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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Charleston County

Honorable Deadra L. Jefferson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

MARVIN DONTE BRYAN,

APPELLANT

APPELLATE CASE NO. 2017-001468

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 13, 2017, a Charleston County Grand Jury indicted Marvin Bryan, Appellant, for one count of murder and three counts of attempted murder. Appellant was tried jointly with his codefendant, Justin Martel Wilson, from June 19 – 23, 2017, before the Honorable Deadra L. Jefferson and a jury. Appellant was represented by Bentley Price. Wilson was represented by Mark Peper. E. Culver Kidd, IV, and Charles Patrick, III, prosecuted the case.[1]

Petitioner was convicted as indicted, and he was sentenced to serve concurrent terms of imprisonment of fifty years for murder and thirty years for each count of attempted murder.[2]

On June 28, 2017, Appellant served his notice of intent to appeal his convictions and sentences. On August 22, 2018, Appellant moved this Court for an order to reconstruct the record of the bench conferences from trial. On August 29, 2018, the State made its return. On November 8, 2018, this Court issued an order in which it granted the motion to remand for reconstruction and remanded the matter to the Charleston County Court of General Sessions. On August 8, 2023, a reconstruction hearing was held before the Honorable Deadra L. Jefferson. Undersigned counsel represented Appellant. Tommy Evans, Jr., represented the State. The court found the record was reconstructed. On August 11, 2023, Appellant served his notice of intent to appeal the trial court's ruling that the record was adequately constructed.[3]

This appeal follows.

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[1] R. *(indictments); Tr. I, 1.

[2] Tr. I, 665, l. 16 – 666, l. 24; Tr. I, 706, l. 25 – 707, l. 10; R. *(sentence sheets).

[3] Tr. IV, 1 – 2; Tr. IV, 74, ll. 7-18.

STATEMENT OF FACTS

The State alleged that at approximately 2:00 a.m. on November 22, 2015, in North Charleston, Appellant was with codefendants Justin Wilson, Daquan Gilliard, and Keith Evans in a Ford Edge when Wilson shot into a Dodge Charger. Someone in the Charger shot back and a chase ensued, with both cars crashing into a ball field in Park Circle. Wilson continued to fire into the Charger even as he got out and ran away. All of the occupants of the Charger were shot: Franklin Williams was killed; Montez Capers, Quran Allen, and Adrian Williams were wounded.[4]

At 2:19 a.m., approximately ten or fifteen minutes after the shooting, Officer Charles Martin saw three men running down the street about one hundred and fifty yards away from the crime scene. Officer Martin stopped and frisked the men and got their names—Appellant, Keith Evans, and Daquan Gilliard. Martin noticed that Gilliard had a wet shirt. Martin questioned the three men but let them go.[5]

Another officer canvassing the area found three guns about a block or block-and-a-half away from the crashed cars, in a flower bed and near a power pole. The guns were a "TABCO" rifle, a Smith & Wesson .40 caliber handgun, and a Glock handgun. Law enforcement collected two McDonald's cups from the crashed Ford Edge; there was spilled liquid in the car. DNA analyses showed the straws from the cups contained DNA consistent with DNA from Appellant and from Keith Evans.[6]

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[4] Tr. I, 110, l. 19 – 113, l. 3; Tr. I, 123, l. 4 – 136, l. 16; Tr. I, 213, l. 14 – 224, l. 18; Tr. I, 209, l. 11 – 211, l. 2; Tr. I, 248, l. 9 – 252, l. 5; Tr. I, 319, ll. 15-17.

[5] Tr. I, 254, l. 23 – 258, l. 11; Tr. I, 262, l. 17 – 271, l. 10.

[6] Tr. I, 295, l. 9 – 304, l. 25; Tr. I, 350, l. 5 – 353, l. 18; Tr. I, 529, l. 17 – 531, l. 17.

Domonique Edwards would testify Keith Evans and Justin Wilson came by his house the morning of November 22, 2015, and asked Edwards to alibi them and say they had been with Edwards earlier. Edwards refused.[7]

The evidence regarding the identity of those responsible for the shooting came from two men: Keith Evans and Daquan Gilliard. Both Evans and Gilliard were charged with the murder and attempted murders in this case, but both testified for the prosecution at the joint trial of Appellant and Wilson. Evans and Gilliard claimed they were merely present and that Wilson was the shooter. They also claimed Appellant handed Wilson a second gun when the first gun he was using jammed.[8]

