

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO: 2011-AP-32
LOWER COURT CASE NO: 48-2010-MM-12557

JOSEPH PABON,

Appellant,
vs.

STATE OF FLORIDA,

Appellee.
_____ /

Appeal from the County Court
for Orange County, Florida,
Martha C. Adams, County Court Judge

Robert Wesley, Public Defender, and
Benjamin Wurtzel, Assistant Public Defender,
for Appellant

Lawson Lamar, State Attorney and
Dugald McMillan, Assistant State Attorney,
for Appellee

Before EGAN, LATIMORE, and ROCHE, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

Appellant, Joseph Pabon (herein "Appellant"), appeals the Orange County Court's judgment and sentence against him for the offense of stalking, a misdemeanor, in violation of Florida Statute 784.048(2). This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1). We conclude that the trial court abused its discretion by denying Appellant the right to present admissible testimony on direct examination regarding his prior conviction as a means of anticipatory rehabilitation, and reverse.

The facts can be summarized as follows. On November 3, 2010, Appellant was charged by Information alleging that he, between the 1st day of August, 2010 and the 16th day of October, 2010, knowingly, willfully, maliciously and repeatedly followed or harassed or cyberstalked Sarah Foley. Appellant exercised his right to a trial by jury in the above-styled cause and was found guilty as charged by said jury on June 2, 2011.

On June 1, 2011, prior to trial the State announced it was in possession of a notice of prior criminal convictions for a 2009 petit theft case and noted that it represented a conviction of a crime of dishonesty. On June 2, 2011, the second day of Appellant's trial, on direct examination, Appellant's counsel asked whether Appellant had been charged with petit theft in 2009. The State immediately objected arguing that the charge itself and the related details of said charge were not relevant and thus inadmissible.

In response to the State's objection, Appellant's counsel argued that Appellant had the right to anticipatory rehabilitation, and that right allowed him to ask the witness about the nature and details of the 2009 petit theft charge. In support of his argument, Appellant's counsel noted that different evidentiary considerations applied regarding the anticipatory rehabilitation verses the general impeachment of a witness' prior convictions.

Over Appellant's argument, the trial judge ruled that Appellant could only testify that he pled to the charge as opposed to going to trial, that he was convicted, and that he was subsequently found guilty; he could not testify to the nature and details of the crime of dishonesty. Accordingly, Appellant testified that he had been convicted of a crime of dishonesty and that he had pled as opposed to exercising his right to trial.

Appellant was found guilty as charged by the jury of stalking, a misdemeanor, in violation of Florida Statute 784.048(2). He was adjudicated guilty and sentenced to 62 days in

the Orange County Jail with credit for 62 days time served to be followed by 300 days probation under the supervision of the Orange County Community Corrections.

On appeal, Appellant argues that the trial court erred in precluding him from testifying on direct examination as to the nature and circumstances of his prior conviction for petit theft, a crime of dishonesty, over objection by the State.

Under section 90.610(1), Florida Statutes, convictions for crimes involving dishonesty or false statement are admissible to attack the credibility of a witness. This type of prior criminal activity is considered relevant to impeach because it involves the person's capacity to testify truthfully, which is the issue it is offered to prove. *See State v. Page*, 449 So. 2d 813 (Fla. 1984). Generally, counsel may ask whether a witness has been convicted of a crime of dishonesty, and if so, how many times. *Brown v. State*, 787 So. 2d 136, 138-39 (Fla. 4th DCA 2001). On cross-examination, counsel may not impeach a witness with the exact nature of his prior convictions. *Gavins v. State*, 587 So. 2d 487, 489-90 (Fla. 1st DCA 1991).

However, on direct examination, counsel may ask its own witness not only about a prior conviction of dishonesty that the State will be permitted to elicit on cross-examination, but also about the nature and circumstances of that crime as a means of anticipatory rehabilitation against such impeachment. *Lawhorne v. State*, 500 So. 2d 519, 521 (Fla. 1986). The purpose of anticipatory rehabilitation is to attempt to diminish the effect of the disclosure in advance. *Id.* at 522. *See also Williams v. State*, 730 So. 2d 777 (Fla. 3d DCA 1999) (holding that on direct examination the defendant was entitled to explain the nature of his prior convictions in order to “reduce the harmful consequences' by explaining something about the nature or character of the damaging information—in other words, to rehabilitate [himself] before he [was] impeached”) (citations omitted).

The trial court has broad discretion concerning the admissibility of evidence, and its rulings will not be disturbed absent a clear abuse of discretion. *Hendry v. Zelaya*, 841 So. 2d 572 (Fla. 3d DCA 2003); *LaMarr v. Lang*, 796 So. 2d 1208 (Fla. 5th DCA 2001); *Grau v. Branham*, 761 So. 2d 375 (Fla. 4th DCA 2000). The trial judge's decision with regard to the admission of evidence or testimony must be evaluated on appeal in the context of the entire trial because "[a] trial court's error in admitting or rejecting evidence does not necessarily constitute harmful error." *Forester v. Norman Roger Jewell & Brooks Intern., Inc.*, 610 So. 2d 1369, 1372 (Fla. 1st DCA 1992). "Only when it appears that such errors injuriously affect the substantial rights of the complaining party will a judgment be reversed." *Id.*

Precluding a defendant from testifying and explaining the nature and circumstances of his prior convictions on direct examination constitutes harmful error where his credibility is a critical aspect of the case. *Jackson v. State*, 947 So. 2d 480, 483 (Fla. 3d DCA 2006) (citing *Lawhorne*, 500 So. 2d at 522 and *Williams*, 730 So. 2d at 779). This is particularly true where a jury is instructed that one of the factors they should consider is whether the witness has been previously convicted of a crime. *See Jackson*, 947 So. 2d at 483.

In the instant case, it was harmful error for the trial court to deny Appellant the right to present admissible testimony on direct examination regarding his prior convictions as a means of anticipatory rehabilitation because his credibility was a critical aspect of the case. The State's case consisted primarily of the testimony of the victim. Appellant, waiving his right to remain silent, testified and in doing so, directly refuted the claims made by the victim. In large part, the evidence the jury considered in making its decision consisted of the credibility of the testimony of the victim compared to that of the Appellant.

In sum, having considered the entire context of the trial, the Court finds that the trial court abused its discretion by precluding Appellant from explaining the nature and circumstances of his prior conviction on direct examination substantially affecting his rights. The State concedes that Appellant is entitled to relief.

The trial court abused its discretion and as a result, the final judgment and sentence must be reversed.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's final judgment and sentence are **REVERSED** and the case is **REMANDED** for a new trial.

DONE AND ORDERED on this 7th day of January 2013.

/S/
ROBERT J. EGAN
Circuit Court Judge

/S/
ALICIA L. LATIMORE
Circuit Judge

/S/
RENEE A. ROCHE
Circuit Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Final Order Reversing Trial Court has been provided to **Benjamin Wurtzel, Assistant Public Defender**, 435 N. Orange Avenue, Suite 400, Orlando Florida 32801 and **Dugald McMillan, Assistant State Attorney**, 415 North Orange Avenue, Orlando, Florida 32801 this 7th day of January 2013.

/S/ _____
Judicial Assistant