23-CF-0455

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

CLIFTON A. BROWNE
Appellant

v.

UNITED STATES
Appellee

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Case No. 2021-CF1-006943

BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE(S)

I. Did the trial court err in ruling that Mr. Browne's second degree assault convictions in Maryland could be used for impeachment?

STATEMENT OF THE CASE

There was an altercation on September 28, 2021, between Clifton Browne and Luther Brooks; Brooks was removed from life support and died on October 8, 2021. Browne was charged on December 7, 2021; a single-count indictment for second degree murder was filed on June 9, 2022.

Following a jury trial before the Honorable Marisa J. Demeo, Associate Judge, from January 9 to 12, 2023, with jury deliberations on January 12, 17, and 18, the jury returned a guilty verdict on the lesser included offense of voluntary manslaughter.

On May 12, 2023, Browne was sentenced to 11 years incarceration. Browne filed a notice of appeal on May 25.

STATEMENT OF FACTS

Clifton Browne

Clifton Browne's 26-minute recorded telephone interview with police was put into evidence. (Government Exhibit 21.)[1]

On September 28, 2021, Browne, 56 years old, 5'4" and 150 pounds (1/11/23 a.m. at 94), went to the home of Valerie Mann, the best friend of Browne's aunt, to help her get her home ready for sale. The basement of the home was occupied by a holdover tenant, Luther Brooks, 75 years old but described as tall and weighing close to 200 pounds. (1/11/23 p.m. at 94-95, 59-60.) Brooks was still physically capable, doing "spin" exercise classes, working as an Uber driver, doing handyman work, and was even learning the trade of installing solar panels on roofs. (1/10/23 at 95-96, 146-47.)

Browne and Mann went downstairs to Brooks's basement unit for Mann to show Browne what work needed to be done. Mann knocked on the door, announced herself, and inserted the key. Brooks exited the door and swung a stick at Mann (described as a closet pole, 1/10/23 at 82); Browne pushed Mann out of harm's way, received the blow, and fell to

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[1] Details in this section are from the telephone interview except where cited.

the ground. Browne got up and began fighting with Brooks in the hallway, which carried into Brooks's unit. Browne believed that Brooks was intending to kill him and so Browne "went into self defense mode." The two men were "rumbling" with Browne ultimately getting on top of Brooks and beating him. Browne then carried Brooks outside and tossed him to the ground as Brooks continued fighting ("He was steady fighting, said he wanted to go some more.")

Mann called 911, an ambulance took Brooks to the hospital, and Mann told police that Brooks fell down the stairs.

Valerie Mann

Valerie Mann picked up Browne at a Metro station and on the drive to her home told Browne about Brooks dragging his feet in vacating the basement unit. (1/10/23 at 156.) Browne suggested Brooks was taking advantage of her because she was a woman, and offered to talk to Brooks "man to man." (156)

At the house she heard Browne kick the interior basement door and Brooks shouting from inside. (161) Brooks opened the door armed with the stick (4 to 4.5 feet long and 2 inches diameter) and shoved it into

Browne's chest "pretty hard," causing Browne to fall backward. (161-63) Browne and Brooks were cursing and screaming at each other. (167-68) When Mann got to the basement unit, Browne was on top of Brooks and she pulled Browne off of Brooks. (169, 172) Browne took Brooks outside and Brooks was initially sitting up but fell backward. (178)

Mann testified that she initially believed Brooks suffered minor injuries, and told police that Brooks fell in order to protect Browne, who was her best friend's nephew and was his elderly father's caretaker. (182) After hearing from Brooks's daughter about the severity of Brooks's injuries, Mann contacted the police detective to give a new statement. (201-4)

Jennifer Price

Jennifer Price lived opposite the back alley. (1/10/23 at 109.) She heard cursing and fighting, and saw a man, about six feet tall, wielding and swinging a 2x4 at the exterior basement door. (111-12, 124-27) She then saw the man enter the residence through the upper back door. (131)

Autopsy

According to the forensic pathologist, Brooks suffered a non-displaced lower-back fracture, rib fractures, bruises, abrasions, and a skull fracture. The skull injury caused bleeding and swelling in the brain which the witness determined to be the cause of death. (1/11/23 p.m. at 40-56.)