Daquan Gilliard was the first witness called by the State. Gilliard claimed mere presence: "I was just in the car." Gilliard met with the prosecutor twice regarding his testimony, and said he was hoping for "leniency." Gilliard admitted he had lied during his proffer. According to Gilliard, Justin Wilson got a call the night of the shooting and was told the guy who had previously shot him (Wilson) was out at a nightclub. Gilliard alleged he went to Wilson's cousin's house with Wilson, Appellant, and Keith Evans. According to Gilliard, Wilson went in the house and came out with a big gun wrapped in a shirt or sheet. Gilliard alleged Wilson told Evans, the driver, they were looking for a black Lincoln. They did not find the black Lincoln, but Wilson saw a red Charger, and said, "That's the boy right there." When the Charger stopped at a red light, Gilliard alleged Wilson rolled down his window and began firing into the Charger.

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[7] Tr. I, 558, l. 4 – 564, l. 19.

[8] Tr. I, 145, ll. 11-16; Tr. I, 128, l. 13 – 130, l. 15; Tr. I, 583, l. 19 – 584, l. 15; Tr. I, 609, l. 2 – 612, l. 6; Tr. II, 19, ll. 3-5; Tr. II, 41, ll. 2-18.

After about ten shots, the gun jammed. Gilliard claimed Wilson asked for another gun and Appellant gave him a .40 caliber handgun. According to Gilliard, Wilson continued to shoot.[9]

Appellant sought to impeach Gilliard with a prior conviction for possession with intent to distribute (PWID) cocaine with a conviction date of June 2014 for an arrest from 2013. As seen, this trial took place in 2017. Appellant also sought to use the prior conviction to show "that he [Gilliard] has been in a courtroom before. This isn't his first time. He's been convicted before."[10]

The court found the prior conviction inadmissible, and explained its reasoning as follows.

> The rules are clear that evidence of a witness, evidence that any witness has been convicted of a crime, shall be admitted if it involved dishonesty or false statement regardless of punishment. However, **the Supreme Court has clarified that they do not find drug offenses to be dispositive of truthfulness or dishonesty** . . . **the whole purpose of using a prior crime to impeach somebody's credibility is it involved false statement or dishonesty. A crime in and of itself does not impeach a person's credibility**. It more tends to involve their character. In other words, saying because they were convicted of something that they are a bad person and you shouldn't believe them, **The only exception to that rule is 609(b)** [sic] **which deals with crimes of dishonesty or involving moral turpitude**. Because then that implicates the person's veracity. . .
>
> **609(a)(2) says evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement regardless of punishment**. . . However, our Supreme Court has gone on to interpret that provision of the rule, and it is articulated that only offenses involving dishonesty or false statement come in, And further articulated that a firearms violation is not probative of truthfulness; narcotics are not probative; and those are all State versus Bryant, State versus Johnson, State versus—State versus Bryant again, State versus Cheeseboro (ph), and Green versus State.

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[9] Tr. I, 84, ll. 11-12; Tr. I, 175, ll. 5-14; Tr. I, 145, ll. 20-25; Tr. I, 167, l. 6 – 168, l. 11; Tr. I, 114, l. 22 – 130, l. 15; Tr. I, 124, ll. 2-3.

[10] Tr. I, 149, l. 4 – 150, l. 18; Tr. I, 149, l. 4 – 157, l. 25; Tr. I, 1; Tr. I, 151, ll. 7-10.

> Now, if they impersonated a police officer, of course, that involved dishonesty. Shoplifting involves dishonesty as long as it was a theft. Burglary is dishonesty as long as it involved a theft. **And even if it involved all those things, I would still have to engage in the balancing test that its more probative then prejudicial, which means—and of course in this case I think it would meet that standard because credibility is an issue**. But I think when you start talking about drug offenses, it's more of a character issue than a truthfulness issue. Because you're saying by virtue of the fact that they've been convicted of a drug offense, they shouldn't be believed because they're dishonest. . .
>
> I would rule that's inadmissible. It is not probative because the Supreme Court has ruled that when interpreting Rules of Evidence, 609(b) [sic], that convictions involving dishonesty or false statement come in regardless of punishment. However, our Supreme Court has clarified that drug offenses are generally not probative of truthfulness. . .
>
> And it would be elicited to impeach his character not probative on his truthfulness or his veracity under these circumstances. But, however, if he had some offenses that involved dishonesty or false statement, they would come in regardless of punishment.[11]

Appellant next sought to cross-examine Gilliard about a pending charge in Orangeburg County for carrying a firearm on school grounds. "I think it just goes to, again, he has indicated on direct that he is here today to get leniency. And I, of course, was going to ask him on all of his charges." The court ruled Appellant could not get into the Orangeburg charge: "The only thing that's relevant is what's pending in Charleston, and if he thinks he's going to get a deal as a result of that . . . unless you have some indication that Charleston prosecutor and Orangeburg prosecutor have worked out some deal." "You're going to have to connect the dots. You're going to have to prove . . . he expects to get some leniency from Orangeburg. They have no obligation. I've been in this system way too long where they don't. Otherwise, it's speculative."[12]

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[11] Tr. I, 151, l. 16 – 157, l. 25 (emphasis added).

