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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Lexington County
Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODNEY JEROME FURTICK,

PETITIONER

Opinion No. 6032 (S.C. Ct. App. Filed November 8, 2023)

APPELLATE CASE NO. 2019-001920

APPENDIX

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in Appellant’s trial for criminal sexual conduct and burglary where it allowed the prosecution to impeach Appellant with “sanitized” convictions (two convictions for second-degree assault and battery referred to as misdemeanors and one conviction for third-degree burglary referred to as a felony), where the convictions were inadmissible under Rule 609(a)(1), SCRE and *Colf*¹, since the court’s approach implicitly determined that it would not exclude evidence of prior convictions under Rule 609(a)(1)?

¹ *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

STATEMENT OF THE CASE

On June 5, 2017, a Lexington County Grand Jury indicted Appellant for criminal sexual conduct in the first degree. R. 515. Appellant was also indicted for burglary in the first degree. R. 151, ll. 5-8. Appellant was tried before the Honorable Frank R. Addy, Jr., and a jury, from November 4 – 6, 2019. R. 1; R. 14. Appellant was represented by Elizabeth Fullwood and Robert Madsen. R. 14. The State was represented by Suzanne Mayes and Rhonda Patterson. R. 14.

Appellant was found guilty of the lesser-included offense of criminal sexual conduct in the second degree and he was found not guilty of burglary in the first degree. R. 503, ll. 6-14. The court sentenced Appellant to twenty years' imprisonment. R. 513, ll. 8-10; R. 517.

This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). This court is bound by the trial court’s factual findings unless they are clearly erroneous. *Id.* at 6, 545 S.E.2d at 829. On review, we are limited to determining whether the trial judge abused his discretion. *Id.* This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge’s ruling is supported by any evidence. *Id.* The admission and exclusion of evidence is largely a matter of trial judge discretion and his rulings will not be overturned on appeal unless he manifestly abuses his discretion and the defendant suffered prejudice as a result. *State v. Thompson*, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991).

“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.” *State v. Robinson*, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (internal alterations and quotations omitted) (quoting *State v. Dunlap*, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001)).

ARGUMENT

The trial court erred in Appellant’s trial for criminal sexual conduct and burglary where it allowed the prosecution to impeach Appellant with “sanitized” convictions (two convictions for second-degree assault and battery referred to as misdemeanors and one conviction for third-degree burglary referred to as a felony), where the convictions were inadmissible under Rule 609(a)(1), SCRE and *Colf*², since the court’s approach implicitly determined that it would not exclude evidence of prior convictions under Rule 609(a)(1).

Appellant’s convictions fell under Rule 609(a)(1) but the trial court determined they should be “sanitized” so that their admission would not be precluded by the evidence rules. The court’s decision to admit Appellant’s prior convictions as unnamed felonies and misdemeanors was an improper application of Rule 609, SCRE. By adopting this approach, the trial court implicitly determined that it would not exclude convictions under Rule 609(a)(1).

The court’s ruling also failed to recognize that even if the convictions were probative of Appellant’s credibility, admitting the convictions in such a blatantly “sanitized” form stripped them of probative value and did little to mitigate prejudice.

Relevant facts

J.H. (Complainant), who was from Wisconsin, moved to Cayce with her husband and one-year-old child in August of 2015. R. 167, l. 1 – 168, l. 23. Complainant had no car, she had limited access to a telephone, and she had been medicated for depression for many years. R. 169, ll. 14-17; R. 171, ll. 21-22; R. 195, ll. 18-24. Complainant was soon-to-be both evicted and divorced. R. 167, ll. 12-19; R. 198, ll. 4-25.

² *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

As defense counsel would later argue, “She was unhappy in [her] marriage.” R. 473, ll. 20-21.

Appellant was friendly with Complainant’s husband and came over regularly. R. 195, l. 25 – 196, l. 2; R. 170, ll. 15-17. Appellant would testify at his trial that on November 18, 2015, he had consensual sex with Complainant. R. 408, l. 9 – 412, l. 24. Appellant would also reveal that he and Complainant had consensual sex on a prior occasion in October. R. 391, l. 21 – 398, l. 19.

Complainant denied she ever had consensual sex with Appellant and she claimed that he pushed his way into her home and raped her on the evening of November 15, 2018. R. 174, l. 4 – 182, l. 18; R. 194, l. 13 – 195, l. 12. According to Complainant, she did not try to resist the rape because Appellant threatened to hurt her child if she did so. R. 179, l. 18 – 182, l. 25.

Complainant reported the alleged rape to her neighbor and the neighbor called 911. R. 210, l. 12 – 212, l. 2; R. 217, ll. 6-8. Complainant was taken to the hospital and she was given a sexual assault examination. R. 261, l. 13 – 280, l. 4. She provided police officers with Appellant’s description and first name. R. 292, l. 2 – 293, l. 1. When officers questioned Appellant, he denied knowing Complainant and her husband, and he said there was no reason his DNA would be at their home. R. 307, l. 24 – 312, l. 25.

Months later, DNA analysis confirmed that Appellant and Complainant did have sex. R. 313, l. 7 – 314, l. 19; R. 367, l. 1 – 368, l. 13. According to SLED, DNA was found in semen collected during Complainant’s sexual assault examination and it matched Appellant’s DNA. R. 367 l. 1 – 368, l. 11.

Appellant’s trial took place in 2019. Prior to Appellant’s testimony, the solicitor moved to impeach Appellant with prior convictions: (1) third-degree burglary from 2010; (2) petit

larceny from 2012; (3) second-degree assault and battery from 2012; (4) second-degree assault and battery from 2012; and (5) property offense, third or greater from 2015. R. 376, ll. 5-14.

The court noted that the petit larceny and the property offense were crimes involving dishonesty and defense counsel agreed. The parties agreed to refer to the property offense, third or greater as a petit larceny. R. 376, l. 15 – 377, l. 6.

However, defense counsel objected to the admissibility of Appellant’s third-degree burglary and second-degree assault and battery convictions and asked the court to “keep [those convictions] out under Rule 609(a)(1).” R. 377, ll. 10-20. Defense counsel argued the burglary and assault convictions were “very similar in nature” to the crimes for which Appellant was on trial. R. 377, ll. 10-20.

The court noted that *State v. Bryant*, 369 S.C. 511, 633 S.E.2d 152 (2006), “holds that a conviction for burglary is not probative of truthfulness.” R. 378, ll. 7-9. “[T]hen you’ve got the problem with *State versus Howard*³ with the similarity of prior convictions.” R. 378, ll. 12-14.

The court also cited *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000). R. 378, ll. 15-16. The court indicated that it was familiar with *State v. Robinson*, 426 S.C. 579, 828 S.E.2d 203 (2019), and stated that, “where you have a swearing contest between two people the impeachment value of the crime is all the more important as opposed to less important.” R. 382, l. 16 – 383, l. 4. The court offered that it believed of Appellant’s trial: “it is a swearing contest.” R. 380, ll. 6-7.

As to Appellant’s conviction for burglary in the third degree, the court decided that the solicitor could not “specifically say a burglary,” but could refer to the conviction as a “felony that carries more than one year.” R. 379, ll. 4-19. The court stated its decision was because “the

³ *State v. Howard*, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011).

issue of credibility is quite important in this case” but that since Appellant was standing trial for burglary, the offense was of too “similar [a] nature.” R. 378, l. 25 – 379, l. 6.

As to Appellant’s convictions for assault and battery in the second degree, the court found they were “fair game.” “[T]hey’re not so similar as to warrant exclusion” and “since it is a swearing contest . . . that makes the use of those convictions all the more valuable to the State.” R. 380, ll. 3-10. Defense counsel initially responded to the ruling by asking the convictions be referred to as misdemeanors but quickly changed course and asked the court to exclude the assault and battery convictions since they were not probative of credibility. R. 380, l. 11 – 381, l. 23. Defense counsel argued that assault “doesn’t have anything to do with truthfulness.” R. 381, ll. 16-17. Defense counsel pointed out that prior convictions may not be admitted to show “habit.” R. 381, ll. 17-19. “It’s just for the truthfulness, the ability to impeach his current testimony, and we don’t think under 403 that the assault . . . there’s just no way that those are more probative than prejudicial.” R. 381, ll. 19-23.

The solicitor argued the convictions should be admitted because: “They’re simply allowed under the rule because they carry more than a year.” R. 381, l. 24 – 382, l. 2; R. 378, ll. 7-11. Although the solicitor offered no facts or circumstances about the assault and battery convictions (or about the burglary conviction), she would later say, during sentencing, that Appellant’s convictions for second-degree assault and battery “were pled down from criminal sexual conduct with a minor second degree.” R. 508, ll. 11-15.

The court broke for the evening, and when the parties reconvened, the court advised that as to the second-degree assault and battery convictions,

I’ve looked at the five factors, I’ve considered it. Doing a 403 balancing analysis, I think that the **impeachment value mostly outweighs but I cannot say substantially outweighs the danger**

of unfair prejudice⁴ and the key to . . . my reasoning is that by **allowing the jury to hear that he was convicted of assault and battery in the second degree is tantamount to basically suggesting improperly to the jury that the [d]efendant has a propensity towards violence, a propensity to assault people, and, of course, sexual assault is one of the charges that he’s facing.**

So I’ll ask the State to simply limit your inquiry of the [d]efendant as it relates to that conviction; that he was convicted in 2012 of two misdemeanor offenses that carry more than a year in prison . . .

....

. . . [T]he way that I would allow the State to go into this, and it’s how it’s done in other parts . . . of the state **in order to sanitize the conviction, but the burglary third from 2010 I will allow the State to characterize that as a felony punishable by greater than a year, a petit larceny from 2012. The 2012 assault convictions may be referred to as two counts—two misdemeanors carrying more than a year, and then the 2015 larceny.** So that’s how that can be elicited.

R. 385, l. 19 – 387, l. 14 (emphasis added).

Defense counsel objected to the “sanitization” of the offenses.

[O]ur objection at the end for the burglary and the assault and battery . . . the word ‘sanitize,’ our position would be if the rules don’t allow it, if you can’t fit a square box into a round hole, then why should we sand off the corners of the square box and now push it through the hole? I didn’t see anything where that was addressed in any of our caselaw and so our position would be if the rules don’t allow it, then it just shouldn’t come in, it shouldn’t be, quote unquote, sanitized. In other words, hey, let’s do the

⁴ This ruling was a misapplication of Rule 609. When analyzing whether the conviction of a defendant should be admitted under Rule 609(a)(1), the court must consider whether “the **probative** value of admitting this evidence outweighs its prejudicial effect to the accused,” not whether the **impeachment** value outweighs prejudicial effect. Rule 609(a)(1), SCRE (emphasis added). While impeachment value is a component of probative value, impeachment value is merely one factor to be considered pursuant to *Colf*. However, the analysis of probative value versus prejudicial effect considers all five of the *Colf* factors. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. Moreover, where the witness is the accused, as here, the test is simply whether the probative value of the conviction outweighs its prejudicial effect, not whether the probative value is “substantially” outweighed by the danger of unfair prejudice. Rule 609(a)(1), SCRE.

State a solid and even though it doesn't comply to the rules, let's let them do something that the rules don't necessarily allow them to do . . .

R. 387, l. 16 – 388, l. 7 (emphasis added).

Defense counsel reiterated that per the reasoning in *Bryant, supra*, the offenses “are just not probative of truthfulness, and so that is ultimately our objection . . .” R. 388, ll. 12-15. Defense counsel clarified that although the defense would bring out Appellant’s prior convictions in the manner specified by the court during Appellant’s direct testimony to lessen the impact, “we certainly want to preserve our objections with that . . .” R. 386, l. 19 – 387, l. 4.

The court ruled,

I understand your position and you do have a running objection. My—my opinion is that the prejudice flows from the similar nature of the crime, so calling something a burglary when you’re on trial for burglary or calling something a rape when you’re on trial for rape is what creates the prejudice if they have that prior conviction for that similar type of offense and **the prejudice is substantially lessened if you’re simply allowed to inquire as to a nameless felony or a nameless misdemeanor**, and so that’s the reasoning that this court is employing it and I think other judges has employed routinely.

