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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Walton J. McLeod, IV, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ISAIAH DESHAUN BUTLER,

APPELLANT

APPELLATE CASE NO. 2021-001272

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by admitting Appellant's prior conviction for possession of a stolen vehicle as impeachment evidence when (1) the conviction was not a crime of dishonesty or false statement, as the judge found, and therefore not automatically admissible pursuant to Rule 609(a)(2), SCRE, (2) the probative value of the conviction did not outweigh the prejudicial effect and thus should have been excluded pursuant to Rule 609(a)(1), SCRE, (3) and any probative value of the conviction was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE, particularly where it was alleged that the vehicle involved in the drive by shooting, which led to charges for which Appellant was being tried, was stolen?

STATEMENT OF THE CASE

A Lexington County Grand Jury indicted Appellant on August 5, 2019 for two counts of attempted murder. R. 130. His case was called to trial on August 23, 2021 before the Honorable Walton J. McLeod, and a jury. On the third day of trial, the judge granted a mistrial due to juror misconduct. Appellant's case was called to trial again on October 11, 2021 before Judge McLeod, and a jury. R. 1. Assistant Solicitors Sutania Fuller and Whitney Yongue represented the state. R. 1. Jason Chehoski and Jean Popowski represented Appellant. R. 1. The state chose to try Appellant for one count of attempted murder and one count of the lesser included offense of assault and battery of a high and aggravated nature (ABHAN).

On October 14, 2021, the jury found Appellant guilty. R. 603, ll. 6-14. Judge McLeod sentenced Appellant to twenty-eight years for attempted murder and twenty years concurrent for assault and battery of a high and aggravated nature. R. 622, ll. 5-13.

This appeal follows.

STATEMENT OF FACTS

In August 2018, Appellant's then girlfriend, Keanna Outlaw, and her brother, Isaiah Outlaw,¹ lived together in Apartment C-22 at Serenity Apartments, more commonly known as Riverbend Apartments, on Riverbend Drive in West Columbia. R. 15, ll. 1-14; R. 83, l. 22 – 84, l. 14; R. 146, l. 20 – 147, l. 1. Their friend, Tomiah, also stayed with them. R. 15, ll. 1-20. The power had been turned off at their apartment “because [they] had become past due” on payments. R. 85, ll. 6-9. Their close friend, Areauna Lindsey, lived in Apartment G-38 in the same complex. R. 15, ll. 21-24. The siblings often went to Areauna's apartment to cool off in the air conditioning, shower, and charge their phones. R. 86, ll. 5-9.

Keanna and Isaiah had a strained relationship since childhood. R. 83, l. 22 – 84, l. 4. Their relationship became even more strained when the power was turned off at their apartment. R. 85, ll. 6-14. “There was a lot of stress on” Isaiah to get the power turned back on and he was upset Keanna was not helping. R. 85, ll. 6-14.

On the night of August 29, 2018, the pair argued. R. 86, ll. 18-24. Keanna “was talking about going back to school” and, while Isaiah was “happy for her to do that,” he did not feel “it was an appropriate time” for Keanna “to talk about it.” R. 86, l. 18 – 87, l. 3. Isaiah was also angry because Keanna “wanted to put . . . Tomiah out of the house” because she was not “contributing to the bills.” The argument escalated and Isaiah ultimately struck Keanna. R. 87, ll. 6-11; R. 147, ll. 8-12. Keanna did not hit Isaiah back. R. 87, ll. 21-22.

¹ By the time of trial, Isaiah Outlaw preferred to be called Zariah although his legal name was still Isaiah. R. 82, ll. 3-9. He is interchangeably referred to as Isaiah and Zariah throughout the record, but only as Isaiah in this brief. Appellant's first name is also Isaiah. He is interchangeably referred to as Isaiah or his nickname “Ike” throughout the record. He is referred to as Appellant in this brief.

Because they were not getting along, Isaiah decided he would move out of the apartment the siblings shared. R. 87, ll. 24- 25. That night, he slept at Areauna's apartment, G-38. R. 87, l. 23 – 88, l. 1. While Isaiah was gone, Keanna threw all of his belongings out the window of their apartment and pushed his bed out the front door. R. 88, ll. 5-13; R. 147, ll. 13-17.