[12] Tr. I, 155, l. 18 – 157, l. 2; Tr. I, 156, ll. 16-23; Tr. I, 157, ll. 3-7.

Apparently, Gilliard did not understand the rulings, because when he was subsequently asked about his "current pending charges" (i.e., the murder and attempted murders), he stated: "I have PWID in a school zone; and unlawful carrying in a school zone." However, there was no explanation of what "PWID" stood for, or that the PWID offense involved cocaine. There was no explanation of what Gilliard was unlawfully carrying—a gun. Additionally, there was no mention that he had been *convicted* of the PWID cocaine—Gilliard said it was pending.[13]

Codefendant Keith Evans was the other person who claimed that Appellant handed Justin Wilson a gun. Keith Evans met with the prosecutor several times[14] prior to trial, according to his trial testimony, and he had entered into a proffer agreement. Evans admittedly lied during the proffer. Evans had been housed in the same unit at the detention center as Daquan Gilliard. Evans said he was in court to "tell a story." Evans hoped his testimony would get him a "deal."[15]

Appellant was convicted as indicted. As noted in the Statement of the Case, a reconstruction hearing was held in this matter. This was because, as stated by the trial court during pretrial matters,

> **I don't take speaking objections**[.] So if you have an objection, you should be able to tell me succinctly what that objection is, whether it's leading, pitting, relevance, you know the plethora of objections, foundation. And **if I need argument, I'll have it at the bench**. **I always have my bench conferences recorded**. And if I

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13 Tr. I, 159, ll. 24-25.

14 The transcript reflects Evans answered, "Yes, sir," when the prosecutor asked if Evans had met with him "a couple of times," but also reflects that when asked how many times, Evans answered, "Thirty-three times." Tr. I, 583, ll. 19-23. It appears likely Evans answered, "two or three times," and the answer was incorrectly transcribed, since Evans later stated he met with the prosecutor three times. Tr. I, 584, l. 18 – 585, l. 11.

15 Tr. I, 583, l. 19 – 584, l. 17; Tr. II, 41, l. 2 – 42, l. 13; Tr. I, 637, ll. 6-21; Tr. II, 39, l. 24 – 45, l. 12.

> need to excuse the jury, I will hear additional argument, but I will rule contemporaneously.[16]

(emphasis added). However, when the case was initially transcribed, it became apparent that the bench conferences were not fully recorded—none of the bench conferences were transcribed. The court reporter was subsequently able to produce an additional transcript which reflected portions of the bench conferences, but many portions were still missing. *See* R. *(Tr. III, 1 – 36). A reconstruction hearing was held, and testimony was taken from the prosecutor and from defense counsel. The trial judge read her notes into the record. *See* R. *(Tr. IV, 1 – 78). The court denied Appellant's motion for a new trial based on inadequate reconstruction, and ruled the record was reconstructed.[17]

[16] Tr. I, 52, ll. 5-13.

[17] Tr. I, 52, ll. 5-13; Tr. IV, 74, ll. 17-18; Tr. IV, 69, l. 14 – 71, l. 6.

ARGUMENT

1.

The trial court erred in ruling Appellant could not impeach Daquan Gilliard with a 2014 conviction for possession with intent to distribute cocaine, where the court ruled the conviction was not a crime of dishonesty and thus was inadmissible pursuant to Rule 609(a)(2), SCRE, since admissibility was instead controlled by Rule 609(a)(1), SCRE, because the crime was punishable in excess of one year.

The court erroneously applied Rule 609(a)(2) (crimes of dishonesty) when it ruled on the admissibility of Gilliard's three-year-old conviction for PWID cocaine.[18] The court should have instead applied Rule 609(a)(1) (crimes punishable by imprisonment in excess of one year). This was an error of law.

Standard of review

In criminal cases, appellate courts sit to review errors of law only. *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). "The admission of evidence concerning past convictions for impeachment purposes remains within the trial court's discretion, provided the trial court conducts the analysis mandated by the evidence rules and case law." *State v. Robinson*, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (cleaned up). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Douglas*, 369 S.C. 424, 429-30, 632 S.E.2d 845, 848 (2006).