R. 388, l. 21 – 389, l. 7 (emphasis added).

When Appellant testified, defense counsel brought out Appellant’s prior convictions during direct examination in accordance with the court’s ruling. R. 391, ll. 1-10. The solicitor brought the sanitized convictions out again during her cross examination of Appellant. R. 419, l. 24 – 420, l. 18. After closing arguments, the court gave a limiting instruction to the jury that evidence of Appellant’s prior convictions could be considered for credibility but not as proof of guilt. R. 492, l. 20 – 493, l. 2.

The jury deliberated for three and a half hours, and it ultimately acquitted Appellant of burglary in the first degree. R. 501, l. 19 – 503, l. 10. It also acquitted Appellant of criminal

sexual conduct in the first degree but found him guilty of criminal sexual conduct in the second degree. R. 503, ll. 11-14. The court sentenced Appellant to twenty years in prison. R. 513, ll. 8-10.

Discussion

I. Rule 609 and *Colf*

The admissibility of Appellant's prior convictions for third-degree burglary and second-degree assault and battery is governed by Rule 609(a), SCRE, which 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.

For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of *nolo contendere* or a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

(emphasis added).

To admit Appellant's prior convictions for burglary and assault here, the trial court was required to find the probative value of the prior convictions outweighed their prejudicial effect. "[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).

Here, the State made no presentation or argument as to the probative value of Appellant’s prior convictions. Instead, the solicitor merely argued the convictions should be admitted because: “They’re simply allowed under the rule because they carry more than a year.” R. 381, l. 24 – 382, l. 2; R. 378, ll. 7-11.

Similarly, the court articulated no findings as to why the prior convictions were probative of credibility. Instead, the court only ruled the convictions had “impeachment value” but were prejudicial due to their similarity to the offenses for which Appellant was on trial. R. 385, l. 9 – 386, l. 10; R. 388, l. 21 – 389, l. 7. *See State v. Elmore*, 368 S.C. 230, 238–39, 628 S.E.2d 271, 275 (Ct. App. 2006) (current state of the law does not mandate trial court make on-the-record specific finding as long as record reveals trial judge did engage in a meaningful balancing of probative value and prejudicial effect before admitting a prior conviction under 609(a)(1)).

“However, as we have urged trial courts, when balancing the probative value of a prior conviction under Rule 609(a)(1) against the prejudicial effect, meaningful appellate review is best achieved when the trial court articulates its ruling and the basis for it.” *Elmore*, 368 S.C. at 239, 628 S.E.2d at 275 (alterations and quotations omitted). “An on-the-record balancing test is particularly important for prior similar convictions under Rule 609(a)(1) because the similarity of a prior crime to the crime charged heightens the prejudicial value of the crime.” *State v. Howard*, 384 S.C. 212, 221, 682 S.E.2d 42, 47 (Ct. App. 2009) (internal alterations and quotations omitted) (citing *Elmore, supra*).

In *State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000), 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.” *Robinson*, 426 S.C. at 594, 828 S.E.2d at 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.* (hereinafter, *Colf* factors).

These factors are not exclusive. *Id.* The burden of establishing admissibility is upon the State, the proponent of the evidence.” *State v. Howard*, 396 S.C. 173, 180, 720 S.E.2d 511, 515 (Ct. App. 2011).

1. Impeachment value of prior convictions

The first factor the trial court must consider when weighing prejudice and probative value is the extent to which the prior crimes have impeachment value. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. “Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility of the witness.” *State v. Black*, 400 S.C. 10, 21-22, 732 S.E.2d 880, 887 (2012).

“[A] conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness.” *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006). However, “[a]lthough prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1).” *State v. Robinson*, 426 S.C. at 599, 828 S.E.2d at 213. “A rule of thumb is that convictions that rest on dishonest conduct relate to credibility, whereas crimes of violence, which may result from a myriad of causes, generally do not.” *State v. Black*, 400 S.C. at 22, 732 S.E.2d at 887.

In *Colf*, the South Carolina Supreme Court helpfully explained that federal cases may be persuasive since our rule is identical to the federal rule. *Colf*, 337 S.C. at 626, 525 S.E.2d at 248. In *United States v. Estrada*, 430 F.3d 606, 617 (2d Cir. 2005), the Second Circuit explained, “[A]ll Rule 609(a)(1) felonies are not equally probative of credibility . . .” “The distinction between crimes falling outside Rule 609(a)(2) but nonetheless ranking high on the scale of probative worth on credibility, including, for example, theft and escape crimes, and those ranking low on that scale, including crimes of violence, appears in cases from many jurisdictions.” *Id.* at 618.

Here, there was no showing that Appellant’s prior convictions for burglary and second degree assault and battery reflected dishonesty. As seen, the burden is on the State to show admissibility under Rule 609. Here, the State did not meet its burden to show how Appellant’s 2010 third-degree burglary or 2012 second-degree assault and battery convictions had impeachment value. This factor therefore weighed in favor of exclusion.

2. Point in time of conviction and subsequent history

The second *Colf* factor addresses the point in time of the convictions and the witness’s subsequent history. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. This factor considers the “temporal proximity” of prior convictions to current charges and whether that proximity reveals a “pattern of behavior” that evokes questions of credibility. *State v. Robinson*, 476 S.C. at 600, 828 S.E.2d at 214. Here, the State sought to impeach Appellant in 2019 with convictions from 2010 (third-degree burglary) and 2012 (two counts of second-degree assault and battery). The State also impeached Appellant with two other offenses the parties agreed to refer to as petty larcenies, from 2012 and 2015.

As to subsequent history, Appellant had a lengthy criminal history prior to 2010 (the date of the earliest offense with which the State sought to impeach him) but this factor addresses a witness's subsequent criminal history, not his prior criminal history. Appellant's criminal history subsequent to 2010 consisted of convictions in 2012 and 2015, and additional arrests in 2015. R. 507, l. 22 – 508, l. 16.

Appellant's burglary and assault and battery convictions were remote in time—nine years and seven years prior to trial—approaching the degree of remoteness presumptively barring their admissibility under Rule 609(b). Although Appellant did have a subsequent criminal history, the remoteness of the offered convictions meant that this factor also weighed in favor of exclusion.

3. Similarity between past crimes and charged crimes

The third *Colf* factor looks to the nature and details of the past crimes compared with the crimes for which an accused stands trial. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. Where the past convictions are similar to the case at trial, this factor weighs in favor of exclusion rather than admission. *Id.* at 628, 525 S.E.2d at 249.

“Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him.” *United States v. Beahm*, 664 F.2d 414, 418 (4th Cir. 1981). “[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.” *State v. Bryant*, 369 S.C. at 517–18, 633 S.E.2d at 156. “[T]he prejudicial effect of admitting prior convictions for the exact same offense is often very high.” *State v. Broadnax*, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015).

“We take this opportunity to remind and caution the bench and bar of the inherent prejudice that flows from the use of similar prior convictions for impeachment purposes under

Rule 609(a)(1), SCRE.” *State v. Elmore*, 368 S.C. at 238, 628 S.E.2d at 275. *See Colf*, 337 S.C. at 628, 525 S.E.2d at 249 (trial court “erred in treating the prior crimes as if their similarity heightened their probative value when it actually increased their prejudicial effect”).

Appellant was on trial for criminal sexual conduct in the first degree and burglary in the first degree. The State sought to impeach him with a third-degree burglary conviction and two second-degree assault and battery convictions. These convictions appear extremely similar to the crimes for which Appellant was on trial—in a trial for burglary in the first degree, a prior conviction for burglary in the third degree. In a trial for criminal sexual conduct in the first degree, two prior convictions for assault and battery in the second degree which had been pled down from criminal sexual conduct with a minor in the second degree. The consideration of this factor alone was enough to tip the scales in favor of exclusion.

However, although the court found Appellant’s prior convictions were prejudicial due to their similarity to the charges at trial, it decided simply to sanitize them. R. 388, l. 21 – 389, l. 7. This was error. The trial court is required to consider all of the *Colf* factors and compare prejudice with probative value before it may admit prior convictions against an accused pursuant to Rule 609(a)(1). *Colf*, 337 S.C. at 627, 525 S.E.2d at 248; Rule 609, SCRE. The court may not simply short-circuit the Rule 609 analysis.

“If the nature of the crime makes the conviction prejudicial, ordinarily the trial judge should prevent the prejudice by excluding the conviction instead of admitting it in denatured form.” ROGER PARK & TOM LININGER, *THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION* § 3.4 (1st ed. Cum. Supp. 2020). This factor weighed heavily in favor of exclusion, and the court erred when it decided sidestep the proper remedy—exclusion—and instead merely sanitize the convictions.

4. Importance of defendant's testimony

The fourth *Colf* factor looks at the importance of the defendant's testimony. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. "[E]vidence that a witness is a convicted criminal can [] seriously prejudice the defense, especially when the witness is the defendant himself." *United States v. Lipscomb*, 702 F.2d 1049, 1062 (D.C. Cir. 1983).

In *Lipscomb*, the D.C. Circuit Court of Appeals discussed the legislative history of Fed. R. Evid. 609, and observed per *Luck v. United States*, 348 F.2d 763, 769 (D.C. Cir. 1965), that the trial court should consider "the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." *Lipscomb*, 702 F.2d at 1065. "There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction." *Luck v. United States*, 348 F.2d at 768.

In some cases, the defendant's testimony may be cumulative rather than important, if other evidence supports the defense. But, given that the defense was consent here, it was important for the jury to hear Appellant's side of the story. Appellant's testimony was important, too, since there were no other witnesses who corroborated his version of events. This factor weighed in favor of exclusion since it was more important that the jury hear Appellant's testimony than it was that the jury hear of his convictions, in this criminal sexual conduct case where the issue was consent.

5. *Centrality of the credibility issue*

The fifth *Colf* factor considers the centrality of the credibility issue. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. “[W]hen credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate.” *State v. Robinson*, 426 S.C. at 606, 828 S.E.2d at 217. “If the jury must choose between the defendant’s credibility and that of another witness, there would be a high probative value in admitting evidence of prior convictions to impeach the defendant’s credibility.” *Id.*

Here, this factor initially weighed in favor of admitting prior convictions that would impeach Appellant’s credibility since credibility was the central issue of the case. However, as will be discussed *infra*, the court’s sanitization of the prior convictions meant the jury was not informed of the essential facts of the convictions, and the essential facts of convictions—including their nature or name—are what allows a jury to use prior convictions to weigh credibility.

Applying Rule 609’s balancing test to these five factors, the court should have found the probative value of the convictions did not outweigh their prejudicial effect. Four of the five factors weighed heavily in favor of exclusion, as discussed above. Although the fifth factor initially weighed in favor of admission, the form of admission the court chose to take neutralized the probative value and, since, as will be discussed *infra*, the sanitization was blatant it increased the likelihood the jury would improperly speculate about the nature of the crimes and simply take them as evidence that Appellant’s past was blameworthy.

Under Rule 609 and *Colf*, the prior convictions should have been excluded. The court found that Appellant’s convictions for second degree assault and battery would improperly suggest to the jury that Appellant had “a propensity for violence, a propensity to assault people,

and of course, sexual assault is one of the charges that he's facing." R. 385, l. 24 – 386, l. 5. The court also noted that Appellant's burglary conviction was not probative of truthfulness. R. 378, ll. 7-9. The solicitor offered no facts or argument as to why the convictions had impeachment value. Appellant's testimony was important since the defense was consent. The prior convictions were remote in time.

The State offered no argument as to why the convictions were probative of Appellant's credibility, merely maintaining they should be admitted because they carried more than one year. The court found the convictions were similar to the crimes for which Appellant was being tried. R. 378, ll. 12-14. Their admission here was error.

II. "Sanitization"

The trial court's "sanitization" of Appellant's convictions for assault and burglary was an improper end-run around Rule 609 and *Colf*. Sanitizing the convictions was not a substitute for the requisite balancing process, and it rendered the convictions improper propensity evidence.

