STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Aiken County

Honorable Courtney Clyburn-Pope, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOSEPH EUGENE EDMOND,

APPELLANT

APPELLATE CASE NO. 2023-000799

FINAL BRIEF OF APPELLANT

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1. Did the trial judge err in refusing to admit extrinsic evidence of the mother's prior statement to impeach her trial testimony when the mother did not unequivocally admit making the prior statement?

2. Did the trial judge err in admitting Appellant's prior conviction for assault and battery second degree without conducting a proper balancing analysis between any possible probative value of the prior conviction and the prejudicial impact?

STATEMENT OF THE CASE

In September of 2021, the Aiken County Grand Jury indicted Appellant, Joseph Eugene Edmond, for criminal sexual conduct with a minor first degree, indictment #2021-GS-02-01420. (R. pp. 303-304). In May of 2023, the Aiken County Grand Jury indicted Appellant for criminal sexual conduct in the third degree, indictment #2023-GS-02-01045. (R. pp. 307-308). On May 8, 2023, Appellant proceeded to jury trial before the Honorable Courtney Clyburn-Pope. William McKellar and Barry Thompson represented Appellant at trial. Ashley Hammack and Brandy Sanderlin prosecuted the case. The jury found Appellant guilty as charged. Judge Clyburn-Pope sentenced Appellant to thirty-two (32) years for criminal sexual conduct with a minor first degree and fifteen (15) years concurrent for criminal sexual conduct with a minor third degree. (R. pp. 305-306, 309-310). A timely notice of intent to appeal was served on May 17, 2023. This appeal follows.

STANDARDS OF REVIEW

1. "Our courts have consistently held that a trial court's decision to admit evidence of a witness's prior inconsistent statement will not be reversed absent a manifest abuse of discretion. State v. Lynn, 277 S.C. 222, 225, 284 S.E.2d 786, 788 (1981); State v. Sierra, 337 S.C. 368, 373, 523 S.E.2d 187, 189 (Ct.App.1999) (finding appellant must show both abuse of discretion and resulting prejudice)."

State v. Blalock, 357 S.C. 74, 78, 591 S.E.2d 632, 635 (Ct. App. 2003).

2. "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. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001). "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).

State v. Robinson, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019)

ARGUMENTS

1. **The trial judge erred in refusing to admit extrinsic evidence of the mother's prior statement to impeach her trial testimony when the mother did not unequivocally admit making the prior statement.**

At the time the minor made the allegations for which the jury found Appellant guilty, Appellant was dating the minor's mother. At trial defense counsel questioned the mother about how Appellant seemed after the alleged incident asking, "How did he seem on the way back home? What was his demeanor like?" (R. p. 81, lines 20-21). The mother answered, "Kind of confused and anxious at the same time." (R. p. 81, lines 22).

Defense counsel then asked the mother, "Do you recall telling Investigator Sullivan when you met with him on that Sunday night that he [Appellant] seemed like everything was normal?" (R. p. 81, lines 23-25). The mother answered, "No." (R. p. 82, line 1). During the cross-examination of Investigator Sullivan defense counsel asked about what the mother informed him. (R. p. 140, lines 1-11). The prosecutor objected on hearsay grounds. (R. p. 140, lines 12-14). When asked to respond to the hearsay objection defense counsel responded, "It's going to be a prior existing[1] [sic] statement, Your Honor." (R. p. 140, lines 16-17). The prosecutor responded, "And your Honor, that's something that would be proper to cross examine Ms. Fulton on. She didn't deny making any statements that Mr. McKellar asked her, so at this point the proper

[1] Defense counsel may have said that it was a prior inconsistent statement rather than a prior existing statement.

foundation for bringing in a statement has not been made." (R. p. 140, lines 18-23). The judge held a sidebar and then sustained the objection. (R. p. 140, line 24 – p. 141, lines 1-2).

At the close of the State's case defense counsel was allowed to proffer the testimony of Investigator Sullivan that the trial judge earlier excluded. (R. p. 156, lines 6-14). The following proffer took place:

> Q. Investigator Sullivan, did you ask Ms. Fulton what the demeanor was of Mr. Edmond when he was taken home?
>
> A. I did.
>
> Q. And what was her answer for that?
>
> A. If I can refer to my notes.
>
> Q. Please.
>
> A. She said Joey was normal acting.