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[18] The court also stated it was excluding the conviction under Rule 609(b), which governs the admissibility of crimes more than ten years old. However, this appears to be a misstatement—there was no contention the conviction was more than ten years old.

Discussion

In 2013, PWID cocaine, first offense, carried up to fifteen years' imprisonment. S.C. Code Ann. § 44-53-375(B)(1) (2010). Therefore, Rule 609(a)(1), SCRE; Rule 403, SCRE; and *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000), provided the applicable framework for admissibility. However, the trial court applied the wrong subsection of Rule 609, SCRE. It did not apply the *Colf* factors. It did not engage in Rule 403 balancing, although the court stated that if it were to engage in Rule 403 balancing, it would come down on the side of admission.

Rule 609 governs impeachment by evidence of criminal convictions, and it provides:

> (a) General Rule. 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).
>
> (b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as

> calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(emphasis added).

Rule 403, SCRE, provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." In *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000), the Supreme Court explained the following factors are to be considered when weighing the probative value of prior convictions against the prejudicial effect to the accused: "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." *State v. Robinson*, 426 S.C. 579, 594, 828 S.E.2d 203, 211 (2019) (citing *Colf*, 337 S.C. at 627, 525 S.E.2d at 248). The Rule 403 test places the burden upon the opponent of the evidence to establish inadmissibility pursuant to Rule 403." *State v. Robinson*, 426 S.C. at 593, 828 S.E.2d at 210. "[U]nder Rule 609(a)(1), if the witness is someone other than 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, under Rule 403, the probative value of the conviction is substantially outweighed by the danger of unfair prejudice and/or other relevant considerations set forth in Rule 403." *State v. Robinson*, 426 S.C. at 595, 828 S.E.2d at 211.

"The current state of the law does not mandate the trial court make an on-the-record specific finding as long as the record reveals that the trial judge did engage in a meaningful balancing of the probative value and the prejudicial effect before admitting a non–609(a)(2) prior

conviction under 609(a)(1)." *State v. Elmore*, 368 S.C. 230, 238–39, 628 S.E.2d 271, 275 (Ct. App. 2006) (cleaned up). "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." *Id.* (cleaned up).

Applying Rule 609(a)(1) and *Colf* to Gilliard's 2014 PWID cocaine conviction would have resulted in admission. Under the first *Colf* factor (impeachment value), "[t]he purpose of the impeachment is not to show the witness is a bad person but rather to show background facts which impact the witness's credibility." *State v. Robinson*, 426 S.C. at 598, 828 S.E.2d at 213. When employing a *Colf* analysis and addressing the impeachment value factor, a rule of thumb is that convictions that rest on dishonest conduct relate to credibility, whereas crimes of violence generally do not. Although prior convictions may arguably raise "concerns regarding the witness's general character, it is more narrowly the witness's propensity for telling the truth that is properly placed at issue under Rule 609." *Robinson*, 426 S.C. At 598-99, 828 S.E.2d at 213 (quoting *State v. Black*, 400 S.C. 10, 23, 732 S.E.2d 880, 887 (2012)).

"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)*." *State v. Robinson*, 426 S.C. at 599, 828 S.E.2d at 213 (emphasis added). Otherwise, "no convictions would ever have impeachment value under Rule 609 unless they were crimes of dishonesty or false statement admitted under Rule 609(a)(2). Rule 609(a)(2) would inevitably swallow Rule 609(a)(1)." *Id.* In this case, possession with intent to distribute had more impeachment value than drug possession, since distribution requires secrecy and embarking on and continuing a criminal

enterprise instead of, say, simply possessing drugs due to addiction. A cocaine-related crime also has impeachment due to the violence and danger the cocaine trade occasions. PWID cocaine was a conviction that showed a man comfortable living outside of lawful society. Moreover, the mere fact of any conviction has impeachment value. The PWID cocaine had impeachment value under *Colf*. *Robinson*, 426 S.C. at 599, 828 S.E.2d at 213.

Under the second *Colf* factor, the point in time of the conviction and the witness's subsequent history, closeness in time may reveal "a pattern of behavior that legitimately evoke[s] questions of [the witness's] credibility." *State v. Robinson*, 426 S.C. at 600, 828 S.E.2d at 214. Gilliard's PWID cocaine was only three years old. The next year he was charged with the murder and attempted murders in this case. This factor weighed in favor of admission. The third *Colf* factor (similarity between past crime and charged crime) and fourth *Colf* factor (importance of the defendant's testimony) weigh in favor of admission since Gilliard was not the defendant. There was no danger of prejudice to Gilliard as he was not on trial, and there was no danger of unfair prejudice to the State.