Moreover, the record did not show that the court considered probative value vis-à-vis prejudicial effect once the convictions had been scrubbed of information that could bear on credibility. All felonies and misdemeanors are not equally probative of credibility, and so the trial judge's approach here left the convictions indistinguishable from a myriad of other crimes and left the jury to speculate about their nature.

"Sometimes courts will 'sanitize' a conviction by requiring that the impeaching party ask about the 'mere fact' of a felony conviction, without naming the crime. However, this practice is not generally followed, and has been specifically disapproved by some courts." ROGER C. PARK AND AVIVA ORENSTEIN, TRIAL OBJECTIONS HANDBOOK 2d § 7:12 (Sept. 2019 update). "Sanitizing' the conviction can backfire, because the jury's imagination may furnish worse

crimes than those that are being concealed. Also, the concealment by ‘sanitizing’ is blatant and visible to the jury . . . It may cause jurors to wonder what else is being concealed, and to base decisions on speculation about what is being kept from them.” ROGER PARK & TOM LININGER, THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 3.4 (1st ed. Cum. Supp. 2020).

“In the case law, one can find statements suggesting that the practice of sanitizing convictions is routine countered by statements from other courts asserting that it is unprecedented and unwise.” *Id.* “In sum, the case law indicates that ordinarily the trial judge should admit the name of the crime as well as the fact of conviction. If the nature of the crime makes the conviction prejudicial, ordinarily the trial judge should prevent the prejudice by excluding the conviction instead of admitting it in denatured form.” *Id.*

The appellate courts of this State have not directly addressed the issue of whether a conviction that would be otherwise inadmissible under Rule 609 may be “sanitized” and admitted against the defendant over his objection. In *State v. Elmore*, 368 S.C. 230, 239, 628 S.E.2d 271, 276 (Ct. App. 2006), however, this Court suggested sanitization under some circumstances was “permissible” in dicta. In *Elmore*, the defendant appealed the trial judge’s ruling that his prior convictions could be used for impeachment. However, Elmore never actually testified at his trial and so this Court found the issue unpreserved. *Id.* at 237-38, 628 S.E.2d at 274-75. After so finding, this Court “strongly encourage[d] trial courts to engage in an on-the-record analysis when admitting such [prior similar] convictions because of the presumption against their admission.” *Id.* at 239, 628 S.E.2d at 276. This Court then stated in a footnote,

One permissible approach, advocated by the United States Fourth Circuit Court of Appeals, is to allow the prosecutor to ask the witness about the existence of a prior similar conviction under Rule 609(a)(1) without disclosing to the jury the nature of the prior

offense. See *United States v. Boyce*, 611 F.2d 530, 531 n. 1 (4th Cir. 1979). The *Boyce* approach was approvingly referenced by our supreme court in *Green v. State*, 338 S.C. 428, 433 n. 5, 527 S.E.2d 98, 101 n. 5 (2000). The *Boyce* approach still requires a meaningful balancing of the probative value and prejudicial effect before admission of the prior conviction, although the prejudice occasioned by the similarity of the prior crime to the crime charged is removed.

Id. at 239, 628 S.E.2d at 276, n. 5.

A close reading of *Boyce*, however, supports Appellant’s position. In *United States v. Boyce*, 611 F.2d at 530, the Fourth Circuit Court of Appeals held: “In proving the felony conviction on cross-examination, the United States Attorney may ask about the **name of the crime**, the time and place of conviction, and the punishment.” (emphasis added) (internal quotations omitted). “It follows that there was no plain error in permitting the United States Attorney to inquire about the number and nature of defendant’s felony convictions, particularly since the defendant himself had already testified that he had been convicted of a felony and there was no objection at trial, See *United States v. Wolf*, 561 F.2d at 1381.” *Boyce*, 611 F.2d at 530–31.

The Fourth Circuit then added as dicta, “In the special case, where the prior conviction is for the same offense as that for which the defendant is being tried, the trial court generally will not permit the Government to prove the nature of the offense on the ground that to do so would amount to unfair prejudice. This, however, is not such a case.” *Boyce*, 611 F.2d at 531, n. 1.

Similarly, the other case referenced by this Court in *Elmore—Green v. State*, 338 S.C. 428, 433, 527 S.E.2d 98, 101 n. 5 (2000)—only referred to *Boyce* in dicta.

As seen, in *Colf*, the South Carolina Supreme Court explained that federal cases may be persuasive since our rule is identical to the federal rule. *Colf*, 337 S.C. at 626, 525 S.E.2d at 248. In *United States v. Estrada*, 430 F.3d 606, 615 (2d Cir. 2005), Justice Sotomayor, who was then

writing for the Second Circuit Court of Appeals, helpfully provided a detailed analysis on the issue of “whether Rule 609(a)(1) requires district courts to admit evidence of the statutory names of a witness’s offenses of conviction by looking at the language and structure of the rule.”

The facts underlying *Estrada* were the district court’s refusal to allow defense counsel to impeach three government witnesses with their actual convictions—the district court instead limited cross-examination to “the fact of an unnamed felony conviction.” *Id.* at 609. The Second Circuit explained that pursuant to Fed. R. Evid. 609(a)(1), “inquiry into the ‘essential facts’ of the conviction, including the nature or statutory name of each offense, its date, and the sentence imposed is presumptively required by the Rule, subject to balancing under Rule 403.”⁵ *Id.* at 616.

The Second Circuit reasoned, “This interpretation of Rule 609 is consistent with both the Rule’s structure and the insight that different felonies, even those that do not constitute *crimen falsi*, bear on credibility to varying degrees.” *Id.* at 616. All Rule 609(a)(1) felonies are not “equally probative” of credibility. *Id.* at 617.

“District courts must thus undertake an individualized balancing analysis under Rule 609(a)(1) before excluding evidence of the statutory name of a witness’s crime. Applying a generalized heuristic is simply improper.” *Id.* at 616.

The Second Circuit explained the impropriety of the district court’s admission of “aseptic” convictions as follows.

Here, by following a policy that presumptively excluded the statutory names of the cooperating witnesses’ Rule 609(a)(1) convictions, the district court essentially applied a *per se* rule that all felony convictions not determined to be *crimen falsi* for purposes of Rule 609(a)(2) are equally probative of credibility. By permitting to go before the jury only evidence of an aseptic, unnamed “felony” conviction for Rule 609(a)(1) crimes of which

⁵ *Estrada* involved the impeachment of the government’s witnesses rather than impeachment of the accused, as here.

government witnesses had been convicted, **the district court acknowledged the generic probative value of felony convictions. By interpreting the Rule to require nothing more, however, the district court failed to undertake the balancing prescribed by the Rule**, which requires assessment of the probative value of a particular conviction on a witness's propensity for truthfulness in light of the risk of prejudice, confusion, and delay. Rather, **the district court short-circuited the balancing prescribed by the Rule, determining first whether a crime fell under Rule 609(a)(1) or (a)(2) and, if the former, foreclosing the typical Rule 403 analysis by admitting evidence only of an unnamed felony.**

Equally important, the district court's approach implicitly determined that it would not exclude evidence of prior felony convictions under Rule 609(a)(1). While the district court indicated that the fact of a witness's felony convictions was admissible under Rule 609(a)(1) "unless there is a 403 balancing problem," it obviated the need for such balancing **by scrubbing the convictions of any factors that would be relevant to a Rule 403 analysis.**

United States v. Estrada, 430 F.3d at 620.

The Second Circuit found this was error. "What is crucial is that the district court perform the Rule 403 analysis with respect to the essential facts of conviction and admit or exclude the evidence, rather than merely determining whether a crime falls under Rule 609(a)(1) or 609(a)(2) before applying a general rule as a matter of policy." *Id.* at 621.

In *United States v. Burston*, 159 F.3d 1328, 1335 (11th Cir. 1998), the Eleventh Circuit Court of Appeals has explained, "The implicit assumption of Rule 609 is that prior felony convictions have probative value. Their probative value, however, necessarily varies with their nature and number." "Evidence of a murder conviction says something far different about a witness' credibility than evidence of a conviction for a minor drug offense, although both may constitute a prior felony conviction." *Id.*

Similarly, the Tenth Circuit Court of Appeals has held that, ordinarily, impeachment of the defendant with prior convictions “should be confined to a showing of the essential facts of convictions, the nature of the crimes, and the punishment.” *United States v. Wolf*, 561 F.2d 1376, 1381 (10th Cir. 1977). *And see United States v. Gordon*, 780 F.2d 1165, 1176 (5th Cir. 1986) (impeachment pursuant to Rule 609 “is limited to the number of convictions, the nature of the crimes and the dates and times of the convictions”).

See also People v. Garth, 287 N.W.2d 216, 219 (Mich. Ct. App. 1979) (“Without knowledge of the nature of the felony, the trier of fact has no probative evidence to consider, merely an amorphous suggestion that defendant’s past is blameworthy”); *Bells v. State*, 759 A.2d 1149, 1154 (Md. Ct. Spec. App. 2000) (“A sanitized prior conviction is not merely ‘ill-defined,’ but totally undefined. A jury would be completely unable to assess what, if any, impact a ‘prior felony conviction’ has upon a witness’s veracity”); *State v. Taylor*, 993 S.W.2d 33, 35 (Tenn. 1999) (“Identifying the nature of the prior conviction avoids confusion and speculation on the part of the jury and permits the jury to properly evaluate the conviction’s probative value on the issue of credibility”); *State v. Hardy*, 946 P.2d 1175, 1181 (Wash. 1997) (internal citations and quotations omitted) (“unnaming a felony is not a substitute for the balancing process required under ER 609(a)(1) . . . it is generally the nature of the prior felony which renders it probative of veracity”); *State v. Crawford*, 206 P. 717, 719 (Utah 1922) (“jurors are entitled to know of what particular felony a witness has been convicted . . . Some convictions on felony charges affect the credibility of witnesses much more than others”).

The proposition that different felonies bear on credibility to different degrees—and thus, that a trial court’s general insertion of an aseptic term is improper—is supported by South Carolina law. In *State v. Black*, the Supreme Court explained that a consideration of the nature of

the crime, not the mere fact of a conviction, is what is relevant to a determination of impeachment value. “Under the Rule, the pivotal issue of the probative value of a conviction turns largely on a consideration of the nature of the conviction itself.” *Black*, 400 S.C. at 22, 732 S.E.2d at 887 (citing *United States v. Cavender*, 578 F.2d 528, 534 (4th Cir. 1978)).

“This follows because the purpose of impeachment is not to show that the witness who takes the stand is a ‘bad’ person but rather to show background facts which bear directly on whether jurors ought to believe him. Accordingly, in general it is a conviction which bears on whether jurors ought to believe the witness or party that qualifies for impeachment purposes.” *Black*, 400 S.C. at 22, 732 S.E.2d at 887 (internal alterations and quotations omitted) (quoting *Cavender*, *supra*).

The trial court’s “sanitization” here was improper under South Carolina law, since it precluded a full application of Rule 609 and *Colf*. As was the case in *Estrada*, the trial court’s “approach implicitly determined that it would not exclude evidence of prior felony convictions under Rule 609(a)(1),” since it ruled that although the potential for prejudice was great, any similarity problem under Rule 609 and *Colf* could be obviated by a generic substitution.

III. Reversible error

The erroneous admission of Appellant’s prior convictions was not harmless, since the critical issue for the jury to decide was whether Appellant’s entry into the home and sex with Complainant were consensual.

“Whether the improper introduction of this evidence is harmless requires us to look at the other evidence admitted at trial to determine whether the defendant’s guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached.” *State v. Broadnax*, 414 S.C. at 479, 779 S.E.2d at 794 (2015) (internal alterations and quotations

omitted)). “Error is harmless where it could not reasonably have affected the result of the trial.” *State v. Bryant*, 369 S.C. at 518, 633 S.E.2d at 156.

In *Bryant*, the Supreme Court found that the erroneous admission of prior convictions to impeach the accused was not harmless where the defense was self-defense and “hinged entirely” on the accused’s own testimony, where “the only witnesses to the shooting were [the defendant] and the victim.” *Id.* The Supreme Court concluded, “the State should not be allowed to attack the defendant’s credibility with inadmissible prior convictions; especially where the [defendant’s] credibility was essential to his defense. Accordingly, we hold the improper admission of [the defendant’s] prior firearms convictions was not harmless.” *Id.* at 518–19, 633 S.E.2d at 156.