The following day, August 30, 2018, Keanna called the police shortly after noon to report the assault from the night before. R. 88, ll. 18-22; R. 126, l. 23 – 127, l. 10. She wanted Isaiah to get arrested for hitting her. R. 88, ll. 21-22. While the police responded to the apartment, the officers said they could not make an arrest because Keanna had not timely reported the assault. R. 88, ll. 22-25; R. 326, ll. 16-25.

Later that afternoon, Keanna came to Areauna's apartment where Isaiah was staying. Their seven year old brother was with her. R. 89, ll. 15-17. Isaiah escorted their brother to the bathroom and helped him prepare to take a shower. R. 89, ll. 17-18. When Isaiah returned from the bathroom, Keanna and his phone, which he had left sitting on the couch, were gone. R. 89, l. 17 – 90, l. 3. Isaiah suspected Keanna had taken it. R. 89, l. 24 – 90, l. 3. He called the police shortly after six o'clock that evening to report the theft. However, "the police said they couldn't do anything" since Isaiah did not actually see Keanna take the phone. R. 91, ll. 14-24; R. 127, l. 19 – 128, l. 1.

Shortly thereafter, Isaiah and two friends, Ebony Ponds and Iyana Tyus, walked from Areauna's apartment, G-38, to Keanna and Isaiah's apartment, C-22, to try to get Isaiah's phone back. R. 21, l. 22 – 22, l. 21; R. 24, ll. 3-9; R. 90, ll. 17-24; R. 328, l. 10 – 329, l. 13. When they got to the apartment, Appellant, Keanna's then boyfriend, and Keanna were outside. R. 24, ll. 10-14. Isaiah went inside and began damaging Keanna's property. R. 90, l. 23 – 91, l. 1. Keanna followed him inside. R. 22, l. 24 – 23, l. 3. While they were inside, "all you heard was a whole lot of arguing and yelling." R. 23, ll. 1-3. Isaiah eventually came outside followed by Keanna.

R. 23, ll. 3-4. Keanna was carrying “a glass top to a dining room table.” R. 23, ll. 3-5. She “busted it over” Isaiah’s head. R. 23, ll. 5-6; R. 91, ll. 3-5. The glass shattered all over the terrace outside. R. 91, ll. 3-5. Isaiah and Keanna then began physically fighting. R. 23, ll. 6-7; R. 91, ll. 5-6. Appellant broke up the fight and carried Keanna inside. R. 26, ll. 14-16; R. 91, ll. 6-7; R. 349, ll. 2-14. Keanna kept coming back outside and Appellant repeatedly put her back in the house to prevent any further altercation. R. 349, ll. 5-14.

After Appellant broke up the fight, he showed Isaiah that he (Appellant) had Isaiah’s phone. R. 28, ll. 15-22. Appellant told Isaiah that he would not give him his phone back “until Keanna say so.” R. 28, ll. 15-22. Appellant was upset because he did not think Isaiah should be “fighting a girl.” R. 25, ll. 1-6. He told Isaiah to “stop putting his hands on his sister.” R. 481, ll. 10-14. “Things . . . got heated” and “a lot of words were exchanged between everybody.” R. 25, ll. 5-10. There was a lot of shouting and cursing. R. 25, ll. 11-24; R. 332, l. 25 – 333, l. 2. During the chaos, multiple threats were exchanged. R. 284, l. 15 – 285, l. 11. Appellant supposedly threatened to shoot Iyana, Isaiah, and Ebony. R. 26, l. 21 – 27, l. 11; R. 91, ll. 10-13; R. 331, ll. 7-11. Appellant admitted to threatening Iyana only because she threatened him first, but it was not “serious.” R. 481, l. 14 – 482, l. 3.

Eventually, Isaiah, Iyana, and Ebony left and walked back to Areauna’s apartment, G-38. R. 29, ll. 1-3. While they were walking, Isaiah used Ebony’s phone to call 911 since he had now confirmed that Keanna had taken his phone. R. 92, ll. 12-25. This call was placed at 7:30 pm. R. 128, ll. 2-13. The police responded to Keanna’s apartment and spoke to Keanna. R. 128, ll. 14-23; R. 211, l. 23 – 212, l. 18. While Appellant saw the police arrive, he did not talk to them. R. 482, l. 22 – 483, l. 8. His close friend, who he often referred to as his sister, Monee Anderson, picked him up and took him home. R. 187, l. 18 – 188, l. 4; R. 410, ll. 11-19.