The fifth *Colf* factor (centrality of the credibility issue), also weighed in favor of admission. "[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. Gilliard was a critical witness for the State. His testimony directly inculpated Appellant, and his claim that Appellant handed Wilson a gun was only corroborated by Evans. Both Evans and Gilliard were codefendants charged with the same crimes as Appellant and Wilson, and both were aiming for leniency. Credibility was central to the case.

Applying Rule 403 to Gilliard's 2014 conviction for PWID cocaine would have resulted in admission. Under Rule 403, relevant evidence may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice. In this case, there was nothing unfair about any prejudice to the State from the impeachment of Gilliard. The trial court recognized this. Although the trial court did not apply the correct portion of Rule 609, it did state that if it were applying a Rule 403 balancing test, it would have admitted the conviction: "[E]ven if it involved all those things [i.e., dishonesty], **I would still have to engage in the balancing test that its more probative then prejudicial, which means—and of course in this case I think it would meet that standard because credibility is an issue**." Tr. I, 153, ll. 14-18.

The error was not harmless. "In determining harmless error regarding any issue of witness credibility, we will consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case." *State v. Black*, 400 S.C. 10, 27–28, 732 S.E.2d 880, 890 (2012) (cleaned up). *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (listing same factors for assessing harmless error).

Gilliard was the State's first and most important witness—one of only two people whose testimony inculpated Appellant. (The other person was Keith Evans—who testified he was there to "tell a story" and get a "deal.") Nothing corroborated Gilliard's critical testimony that Appellant provided Wilson a gun except for Evans's testimony. As seen, Appellant was not permitted to cross-examine Gilliard on another, similar matter, which will be discussed in Issue 3, below. If Gilliard's testimony was discounted by the jury, the prosecution had a weak case against Appellant. Although Gilliard stated, when asked about his "current pending charges" (i.e., the murder and attempted murders), "I have PWID in a school zone[,]" there was no explanation of what "PWID" stood for, or that the PWID offense involved cocaine. Tr. I, 159, ll.

24-25. Additionally, there was no mention that he had been *convicted* of the PWID cocaine—Gilliard said it was pending. Appellant was prejudiced. *Van Arsdall*, 475 U.S. at 684.

2.

The trial court erred in ruling Appellant could not cross-examine Daquan Gilliard regarding his prior conviction for possession with intent to distribute cocaine, since Appellant was entitled to considerable latitude in cross-examining his accuser.

Appellant also sought to bring out Gilliard's PWID cocaine to show he was no stranger to the courtroom. Given Gilliard's choice to testify for the State as a codefendant, this would have been useful information for the jury to have when evaluating his credibility. It was proper material for cross-examination.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id*. at 429–30, 632 S.E.2d at 848.

Discussion

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (quoting U.S. Const. amend. VI). The right of confrontation includes the right to cross-examine witnesses. *Id.* (citing *Pointer v. Texas*, 380 U.S. 400, 401 (1965)). "The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias." *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). *Accord State v. Smith*,

315 S.C. 547, 551, 446 S.E.2d 411, 413 (1994) ("the right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accuser.")

"[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316-17 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). A witness's credibility may be attacked "by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis*, 415 U.S. at 316.

"Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias." *State v. Brown*, 303 S.C. at 171, 399 S.E.2d at 594 (citing *State v. McFarlane*, 279 S.C. 327, 306 S.E.2d 611 (1983); *State v. Collins*, 235 S.C. 65, 110 S.E.2d 270 (1959)). *See also* Rule 611(b), SCRE ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility."); Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."); *State v. Grace*, 350 S.C. 19, 33, 564 S.E.2d 331, 338 (Ct. App. 2002) (where there was no physical evidence to support the victim's claims of sexual abuse and the State relied primarily on the credibility of the witnesses, "Appellant's right to present a defense mandates that he be permitted to freely cross examine the witnesses about the credibility issues relevant to his defense.")

"A criminal defendant may show a violation of the Confrontation Clause 'by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the

witness.'" *State v. Blackwell*, 420 S.C. 127, 150, 801 S.E.2d 713, 725 (2017) (quoting *State v. Mizzell*, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679.

"As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion. This rule is subject, however, to the Sixth Amendment's guarantee of a defendant's right to a 'meaningful' cross-examination." *State v. Mitchell*, 330 S.C. 189, 196, 498 S.E.2d 642, 645 (1998). "Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness, the record must clearly show the cross-examination is inappropriate." *Mizzell*, 349 S.C. at 331, 563 S.E.2d at 317. "[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (cleaned up).