Here, the defense was consent and hinged entirely on Appellant’s testimony, and the only witnesses to the alleged criminal sexual conduct and burglary were Appellant and Complainant. Although Appellant was additionally impeached with two petit larcenies, those convictions were both minor and specified.

As the trial judge observed, the case boiled down to “a swearing contest.” R. 380, ll. 6-7. The jury deliberated for three and a half hours and acquitted Appellant of the crimes for which he was indicted. Under these circumstances, the erroneous admission of impeachment evidence was not harmless.

Also, the court’s limiting instruction was insufficient to overcome the harm here, where the convictions were stripped of their essential facts, since the sanitization invited prejudicial jury speculation about the nature of the crimes. “Limiting instructions alone do not make an erroneous admission of prior conviction evidence harmless.” *Green v. State*, 338 S.C. at 434, 527 S.E.2d at 101.

“The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged.” *United States v. Beahm*, 664 F.2d at 418–19. “[C]oncealment by ‘sanitizing’ is blatant and visible to the jury . . . It may cause jurors to wonder what else is being concealed, and to base decisions on speculation about what is being kept from them.” ROGER PARK & TOM LININGER, *THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION* § 3.4 (1st ed. Cum. Supp. 2020).

Here, blatant sanitization was an improper substitute for a full consideration of the *Colf* factors and meaningful balancing of probative value and prejudicial effect under Rule 609, SCRE. This Court should reverse.

CONCLUSION

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

s/ Joanna K. Delany

Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 11th day of January, 2021.

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.”

January 11, 2021.

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Jan 15 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODNEY JEROME FURTICK,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above referenced case has been served upon William F. Schumacher, IV, Esquire at the primary e-mail address listed in the Attorney Information System (AIS), this 11th day of January, 2021.

s/ Joanna K. Delany

Joanna K. Delany

Appellate Defender

ATTORNEY FOR APPELLANT

RECEIVED

Mar 10 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2019-001920

THE STATE,RESPONDENT,

v.

RODNEY JEROME FURTICK,APPELLANT.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

The trial judge properly admitted Appellant's sanitized convictions into evidence. While the trial judge applied the incorrect balancing test—in Appellant's favor—the prior convictions were still admissible pursuant to Colf and Rule 609, SCRE. Further, even if the prior convictions were improperly admitted, any error in their admission is harmless given the overwhelming evidence of guilt which also illustrated Appellant's testimony—the only evidence supporting his innocence—was completely incredible.

- a. The trial judge incorrectly weighed the prior convictions under Rule 609, SCRE, which benefitted Appellant.
- b. Sanitization is a proper process under both South Carolina and federal law.
- c. Appellant's prior convictions were properly admitted pursuant to Rule 609 and Colf.

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County Grand Jury for first-degree criminal sexual conduct and first-degree burglary. On November 4–6, 2019, Appellant proceeded to a jury trial before the Honorable Frank R. Addy, Jr. Assistant Solicitors L. Suzanne Mayes, Esquire, and Rhonda Patterson, Esquire, represented the State; Elizabeth Fullwood, Esquire, and Robert Madsen, Esquire, represented Appellant. The jury found Appellant guilty of the lesser-included offense of second-degree criminal sexual conduct and acquitted of his burglary charge. The trial judge sentenced Appellant to twenty years' incarceration.

Appellant timely filed a notice of appeal and brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Julie Hall, the Victim, moved to Cayce, South Carolina in August of 2015 along with her then-husband Brian Dean and eleven-month-old daughter (Daughter). Over the next several months, Dean befriended Appellant and invited him to their home on several occasions, usually once or twice a week after Dean befriended him. From the beginning, Victim felt uncomfortable around Appellant and informed both Dean and her friend (and neighbor) April Carter about her concerns. Victim and Dean agreed Appellant could only visit their home when Dean was around. Appellant was informed of this restriction on multiple occasions. (R.p.166, line 17–R.p.171, line 10)

On the evening of November 18, 2015, Dean left the home to go to a local hobby shop, taking with him the family's sole cellular phone. Victim spent her time preparing dinner for Daughter and performing household chores. As she was preparing Daughter for bed, she heard a knock at back door, followed by it opening. Without seeing the face of the person, Victim attempted to close the door while stating she did not want any visitors in the home while she readied Daughter for bed. However, the intruder was able to enter the home and was immediately recognized as Appellant by Victim. Appellant, appearing angry, was holding a container of food. Concerned, Victim again asked Appellant to leave, but he ignored the request and set the food down in the kitchen of the home. Appellant starting approaching Victim. (R.p.170, lines 2–4; R.p.171, line 11–R.p.178, line 24)

Daughter, who had walked into the situation, did not go into Hall's bedroom like the latter had requested but instead stood in front of Victim. Appellant pushed Daughter against a nearby corner, leaving markings on her back. Daughter began crying so Victim picked her up and tried to calm her down. Appellant then told Victim that if she did not obey his commands, he would hurt Daughter, a threat which Victim believed serious. Appellant started pushing

Victim towards Daughter's room. Daughter's crying escalated into screaming, at which point Appellant shoved Victim onto the floor of Daughter's room and ordered her to lay down. Appellant began assaulting Victim by kissing her and tearing off her tights and underwear. The assault escalated into oral sex, the groping of Victim's breasts, and eventually vaginal intercourse. Appellant also grabbed Victim's hands and forced her to touch him. Throughout the process, Appellant would turn to glare menacingly at the hysterical Daughter, terrifying Victim into submission. After completing his attack, Victim used Daughter's nearby baby wipes to clean himself up. As he left, Appellant threatened victim that if she told anyone about the assault, she would tell his friends "[her] house was free game." After Appellant left, Victim redressed and ran over to Carter's house for help. Carter immediately called 9-1-1 while Victim called Dean. When the police arrived, Victim described to them the night's events. When the officers searched her house, they found Victim's ripped tights in Daughter's room. After, she was taken to the hospital for treatment and a medical examination. She was photographed, with those pictures capturing her visible distress. (R.p.178, line 25–R.p.195, line 12; R.p.203, line 13–R.p.206, line 1)

On cross-examination, trial counsel's entire strategy was to discredit Victim by attacking various aspects of her social life. Trial counsel questioned Victim regarding depression medication she was on at the time of the rape, the financial issues Victim and Dean experienced as a couple including a rule to vacate based on missed rent payments, the theft of an EBT card in October 2015 which Victim had reported to police and suggested Appellant was the culprit. Trial counsel also questioned her about the events of the attack, including her inability to remember how long it lasted, that she waited a few minutes after Appellant left before going to

Carter's home, and her report to police that Appellant had visited her home several times on the day of the attack. (R.p.195, line 16–R.p.203, line 8)

Carter testified to having a friendship with Victim and interacting with her on a daily basis. On November 18, 2015, she was sitting on her porch at home when Victim ran over to her house, crying and hysterical, and claiming she had been raped by Appellant after he entered through the rear of her home. Carter also noted she had observed Appellant lurking around the neighborhood that night. (R.p.207, line 10–R.p.218, line 18)

Sergeant John Reese was the first officer to respond to the 9-1-1 call and arrived at Carter's residence at 9:00 p.m. He immediately noticed Victim appeared disheveled and upset. She reported Appellant had entered through the backdoor of the residence, forced her onto the floor in her daughter's room, before beginning his assault with oral sex and progressing to vaginal intercourse. Following the attack, Appellant threatened Victim that if she told anyone about the assault, her daughter would be harmed. Later, Appellant obtained a search warrant and obtained a DNA sample from Appellant. Sergeant Jason Merrill also responded to the call, and was the officer who ultimately brought Victim and Daughter home from the hospital. At their home, he investigated the scene and found several items of note located in Daughter's room: (1) crumpled baby wipes in the arm of the chair, (2) a clump of wipes removed from the package, but which appeared to be unused; and (3) a pair of tights, torn and found on the floor. (R.p.220, line 7–R.p.236, line 4; R.p.289, line 21–R.p.300, line 17)

Based on the information collected from Victim, Sergeant Merrill contacted Appellant for additional information. After providing Appellant with his Miranda rights, Sergeant Merrill pointedly questioned him about the attack. He showed Appellant pictures of both Dean and Victim, and also revealed their names. Appellant denied knowing both individuals and claimed

he did not even recognize their names. Appellant further asseverated that there was no reason his DNA would be found in their home. Sergeant Caleb Thomas was also present for the interview with Appellant, and confirmed Sergeant Merrill's testimony that Appellant denied knowing Victim and Dean, and that Appellant claimed his DNA would not have been found in their home. (R.p.300, line 18–R.p.314, line 19; R.p.329, line 8–R.p.336, line 12)

Marilyn Sanchez, a paramedic, arrived to treat Victim and observed she was “very nervous, kind of scared, frantic, . . . very worried about her toddler that was with her.” Victim claimed she was concerned Appellant would return. Victim also told Sanchez about the beginning of the attack, specifically how Appellant entered the back door of the home before she could lock it, and told her that Appellant had performed sexual acts in her vaginal area. Jennifer Nguyen, a forensic nurse examiner, treated Victim after she arrived at the hospital. She used a sexual assault kit to collect evidence from Victim, which including vaginal swabs, swabs for “touch” DNA on her body, saliva swabs, and even took the underwear she was wearing. She also heard Victim state that there had been verbal threats of harm to herself and Daughter following the attack. (R.p.241, line 21–R.p.254, line 23; R.p.258, line 21–R.p.281, line 2; R.p.286, line 1–R.p.287, line 10)

Jaclyn McKay, a SLED agent and expert in forensic serology, found semen on the vaginal swabs, rectal swabs, and the underwear recovered by officers. She also found saliva on the swabs taken from parts of the Victim's body. Those samples were forwarded for DNA testing. SLED agent Samuel Stewart, an expert in DNA analysis, analyzed the samples gathered. DNA from the vaginal swabs, rectal swabs, and the bodily fluid swabs all matched Appellant, with “the probability of randomly selecting an unrelated individual matching the semen on th[o]se items [being] approximately 1 in 17 quintillion. Appellant could not be excluded as the

minor contributor from the sperm sample collected from the underwear, with the probability of an unrelated individual contributing to that mixture being 1 in 110 million. (R.p.345, line 1–R.p.357, line 14; R.p.359, line 10–R.p.370, line 23)

Prior to Appellant’s testimony and outside the presence of the jury, the State proffered the convictions with which it sought to impeach Appellant: (1) third-degree burglary from 2010; (2) petit larceny from 2010; (3) two second-degree assault and batteries from 2012; and (5) property offense, third or greater from 2015. The admissibility of the petit larceny and property offense convictions was not challenged by trial counsel or the trial judge, but trial counsel requested the property offense be referred to as “larceny” to avoid mention of the fact that it was a third offense. However, trial counsel objected to the admission of the burglary and assault and battery convictions pursuant to Rules 403 and 609(a)(1), SCRE, arguing they were “very similar in nature” to the crimes for which Appellant was on trial . Further, trial counsel claimed assault and battery “has absolutely nothing to do with truthfulness whatsoever.” In response, the State argued that the defense’s constant assault on Victim’s credibility made the challenged convictions relevant to the case.¹ The trial judge expressed concern over the similarity of the