Once the police left, Keanna walked to Areauna's apartment because she discovered Isaiah had taken her wallet during the recent altercation. R. 94, ll. 13-22. As she was sitting on the stairs outside Areauna's apartment, Keanna texted Appellant and told him that Isaiah had stolen her money. She also said the group was trying to "jump" her and asked Appellant to meet her at her apartment. R. 33, l. 20 – 34, l. 18. Appellant responded that he was on his way. R. 34, ll. 13-15. He planned to give Isaiah his phone back so Keanna could get her wallet back. R. 485, ll. 22-24.

After texting Appellant, Keanna went back to her apartment, but returned shortly thereafter and stood at the entrance to the "cut" or path that led from Areauna's apartment to her own. R. 35, l. 23 – 36, l. 7; R. 188, l. 22 – 190, l. 7. By that time, there was a large group of people standing outside Areauna's apartment, including, Ebony, Iyana, Isaiah, Areauna, Larresia Thompson, Ebony's mother, and Nashaun Thompson, Ebony's cousin. R. 29, ll. 7-22; R. 36, ll. 8-11. Ebony had called Nashaun "because of the threats that were made" during the prior altercation. R. 334, l. 25 – 335, l. 1. Nashaun was carrying a gun and looking for Appellant. R. 188, ll. 5-14. Keanna immediately Facetimed Appellant and told him not to come because of this potential danger. R. 188, ll. 15-21. Consequently, Appellant did not return to the apartments. R. 485, l. 25 – 486, l. 25.

Shortly after nine o'clock, a black SUV pulled into the parking lot and drove by the group of people standing outside Areauna's apartment, G-38. Some witnesses claimed the SUV was a Range Rover.² R. 97, ll. 7-9; R. 337, ll. 14-17. As it passed by, "shots came from the

²The state alleged Appellant owned a black Range Rover at the time of the shooting. There were photographs of a black Range Rover on Appellant's phone, which was searched shortly after the shooting by law enforcement. Appellant explained that the Range Rover in the photographs on his phone belonged to a friend. R. 498, l. 3 – 499, l. 15. He denied owning or driving a Range Rover. He did not have a car at the time. R. 149, ll. 12-22.

vehicle.” R. 97, ll. 17-23; R. 190, ll. 12-15; R. 336, ll. 11-17. It was dark outside and the windows of the vehicle were darkly tinted. R. 101, ll. 19-24; R. 190, ll. 16-23. Consequently, no one could see the shooter or shooters. R. 97, ll. 15-25; R. 190, l. 24 – 191, l. 7; R. 337, l. 14 – 338, l. 3. However, Iyana claimed that while she did not see the shooter nor the gun, “from what she could tell” Appellant was the driver of the vehicle and the bullets were coming from the driver’s side of the car. R. 37, ll. 3-21. Ebony Ponds suffered a graze wound to the head while her mother, Larresia Thompson, was shot in the arm, chest, and abdomen. R. 277, l. 19 – 280, l. 18. Both women survived their injuries.

After the shooting, Nashaun Thompson pulled a gun on Keanna and threatened her. R. 191, l. 18 – 192, l. 2. Two women also attacked her. R. 192, ll. 3-4. Areauna intervened and told Keanna to run. R. 192, ll. 5-9. Keanna fled on foot. She lost her shoes while she was running. R. 192, ll. 10-13. She ended up barefoot at the nearby chicken farm in West Columbia. R. 192, ll. 14-16. Keanna borrowed a phone from an employee at the chicken farm and called Appellant. R. 193, ll. 10-18. Appellant and Monee Anderson came to pick Keanna up in Anderson’s car. R. 193, l. 19 – 194, l. 4.

Appellant testified in his own defense. He explained that after Monee picked him up from Keanna’s apartment that night he went home. R. 483, ll. 11-19. While he was home, he received the text messages from Keanna about Isaiah stealing her wallet. R. 484, l. 5 – 485, l. 14. He intended to return to Keanna’s apartment to give Isaiah his phone back, which Appellant still had, in exchange for Keanna’s wallet. R. 485, ll. 22-24. However, Keanna Facetimed him and told him there “was a guy out there” with a “firearm” so he decided not to go. R. 485, l. 25 – 486, l. 20. He told Keanna to stay at her apartment because “he wanted her to be safe.” R. 486, ll. 6-10.