Ruling on the Use of Convictions for Impeachment

The defense filed a *Motion in Limine to Limit Impeachment of the Defendant* (01/09/23) to bar the impeachment use of Browne's Maryland convictions for second degree assault (from 1998, 2005, 2006, and 2012). (R. tab-22/e-94.) The trial court recognized that the convictions could not be used for impeachment if the trial were in Maryland, or in the present case if the convictions were for the equivalent crime in the District. (1/11/23 p.m. at 15-16.) Nonetheless the trial court ruled that the court was required by statute to allow the use of the convictions for impeachment. (1/10/23 at 235 (advising parties of outcome); 1/11/23 p.m. at 4-18 (providing reasons for ruling.)

Decision Not to Testify

Following the trial court's ruling on the impeachment use of the convictions for second degree assault, Browne elected not to testify. During the *Boyd* inquiry the trial court reiterated that if Browne chose to testify, the jury would hear about the prior convictions. (1/11/23 p.m. at 89-92.)

SUMMARY OF ARGUMENT

The trial court erred in concluding that second degree assault in Maryland, which is the equivalent of simple assault in the District, is an impeachable conviction. The only difference is the penalty, which has no relation to the veracity involved in the underlying conduct. Allowing impeachment use of a Maryland conviction — that cannot even be used for impeachment in a Maryland courtroom — but not the equivalent District conviction, is an absurd and plainly unjust result, which was expressly rejected by the legislative committee report.

ARGUMENT

I. The trial court erred in ruling that the Maryland second degree assault convictions could be used for impeachment.

Standard of Review

"[A]ny controversy over the use of prior convictions will pose a legal question for appellate review not dependant on a trial record." *Butler v. United States*, 688 A.2d 381, 393 (D.C. 1996).

A defendant is not required under certain circumstances to testify in order to preserve the issue for appeal. For instance, where the trial court has made a definitive ruling on the use of convictions for impeachment that will not change depending on subsequent evidence or the defendant's testimony. *Haley v. United States*, 799 A.2d 1201, 1208 (D.C. 2002); *Wilson v. United States*, 691 A.2d 1157, 1158 n.3 (D.C. 1997).

The deprivation of the right to testify is a structural error, or in the alternative, the equivalent of a structural error because it denies the defendant a fundamental right and is not amenable to review for harmlessness. *See Arthur v. United States*, 986 A.2d 398, 413-16 (D.C. 2009).

Argument

The trial court erred in ruling that the convictions for second degree assault in Maryland could be used for impeachment.

D.C. Code § 14-305(b)(1) requires allowing the impeachment use of certain prior convictions:

> [F]or the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a criminal offense shall be admitted if offered ... if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment).

The trial court ruled that the convictions could be used under subsection (A) because the crime at issue is punishable with up to 10 years imprisonment.

Other than the penalties, Maryland's second degree assault and the District's simple assault are equivalent. Under the Maryland statute, "[a] person may not commit an assault." Ann. Code of Md., Crim. Law § 3-203(a). "'Assault' means the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings." Md. Crim. Law § 3-201(b). The judicially-determined meanings include battery, attempted battery, and intent to cause fear of battery. *Watts v. State*, 457

Md. 419, 435, 179 A.3d 929, 938 (2018). Maryland second degree assault is thus a run-of-the-mill assault and covers any unlawful touching (or intent to cause fear of unlawful touching). *Wiredu v. State*, 222 Md. App. 212, 218, 112 A.3d 1014, 1017 (2015) ("Second-degree assault is a statutory crime that encompasses the common law crimes of assault, battery, and assault and battery."); *United States v. Royal*, 731 F.3d 333, 342 (4th Cir. 2013) ("Maryland's second-degree assault statute reaches any unlawful touching, whether violent or nonviolent and no matter how slight."). Second degree assault is a misdemeanor punishable by up to 10 years imprisonment and/or a fine of $2,500. Md. Crim. Law § 3-203(b).