¹ In his brief, Appellant repeatedly claims the State’s sole justification for admission of the challenged convictions was that they carried a punishment of more than a year in prison. (Br. of Appellant, p.18). Appellant’s claim is a gross mischaracterization of the State’s argument. Notably, the State did make reference to the fact that Appellant’s convictions carried sentences of greater than a year of incarceration because such is a requirement for admission pursuant to Rule 609, SCRE. See Rule 609(a)(1), SCRE (“evidence that a witness other than an accused has been convicted of a crime shall be admitted . . . if the crime was punishable by death or imprisonment in excess of one year . . . , and **evidence than an accused has been convicted of such a crime** shall be admitted if the court determines”) (emphasis added). The State’s primary reason for admitting these prior convictions was to challenge Appellant’s credibility after the defense made the credibility of Victim its central strategy at trial. See (R.p.377, line 22–R.p.378, line 6). Further, it should be noted this statement by the State was made in rebuttal to trial counsel’s assertion that assault and battery offenses are never related to “truthfulness whatsoever.” See (R.p.380, line 22–R.p.381, line 23). In context, the State was reference the

challenged convictions to the charged crimes, and specifically referenced State v. Howard. However, the trial judge also noted the importance of credibility to the case. Therefore, the trial judge decided he would allow the State to refer to the burglary conviction simply as a felony punishable by more than a year of incarceration. Trial counsel raised a similar argument to the admissibility of the second-degree assault and battery convictions. The trial judge noted those convictions “[were]n’t so similar” to the CSC charge, and that he would consider the question overnight. (R.p.375, line 20–R.p.384, line 24)

The following day, the trial judge noted that he would “have to conclude that the probative value of the impeachment **substantially** outweigh[ed] any undue prejudice,” and found the probative value of the convictions “mostly outweigh[ed],” but did not substantially outweigh the danger of suggesting to the jury that Appellant had a propensity towards violence/attacking people. Accordingly, the trial judge decided to allow the State to “sanitize” the convictions and refer to the assault and battery convictions as “two misdemeanors carrying more than a year” incarceration. Trial counsel objected to this attempt to sanitize the convictions, arguing there was no legal support for the practice of sanitizing convictions under South Carolina law and claiming that prior cases, including State v. Bryant, stated burglary, theft, drugs, and other crimes “are just not probative of truthfulness.” The trial judge stated he believed other courts “routinely” sanitized convictions to minimize prejudice, and such practice was an acceptable way to “substantially lessen[.]” the prejudice of allowing the introduction of prior convictions similar to crimes with which a defendant is charged. (R.p.384, line 25–R.p.389, line 11)

fact that Rule 609(a)(1) does not require an offense based on inherent dishonesty or false statements, as such convictions are discussed under Rule 609(a)(2).

Appellant elected to testify at trial. Appellant immediately acknowledged he had been convicted of “a felony that carried a possible punishment of more than a year” in 2010, petit larceny in 2012, “two misdemeanors that carried a possible punishment of more than a year” in 2012, and larceny in 2015. (R.p.390, line 17–R.p.391, line 10)

At trial, Appellant’s testimony contradicted the statements he provided police: notably, he admitted to knowing and regularly interacting with Victim and Dean beginning in October 2015. He encountered Dean while walking, asked him for cigarette, and then accompanied him to a nearby convenience store. After returning with Dean to his house, he met Victim and remained at the home with her after Dean left for work. In the following hours, Victim and Appellant began flirting and began a sexual relationship. His interactions with Dean and Victim, and his sexual relationship with the latter, continued until November 18, 2015. Appellant claimed he did, in fact, have possession of one of the family’s EBT cards at one point, but that Dean had given it to him and he eventually returned it and paid the money back later. (R.p.391, line 11–R.p.402, line 10)

Appellant claimed he initiated contact with Dean and Victim on November 18, 2015, in an attempt to obtain baby food which he would then sell to a local convenience store to obtain some pocket money. He returned to the home in the late afternoon/early evening with the baby food after the attempt to sell the baby food failed. Finding that Victim had not yet eaten, he left to obtain food and later returned with a meal. Before long, Appellant propositioned Victim for intercourse, which Victim accepted. For an unexplained reason, the two had intercourse in Daughter’s room. Afterwards, Appellant left. Appellant stated that Victim at no time appeared agitated or upset throughout this encounter. (R.p.402, line 11–R.p.416, line 20)

When questioned about his interview with police in which he denied knowing Victim and Dean, he claimed he was not wearing glasses and could not see the pictures shown to him or read any forms listing his rights. He claimed that although officers did provide glasses, he still did not identify either Victim or Dean because “he wanted to keep the glasses” but the detective said the glasses needed returned following the interview. (R.p.416, line 21–R.p.419, line 18)

On cross-examination, Appellant admitted that the details of his first sexual encounter with Victim which he testified to differed from those he provided in a hearing earlier that week. As to his meeting with police, Appellant conceded he knew his rights about communicating with police due to his prior experience with the criminal justice system. Further, he acknowledged that his lack of glasses did not prevent him from recognizing Victim’s name or telling officers as much. As they State continued to press Appellant on his testimony, he walked back man of his statements, claiming he could not remember his police interview very well and that he only had intercourse with Victim on two occasions. (R.p.419, line 22–R.p.437, line 9).

STANDARD OF REVIEW

“In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous.” State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). “The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. “An abuse of discretion occurs when a trial court’s decision is unsupported by the evidence or controlled by an error of law.” Id.

ARGUMENT

The trial judge properly admitted Appellant’s sanitized convictions into evidence. While the trial judge applied the incorrect balancing test—in Appellant’s favor—the prior convictions were still admissible pursuant to Colf and Rule 609, SCRE. Further, even if the prior convictions were improperly admitted, any error in their admission is harmless given the overwhelming evidence of guilt which also illustrated Appellant’s testimony—the only evidence supporting his innocence—was completely incredible.

a) The Trial Judge Incorrectly Weighed the Prior Convictions Under Rule 609, SCRE, Which Benefitted Appellant

Initially, the State would note that, if anything, Appellant benefitted from the trial judge’s balancing test and sanitization of the challenged prior convictions: the trial judge applied the incorrect balancing standard to his ruling, one which restricted the admission of the prior convictions more than what was required under Rule 609(a)(1). Pursuant to Rule 609(a)(1), prior crimes “shall be admitted in the court determines that the probative value of admitting [such] evidence outweighs its prejudicial effect to the accused.” After weighing them, the trial judge found admission of all the challenged convictions outweighed their danger of unfair prejudice to the Appellant. However, the trial judge mistakenly believed admission of these convictions had to **substantially** outweigh their potential for unfair prejudice, which is the standard under Rule 609(b), SCRE for admitting prior convictions which occurred **more than ten years** before a criminal defendant’s trial. All of Appellant’s challenged convictions occurred within ten years of the trial and, pursuant to the trial judge’s on-the-record analysis, were admissible without any sanitization pursuant to Rule 609(a)(1). This is particularly true for Appellant’s only conviction and the topic of this appeal: second-degree CSC, a crime which without further explanation does not have any obvious connection to the prior convictions for second-degree assault and battery.

b) Sanitization is a proper process under both South Carolina and federal law.

Appellant argues the sanitization of the challenged convictions was improper for two reasons: (1) that sanitization of convictions should not be substituted for performing the balancing tests required by Rule 609 and Colf; and (2) sanitizing the convictions scrubbed them of information which would be used by the jury to evaluate Appellant's credibility. The State entirely agrees with Appellant's first point and notes that the case law supporting sanitization clearly states this point. In fact, the reason for the sanitization of the challenged convictions is because the trial judge performed the requisite tests and decided to remove the descriptions of the prior convictions in order to properly "balance" the value which could be gained from admitting the convictions against the potential that the jury would use the descriptions of the convictions as improper propensity evidence.

Appellant's second argument is rooted in a misunderstanding of the federal and state case law involving sanitization. For example, Appellant argues a "close reading of Boyce" supports his position because the Fourth Circuit held: "In proving the felony conviction on cross-examination, the United States Attorney may ask about the name of the crime, the time and place of conviction, and the punishment." United States v. Boyce, 611 F.2d 530 (4th Cir. 1979) (discussing Rule 609, FRE). The State notes the Fourth Circuit ruled a prosecutor "may" ask about these details, not that it "must." Further, the State interprets Appellant's argument pertaining to Boyce as stating that an exception does not exist because there is a general rule pertaining to the admission of prior convictions: however, Appellant's paradoxical argument would mean that no exception could exist because a general rule exists, despite the former's dependence on the latter's existence.

The Boyce court explained in its footnote that the prosecution generally has right to question a defendant about the nature and number of a defendant's previous felonies, but that in "special case[s]" involving prior convictions for the **same** offense as that for which the defendant is tried, a trial court will generally not permit the government to prove the nature of that offense because it would cause unfair prejudice to a defendant. Id. at 530, n.1 (emphasis added).

Similarly, Appellant's belief that his argument is supported by U.S. v. Estrada, 430 F.3d 606 (2nd Cir. 2005) demonstrates confusion over the facts of that case. In Estrada, two defendants appealed their various drug convictions for various issue including the district court's policy of not permitting the impeachment of witnesses with the statutory names of their prior convictions. Id. at 608. In that case, the district court ruled, without performing a balancing test, that crimes "not bearing directly on veracity, 'it's the fact and presumably the date, if you want to get it in, that goes to credibility" and the court was not "aware of any judge in th[e] district that lets in the nature of the [Rule 609(a)(1), FRE] convictions rather [than] simply the fact and the date." Id. at 609.

The Second Circuit Court of Appeals found that district court's actions "short-circuited the balancing prescribed by the Rule." Id. at 620. Notably, the Second Circuit did not criticize the use of aseptic convictions themselves, and only stated: "District courts must thus undertake and individualized balancing analysis under Rule 609(a)(1)[,FRE] before excluding evidence of the statutory name of a witness's crime. Applying a generalized heuristic is simply improper." Id. at 616. The Second Circuit also acknowledged that even sanitized convictions possesses probative value. See id. at 620 ("By permitting to go before the jury only evidence of an aseptic, unnamed "felony" conviction for Rule 609(a)(1) crimes of which government witnesses had

been convicted, the district court acknowledged the generic probative value of felony convictions.”)

Additionally, the Estrada court explained that fairness and the possibility of unfair prejudice to the State should also be considered when performing a Rule 403, FRE balancing test. See id. at 620 (“The Advisory Committee notes make clear that while the prior convictions of a government witness are unlikely to inflame the jury or invite a propensity inference, they may cause unfair prejudice to the government’s interest in a fair trial or unnecessary embarrassment to the witness.”)

Appellant also cites to brief quotations from several cases which, in the abstract, appear to support his argument. However, closer review of these cases indicate they are all distinguishable from the South Carolina and Federal precedent upon which South Carolina’s sanitization standard is based. For example, the federal cases cited by Appellant do not involve sanitization issues. United States v. Wolf, 561 F.2d 1376 (10th Cir. 1977) involved the admission of prior conviction involving dishonesty, which that court approved. Id. at 1381. That court did note that questioning the defendant about the details of a prior conviction, however, was usually improper. Id. In United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986), that court rejected the defendant’s attempts to cross-examine a prosecution witness on the specifics of his prior convictions, noting the defenses was allowed to question that witness about the existence of those convictions and was even able to question the witness about the “deal” he made with the prosecution. Id. at 1176.

The state court cases cited by Appellant similarly do not support Appellant’s argument. People v. Garth, 287 N.W.2d 216 (Mich. Ct. App. 1979), Bells v. State, 759 A.2d 1149 (Md. Ct. Spec. App. 2000), and State v. Taylor, 993 S.W.2d 33 (Tenn. 1999) all involve the admission of

prior convictions based primarily on their respective states' prior case law and rules of evidence. See Garth, 287 N.W.2d at 315–16 (citing M.C.L. s 600.2159); Bells, 759 A.2d at 115255 (analyzing the admission of prior convictions under Michigan law and precedent while acknowledging Maryland is “in the minority of jurisdictions in holding that sanitized prior convictions are improper for impeachment”); Taylor, 993 S.W.2d at 34 (noting Tenn. R. Evid. 609(a) is based upon the Supreme Court of Tennessee’s opinion in State v. Morgan, 541 S.W.2d 385 (Tenn. 1976), and takes Morgan “at face value.”)

In State v. Hardy, 946 P.2d 1175 (Wash. 1997), the Supreme Court of Washington noted that under its rules of evidence, crimes not involving dishonesty or false statement rarely have probative value which merit their introduction at trial. Id. at 1178–79. Moreover, the quotation Appellant cited from the case is not one which contradicts the State’s argument or South Carolina law: unname a felony is not a substitute for the balancing process required, and the probative value must still outweigh the prejudicial effect before admitting an unnamed conviction. See Elmore, at 239 n.5, 628 S.E.2d at 275–76 n.5. Interestingly, State v. Crawford, 206 P. 717 (Utah 1922), actually stands for the opposite of Appellant’s argument: in it, the Supreme Court of Utah found jurors are entitled to know always know the name of the prior conviction submitted for impeachment, even if the conviction is for the same offense for which the defendant is on trial. Id. at 719–20 (finding the trial court properly allowed of impeachment of a defendant on trial for robbery with prior convictions of robbery and burglary).