Appellant's friend, Tavares, picked Appellant up from his house shortly thereafter. They subsequently picked up another friend, Nasir, and then met Monee Anderson near Gamecock Stadium off Bluff Road. R. 487, ll. 1-13. From there, Appellant rode with Monee to Old Chicago, a restaurant in the Vista. R. 490, ll. 3-17. While they were in the parking lot of Old Chicago, he received a call from Keanna. R. 491, l. 14 – 493, l. 21. Keanna told him about the shooting. She said she was at the plaza across the street from the chicken farm and needed a ride. R. 494, ll. 6-9. Appellant and Monee left to pick Keanna up. R. 494, ll. 1-9; R. 495, ll. 3-9. After they picked up Keanna, they went to Copper Beach, an apartment complex off Bluff Road, and stayed there the rest of the night. R. 495, ll. 10-16. Monee Anderson verified Appellant's account of events. R. 434, l. 16 – 437, l. 21.

Appellant denied having any involvement in the shooting. R. 476, ll. 19-25.

STANDARD OF REVIEW

“In criminal cases, appellate courts sit to review errors of law only.” State v. Robinson, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). “The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court’s] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law.” Id. (quoting State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001)) (alterations in original) (internal quotation marks omitted). “An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.” Id. (quoting State v. Douglas, 369 S.C. 424, 429-430, 632 S.E.2d 845, 848 (2006)) (internal quotation marks omitted).

ARGUMENT

The trial judge abused his discretion by admitting Appellant's prior conviction for possession of a stolen vehicle as impeachment evidence when (1) the conviction was not a crime of dishonesty or false statement, as the judge found, and therefore not automatically admissible pursuant to Rule 609(a)(2), SCRE, (2) the probative value of the conviction did not outweigh the prejudicial effect and thus should have been excluded pursuant to Rule 609(a)(1), SCRE, (3) and any probative value of the conviction was substantially outweighed by the danger of unfair prejudice pursuant to Rule 403, SCRE, particularly where it was alleged that the vehicle involved in the drive by shooting, which led to charges for which Appellant was being tried, was stolen.

Relevant Facts

Before Appellant testified, the assistant solicitor stated she intended to impeach Appellant with his prior conviction for possession of a stolen vehicle. R. 424, ll. 10-22; R. 427, ll. 8-13; R. 473, ll. 20-22. Appellant pled guilty to the offense in 2020 in Richland County. R. 427, ll. 8-13; R. 473, ll. 20-22. Defense counsel objected pursuant to Rule 609, SCRE, and Rule 403, SCRE. R. 427, ll. 14-16. The assistant solicitor argued that impeaching Appellant with this prior conviction was "perfectly appropriate." R. 427, ll. 20-23. She contended that possession of a stolen vehicle was a crime of dishonesty and, therefore, pursuant to Rule 609(a)(2), "no balancing test is required." R. 427, l. 25 – 428, l. 7. Additionally, the solicitor emphasized that the prior conviction was not the same or similar to the offenses for which Appellant was being tried and that evidence of the conviction "would go directly toward impeaching" Appellant's testimony. R. 427, l. 23 – 428, l. 2.

The trial judge found possession of a stolen vehicle is a crime of dishonesty. R. 428, ll. 15-16. He noted, as the solicitor argued, that Rule 609(a)(2) does not require the judge to weigh

the probative value and prejudicial effect before admitting evidence of a crime of dishonesty. R. 428, ll. 8-14. However, the judge maintained that he must consider Rule 403 regardless before admitting any evidence. R. 428, ll. 8-14. He determined that a conviction for possession of a stolen vehicle “certainly has a tendency to go towards the credibility of a witness” and in this case credibility is “important.” R. 428, ll. 14-18.

The judge then inquired whether possession of a stolen vehicle has “monetary benchmarks.” R. 428, ll. 19-21. Defense counsel emphasized that it is a “property crime” to which the judge acknowledged. R. 428, l. 24. The assistant solicitor then clarified that Appellant’s conviction involved a vehicle valued at more than two thousand dollars but less than ten thousand dollars. R. 428, l. 25 – 429, l. 1.