(R. p. 156, lines 16-23). The prosecutor told the judge:

> I just would like to put on the record the nature of the sidebar. The State's argument in the hearsay objection that defense had previously asked another witness, Rachel Fulton, if she – and I want to make sure I get this exactly right – remembered telling Investigator Sullivan that the defendant seemed everything was normal. Her answer was no. The State's argument is that there's a distinction between repression and recollection, when a witness does not remember a prior statement versus denying making a prior inconsistent statement. And so we objected to the hearsay of asking this witness what another witness said.

(R. p. 157, lines 3-16). The judge responded, "All right, and just for the record, I did sustain that and did not allow the questioning, hence the proffer. All right, Investigator Sullivan, you can step down. Please watch your step down." (R. p. 157, lines 17-21). The trial judge erred in refusing to allow Appellant to cross-examine Investigator Sullivan about the prior inconsistent statement made by the mother, Rachel Fulton.

Rule 613, SCRE provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

After the mother testified that Appellant seemed confused and anxious at the same time, defense counsel asked the mother if she recalled making a statement to Investigator Sullivan on Sunday night about Appellant's demeanor. (R. p. 81, lines 23-25). The mother answered, "No." (R. p. 82, line 1). Pursuant to Rule 613, SCRE, extrinsic evidence of the prior inconsistent statement was admissible through the cross-examination of Investigator Sullivan.

In State v. Blalock, 357 S.C. 74, 80, 591 S.E.2d 632, 635–36 (Ct. App. 2003), this Court wrote:

> In determining whether a witness has admitted making a prior inconsistent statement and thereby obviated the need for extrinsic proof, the courts of our state and other jurisdictions have held that the witness must admit making the prior statement unequivocally and without qualification. See State v. Bottoms, 260 S.C. 187, 194, 195 S.E.2d 116, 118 (1973) (when a witness admits unequivocally that a prior inconsistent statement has been made by him, he has thereby impeached himself and further evidence is unnecessary and inadmissible); 98 C.J.S. *Witnesses* 727 (2002) (stating admission must be unequivocal).
>
> Generally, where the witness has responded with anything less than an unequivocal admission, trial courts have been granted wide latitude to allow extrinsic evidence proving the statement. For example, a witness's failure to fully recall her prior statement has been found to be a sufficient denial to allow extrinsic evidence. State v. Brown, 296 S.C. 191, 193, 371 S.E.2d 523, 524 (1988); State v. Miller, 262 S.C. 369, 371, 204 S.E.2d 738, 738–39 (1974); 81 Am.Jur.2d *Witnesses* 948 (2003) (stating that a witness may be impeached by proof of prior contradictory statements, where he merely testifies that he does not remember, or has no recollection of, making the statements referred to). Extrinsic

evidence is also usually admitted when the witness simply avoids any direct answer. Confronted with this situation in State v. Sullivan, our supreme court held:

> If the witness neither directly admit [sic] nor deny [sic] the act or declaration, as when he merely says that he does not recollect, or, as it seems, gives any other indirect answer not amounting to an admission, it is competent for the adversary to prove the affirmative, for otherwise the witness might in every such case exclude evidence of what he had done or said by answering that he did not remember.
> 43 S.C. 205, 211, 21 S.E. 4, 7 (1895).

The case law contradicts the argument made by the prosecutor that the mother's failure to remember making the prior statement does not trigger impeachment by extrinsic evidence pursuant to Rule 613, SCRE. Extrinsic evidence that the statement was made is inadmissible only when there is an unequivocal admission by the witness to making the prior inconsistent statement. In the present case Rule 613, SCRE, was triggered because the mother never admitted making the prior statement.

The mother did not unequivocally admit that she told Investigator Sullivan that Appellant was acting normal after the alleged incident. Appellant should have been allowed to impeach the mother's testimony by proof of the prior contradictory statement made to Investigator Sullivan when the mother testified she did not recall making the statement. The trial judge erred in refusing to allow the cross-examination of Investigator Sullivan as extrinsic evidence of the mother's prior inconsistent statement to impeach her trial testimony. The error was not harmless.