State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012), the only South Carolina case cited by Appellant in support of his argument, does not deal with sanitization, while other South Carolina cases noted by the State supra directly support the recognition of sanitization by our Supreme Court. See, e.g., Green, 338 S.C. at 433 n.5, 527 S.E.2d at 101 n.5.

Notably, all the cases cited by Appellant either ignore or fail to consider an informative aspect of prior convictions highlighted in Robinson: that a history of prior convictions may reveal “a continuing pattern of criminal behavior that could legitimately impact [the defendant’s] credibility in the eyes of the jury.” See id. at 600 828 S.E.2d at 214. In Robinson, the Supreme Court of South Carolina noted, analyzing that defendant’s prior convictions “illustrate[d] closeness in time between the prior offenses and the offense for which Robinson was on trial, revealing a pattern of behavior that legitimately evoked questions of Robinson’s credibility.” Id. In the instant case, Appellant’s sanitized convictions, combined with the prior convictions not disputed on appeal, showed a consistent pattern of criminal behavior: he had five prior convictions in the five years prior to the current offense. Similar to Robinson, Appellant’s pattern of disregard for the law directly impacted his credibility and was an important consideration for the jury.

Ultimately, all of the cases cited by Appellant do not contradict the fact that both federal and South Carolina law recognize and approve the use of sanitization of prior convictions, provided the sanitization process is not used without also performing the balancing test required before admitting prior convictions. In the instant case, the trial judge performed the balancing test and concluded the sanitized convictions were admissible. The trial judge did not abuse his discretion in making this ruling.

c) Appellant’s prior convictions were properly admitted pursuant to Rule 609 and

Colf

Issue Preservation: Appellant’s Failure to Argue the Colf Factors at Trial

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is “to give the trial court a fair opportunity to rule on the

issues, and thus provide [the appellate court] with a platform for meaningful appellate review.” Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity “to rule properly after it considered all relevant facts, law, and arguments.” I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Moreover, a party cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) (“[A] party cannot argue one theory at trial and a different theory on appeal.”); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) (“[A] defendant may not argue one ground below and another on appeal.”).

In his brief, Appellant argues the trial judge erred in admitting the contested prior convictions based on his analysis of the five Colf factors. However, Appellant’s arguments for three of the five Colf factors are not preserved for review. Despite the trial judge performing an

on-the-record analysis which considered both Rule 609 and the Colf factors, Appellant made arguments which, viewed in the light most favorable to him, only applied to two of the Colf factors: (1) Appellant claimed “assault and battery has absolutely nothing to do with truthfulness whatsoever”; and (2) the challenged convictions should be inadmissible because they were too similar to the crimes for which Appellant was on trial. Appellant did not argue or challenge the trial judge’s findings regarding the timeliness of the prior convictions in regards to his trial, the importance of Appellant’s testimony, or the centrality of the credibility issue to the trial; in fact, trial counsel’s statements indicate, if anything, agreement with the trial judge’s findings as to these factors. Accordingly, Appellant’s arguments as to three of the five Colf factors are unpreserved for review. See Bailey, 298 S.C. at 5, 377 S.E.2d at 584.

Appellant’s Rule 609 Analysis Improperly Considers His Burglary Acquittal

The State also notes that Appellant’s Rule 609(a)(1) and Colf analysis greatly confuses the facts of this case. First and foremost, Appellant acts as if the unmodified convictions were presented to the jury. See, e.g., (Br. of Appellant p.17). However, the record (and both parties’ briefs) demonstrate this was not the case. Any discussion of the challenged prior convictions must weigh their potential prejudice from the sanitized information presented to the jurors. It is also important to note that Appellant, in an apparent effort to bolster his argument, analyzes the potential prejudice the prior convictions had on his burglary charge. However, such analysis is inappropriate, confusing, and pointless because Appellant was acquitted of burglary. This Court should ignore any of Appellant’s arguments regarding prejudice as to this acquitted charge.

The Colf Factors as Applied to Appellant’s Case

Assuming Appellant’s arguments regarding the Colf factors are preserved, the record shows the trial judge did not abuse his discretion in admitting the prior convictions.

1. Impeachment Value of the Prior Convictions

Appellant argues there was “no showing” that Appellant’s prior convictions for burglary and second-degree assault and battery reflected dishonesty, meaning this factor weighed in favor of excluding the prior convictions. However, Appellant’s argument ignores the guidance provide in Robinson: it is not necessary for crimes to involve dishonesty or a false statement for them to be admissible pursuant to Rule 609. Id. at 599, 828 S.E.2d at 213. As explained by the Robinson court, prior convictions for crimes involving false statement or dishonesty are automatically admissible pursuant to Rule 609(a)(2), and interpreting Rule 609(a)(1) to require some degree of dishonesty in admitted crimes would mean “no convictions would ever have impeachment value under Rule 609 unless they were crimes of dishonesty or false statement Rule 609(a)(2) would inevitably swallow Rule 609(a)(1).” Id. The court also noted that Rule 609(a)(1) prior convictions do indicate to a jury that the accused is someone who might not be credible, and “[i]t was within the trial court’s discretion to conclude that because Robinson ha[d] prior convictions for such offenses, he legitimately might not be considered credible” Id. at 599–600, 828 S.E.2d at 213–14.

In the instant case, the trial judge determined Appellant’s frequent criminal history, which included numerous convictions in the years leading up to the crime, was evidence that challenged Appellant’s credibility and thus possessed impeachment value. This was of particular importance in this case because the defense focused its effort on discrediting Victim and portraying her as a liar who misrepresented a consensual encounter, which only increased the impeachment value of his prior convictions. Contrary to Appellant’s blanket assertion that convictions not involving dishonesty or false statements are inadmissible, both Robinson and Rule 609(a) flatly contradict his claim and allow for the admission of any convictions provided

they comply with Rule 609(a)(1). Accordingly, the trial judge properly exercised his discretion in finding the admission of the challenged prior convictions possessed impeachment value.

2. The Point in Time of the Conviction and Appellant's Subsequent History

Appellant argues his burglary and assault and battery convictions were remote in time because they all occurred between seven and nine years prior to trial. Again, Appellant's argument shows a fundamental misunderstanding of both Rule 609 and Colf. Rule 609(a)(1). Notably, Rule 609(b) allows the use of any conviction for the purposes of Rule 609(a)(1) which occurred within ten years of the conviction or release from said conviction. Rule 609(b) does establish a "presumption against admissibility of remote convictions," only convictions and sentences which occurred greater than ten years prior to trial, and even those convictions may be admitted if their probative value, supported by specific facts and circumstances, substantially outweighs their prejudicial effect. Rule 609(b), SCRE; Colf, 337 S.C. at 626, 525 S.E.2d at 248.

A Colf analysis of the timing of a prior conviction is slightly different: as clarified in Robinson, this factor focuses on the "closeness in time" between the prior offenses and the charge for which the defendant is on trial, not the trial itself. See Robinson, 426 S.C. at 600, 828 S.E.2d at 214. The Robinson court found that the named defendant's criminal history, which included convictions in 2007 and 2009, "reveal[ed] a pattern of behavior that legitimately evoked questions of Robinson's credibility" related to his 2011 offense. Id. In the instant case, the second-degree assault and battery convictions occurred only three years prior to the charged offense and the burglary charge occurred two years before those convictions. Further, these convictions were submitted in conjunction with three others for petit larceny and a property offense which also occurred during the five-year period up to the crime. Similar to Robinson,

Appellant's routine pattern of behavior evoked serious questions of his credibility and weighed in favor of the admission of the challenged offenses.

3. Similarity Between Past Crimes and the Charged Crimes

The third factor, the similarity of the past crimes to the crime(s) for which a defendant stands trial, weighs entirely in the State's favor. In Colf, the South Carolina Supreme Court cautioned that "evidence of similar offenses inevitably suggest to the jury the defendant's propensity to commit the crime with which he is charged." Id. at 628, 525 S.E.2d at 249. By removing the names of these crimes, the trial judge eliminated the possibility that the jury would know that Appellant had prior convictions which were similar to his charges, and that these prior convictions could then be improperly used as propensity evidence. Accordingly, this factor also weighs in favor of admission by the trial judge.

4. Importance of Appellant's Testimony

Appellant argues this factor weighed against admission of the challenged prior convictions simply because "it was important for the jury to hear Appellant's side of the story" and "it was more important that the jury hear Appellant's testimony than it was that the jury hear of his convictions." (Br. of Appellant p.16). In addition to being unpreserved, Appellant's argument demonstrates another fundamental misunderstanding of Colf. As explained in Robinson: "Th[e] right [to testify] does not preclude the State from impeaching a defendant's credibility with prior convictions. If the defendant's right to testify were to trump all other considerations relevant to Colf and Rule 609, then a defendant could never be impeached with prior convictions." Robinson, 426 S.C. at 604, 828 S.E.2d at 216.

Notably, Appellant's briefing of this factor cites to federal cases pre-Colf which do not utilize anything similar to a Colf analysis. In fact, the case Appellant focuses on, U.S. v.

Lipscomb, 702 F.2d 1049 (D.C. Cir. 1983), involved a defendant who, with the knowledge that he would be impeached with prior convictions, elected not to testify. In the instant case, Appellant did elect to testify. In fact, Appellant's decision to testify is a tacit acknowledgement that the admission of the prior convictions did not prevent him from presenting his version of events to the jury. This factor weighs in favor of admission of the challenged prior convictions.

5. The Centrality of the Credibility Issue

The fifth factor, the importance of credibility to the trial, also weighed in favor of admitting all of prior convictions tendered by the State. “[W]hen credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate.” Robinson, 426 S.C. at 606, 828 S.E.2d at 217. Further, “[i]f the jury must choose between the defendant's credibility and that of another witness, there would be a high probative value in admitting evidence of prior convictions to impeach the defendant's credibility.” Id.

Appellant's entire defense strategy was to use his testimony to try and contradict and/or reframe the testimony provided by the State's witnesses, especially Victim's. Not only did trial counsel attempt to discredit Victim by questioning her about the details of the attack that she was unable to remember, such as exactly how long it lasted, but trial counsel also went after aspects of Victim's life that appeared entirely unrelated to the attack, such as the financial issues she and Dean experienced and even her past diagnosis of depression and her use of medication for it. Appellant directly assailed Victims' credibility and reputation by claiming she participated in a long-term affair with him and made no efforts to conceal such indiscretion from her young child. Appellant also attempted to discredit the testimonies of the officers who interviewed him after the sexual assault. By directly assaulting the credibility of the witnesses, Appellant only increased the value of introducing the challenged convictions at trial.

Harmless Error

Even if the admission of the prior convictions was improper, their admission was harmless error. The evidence presented at trial, including Appellant's incredible testimony, left no room for doubt as to his guilt.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct. App. 2012). Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." Heller, 399 S.C. at 171, 731 S.E.2d at 320.

In the instant case, all the evidence at trial confirmed Appellant had sexual relations with Victim on the night in question; even the defense did not dispute that fact. The defense's only strategy was to discredit nearly all of the state's witnesses to make it appear as if, most notably, Victim and the police officers who met with him were all lying. As to Victim, trial counsel tried to signal that she was lying about a consensual sexual encounter, but provided no explanation as to why Victim reported this encounter and appeared visibly distressed to the numerous witnesses who saw her in the hours after the attack. Further, Appellant failed to provide a credible explanation as to why he denied knowing Victim or having sexual contact with her when he was interviewed by police officers. Appellant's implausible, self-serving explanations for the State's

evidence was contradicted by the State's evidence and any reasonable juror, even in the absence of the disputed prior convictions, would have convicted Appellant based on the remainder of the evidence presented by the State. Accordingly, the error alleged by Appellant is harmless. See Bryant at 518, 633 S.E.2d at 156.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

March 10, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2019-001920

THE STATE,RESPONDENT,

v.