This evidence was admissible pursuant to Appellant's constitutional right to confrontation and meaningful cross-examination. Gilliard was Appellant's codefendant, and he was one of only two people who implicated Appellant in the crime. Gilliard admitted he testified because he was hoping for "leniency." Tr. I, 145, ll. 23-25. Appellant argued he wanted to use the prior conviction to show "that he [Gilliard] has been in a courtroom before. This isn't his first time. He's been convicted before." Tr. I, 151, ll. 7-10. This evidence would have aided the

factfinder in evaluating Gilliard's credibility. It went to his familiarity with the court system and thus his canniness in seeking leniency through his testimony against Appellant. Its exclusion was error. *Blackwell*, 420 S.C. at 150, 801 S.E.2d at 725; *Van Arsdall*, 475 U.S. at 680 (1986).

The error was not harmless. "A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." *State v. Blackwell*, 420 S.C. at 156, 801 S.E.2d at 728 (quoting *State v. Gracely*, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012)). "Whether such an error is harmless in a particular case depends upon a host of factors." *Blackwell*, 420 S.C. at 156, 801 S.E.2d at 728 (quoting *Delaware v. Van Arsdall*, 475 U.S. at 684). "These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684.

Gilliard was the State's most important witness—one of only two people whose testimony inculpated Appellant. The other person was Keith Evans. Evans, as seen, lied repeatedly to the prosecution, and admitted he was in court to "tell a story" and get a "deal." Nothing corroborated Gilliard's critical testimony that Appellant provided Wilson a gun except for the testimony of Evans, who was seeking leniency. As seen, Appellant was not permitted to cross-examine Gilliard on another, similar matter, which will be discussed in Issue 3, below. If Gilliard's testimony was discounted by the jury, the prosecution had a weak case against Appellant. This was proper material for cross-examination. *Mizzell*, 349 S.C. at 331, 563 S.E.2d at 317. Although Gilliard stated, when asked about his "current pending charges" (i.e., the murder and attempted murders), "I have PWID in a school zone[,]" there was no explanation of

what “PWID” stood for, or that the PWID offense involved cocaine. Tr. I, 159, ll. 24-25. Additionally, there was no mention that he had been convicted of the PWID cocaine—Gilliard said it was pending. Appellant was prejudiced. *Van Arsdall*, 475 U.S. at 684.

3.

The court erred in ruling Appellant was not permitted to cross-examine Daquan Gilliard about a pending charge, since generally, anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered.

The trial court imposed an evidentiary predicate not required by law when it ruled that Appellant could not cross-examine Gilliard about his pending charge in Orangeburg unless he made a preliminary showing that the Charleston prosecutor and Orangeburg prosecutor "have worked out some deal." This was error.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." *State v. Douglas*, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id*. at 429–30, 632 S.E.2d at 848.

Discussion

"The Confrontation Clause of the Sixth Amendment, extended against the States by the Fourteenth Amendment, guarantees the right of a criminal defendant 'to be confronted with the witnesses against him.'" *Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (quoting U.S. Const. amend. VI). The right of confrontation includes the right to cross-examine witnesses. *Id.* (citing *Pointer v. Texas*, 380 U.S. 400, 401 (1965)). The Confrontation Clause guarantees a defendant the opportunity to cross-examine a witness concerning bias." *State v. Brown*, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991) (citing *Davis v. Alaska*, 415 U.S. 308 (1974)). *Accord State v. Smith*,

315 S.C. 547, 551, 446 S.E.2d 411, 413 (1994) ("the right to meaningful cross-examination of an adverse witness is included in the defendant's Sixth Amendment right to confront his accuser.") "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Davis*, 415 U.S. at 316-17 (citing *Greene v. McElroy*, 360 U.S. 474, 496 (1959)). A witness's credibility may be attacked "by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis*, 415 U.S. at 316.

"Considerable latitude is allowed in the cross-examination of an adverse witness for the purpose of testing bias." *State v. Brown*, 303 S.C. at 171, 399 S.E.2d at 594 (citing *State v. McFarlane*, 279 S.C. 327, 306 S.E.2d 611 (1983); *State v. Collins*, 235 S.C. 65, 110 S.E.2d 270 (1959)). *See also* Rule 611(b), SCRE ("A witness may be cross-examined on any matter relevant to any issue in the case, including credibility."); Rule 608(c), SCRE ("Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced."); *State v. Grace*, 350 S.C. 19, 33, 564 S.E.2d 331, 338 (Ct. App. 2002) (where there was no physical evidence to support the victim's claims of sexual abuse and the State relied primarily on the credibility of the witnesses, "Appellant's right to present a defense mandates that he be permitted to freely cross examine the witnesses about the credibility issues relevant to his defense.").