The trial judge ultimately concluded that “while all evidence could have the tendency to be prejudicial,” evidence of Appellant’s conviction for possession of a stolen vehicle was not “unfairly prejudicial under the circumstances” and thus “impeachment will be allowed.” R. 429, ll. 2-5. Defense counsel renewed his objection immediately before Appellant testified. R. 473, ll. 20-25.

After Appellant introduced himself to the jury, defense counsel immediately questioned Appellant about his prior conviction. Counsel asked, “Right off the top Mr. Butler, I have to ask you an uncomfortable question. You have a conviction for possession of a stolen vehicle?” R. 476, ll. 15-17. Appellant responded, “Yes, sir.” R. 476, l. 18. The assistant solicitor did not question Appellant about his conviction during cross-examination.

Discussion

The trial judge abused his discretion by admitting evidence of Appellant’s prior conviction for possession of a stolen vehicle as impeachment pursuant to Rule 609, SCRE, and

Rule 403, SCRE. The judge erred by concluding that the offense was a crime of dishonesty and by failing to conduct a proper balancing test pursuant to Rule 609(a)(1), SCRE. Evidence of the prior conviction should have been excluded because it had no probative value whatsoever and was unduly prejudicial to Appellant whose testimony was crucial to his defense.

Rule 609(a), SCRE, provides:

For the purpose of attacking the credibility of a witness,

- (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and **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.**

Rule 609(a), SCRE (emphasis added).

“[U]nder Rule 609(a)(1), when the accused chooses to testify during his trial, if the State seeks to introduce impeachment evidence that the accused has been convicted of a crime punishable by imprisonment for more than one year, the evidence is admissible *if the State establishes* the probative value of admitting the evidence outweighs its prejudicial effect upon the accused.” State v. Robinson, 426 S.C. 579, 593, 828 S.E.2d 203, 210 (2019) (emphasis added). However, “[u]nder Rule 609(a)(2), SCRE, if a crime is viewed as one involving dishonesty, the court must admit the prior conviction because, prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect.” State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006); See Robinson, 426 S.C. at 593, 828 S.E.2d at 210.

Our Supreme Court has held that “for impeachment purposes, crimes of ‘dishonesty or false statement’ are crimes in the nature of *crimen falsi* ‘that bear upon a witness’s propensity to testify truthfully.’” State v. Broadnax, 414 S.C. 468, 476, 779 S.E.2d 789, 793 (2015) (quoting Adams v. State, 284 Ga.App. 534, 644 S.E.2d 426, 431-432 (2007)); See also United States v. Smith, 551 F.2d 348, 362-363 (D.C. Cir. 1976) (“Even in its broadest sense, the term ‘*crimen falsi*’ has encompassed only those crimes characterized by an element of deceit or deliberate interference with a court’s ascertainment of truth.”). In so holding, the Supreme Court emphasized that the “Federal Rules of Evidence specifically identify *crimena falsi* in Rule 609(a)(2), FRE, as crimes which by their very nature permit the impeachment of a witness convicted of a crime of ‘dishonesty or false statement.’” Id. at 476-477, 779 S.E.2d at 793 (quoting Stuart P. Green, Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of *Crimen Falsi*, 90 J. Crim. L. & Criminology 1087, 1090 (2000)). The Court further cited to the “original Conference Report,” which made “the link between Rule 609(a)(2) and *crimena falsi* explicit, defining the phrase ‘crimes involving dishonesty or false statement’ as ‘crimes such as perjury, subornation of perjury, false statements, 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.’” Id. (quoting Green, *supra*, 1090-1091); See H.R. Conf. Rep. No. 93-1037, at 9 (1975).

Based on this definition of crimes of dishonesty or false statement, the Supreme Court in Broadnax determined armed robbery was not “per se probative of truthfulness” and, therefore, the trial court was required to weigh the probative value and prejudicial effect of the admission of an armed robbery conviction pursuant to Rule 609(a)(1). Id. at 476, 779 S.E.2d at 793.

