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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2023-001474

The State, ...Respondent,

v.

James J. Patterson, III, ...Appellant.

FINAL BRIEF OF RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether the trial court properly exercised its discretion in admitting the prior convictions of defense witness Tamare Howell for impeachment under Rule 609(a)(1), SCRE, where: (1) a period of less than ten years had passed since the date of the convictions; (2) the convictions were for crimes punishable by more than one year's imprisonment; and (3) the probative value of the convictions was *not* substantially outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

James J. Patterson, III (Appellant), was indicted at the September, 2022 term of the grand jury for Lexington County for murder (2022-GS-32-6147) and possession of a weapon during commission of a violent crime (2022-GS-32-6146). On September 5-7, 2023, Appellant proceeded to a trial by jury before the Honorable Daniel D. Hall. He was represented by James M. Ervin, Esquire. Respondent (the State) was represented by Deputy Attorney General Kinli B. Abee and Assistant Attorney General Joel A. Kozak of the South Carolina Attorney General's Office. At the conclusion of trial, the jury found Appellant guilty as indicted. He was sentenced by Judge Hall to thirty (30) years' imprisonment for murder and five (5) years' concurrent imprisonment for possession of a weapon during commission of a violent crime. (Sentencing Sheets; R.p.1; p.411-p.413; p.415-418). Appellant timely filed a notice of intent to appeal his convictions and sentence and a brief was submitted in support of his appeal by Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent Defense. This Brief of Respondent follows.

STATEMENT OF FACTS

As briefly summarized by the State in its opening statement, the charges against Appellant stemmed from the November 9, 2020, shooting death of William Clark (Victim) at his home in Lexington County. According to the State, Appellant shot Victim following a game of dice and a dispute over forty dollars. The prosecutor said the State would call two eyewitnesses from the crime scene to testify at trial—Kenyatta Strother, the mother of Victim's child, and Albert Clark, Victim's brother—as well as calling several law enforcement officers and crime scene investigators in an effort to prove, beyond a reasonable doubt, that Appellant committed the crimes. (R.p.52-p.56).

Trial

Following jury selection and addressing some pretrial matters (R.p.8-p.46), the jury was sworn and the trial court gave preliminary instructions to the jurors. (R.p.46-p.52). As part of those instructions, the trial court explained the jury's role in determining the facts of the case, including determining whether-or-not the testimony of a witness was believable. The court briefly described things the jurors could consider in determining believability, which included interest, bias, prejudice, opportunity, and how the witness acts on the stand. It also noted the jurors had a right to consider anything in the record that would help them evaluate the testimony of witnesses. (R.p.51, lines 7-25).

The parties gave brief opening statements before the State began presenting its case-in-chief. During the State's open, the prosecutor acknowledged the burden of proof rests entirely on the State, but he also explained that if the defense put up any witnesses, the jury could question whether their story makes sense, particularly in light of any evidence recovered at the crime scene. (R.p.55, lines 13-21). During Appellant's open, counsel repeated what the court had explained, noting that with testimonial evidence the jury's job was to weigh credibility to determine if the witness was telling the truth. Counsel explained that credibility could be affected by a witness's bias, motive, and perspective. (R.p.57, line 8-p.58, line 18).

As its first witness, the State called Sharmel Miller, an employee with the Lexington County 911 call center, to the stand. He briefly explained how 911 calls are received, logged in to the system, processed through the computer aided dispatch (CAD) system, and recorded. Miller identified the recording of the single call that was made to 911 related to the incident in question and that recording was admitted into evidence and played for the jury. (R.p.59-p.63).

Next, the State called Victim's former girlfriend, Kenyatta Strother, to the stand. She explained Victim was the father of the youngest of her three children and had dated her for seventeen years prior to him being killed. Strother identified a diagram of the crime scene as well as several photos of Victim's house which were admitted into evidence. She said that on November 9, 2020, the night of the incident, she and Victim were no longer together, but were still close and that she would still go see him frequently at his house in the Red Bank area of Lexington County. Strother testified she arrived at Victim's house about 8:45 PM on the night of November 9, 2020, and that ten to twelve other people were already present. Strother proceeded to use the photos and the diagram to set the scene. (R.p.64-p.71).

Strother testified that when she entered the house, she heard lots of noise from the crowd, which sounded like people gambling—either dice or cards—and she went straight into Victim's room to sit on his bed. She said she could see into the room where people were gambling and overheard talk that somebody was cheating. Strother identified Appellant as one of the gamblers, testifying she knew Appellant previously. She pointed him out in the courtroom and said she heard him say he was owed money because another guy cheated him out of $40 on a game. (R.p.71-p.74).

Strother testified that after the claim of cheating, she saw Appellant come out of the living room, walk past her, and then walk outside where he approached a Crown Vic, was handed a gun, and reentered the house. She said Appellant was holding the gun when he came inside and that he went back into the living room where the dice game was being played. Strother said Appellant was standing near the group of people playing dice when she suddenly heard him say "don't push me" which caused everyone to jump up. She said Appellant then

fired the gun once inside the house before some of the guys closest to him collectively ushered him out of the house through the back door. (R.p.74-p.78).