As the South Carolina Supreme Court explained in *Smalls v. State*, 422 S.C. 174, 182–83, 810 S.E.2d 836, 840 (2018),

> Evidence of a witness's bias can be compelling impeachment evidence, and for that reason "considerable latitude is allowed" to defense counsel in criminal cases "in the cross-examination of an adverse witness for the purpose of testing bias." *State v. Brown*,

> 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). **Our courts have followed the "general rule" that "'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded his testimony,'" so that "'on cross-examination, any fact may be elicited which tends to show interest, bias, or partiality' of the witness**." *State v. Brewington*, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1976) (quoting 98 C.J.S. Witnesses §§ 460, 560a). "Rule 608(c) [of the South Carolina Rules of Evidence] 'preserves [this longstanding] South Carolina precedent.'" *State v. Sims*, 348 S.C. 16, 25, 558 S.E.2d 518, 523 (2002) (quoting *State v. Jones*, 343 S.C. 562, 570, 541 S.E.2d 813, 817 (2001) and citing *Brewington*, 267 S.C. at 101, 226 S.E.2d at 250).

"A criminal defendant may show a violation of the Confrontation Clause 'by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.'" *State v. Blackwell*, 420 S.C. 127, 150, 801 S.E.2d 713, 725 (2017) (quoting *State v. Mizzell*, 349 S.C. 326, 331, 563 S.E.2d 315, 317 (2002); *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). However, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679.

"As a general rule, a trial court's ruling on the proper scope of cross-examination will not be disturbed absent a manifest abuse of discretion. This rule is subject, however, to the Sixth Amendment's guarantee of a defendant's right to a 'meaningful' cross-examination." *State v. Mitchell*, 330 S.C. 189, 196, 498 S.E.2d 642, 645 (1998). "Before a trial judge may limit a criminal defendant's right to engage in cross-examination to show bias on the part of the witness,

the record must clearly show the cross-examination is inappropriate." *Mizzell*, 349 S.C. at 331, 563 S.E.2d at 317.

"[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process. But its denial or significant diminution calls into question the ultimate integrity of the fact-finding process and requires that the competing interest be closely examined." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (internal quotations and citations removed) (citing *Mancusi v. Stubbs*, 408 U.S. 204 (1972); *Berger v. California*, 393 U.S. 314, 315 (1969)).

Appellant was entitled to considerable latitude in cross-examining Gilliard, his accuser. Gilliard had already admitted he was testifying in hopes of leniency on the charges in this case. Appellant was entitled to explore the pending Orangeburg gun charge on cross-examination. The nature of the pending charge made it particularly pertinent given that the crimes in this case were accomplished with guns. Appellant was not required to show the prosecution had worked out a deal regarding the pending Orangeburg charge, but the trial court ruled this predicate was required. Tr. I, 156, ll. 16-23. The judge's ruling was premised on an error of law, and was in violation of Appellant's rights. Another pending charge was not of "marginal relevance." Gilliard's credibility was critical. *See Brown*, 303 S.C. at 171, 399 S.E.2d at 594; *Van Arsdall*, 475 U.S. at 680. This record does not show the cross-examination sought was inappropriate. *Mizzell*, 349 S.C. at 331, 563 S.E.2d at 317.

"A violation of the Confrontation Clause is not per se reversible but is subject to a harmless error analysis." *State v. Blackwell*, 420 S.C. at 156, 801 S.E.2d at 728 (quoting *State v. Gracely*, 399 S.C. 363, 375, 731 S.E.2d 880, 886 (2012)). *Accord State v. Brown*, 303 S.C. at 171, 399 S.E.2d at 594. "Whether such an error is harmless in a particular case depends upon a

host of factors." *Blackwell*, 420 S.C. at 156, 801 S.E.2d at 728. (quoting *Delaware v. Van Arsdall*, 475 U.S. at 684. "These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Van Arsdall*, 475 U.S. at 684.

Gilliard was the State's first and most important witness, and he was one of only two people whose testimony inculpated Appellant. The other person was Keith Evans, a codefendant who lied to the prosecution repeatedly, and said he was in court to "tell a story" and get a "deal." Nothing corroborated Gilliard's critical testimony that Appellant provided Wilson a gun except for Evans's testimony, which was suspect. If Gilliard's testimony was discounted by the jury, the prosecution had a weak case against Appellant. Although Gilliard, when asked about his "current pending charges" (i.e., the murder and attempted murders), stated: "I have . . . unlawful carrying in a school zone, there was no explanation of what Gilliard was unlawfully carrying—a gun. Appellant was prejudiced. *Van Arsdall*, 475 U.S. at 684.