In State v. Bryant, our Supreme Court held the trial court erroneously admitted Bryant's prior firearm convictions pursuant to Rule 609 without weighing the probative value and prejudicial effect of their admission because firearm offenses were not crimes involving dishonesty. 369 S.C. 511, 517, 633 S.E.2d 152, 155-156 (2006). In so holding, the Court stated, "Violations of narcotics laws are generally not probative of truthfulness. See State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) (citing State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000)). Furthermore, a conviction for *robbery, burglary, theft, and drug possession*, beyond the basic crime itself, is not probative of truthfulness. United States v. Smith, 181 F.Supp.2d 904 (N.D.Ill.2002). Likewise, firearms violations also are not generally probative of truthfulness. Accordingly, [Bryant's] prior firearms convictions do not involve dishonesty and their probative value should have been weighed against their prejudicial effect prior to their admission pursuant to Rule 609(a)(1)." Id. The Supreme Court ultimately held it was error to admit Bryant's firearm convictions because they "had nothing to do with [Bryant's] credibility and, their admission was more prejudicial than probative, especially in light of the offenses for which he was on trial." Id. at 518, 633 S.E.2d at 156.

Moreover, in Robinson, our Supreme Court held Robinson's strong arm robbery conviction and his two breaking and entering into an automobile with the intent to commit a felony or theft convictions were not automatically admissible as crimes of dishonesty or false statement under Rule 609(a)(2). Robinson, 426 S.C. at 597, 828 S.E.2d at 212.

Based on our Supreme Court's holdings in Broadnax, Bryant, and Robinson, possession of a stolen vehicle is not a crime of "dishonesty or false statement" under Rule 609(a)(2) because it does not involve an element of deceit or deliberate interference with a court's ascertainment of the truth. See United States v. Smith, 181 F.Supp.2d 904 (N.D.Ill.2002). It "is not per se

probative of truthfulness.” See Broadnax, 414 S.C. at 476, 779 S.E.2d at 793. Consequently, the trial judge erred by concluding the offense was a crime of dishonesty.

Because possession of a stolen vehicle is not a crime of dishonesty, the trial judge was required to balance the probative value of the evidence and its prejudicial effect to Appellant pursuant to Rule 609(a)(1) before admitting the conviction to impeach Appellant’s credibility. See State v. Scriven, 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct. App. 2000) (providing a trial court *must* conduct “a meaningful analysis to balance the impeachment value of [a defendant’s] prior convictions, if any, against the prejudicial impact, as clearly required under Rule 609(a)(1)”).

Our Supreme Court has provided a uniform set of factors for the trial judge to consider when weighing the probative value of prior convictions against the prejudicial effect to the accused. Robinson, 426 S.C. at 594, 828 S.E.2d at 210-211. These factors include:

- (1) The impeachment value of the prior crime.
- (2) The point in time of the conviction and the witness’s subsequent history.
- (3) The similarity between the past crime and the charged crime.
- (4) The importance of the defendant’s testimony.
- (5) The centrality of the credibility issue.

Id. at 592, 828 S.E.2d at 211 (citing State v. Colf, 337 S.C. 622, 625-626, 525 S.E.2d 246, 247-248 (2000)). “These factors are not exclusive; trial courts should exercise their discretion in light of the facts and circumstances of each particular case.” Id. (quoting Colf, 337 S.C. at 627, 525 S.E.2d at 248) (internal quotation marks omitted). “Although Colf focused on the admission of prior convictions more than ten years old under Rule 609(b), our courts have also consistently

applied these factors for purposes of a Rule 609(a)(1) analysis.” Id. (citing Bryant, 369 S.C. at 517 n.1, 633 S.E.2d at 155 n.1).

Based on an analysis of the Colf factors, Appellant’s conviction for possession of a stolen vehicle should have been excluded pursuant to Rule 609(a)(1). As to the first factor, the impeachment value of a conviction for possession of a stolen vehicle is extremely low. “The tendency to impact credibility . . . determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness.” Id. at 598, 828 S.E.2d 212-213 (quoting State v. Black, 400 S.C. 10, 21-22, 732 S.E.2d 880, 887 (2012)) (internal quotation marks omitted). “The purpose of the impeachment is not to show the witness is a bad person but rather to show background facts which impact the witness’s credibility.” Id. (citing Black, 400 S.C. at 22, 732 S.E.2d at 887). Possessing a stolen vehicle does not bear upon an individual’s veracity or credibility. It does not suggest an individual is not truthful. Rather, it merely implies the individual is a bad person, which is prohibited propensity evidence. See Id. Consequently, Appellant’s conviction had no impeachment value.