RODNEY JEROME FURTICK,APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent 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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March 10, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Rodney Jerome Furtick, Appellant.

Appellate Case No. 2019-001920

Appeal From Lexington County
Frank R. Addy, Jr., Circuit Court Judge

Opinion No. 6032
Heard December 6, 2022 – Filed November 8, 2023

AFFIRMED

Appellate Defender Joanna Katherine Delany, of
Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Joshua Abraham Edwards, both of
Columbia, and Solicitor Samuel R. Hubbard, III, of
Lexington, all for Respondent.

MCDONALD, J.: Rodney Furtick appeals his second-degree criminal sexual conduct (CSC) conviction and sentence, arguing the circuit court erred in finding certain prior convictions admissible under Rule 609, SCRE. Furtick contends the circuit court applied an improper balancing test and eliminated any probative value the prior convictions may have once had by "sanitizing" them. Essentially, Furtick's position is that if the convictions needed sanitizing, the circuit court

should have excluded them entirely. We disagree, and we affirm the circuit court's well-reasoned analysis.

Facts and Procedural History

In August 2015, J.H. (Victim), her then-husband (Husband), and their one-year-old daughter moved to Cayce. The couple did not own a vehicle, and they shared a cell phone. Husband generally worked a night shift and walked to work.

In October 2015, Husband befriended Furtick, who could often be seen walking around the neighborhood. Victim testified at Furtick's trial that she told Husband she did not want Furtick around when Husband was not present because Furtick made her uncomfortable. By that time, Furtick was visiting the couple's home once or twice a week.

At some point that same October, Victim reported to the police that Furtick or his girlfriend had stolen her Electronic Benefits Transfer (EBT) card; however, at the time of Furtick's trial, Victim did not recall making this report. She explained, "I probably did, but I was basically a single mother. My husband didn't do anything for my daughter. I was more focused on my daughter than anything else."¹

On November 18, 2015, Husband left the house shortly before dark to visit a hobby shop. Victim recounted that while she was getting Daughter ready for bed, she heard a knock at the back door and saw the door begin to open as she approached it. Although she tried to push the door closed, Furtick entered the home uninvited, and Victim asked him to leave. At that point, Victim instructed Daughter to go lie down in her bed, but Daughter instead moved in front of Victim. Furtick put down a plate of food he was carrying, walked toward Victim, and pushed Daughter into a corner, causing a red mark on Daughter's back. When Daughter began to cry, Victim carried her to Victim's bedroom and instructed her to cuddle with the pillows there. Furtick then pushed Victim backwards into Daughter's room and ordered her to lie down. During all of this, Victim was scared for Daughter because Daughter "started crying and screaming." While backing into the bedroom, Victim tripped over Daughter's toys and Furtick shoved her to the floor. He then began trying to kiss her and attempted to remove her tights at the feet but became frustrated and yanked the tights down from Victim's waist. Furtick then raped Victim while Victim stared at Daughter in an effort to try to

¹ Victim and Husband have since divorced.

keep her from approaching. Following the sexual assault, Furtick cleaned himself with baby wipes.

When asked why she did not try "to fight him off," Victim explained she was afraid Furtick would hurt Daughter. Victim testified Furtick became annoyed because Daughter continued to cry and try to enter the room. At times, Furtick "kept turning to glare" at Daughter. Then, as he was leaving, Furtick told Victim that if she told anyone about what happened, "he would tell his friends that [her] house was free game."

After Furtick left, Victim grabbed Daughter and ran across the street to a neighbor's house. She told the neighbor she had been raped, and the neighbor called 911. Neighbor testified Victim was very upset and visibly shaking.

Shortly after receiving the dispatch, Sergeant John Robert Reese of the Cayce Department of Public Safety (CDPS) responded to the scene. Sergeant Reese testified Victim was very upset, her clothing was disheveled, and she identified her attacker as "a black male and the name was Rodney or Todd."²

Paramedic Marilyn Sanchez treated Victim at the scene and observed she was "very anxious, nervous, paranoid, looking around like she was looking for someone or something." Victim was then transported to Prisma Health Richland, where a forensic nurse examiner completed a sexual assault evidence collection kit. Lieutenant Jason Merrill responded to the hospital and interviewed Victim; he then gave her a ride home. In his search of the home, Lieutenant Merrill collected crumpled baby wipes and black tights from the floor of Daughter's room.

On December 10, Lieutenant Merrill and Sergeant Caleb Thomas questioned Furtick at CDPS headquarters. Lieutenant Merrill informed Furtick that CDPS was investigating a November 18 criminal incident at Victim's home. When Lieutenant Merrill asked Furtick if there was any reason his DNA might be found there, Furtick denied ever being inside the house. He further denied that he knew Husband or Victim, even after being shown a photograph of Victim bearing her name.

On December 30, CDPS transported evidence from the scene and Victim's sexual assault kit to the South Carolina Law Enforcement Division (SLED), where it was

² Victim provided Sergeant Reese with a description and a first name but did not know Furtick's last name.

tested for semen and saliva. Vaginal and rectal swabs from the kit tested positive for the presence of semen; the swabs from Victim's arm, breasts, and cheeks were positive for saliva. Cuttings from Victim's underwear were also positive for components of semen. SLED forensic scientist Samuel Stewart later developed a DNA profile.

CDPS then obtained a search warrant and collected Furtick's DNA, which matched the semen on the vaginal and rectal swabs. Stewart testified the probability of an unrelated individual matching the semen on these items was one in seventeen quintillion. He further noted Furtick was a minor contributor to some of the DNA found on other tested items.

A Lexington County grand jury indicted Furtick for first-degree CSC and first-degree burglary. At Furtick's subsequent trial, the State notified the circuit court that if Furtick testified, it intended to introduce evidence of his prior convictions: a 2010 conviction for burglary, a 2012 petit larceny conviction, two 2012 second-degree assault and battery convictions, and a 2015 conviction for a third-offense property crime.

The circuit court noted the petit larceny and property offense were crimes involving dishonesty, and Furtick requested that the court reference larceny only, not "a third or subsequent offense," because this was a petit larceny with a sentencing enhancement. The State consented to this request.

Furtick further argued that under Rule 609(a), SCRE, his convictions for burglary and assault and battery should be excluded due to their similarities to the crimes for which he was currently being tried. Furtick asserted that under Rule 403, the probative value of these prior convictions would be substantially outweighed by their prejudicial effect because the case "boils down to a swearing contest." The State countered that burglary was a crime of dishonesty and Furtick had frequently attacked Victim's credibility. The circuit court noted burglary was not a crime of dishonesty under *State v. Bryant*³ and the burglary conviction was indeed similar to one of the crimes for which Furtick was on trial. Thus, the court's "initial impression [was] to decline to allow the State to go into or specifically say a burglary."

³ 369 S.C. 511, 517–18, 633 S.E.2d 152, 155–56 (2006).

The circuit court noted the assault and battery convictions were likely admissible because their similarities to the CSC count were insufficient to warrant exclusion. Still, the circuit court explained that after an evening review of the *State v. Colf*⁴ factors and recent caselaw, the court would revisit the admissibility of these convictions the following day before trial resumed.

Upon reconvening the next morning, the circuit court explained:

I have some further reflection on how to treat the assault charges or the assault convictions and after reviewing the caselaw, the Court has to conclude in order to allow those specific convictions to come in as assault and battery seconds that legally the Court would have to conclude that the probative value of that impeachment substantially outweighs any undue prejudice.

And I've looked at the five factors, I've considered it. Doing a 403 balancing analysis, I think that the impeachment value mostly outweighs the danger of unfair prejudice but I cannot say it substantially outweighs the danger of unfair prejudice and the key to this—or the key to my reasoning is that by allowing the jury to hear that he was convicted of assault and battery second degree is tantamount to basically suggesting to the jury that the Defendant has a propensity towards violence, a propensity to assault people, and, of course, sexual assault is one of the charges he's facing.

The circuit court instructed the State to limit its questions relating to the assault and battery and burglary convictions to reflect Furtick was convicted of "two misdemeanors in 2012 and a felony in 2010 that carried a possible punishment of more than one year in prison."

Furtick's counsel responded,

[O]ur position would be that if the rules don't allow it, if you can't fit a square box into a round hole, then why should we sand off the corners of the square box and now

⁴ 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000).

push it through the hole? I didn't see anything where that was addressed in any of the caselaw and so our position would be if the rules don't allow it, then it just shouldn't come in, it shouldn't be, quote unquote, sanitized.

Furtick's counsel further noted, "I can't find any cases that talk about this whole hey, sanitizing it is okay, but I've seen it in this circuit and I've seen it in some other circuits, I've just not seen it challenged."

The circuit court replied,

[M]y opinion is that the prejudice flows from the similar nature of the crime, so calling something a burglary when you're on trial for burglary or calling something a rape when you're on trial for rape is what creates the prejudice if they have that prior conviction for that similar type of offense and the prejudice is substantially lessened if you're simply allowed to inquire as to a nameless felony or a nameless misdemeanor, and so that's—that's the reasoning that this Court is employing it and I think other judges [have] employed routinely.

Furtick testified he met Husband in October 2015 when he saw him in his yard smoking a cigarette. He and Husband talked all afternoon, walked to a store, and Husband eventually invited Furtick into his home. Later, when Husband left for work, Furtick stayed and socialized with Victim. He claimed the two "became fond of one another" and had consensual sex that afternoon. Furtick further claimed Victim and Husband were friendly toward him when they saw him after this encounter. Although Furtick admitted he had Victim's EBT card at one point, he said Husband gave him the card and pin number and agreed for Furtick to sell it "and get them a few dollars."

Furtick admitted he was present at Victim's home on November 18, 2015. He testified he had agreed to help Victim sell some baby food that she no longer needed, but he returned the food to her when he was unable to sell it. Furtick denied Victim ever asked him to leave; he claimed he and Victim talked for a while, he asked her if she wanted to have sex, and she said yes.⁵ He then remained at the house for another five to ten minutes. On cross-examination, the State

⁵ During her testimony, Victim denied the two ever had consensual sex.

brought out inconsistencies between Furtick's testimony at a pretrial hearing and his trial testimony, such as the location of the first alleged sexual encounter and what Victim was wearing.

Furtick's trial testimony also contradicted his statements to law enforcement during the investigation—the most notable contradiction was Furtick's trial admission that he knew Husband and Victim and began regularly interacting with them in October 2015. Furtick claimed that when law enforcement asked him if he knew Victim or Husband, he did not deny that he knew them but told the officers he could not see the pictures. He maintained he did not admit he knew Victim—despite being asked if he knew her by name—because he could not see her photo. He provided the same explanation as to Husband's photo and his initial denial. When asked why he did not identify the couple after the officers obtained a pair of glasses for him, Furtick claimed he ended the interview because the officers would not let him keep the glasses.

Furtick was convicted of the lesser included offense of second-degree CSC but acquitted of burglary. The circuit court sentenced him to twenty years' imprisonment.

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). "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.* (alteration by court) (quoting *State v. Dunlap*, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001)).

Law and Analysis

Furtick argues the circuit court erred in allowing the State to impeach him with sanitized convictions otherwise inadmissible under Rule 609(a)(1) and the *Colf* factors. He contends this error was not harmless because his defense hinged on the credibility of his testimony that any sexual encounter with Victim was consensual.

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.

For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of nolo contendere or a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

In *Colf*, our supreme court delineated the following factors a circuit court must consider in a Rule 609 analysis when weighing the probative value of prior convictions against their prejudicial effect:

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.

337 S.C. at 627, 525 S.E.2d at 248.

Our supreme court provided further guidance in *Robinson*,⁶ explaining:

⁶ In *Robinson*, the circuit court admitted into evidence several prior convictions, including a burglary conviction the circuit court ruled "had to be referred to generically as a 'prior felony conviction carrying more than one year in prison.'"

