State points out in its brief, to preserve an issue for appellate review, an objection is required at the time of the "offending question." (State's brief, p. 8.)

However, during the prosecutor's questioning of Laakkonen regarding whether he had a prior conviction, no "offending" question was asked. The prosecutor was within his rights to

ask Laakkonen on cross-examination about whether he had ever been convicted of giving a false name to a police officer. See Rule 609(a)(2), Ala. R. Evid. (evidence of a prior conviction may be used to attack the credibility of a witness if the crime for which the witness was convicted involved dishonesty or a false statement). Furthermore, at that point, Laakkonen could not have been aware that the State would not attempt to properly prove the conviction. Thus, at the time of the questioning, Laakkonen's attorney had no basis for objecting.

Not until the prosecutor apparently attempted to assert during closing arguments that Laakkonen had been impeached by evidence of a conviction of a crime -- which was improper because the State never proved that Laakkonen had such a conviction -- was there a valid ground for an objection.

> "In Ex parte Peagler, 516 So. 2d 1369, 1371 (Ala. 1987), the Alabama Supreme Court held that in attempting to impeach a hostile witness by questioning the witness about a prior conviction, a prosecutor must be prepared to rebut a negative answer with proper proof of the prior conviction: '"When a witness denies that he has been convicted of the crime, it becomes incumbent upon the impeaching party to prove the conviction."'"

Covington v. State, 620 So. 2d 122, 126 (Ala. Crim. App. 1993); see also Jennings v. State, 588 So. 2d 540, 542 (Ala. Crim. App. 1991). Proving the conviction "'"can be done by introducing the original court record of the conviction or a certified or sworn copy. The prior conviction cannot be proven by the offering of oral testimony by the impeaching party. See Headley v. State, 51 Ala. App. 148, 283 So. 2d 458 (1973)."'" Jennings, 588 So. 2d at 542 (quoting Ex parte Peagler, 516 So. 2d 1369, 1371 (Ala. 1987), quoting in turn Gregath v. Bates, 359 So. 2d 404, 408 (Ala. Civ. App. 1978))(emphasis omitted). The record shows that the State never presented any evidence of Laakkonen's alleged prior conviction, or that the prosecutor stood ready to prove the existence of the alleged prior conviction.

> "'It has long been the rule in Alabama that, although counsel should be given considerable latitude in drawing reasonable inferences from the evidence, they may not argue as a fact that which is not supported by the evidence.... This has been the rule since it was first stated in McAdory v. State, 62 Ala. 154[, 163] (1878):
>
> > "'"[C]ounsel should not be permitted to comment upon facts not proved before the jury as true, and not legally competent and admissible as evidence.

> However reluctant an appellate court may be to interfere with the discretion of a primary court in regulating the trial of cases, if it should appear that it had refused, to the prejudice of a party, to compel counsel to confine their arguments and comments to the jury, to the law and evidence of the case under consideration-if it had permitted them to refer to and comment upon facts not in evidence, or which would not be admissible as evidence, it would be a fatal error...."'
>
> "[Ex parte] Washington, 507 So. 2d at [1360] 1361-62 [(Ala. 1986)]. See also King v. State, 518 So. 2d 191, 194 (Ala. Cr. App. 1987). '[F]or the state's attorney to ask a question which implies the existence of a factual predicate which the examiner knows he [or she] cannot support by the evidence is unprofessional conduct.' Daniel v. State, 534 So. 2d 1122, 1126 (Ala. Cr. App. 1988)."

Covington, 620 So. 2d at 125-26.

"'"Laying prejudicial allegations before the jury 'by dint of cross-examination without being prepared to prove them is generally regarded as reversible error.' United States v. Brown, 519 F.2d 1368, 1370 (6th Cir. 1975)."'" Covington, 620 So. 2d at 126 (quoting Daniel v. State, 534 So. 2d 1122, 1126 (Ala. Crim. App. 1988)); see also Hooper v. State, 585 So. 2d

142, 151 (Ala. Crim. App. 1991); and Gillespie v. State, 549 So. 2d 640, 645 (Ala. Crim. App. 1989).

Nevertheless, in this case, the trial court did not rule on Laakkonen's objection during the prosecutor's closing arguments. When Laakkonen's attorney objected, the trial court merely stated, "Let's move on," and the prosecutor continued his closing. (R. 135.) It is incumbent upon counsel to obtain an adverse ruling to preserve an issue for appellate review. See Jones v. State, 895 So. 2d 376 (Ala. Crim. App. 2004); and Ragsdale v. State, 448 So. 2d 442 (Ala. Crim. App. 1984). Thus, Laakkonen's challenge to the prosecutor's closing argument is not preserved for appellate review.

However, Laakkonen's challenge to the trial court's improper jury instruction was properly preserved, and the improper instruction constitutes reversible error. After the trial court finished its instructions, but before the jury began its deliberations, Laakkonen's attorney entered his exception to the trial court's charge, saying that no evidence had been presented showing that Laakkonen had a prior conviction. The trial court responded by saying that

Laakkonen indicated on the record he could not recall whether he had such a conviction and Laakkonen's attorney had not objected. (R. 154.)

We point out again, however, that at the time the prosecutor was asking Laakkonen whether he had a prior conviction for giving a false name to a police officer, there was no basis for an objection. It is ludicrous to place the burden upon defense counsel to object when his client states he cannot remember whether he had been convicted. As pointed out in the cases cited above, when a witness testifies that he does not recall a prior conviction, the State bears the burden of proving such a conviction.

Laakkonen was not required to object -- indeed, he had no basis for an objection -- when the prosecutor questioned him about whether he had a prior conviction. Laakkonen's attorney objected at the appropriate time, i.e., when the prosecutor began telling jurors during his closing argument that Laakkonen had been impeached with evidence of a prior conviction. Defense counsel should have requested a ruling from the trial court as to his objection; however, counsel did properly take exception to the trial court's charge to the

jury that evidence of the prior conviction had been introduced into evidence.

Although we find that the issue whether the prosecutor's comment unduly prejudiced Laakkonen was not preserved for appellate review, nonethless, the law regarding the prosecutor's statement is equally true for the trial court's comment to the jury. Its instruction to the jury that evidence of a prior conviction had been introduced when in fact no such evidence had been presented is at least as prejudicial to Laakkonen as the prosecutor's comment; thus, Laakonen's conviction must be reversed.

Because we are reversing Laakkonen's conviction, we need not address the remaining issue he raised on appeal.

The judgment of the trial court is reversed and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Baschab, P.J., and Shaw, J., concur. McMillan and Wise, JJ., concur in the result.