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ARKANSAS COURT OF APPEALS

DIVISION IV
No. CACR10-36

ANDREW LOVETT APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** APRIL 13, 2011 APPEAL FROM UNION COUNTY CIRCUIT COURT [CR08-373-4] HONORABLE HARVEY L. YATES, SPECIAL JUDGE AFFIRMED

RITA W. GRUBER, Judge

A Union County jury convicted Andrew Lovett of second-degree murder, felon in possession of a firearm, and a firearm enhancement and sentenced him to consecutive sentences totaling sixty-eight years in prison. He brings two points on appeal: first, the trial court erred by allowing the State to question him about a prior manslaughter conviction; and, second, the trial court erred by allowing admission of a photograph of the victim. We affirm appellant's convictions.

The testimony at trial established that the victim, Michael French, and his friend Matthew Jerry were drinking alcohol and driving around in Mr. French's truck in Strong on the night of June 8, 2008. The problems arose after they stopped in the road to talk to a friend of Mr. French's. A few minutes after they stopped in the road, appellant, on his way home to his grandmother's house, drove up behind Mr. French's truck. Appellant got out

of his truck and asked Mr. French to move so he could get by. Mr. French refused and the two men ended up in an argument.

One of the State's witnesses, Mr. Jerry, testified that Mr. French got mad when he heard appellant "hollering" at him, "threw his truck" into park, and got out. Mr. Jerry said that Mr. French said some "ugly stuff" and they started pushing each other. Mr. Jerry said that he did not see either man punch the other. He then testified that appellant pulled out a gun, pointed it at Mr. French—who put up his hands and backed up—and shot Mr. French. Mr. Jerry said that Mr. French fell and did not get up. He said that he heard four or five shots after Mr. French fell.

Appellant's witnesses, Gregory Green and Pricilla Furlow, testified that Mr. French jumped out of his truck, went over to appellant's truck, and started hitting appellant in the face. Both said that, after appellant shot Mr. French, Mr. French was still fighting.

Appellant testified that Mr. French had the reputation in high school for being a bully and a fighter. He testified that Mr. French got out and said something like, "Lil Wayne, you m*** f*** nigger." Then Mr. French ran up and started punching him. Appellant testified that he had a gun in his waistband and, because he was in fear for his life, he fired it. He testified that, after he shot the first time, Mr. French kept "charging" him so he fired two or three more shots.

Appellant was charged with first-degree murder, felon in possession of a firearm, and a gun enhancement. A jury found him guilty of second-degree murder, felon in possession

of a firearm, and the firearm enhancement. The jury sentenced him to consecutive sentences of forty years, eighteen years, and ten years. He brought this appeal challenging the court's introduction of certain evidence.

I. *Prior Conviction*

Appellant's first point on appeal is that the trial court erred in admitting evidence that appellant had been convicted of manslaughter in 1999. Trial courts have broad discretion in deciding evidentiary issues, and we will not reverse their decisions absent an abuse of discretion. *Shields v. State*, 357 Ark. 283, 288–89, 166 S.W.3d 28, 33 (2004). Under Rule 609 of the Arkansas Rules of Evidence, evidence that a witness has been convicted of a crime is admissible for the purpose of attacking the credibility of the witness in two instances: if the crime "was punishable by death or imprisonment in excess of [1] one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party or a witness" or, regardless of the punishment, if the crime "involved dishonesty or false statement." Ark. R. Evid. 609(a) (2010). Evidence of a conviction is not admissible under Rule 609 if more than ten years has elapsed since the date of the conviction. Ark. R. Evid. 609(b).

On appeal, appellant contends that the court abused its discretion in admitting the conviction because it was within twenty days of being barred by subsection (b)'s ten-year prerequisite. Further, it had no impeachment value since manslaughter is not a crime involving dishonesty. Appellant also argues that the prior conviction and the murder charge

are similar and therefore that admitting evidence of the earlier conviction had a prejudicial effect by causing the jurors to believe that, if he committed a homicide before, he probably did it this time, too. Finally, he claims that because he was one of four witnesses who testified about the event, the credibility of his testimony was not a central issue at trial.

The rule allows evidence of prior crimes that occurred within ten years. At the time of trial, ten years had not elapsed since the manslaughter conviction. Appellant's argument that manslaughter is not a crime of dishonesty and thus has no impeachment value overlooks one of the assumptions of Rule 609(a)(1) that "one who commits a serious offense is, to some extent, less worthy of belief." *Sims v. State*, 27 Ark. App. 46, 47–48, 766 S.W.2d 20, 21 (1989). Further, appellant clearly put his credibility in issue when he took the stand and testified that he shot in self-defense and that Mr. French continued to charge him after the first shot. His credibility is a central issue in the case. Finally, the trial court has considerable discretion in determining whether the probative value of a prior conviction outweighs its prejudicial effect, and we will not reverse that decision absent abuse. *Strong v. State*, 372 Ark. 404, 412, 277 S.W.3d 159, 166 (2008).

Admissibility under Rule 609 must be decided on a case-by-case basis. *Id.* If a defendant chooses to testify, we have consistently permitted prior convictions to be used for impeachment even when those convictions are similar to the charges being tried. *Benson v. State*, 357 Ark. 43, 49, 160 S.W.3d 341, 344 (2004). We hold that the court did not abuse its discretion here.

II. *Photograph*

For his second point on appeal, appellant contends that the trial court erred in admitting a photograph of Mr. French depicting him as he appeared immediately after being transported to the medical examiner for autopsy. The photo was admitted during the testimony of Dr. Daniel Konzelmann, who performed the autopsy on Mr. French. Appellant contends that the photo had no probative value because it merely showed Mr. French's bloody body and photos of his body at the scene had already been introduced.

As with other matters pertaining to the admissibility of evidence, the admission of photographs is a matter left to the sound discretion of the trial court, and we will not reverse absent an abuse of that discretion. *Springs v. State*, 368 Ark. 256, 268, 244 S.W.3d 683, 692 (2006). When photographs are helpful to explain testimony, they are ordinarily admissible. *Id*. Moreover, the mere fact that a photograph is inflammatory or cumulative is not, standing alone, sufficient reason to exclude it. *Sweet v. State*, 2011 Ark. 20, at 16, ___ S.W.3d ___, ___. Even the most gruesome photographs may be admissible if they assist the trier of fact in any of the following ways: by shedding light on some issue, by proving a necessary element of the case, by enabling a witness to testify more effectively, by corroborating testimony, or by enabling jurors to better understand the testimony. *Id*. A photo may also be admissible to show the condition of the victim's body. *Jones v. State*, 340 Ark. 390, 91 S.W.3d 449 (2000).

Dr. Konzelmann testified that the photo depicted Mr. French when he first arrived at the medical examiner's office before he was washed and cleaned up and that it was one of the

standard photos taken by their office. In response to the defense's objection to the photo at trial, the State argued that the photo showed the condition of the body as it existed upon arrival at the medical examiner's office before it was cleaned up for the autopsy and that the photo directly contradicted appellant's contention that Mr. French was not wearing a shirt at the time of the incident. The trial court permitted introduction of the photo but warned the State not to attempt to introduce "repetitious" photographs taken at the medical examiner's office.

We hold that admission of the photo was not an abuse of discretion. The photo showed the condition of Mr. French's body immediately after it arrived at the medical examiner's office, enabled Dr. Konzelmann to testify more effectively, was not cumulative, and was not extraordinarily sensational or gruesome. Therefore we affirm appellant's conviction.

Affirmed.

VAUGHT, C.J., and BROWN, J., agree.