Rule 609(a) invokes three impeachment scenarios. First, under Rule 609(a)(1), evidence that a witness other than an accused has been convicted of a crime punishable by death or imprisonment for more than one year (in the jurisdiction where the conviction occurred) is admissible, subject to Rule 403, SCRE. Under Rule 403, evidence of such a conviction "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 Rule 403 test places the burden upon the opponent of the evidence to establish inadmissibility pursuant to Rule 403. Second, under 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. Third, under Rule 609(a)(2), if a witness, even an accused, has been convicted of a crime involving dishonesty or false statement, evidence of such a conviction shall be admitted regardless of the maximum punishment and regardless of the probative value or prejudicial effect of the evidence.

....

Rule 609(a)(2) requires no balancing test for admissibility of a prior conviction for a crime involving dishonesty or false statement. However, Rule 609(a)(1) and Rule 609(b) require the trial court to balance—in three varying degrees—the probative value of evidence of a prior conviction and the degree of prejudice to the opponent of the evidence (as noted, the Rule 403 test also

426 S.C. at 588, 828 S.E.2d at 207. The supreme court noted the admission of this conviction for the purpose of impeachment was not appealed. *Id.*

requires the trial court to consider confusion of the issues, misleading the jury, etc.). Even though these three Rule 609 admissibility tests differ from one another, we have, through *State v. Colf*, provided a uniform set of factors for the trial court to consider when applying each test.

426 S.C. at 593–94, 828 S.E.2d at 210.

"The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand—the witness's propensity for truthfulness, or credibility." *Id.* at 597, 828 S.E.2d at 212 (quoting *State v. Black*, 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012)). "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 at 212–13 (quoting *Black*, 400 S.C. at 21–22, 732 S.E.2d at 887) (omission by court). "Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1)." *Id.* at 599, 828 S.E.2d at 213.

"[U]nder Rule 609(a)(1), if the witness is the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court must balance the *Colf* factors and determine whether the probative value of the conviction outweighs its prejudicial effect to the accused." *Id.* at 595, 828 S.E.2d at 211. "An on-the-record balancing test is particularly important for prior similar convictions under Rule 609(a)(1) because the 'similarity of a prior crime to the crime charged heightens' its prejudicial nature. *State v. Howard*, 384 S.C. 212, 221, 682 S.E.2d 42, 47 (Ct. App. 2009) (quoting *State v. Elmore*, 368 S.C. 230, 239, 628 S.E.2d 271, 275 (Ct. App. 2006)).

Relying on *United States v. Boyce*, 611 F.2d 530, 530 (4th Cir. 1979), our appellate courts have seemingly approved the sanitization of prior convictions in cases addressing Rule 609. In *Boyce*, a defendant convicted of defrauding a federally insured bank appealed his conviction in part because the prosecutor asked on cross-examination whether he had been convicted of a felony and inquired as to the nature and number of such convictions. *Id.* at 530. The Fourth Circuit noted Rule

609(a), FRE,⁷ allows a defendant to be impeached by proof of his prior felony convictions; a defendant may be asked matters including the name of the crime, the time and place of the conviction, and the punishment. *Id.* The Fourth Circuit found "[i]t follows that there was no plain error in permitting the United States Attorney to inquire about the number and nature of defendant's felony convictions, particularly since the defendant himself had already testified that he had been convicted of a felony and there was no objection at trial." *Id.* at 530–31. The court stated in a footnote, "In the special case, where the prior conviction is for the same offense as that for which the defendant is being tried, the trial court generally will not permit the Government to prove the nature of the offense on the ground that to do so would amount to unfair prejudice." *Id.* at 530, n.1.

In *Green v. State*, our supreme court referenced the *Boyce* footnote, stating, "One tactic the Fourth Circuit Court of Appeals employs is to allow the prosecutor to ask

⁷ Rule 609(a), FRE states:

The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving — or the witness's admitting — a dishonest act or false statement.

the defendant about the existence of prior convictions, but not their nature." 338 S.C. 428, 433 n. 5, 527 S.E.2d 98, 101 n.5 (2000). The *Green* court also explained:

Federal courts have held that prior convictions for the same or similar crimes are highly prejudicial and should be admitted sparingly. While some federal circuits have held such convictions admissible if, after consideration of other factors, their probative value outweighs their prejudicial effect, the Fourth Circuit has been one of the stricter circuits, refusing to permit impeachment with similar prior convictions. We decline to hold similar prior convictions inadmissible in all cases. Trial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence.

Id. at 433, 527 S.E.2d at 100–01 (internal citations omitted) (footnote omitted).

Two years later, in *State v. Rollins*, this court found the circuit court did not abuse its discretion in admitting evidence of a defendant's prior convictions because:

In this case, the trial judge reviewed Rollins' history of convictions and adopted the tactic mentioned in the *Green* footnote. In addition to limiting the amount of detail about the prior convictions, the trial judge instructed the jury that the prior convictions could only be considered in determining Rollins' credibility. This procedure minimized the prejudice to Rollins.

348 S.C. 649, 653, 560 S.E.2d 450, 452 (Ct. App. 2002).

The court of appeals again referenced this approach in its 2006 *Elmore* opinion, explaining:

One permissible approach, advocated by the United States Fourth Circuit Court of Appeals, is to allow the prosecutor to ask the witness about the existence of a prior similar conviction under Rule 609(a)(1) without

disclosing to the jury the nature of the prior offense. *See Boyce*, 611 F.2d at 531 n. 1. The *Boyce* approach was approvingly referenced by our supreme court in *Green*, 338 S.C. at 433 n. 5, 527 S.E.2d at 101 n. 5. The *Boyce* approach still requires a meaningful balancing of the probative value and prejudicial effect before admission of the prior conviction, although the prejudice occasioned by the similarity of the prior crime to the crime charged is removed.

368 S.C. at 239 n.5, 628 S.E.2d at 276 n.5.

In Furtick's case, we acknowledge the circuit court used a different balancing test when it stated, "Doing a 403 balancing analysis, I think that the impeachment value mostly outweighs the danger of unfair prejudice but I cannot say it substantially outweighs the danger of unfair prejudice." Under Rule 609(a)(1), the Rule 403 balancing test is used in determining the admissibility of prior crimes of a witness other than the accused. When determining whether an accused's prior convictions may be admitted under Rule 609(a)(1), evidence of a defendant's prior convictions carrying more than one year of imprisonment "shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Thus, it appears the circuit court's use of a balancing test requiring the impeachment value to *substantially* outweigh the danger of unfair prejudice actually inured to Furtick's benefit.

The circuit court also indicated it considered the *Colf* factors, though it did not specifically reference each factor. Still, the court clearly considered the similarities of the various crimes and the centrality of the credibility issue at trial. The record demonstrates the circuit court weighed the prejudicial effect of admitting the convictions, finding any prejudice was due to the similarity of the convictions to Furtick's current charges. The circuit court then sought to mitigate this prejudice through sanitization—barring any reference to the specific similar crimes for which Furtick had been previously convicted. In requiring sanitization, the court referenced the dates of Furtick's various prior convictions; the oldest admitted conviction occurred five years before Victim's sexual assault. Considering the impact of the prior convictions on credibility, the circuit court explained credibility was "quite important in this case" and thus declined to allow the State to introduce the nature of the convictions. We find the circuit court's sanitization approach was appropriate and that its analysis satisfied the requirement of a meaningful on-the-record balancing of the *Colf* factors.

Moreover, even if the circuit court erred in sanitizing or discussing its balancing of Furtick's prior convictions, such error would be harmless. When the circuit court admitted Furtick's two larceny convictions, Furtick's only request was that one of the convictions be called "larceny" with no "subsequent offense" or enhancement reference. Because evidence of two convictions for crimes of dishonesty had been admitted, the prejudicial effect of admitting other convictions referenced only as "two misdemeanors in 2012 and a felony in 2010 that carried a possible punishment of more than one year in prison" was low. *See Black* 400 S.C. at 27–28, 732 S.E.2d at 890 (finding erroneous admission of a witness's remote manslaughter conviction harmless due to the unchallenged admission of another prior conviction for shooting/throwing a deadly missile). Of further significance is the fact that when law enforcement initially questioned Furtick, he denied that he knew Victim or Husband. Furtick alleged a consensual sexual relationship with Victim only after SLED's analysis revealed his DNA was a match for the DNA recovered from her sexual assault examination kit. For these reasons—and due to the other evidence detailed above, such as Furtick's odd claims about the reading glasses and not recognizing Victim or Husband in their photos—this was far from a "he said, she said" case. *See State v. Phillips*, 430 S.C. 319, 342, 844 S.E.2d 651, 663 (2020) ("As part of our harmless error analysis, we review 'the materiality and prejudicial character of the error' in the context of the entire trial."); *State v. Stukes*, 416 S.C. 493, 501, 787 S.E.2d 480, 484 (2016) (Kittredge, J., dissenting) (in which the dissent noted it would find harmless the erroneous jury charge because "[i]n addition to the evidence corroborating the victim's testimony, the jury was presented with Stukes's inconsistent statements. Stukes initially denied knowing the victim, much less having had sex with her. When pressed with the evidence, including the DNA match, Stukes remembered the victim and that they had consensual sex.").⁸

For these reasons, Furtick's conviction and sentence are

AFFIRMED.

GEATHERS, J. and HILL, A.J., concur.

⁸ We note that despite the admission of the sanitized convictions, the jury acquitted Furtick of the first-degree burglary charge and convicted him of the lesser included offense of second-degree CSC, not the first-degree CSC for which he was indicted.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

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

Opinion No. 6032

THE STATE,

RESPONDENT,

V.

RODNEY JEROME FURTICK,

APPELLANT

APPELLATE CASE NO. 2019-001920

PETITION FOR REHEARING

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.

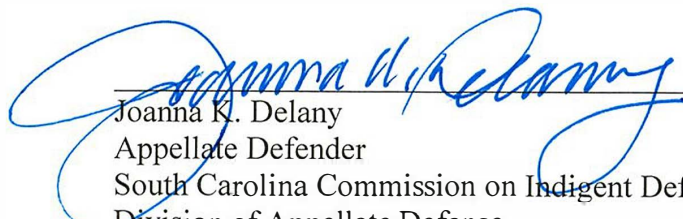
Harmless error analysis

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.



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ATTORNEY FOR APPELLANT

This 27th day of November, 2023.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Nov 27 2023
SC Court of Appeals

Appeal from Lexington County

Honorable Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

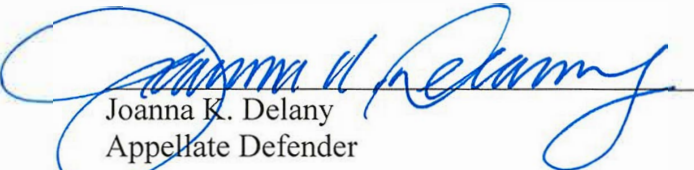
RODNEY JEROME FURTICK,

APPELLANT

APPELLATE CASE NO. 2019-001920

CERTIFICATE OF SERVICE

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.


Joanna K. Delany
Appellate Defender

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ATTORNEY FOR APPELLANT

The South Carolina Court of Appeals

The State, Respondent,

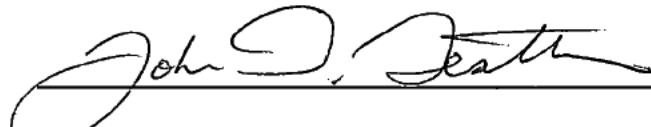
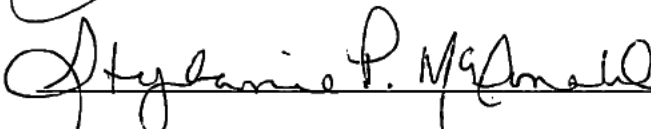

v.

Rodney Jerome Furtick, Appellant.

Appellate Case No. 2019-001920

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 _____ J.
 _____ J.
 _____ A.J.

Columbia, South Carolina

cc:

Alan McCrory Wilson, Esquire
 Joanna Katherine Delany, Esquire
 Samuel R. Hubbard, III, Esquire
 Joshua Abraham Edwards, Esquire
 The Honorable Frank R. Addy, Jr.

FILED
Jan 25 2024