2. **The trial judge erred in admitting Appellant's prior conviction for assault and battery second degree without conducting a proper balancing analysis between any possible probative value of the prior conviction and the prejudicial impact.**

Prior to Appellant testifying defense counsel asked if the prosecution intended to use any prior convictions as impeachment. (R. p. 162, lines 14-18). The prosecutor advised the judge, "I do, Your Honor. Mr. Edmond has a conviction for assault and battery second degree from 2018 out of Greenville County. It carries over a year and is within the last 10 years, and is eligible for impeachment if he testifies." (R. p. 162, line 22 – p. 163, line 1). Defense counsel objected arguing, "Your Honor, we would argue that the prejudicial value outweighs the probative value of that assault and battery second degree, and that it should be inadmissible." (R. p. 163, lines 3-6). The prosecution did not address any possible probative value of the prior conviction. The judge ruled, "All right. I'm going to overrule that objection and allow that conviction to come in." (R. p. 163, lines 7-8). The trial judge did not address any possible probative value of the prior conviction. The trial judge also did not address the prejudice resulting from admission of the prior conviction. The trial judge erred.

Based on the ruling by the judge, on direct examination defense counsel asked Appellant, "One last question. Have you ever been convicted of assault and battery second degree?" (R. p. 179, lines 1-2). Appellant answered, "Yes, I have." (R. p. 179, line 3). Appellant explained that he pled guilty to the charge because he was guilty of that charge. (R. p. 179, lines 4-7). Appellant further explained that he was not guilty of the charges for which he stood trial. (R. p. 179, lines 8-9).

In State v. Robinson, 426 S.C. 579, 593, 828 S.E.2d 203, 210 (2019), the South Carolina Supreme Court wrote, "[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." In this case the State failed to establish that the probative value of admitting the prior conviction outweighed the prejudicial effect upon the accused.

In Greene v. State, 440 S.C. 165, 176, 889 S.E.2d 636, 642 (Ct. App. 2023), this Court wrote:

> In State v. Colf, our supreme court adopted a five-factor test for trial courts to use when weighing whether the probative value of evidence of a defendant's prior convictions outweighs its 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. 622, 627, 525 S.E.2d 246, 248 (2000). "These factors are not exclusive; trial courts should exercise their discretion in light of the facts and circumstances of each particular case." Id.

The trial judge in the present case did not address the Colf factors in overruling the objection to the admission of the prior conviction. As the Court of Appeals noted in Greene:

> "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) (quoting State v. Scriven, 339 S.C. 333, 341, 529 S.E.2d 71, 75 (Ct. App. 2000)). However, "[a]n on-the-record analysis is especially needed when undertaking a balancing that involves a prior similar offense under Rule 609(a)(1)." Id. at 239, 628 S.E.2d at 275. "This is because the 'the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission.' " Id. (quoting State v. Dunlap, 353 S.C. 539, 542, 579 S.E.2d 318, 320 (2003)); see also, Green v. State, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000) (finding

> trial counsel's failure to argue the prejudicial effect of the convictions outweighed their probative value constituted ineffective assistance of counsel and prejudiced the defendant). "Indeed, the similarity of a prior crime to the crime charged heightens the prejudicial value of the crime." Elmore, 368 S.C. at 239, 628 S.E.2d at 275.

440 S.C. at 178, 889 S.E.2d at 643. The record in the present case fails to reflect that the trial judge engaged in a meaningful balancing of the probative value and the prejudicial effect of the prior conviction for assault and battery second degree. An on the record analysis was especially needed in this case because the prior conviction was for a similar offense. While the prior conviction for assault and battery second degree does not reference a minor or a sexual act as the charges for which Appellant was on trial, the prior conviction and criminal sexual conduct with a minor first degree both involve a battery. The judge instructed the jury that criminal sexual conduct with a minor required a battery. (R. p. 280, line 23 – p. 282, 283, lines 1-6).

Like the trial judge in the present case, the trial judge in Greene did not conduct an on-the-record balancing test before admitting Greene's prior conviction for strong armed robbery during his trial for armed robbery and kidnapping. Trial counsel in Greene, however, failed to object to the admission of the prior conviction. This Court found that trial counsel provided ineffective assistance of counsel in failing to object to the admission of the prior conviction and granted post-conviction relief. In contrast, in the present case trial counsel objected to the admission of the prior conviction but the trial judge failed to balance any possible probative against the prejudicial effect. The trial judge abused her discretion.