4.

The trial court erred in ruling the record of the bench conferences were adequately reconstructed, given the passage of six years' time, since the record must be sufficiently specific for meaningful appellate review and must be such that incompleteness does not effectively foreclose any collateral challenge through post-conviction relief or otherwise.

The court's ruling the record was reconstructed was error, given the passage of time.

Standard of review

The appellate courts of this state "review questions of law de novo, with no deference to trial courts." *Smalls v. State*, 422 S.C. 174, 180–81, 810 S.E.2d 836, 839 (2018).

Discussion

"[T]he burden is on the appellant to provide the appellate court with an adequate record for review." *State v. Serrette*, 375 S.C. 650, 652, 654 S.E.2d 554, 555 (Ct. App. 2007). "Where there is a disagreement as to what the record on appeal should contain, the duty and responsibility of settling the question rests upon the trial judge." *China v. Parrott*, 251 S.C. 329, 334, 162 S.E.2d 276, 278 (1968). The trial court may consider affidavits from counsel and the court reporter as to what happened, in order to settle the record on appeal. *Id.* "The authority of the trial court in South Carolina to reconstruct the record for appellate purposes aligns our state with the majority of jurisdictions that hold the inability to prepare a complete verbatim transcript, in and of itself, does not necessarily present a sufficient ground for reversal." *State v. Ladson*, 373 S.C. 320, 324, 644 S.E.2d 271, 273 (Ct. App. 2007) (cleaned up).

The passage of time may prevent adequate reconstruction. *See,* e.g., *Ladson*, 373 S.C. at 326, 644 S.E.2d at 274 (court reporter's delay in disclosing lack of transcript made a bad situation worse, as passage of time clearly dimmed recall of participants). The party challenging

a reconstructed record on appeal must demonstrate prejudice flowing from an inadequate record. *Ladson*, 373 S.C. at 325, 644 S.E.2d at 273. "[B]efore a defendant can establish that he is entitled to a new trial on the basis of an inadequate reconstructed record, he must identify a specific appellate claim that this court would be unable to review effectively using the reconstructed record." *Id.* (quoting *Harris v. Comm'r of Corr.*, 671 A.2d 359, 363 (Conn. App. Ct. 1996). A new trial is appropriate "if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review." *Ladson*, 373 S.C. at 325, 644 S.E.2d at 274 (cleaned up).

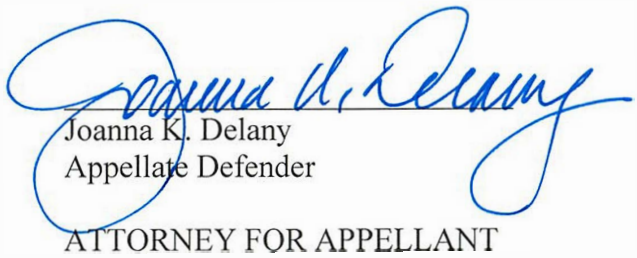
An appellant "has demonstrated clear prejudice" where the appellate court would be "left to speculate" about the record, and "would simply be constrained to affirm based on an insufficient record and issue preservation principles." *Id.* at 327, 644 S.E.2d at 274-75. A new trial is therefore proper where the appellate court is "convinced that under the circumstances of this case the reconstructed record lacks the completeness and reliability necessary for this court to engage in meaningful appellate review." *Id.* Moreover, a record must be reconstructed with sufficient specificity that incompleteness does not "effectively foreclose any collateral challenge through post conviction relief or otherwise." *Id.* at 327, 644 S.E.2d at 275.

Appellant has not identified a specific appellate claim that this Court would be unable to review effectively using the reconstructed record. However, there are potential problems with future collateral challenges, such as through post-conviction relief. For example, Appellant's lawyer recalled that he had joined in many of the objections made by the codefendant's lawyer: "I would say for the record, I think Mr. Peper and I mostly always joined in on any objections that we had for both of our clients." Tr. IV, 31, ll. 19-21. However, according to the partial bench conference transcript and the arguments as reconstructed at the reconstruction hearing,

Appellant's lawyer did not join with the codefendant's lawyer in many objections. Over six years had passed since trial. This record lacks reliability and is insufficiently specific. *Ladson*, 373 S.C. at 327, 644 S.E.2d at 275.

CONCLUSION

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



Joanna K. Delany
Appellate Defender

ATTORNEY FOR APPELLANT

This 1st day of April, 2024.