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Nov 27 2023

SC Court of Appeals

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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Appeal from Lexington County

Honorable Frank R. Addy, Jr., Circuit Court Judge

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Opinion No. 6032

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THE STATE,

RESPONDENT,

V.

RODNEY JEROME FURTICK,

APPELLANT

APPELLATE CASE NO. 2019-001920

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PETITION FOR REHEARING

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Pursuant to Rule 221(a), SCACR, Appellant requests that this Court grant rehearing. Respectfully, this Court misapprehended Appellant's arguments that the trial court's "sanitization" approach was a misapplication of Rule 609(a)(1), SCRE and *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000). "Sanitizing" the convictions did not absolve the trial court of the need to comply with *Colf*. While "sanitization" took care of the similar nature of the crimes, it added to the propensity problem and encouraged speculation. Also, respectfully, in undertaking its harmless error analysis, this Court overlooked the jury's struggle with the case and the jury's role in determining credibility.

### Rule 609 and *Colf*

Appellant's prior convictions fell under Rule 609, SCRE and *Colf*, but the trial court improperly determined they should be "sanitized" and allowed their admission. This Court recognized that the trial court only "specifically" referenced two of the *Colf* factors: the similarities of the crimes and the centrality of the credibility issue. Op. at 13. The trial court did not fully analyze the *Colf* factors and adhere to what their application would have dictated: exclusion per Rule 609.

Rule 609(a)(1), SCRE, provides that for the purpose of attacking the credibility of a witness, "if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, . . . 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." In *Colf*, 337 S.C. at 627, 525 S.E.2d at 248, the South Carolina Supreme Court "adopted the five-factor analysis employed by federal courts when weighing the probative value of prior convictions against the prejudicial effect to the accused." *State v. Robinson*, 426 S.C. 579, 594, 828 S.E.2d 203, 211 (2019). "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.*

Applying the *Colf* factors to this case, (1) there was no showing Appellant's prior convictions for third-degree burglary and second-degree assault and battery reflected dishonesty; (2) the convictions were remote—nine and seven years old; (3) Appellant was on trial for burglary and criminal sexual conduct, offenses extremely similar to burglary and assault; (4) the crux of this case was whether sex between two acquainted adults was consensual, so Appellant's

testimony was important; and (5) credibility was central to this case, but “sanitization” stripped the offenses of information that jurors could use to evaluate credibility.

This Court cites to dicta that seemingly approves “sanitization” (Op. at 10 – 13), but, respectfully, does not address Appellant’s arguments that “sanitization” was an improper substitute for analysis under Rule 609 and *Colf*, and that such an approach: removed information that bore on credibility; rendered the convictions improper propensity evidence; and encouraged jury speculation. Removing the nature of the crimes from the jury’s consideration meant that the only information the convictions gave the jury was that Appellant was a criminal, a bad person. *See State v. Black*, 400 S.C. 10, 22, 732 S.E.2d 880, 887 (2012) (probative value of conviction turns on nature of conviction itself, since the purpose of impeachment is not to show a witness is a “bad” person, but to show background facts which bear directly on whether jurors should believe him). The court failed to consider how denaturing the convictions would impact the *Colf* factors. The first *Colf* factor in particular (impeachment value) is wildly impacted by sanitization. *See, e.g., United States v. Estrada*, 430 F.3d 606, 616 (2d Cir. 2005) (different felonies bear on credibility to different degrees); *People v. Garth*, 287 N.W.2d 216, 219 (Mich. Ct. App. 1979) (without knowing the nature of the felony, a jury has no probative evidence to consider, “merely an amorphous suggestion that defendant’s past is blameworthy”).

Next, although this Court recognized the circuit court applied the wrong balancing test when the trial court ruled: “I think that the *impeachment* value mostly outweighs the danger of unfair prejudice but I cannot say substantially outweighs[,]” this Court found the balancing test inured to Appellant’s benefit. R. 385, ll. 20-23 (emphasis added); Op. at 13. However, the trial court should have considered probative value versus prejudicial effect, not impeachment value versus prejudicial effect. Impeachment value was merely one of the *Colf* factors.

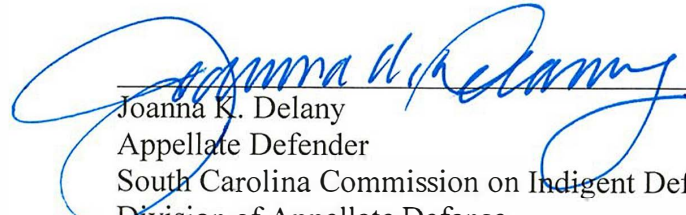
### Harmless error analysis

In finding any error in admission harmless, this Court overlooked the jury's struggle with the case. The jury deliberated for three-and-a-half hours, it acquitted Appellant of first-degree burglary, and it convicted him of second-degree criminal sexual conduct rather than first. Respectfully, this Court erred in concluding this case "was far from a 'he said, she said' case." Op. at 14. It was the jury's role to determine credibility, and the jury found that it was a "he said, she said" case—for example, it acquitted Appellant of burglary despite the complainant's testimony to the contrary. Similarly, Appellant's interactions with law enforcement were a matter for the jury—which could find Appellant behaved suspiciously because he was guilty, or because he was uncomfortable with law enforcement for reasons which did not bear on his guilt in this case. Finally, the admission of two larceny convictions without objection did not render the prejudice of the unnamed convictions "low." Op. at 14. Juxtaposing named larcenies (crimes that sound petty or common) with unnamed felonies and misdemeanors only enhanced the danger of speculation—that these crimes must be particularly serious since they were unnamed, unlike the named less-serious larcenies.

As the trial judge observed, the case boiled down to a "swearing contest." R. 380, ll. 6-7. The error was not harmless. *See State v. Bryant*, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (erroneous admission of prior convictions in self-defense case was not harmless; it could reasonably have affected the result of the trial).

### Conclusion

For the foregoing reasons, Appellant respectfully requests this Court reconsider and grant rehearing in this matter.



Joanna K. Delany  
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ATTORNEY FOR APPELLANT

This 27th day of November, 2023.

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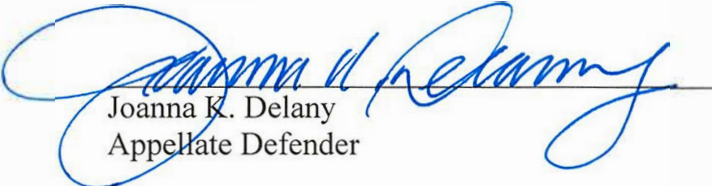
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CERTIFICATE OF SERVICE

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Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Petition for Rehearing in the above-referenced case has been served upon Joshua A. Edwards, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and on Rodney Jerome Furtick, #282923, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 27th day of November, 2023.



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ATTORNEY FOR APPELLANT

**From:** [Mcinnis, Sara](#)  
**To:** [Josh Edwards](#)  
**Cc:** [Anne Mueller](#); [Delany, Joanna](#)  
**Subject:** 2019-001920 The State v. Rodney J. Furtick  
**Date:** Monday, November 27, 2023 4:10:00 PM  
**Attachments:** [2019-001920 The State v. Rodney J. Furtick Petition for Rehearing.pdf](#)

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Good Afternoon Mr. Edwards,

Please find attached for service in the above-referenced case the petition for rehearing, which will be filed with the Court of Appeals today, November 27, via email filing.

Thank you!

**Sara McInnis**

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