In Robinson the South Carolina Supreme Court found the trial judge did not abuse his discretion in evaluating the Colf factors as he did and in concluding Robinson's prior convictions for strong armed robbery and breaking into cars were admissible under Rule 609(a)(1), SCRE, during his trial for burglary first degree and possession of a weapon during the commission of a

violent crime. The trial judge in Robinson, like the trial judge in the present case, initially did not balance probative value and prejudicial impact by evaluating the Colf factors. On appeal this Court remanded the case for an on-the-record balancing test to determine the admissibility of Robinson's prior convictions. State v. Robinson, Op. No. 2014-UP-068, 2014 WL 2579691 (S.C. Ct. App. filed Feb. 19, 2014). After the remand hearing, the trial judge ruled Robinson's prior convictions were properly admitted. Robinson again appealed and the South Carolina Supreme Court affirmed the trial judge's findings on remand.

Although the trial judge in the present case did not conduct a balancing test before admitting the prior conviction for assault and battery second degree, the remand ordered in Robinson is not necessary in the present case because of the nature of the prior conviction. The Court in Robinson noted, "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)." Robinson, 426 S.C. at 599, 828 S.E.2d at 213. Like Robinson's prior convictions for strong armed robbery and breaking into cars, assault and battery second degree is not a crime of dishonesty or false statement. Unlike Robinson's prior convictions, the impeachment value of Appellant's prior conviction for assault and battery second degree is limited.

In State v. Black, 400 S.C. 10, 22, 732 S.E.2d 880, 887 (2012), the South Carolina Supreme Court wrote:

> 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. See Gordon v. United States, 383 F.2d 936, 940 (D.C.Cir.1967) ("In common human experience acts of deceit, fraud, cheating, or stealing ... are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a

> short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A 'rule of thumb' thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not....

The issue in the Black case involved the admission of a defense witness's prior remote convictions for manslaughter pursuant to Rule 609(b), SCRE, which provides, "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." The Court found that the admission of the remote manslaughter convictions was error because the State failed to "meet its heavy burden of demonstrating that the prejudicial effect of the remote manslaughter convictions was *substantially* outweighed by their probative value." The Court, however, found the error harmless.

While the present case does not involve a remote conviction and instead involves a prior conviction pursuant to Rule 609(a)(1), SCRE, the distinction discussed in Black between convictions based on dishonesty relating to credibility and crimes of violence, such as Appellant's prior conviction for assault and battery second degree, not generally relating to credibility is important. This Court should not remand the case for an on-the record balancing test because the prior conviction for assault and battery second degree does not generally relate to credibility.

Additionally, the burden of proof under Rule 609(a)(1), SCRE, is less than the burden for remote convictions under Rule 609(b). "[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. The burden of establishing admissibility is upon the State, the proponent of the evidence" State v. Robinson, 426 S.C. 579, 595, 828 S.E.2d 203, 211 (2019). The State failed to meet its burden under the lessened standard of Rule 609(a)(1). While the trial judge erred in failing to conduct the required balancing test for the admission of the prior conviction, the State had the opportunity but failed to try and argue some possible probative value when defense counsel objected to the admission of the prior conviction. The State should not be rewarded in the form of a remand for failing to meet its burden.

Based on the record in this case this Court should find the prior conviction inadmissible based on the Coif factors present in the record. The impeachment value of the prior conviction for assault and battery second degree was very low as the charge generally does not relate to credibility. The conviction was from 2018, and the alleged incident took place on March 7, 2021. The prior conviction and the criminal sexual conduct with a minor first degree charge were similar as both required a battery. Appellant's testimony was critically important as no other witness, other than the minor, was present at the time of the alleged incident. Credibility was a central issue at trial as there was no physical evidence. Although in some cases the fact that credibility is a central issue at trial may weigh in favor of admissibility of the prior conviction, in this case the prior conviction did not relate to credibility and should weigh in favor of inadmissibility. The trial judge erred in admitting the prior conviction. The error is not harmless.

. CONCLUSION

Based on the above arguments, this Court should reverse the convictions and remand for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 20th day of June, 2024.

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SC Court of Appeals

CERTIFICATE OF COUNSEL

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

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This 20th day of June, 2024.

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STATE OF SOUTH CAROLINA

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THE STATE,

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JOSEPH EUGENE EDMOND,

APPELLANT

APPELLATE CASE NO. 2023-000799

CERTIFICATE OF SERVICE

Pursuant to Rule 262(a)(3) and Rule 262(c)(3), SCACR, the undersigned hereby certifies a true copy of the Final Brief of Appellant in the above-referenced case has been served upon Andrew D. Powell, Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), this 20th day of June, 2024.

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Mr. Powell,

Please find attached for service the final brief of appellant for Joseph Eugene Edmond's appeal which will be filed today with the Court of Appeals.

Thank you.
Chris

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