As to the second factor, Appellant’s conviction occurred in 2020, a year before his trial. While there is temporal proximity between the conviction and Appellant’s trial, it was a single conviction that did not suggest any sort of continuing pattern of criminal behavior. Significantly, it is unclear from the record when the conduct leading to Appellant’s conviction occurred.

The third Colf factor is the similarity between the past crime and the charged crime. “[E]vidence of similar offenses inevitably suggests to the jury the defendant’s propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions.” Robinson, 426 S.C. at 600-601, 828 S.E.2d at 214 (quoting Colf, 337 S.C. at 628,

525 S.E.2d at 249) (alternations in original) (internal quotation marks omitted). “[W]hen the prior offense is similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission.” Id. at 601, 828 S.E.2d at 214 (quoting Bryant, 369 S.C. at 517-518, 633 S.E.2d at 156) (alternations in original) (internal quotation marks omitted).

Here, while possession of a stolen vehicle is not similar to the offenses for which Appellant was being tried, attempted murder and assault and battery of a high and aggravated nature, there were underlying allegations concerning a stolen vehicle. Nikki Rodgers, the chief of communications at Lexington County 911, testified that one of the callers reported to 911 after the shooting that “the shooter has left the scene. Shooter is a black male in a black Range Rover. *Stolen vehicle*, three black males, light skin.” R. 135, ll. 7-9 (emphasis added). The fact that Appellant had a prior conviction for possession of a stolen vehicle may have led the jury to convict him on an improper basis, namely that the vehicle allegedly involved in the shooting was stolen. Importantly, the trial judge wholly failed to give any sort of limiting instruction to the jury concerning Appellant’s prior conviction, such as the instruction given in Robinson. See Robinson, 426 S.C. at 590, 828 S.E.2d at 208-209. The similarity between Appellant’s prior conviction and the underlying allegations of the offense for which he was on trial weighs against admissibility of his conviction.

The fourth Colf factor is the importance of the defendant’s testimony. Like in Robinson, Appellant’s defense was alibi. His testimony was essential to establishing his defense, particularly in light of the state’s cell site location evidence, which placed him near the scene of the shooting. Appellant’s testimony corroborated Monee Anderson’s testimony and established

a complete alibi for the timeframe of the shooting. This factor also weighs in favor of excluding the prior conviction.

The fifth and final Colf factor is the centrality of the credibility issue. Like the trial judge found when ruling Appellant's conviction was admissible as impeachment evidence, credibility in this case was "important." R. 428, ll. 14-18. There was no physical evidence linking Appellant to the shooting. While there was some circumstantial evidence, such as the cell site location information and the text messages found on Appellant's phone, the case largely fell on the credibility of the witnesses, including Appellant.

Appellant acknowledges that our Supreme Court held in Robinson that "when credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate." 426 S.C. at 606, 828 S.E.2d at 217. However, in this case, because Appellant's conviction for possession of a stolen vehicle was likely used as improper propensity evidence given the underlying allegations of the crime and the fact that the judge failed to give a limiting instruction, this factor should weigh in favor of exclusion.

Based on this analysis of the Colf factors, Appellant's conviction for possession of a stolen vehicle should have been excluded as the prejudicial effect outweighed any probative value of the evidence.

Lastly, Appellant's conviction should have been excluded pursuant to Rule 403, SCRE. Under Rule 403, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The analysis of the Colf factors above shows there is a reasonable probability Appellant's prior conviction was used as propensity evidence in a case where Appellant's credibility was crucial to

his defense given that he testified and presented an alibi. Moreover, the conviction was not probative of truthfulness and thus had little to no probative value. Consequently, its probative value was substantially outweighed by the danger of unfair prejudice to Appellant. Additionally, the evidence likely confused the jury as the judge failed to give any limiting instruction informing the jury as to how it was to use the evidence of Appellant's prior conviction.

Respectfully, this Court should hold the trial judge abused his discretion by admitting Appellant's prior conviction for possession of a stolen vehicle, reverse Appellant's conviction, and remand for a new trial.

CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his convictions and sentence and remand for a new trial.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

This 9th day of February, 2023.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled “Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.”

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Feb 09 2023

SC Court of Appeals

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This 9th day of February, 2023.