Second degree assault is thus the equivalent of simple assault in the District under D.C. Code §22-404 ("Whoever unlawfully assaults ...")

Simple assault is not an impeachable offense because it does not carry a penalty of more than one year and does not involve dishonesty. D.C. Code § 14-305(b)(1); *Harris v. United States*, 618 A.2d 140, 147 n.11 (D.C. 1992)*; Jones v. United States*, 131 U.S. App. D.C. 88, 402 F.2d 639, 643 (1968) ("[C]rime of assault is only remotely, if at all, probative on the issue of veracity.")

In Maryland, second degree assault is not an impeachable offense,

either. "There is no basis in logic to say that a propensity to engage in fisticuffs amounts to a predilection to lie." *State v. Duckett*, 306 Md. 503, 512, 510 A.2d 253, 258 (1986).

The trial court recognized that the convictions could not be used for impeachment in Maryland courts, and that convictions under the parallel statue in the District could not be used in the District. Thus, under the trial court's interpretation, if John Doe and Richard Roe are caught in a melee on Eastern Avenue, and John Doe is convicted for punching a person on the District side while Richard Roe is convicted for punching a person on the Maryland side, John Doe does not have a conviction that can be used for impeachment in the District or Maryland, while Richard Roe has a conviction that can be used for impeachment in the District but not in Maryland *(where the offense occurred*). That Maryland saw fit to have more room for punishment for assault has no rational connection to any impeachment value.

The trial court concluded that this outcome was neither absurd or plainly unjust. *See, e.g., George v. Dade*, 769 A.2d 760, 762-63 (D.C. 2001) ("[T]he plain words of a statute must be followed unless the clearly expressed intent of the legislature reveals ambiguities or the plain

language leads to absurd or plainly unjust results.") It is difficult to comprehend how the interpretation is *not* absurd and/or plainly unjust.

Congress did not intend this absurd and plainly unjust result. Rather, the House Committee Report stated the intention that crimes of passion and short temper, "such as assault," would not be used for impeachment. *See Williams v. United States*, 337 A.2d 772, 775 (D.C. 1975), discussing House Committee Report No. 91-907 (March 13, 1970). Congress did not review Maryland's second degree assault statute and decide that such convictions could be used for impeachment; rather it enacted a rough one-size-fits-all provision presumably based upon the general rule at the time that if the potential penalty was more than one year, the crime was a felony not a misdemeanor. 18 U.S.C. § 1, repealed by Public Law 98-473 § 218, 98 Stat. 2027 (Oct. 12, 1984), provided: "Notwithstanding any Act of Congress to the contrary: (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony. (2) Any other offense is a misdemeanor." The reason for mismatch between the crime of second degree assault and any rational use for impeachment was not a deliberative choice of Congress, but is caused by one particular statute in one particular state that Congress never considered and which contradicts

the intention stated in the House committee report. The outcome further contradicts appellate decisions in both Maryland and the District that ordinary assaults are not rationally used for impeachment.

Mechanical reading of D.C. Code § 14-305, as applied to Maryland's second degree assault, produces an absurd and plainly unjust result. The trial court erred in ruling that Browne's second degree assault convictions could be used to impeach him, causing his decision not to testify. Reversal and remand for a new trial is required.

CONCLUSION

For these reasons, the conviction should be reversed and the case remanded for a new trial.

SIGNATURE OF COUNSEL

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Brief** has been served electronically, by the Appellate E-Filing System, upon:

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this **10th** day of **January 2024.**

/s/ Sean R Day
Sean R. Day

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here	**G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.**

/s/ Sean R. Day
Signature

23-CF-0455
Case Number(s)

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