Strother testified that after Appellant was outside, she watched him pacing back and forth with the gun in his hand. She testified someone came around the corner and spoke to Appellant, at which point "he jumped up in the air and he started shooting" towards the kitchen window of the house. Strother said Appellant fired multiple shots and that while she crawled towards the back of the house, she heard someone get into a car, which went screeching through the yard. The car briefly stopped in the yard where she heard more gunshots before hearing the car leave the scene. (R.p.74-p.80). Strother testified she remembered both the white Crown Vic and a burgundy sedan being in the yard behind the house. Once she got up, she discovered Victim crawling on the ground. When he tried to get up himself, he could not stand and collapsed. Then Victim's cousin "Dudley" [sic – later identified by multiple witnesses as "Donnie"] Clark got him in a car and took him to the hospital. Strother testified Appellant was the only person she saw with a gun on the night of the incident. (R.p.80-p.84).

The State then called Traffic Deputy Taylor McChesney of the Lexington County Sheriff's Department (LCSD) to the stand. He was the first officer on the scene and arrived at approximately 9:20 PM. McChesney described the scene as relatively quiet when he arrived. He identified a 9-millimeter shell casing he collected from the ground as well as the video recording from his body-worn camera, both of which were introduced into evidence. (R.p.93-p.100).

Next, the State called former LCSD crime scene investigator Cody Weyandt. Weyandt responded to the incident location and was assigned as the primary crime scene investigator. He took crime scene photographs inside the residence and created a diagram of the residence, all of

which were admitted into evidence. Weyandt described what was depicted in the inside photos and described various items of evidence he had identified with markers including: (1) an expended 9-millimeter cartridge case; (2) a copper jacket from a fired projectile; (3) a Motorola cell phone in a black case; and (4) a Samsung cell phone in a blue case (R.p.104-p.114). Weyandt also took photographs and made a diagram of the outside of the residence, all of which were admitted into evidence. He described what was depicted in the outside photos and described various items of evidence he had identified with markers including: (1) a shiny, new 9-millimeter shell casing; (2) bent, weathered, and aged 45-caliber shell casings; (3) numerous expended 9-millimeter cartridge cases with Hornaday, Sig, and Barnaul headstamps; (4) a custom Apple iPhone case that had a photo on it; and (5) $40 in cash made up of two $20 bills. (R.p.114-p.129; p.136-p.137).

The following day, Dr. Susan Erin Presnell, a forensic pathologist from the Medical University of South Carolina, was qualified and admitted as an expert in forensic pathology, without objection. Dr. Presnell described the steps she generally takes in performing an autopsy and then described the specific autopsy she performed on Victim. She described Victim's injuries, including how a bullet entered the side of his right hip, into the right pelvis through the right pelvic bone, through blood vessels and arteries, and continued to the left-front hip where the bullet was recovered. Dr. Presnell opined that Victim died from a single gunshot wound to his right hip. (R.p.140-p,148). Cameron Sherban from the LCSD special victim's unit then testified as a chain of custody witness about the bullet recovered during the autopsy. (R.p.151-p.155). Next, the State called Talmadge Foulks to the stand. Foulks lived near Victim, heard gunshots the night of the incident, and had gunshot damage to her vehicle. She identified several photographs and briefly described the scene. (R.p.155-p.159).

The State then called Victim's brother, Albert Clark, to the stand. Albert was at Victim's house the day of the shooting from early afternoon until nightfall. He testified that after Victim went to sleep, he and around ten other people, including Appellant, started a dice game. Albert said he left Victim's house at some point during the game when he ran short on money. He drove to his own house which was about two or three minutes away to get more money and heard gunshots as he was returning. Albert testified that as he was pulling in at Victim's house, he actually saw gunfire. He said he saw "Little Joe," whom he identified as Appellant, shooting directly across the yard towards Victim and then saw Victim fall to the ground. Albert picked up Victim with the help of Victim's cousin Donnie, and they drove him to the hospital where they took him inside. Eventually they both returned to Victim's house where the LCSD crime scene unit was processing the scene and law enforcement officers were talking to witnesses. Albert testified he never saw Donnie with a firearm, that he did not have a firearm himself, and that neither he nor Donnie fired a weapon at Appellant when Appellant shot at Victim. He testified Appellant was the only person he saw fire a weapon that night. (R.p.160-p.171; p.178-p.179).

Next, the State called LCSD Detective Arcadeus Dubard to the stand. On the night of the shooting, Dubard responded to the hospital around 9:30 PM where he was able to review security footage and identify the vehicle that had transported Victim to the hospital. Dubard subsequently participated in making a stop of that vehicle, making contact with Donnie Clark and Albert Clark, and searching Donnie's truck. He testified Donnie and Albert were cooperative and came back to Victim's residence with him to answer questions. Dubard said the crime scene had been secured at that point and that neither Donnie nor Albert would have been allowed access to the scene during the investigation. (R.p.181-p.190).

After he arrived at the scene, Dubard spoke separately to Donnie, Albert, and Kenyatta [Strother]—who was able to identify Appellant through a Facebook photo. He said no other witnesses besides these three would cooperate and provide information. Dubard explained the investigators canvassed the area, executed multiple search warrants, and tried to gather security camera footage from nearby businesses. He testified they recovered a cell phone outside Victim's house, surrounded by shell casings—a cell phone which belonged to Appellant. Dubard later returned to the incident scene to talk to Foulks and take photos of the damage to her car and property. He recovered several spent projectiles from Foulks' property. Dubard also subsequently interviewed Donnie about bullet damage allegedly sustained to one of the rear tires of his "Dually" truck on the night of the shooting. (R.p.190-p.203). On redirect examination, Dubard testified LCSD spoke to numerous witnesses on the night of the incident, and no one said Donnie or Albert was the shooter. Conversely, no one told them Appellant was not the shooter. (R.p.222-p.224).

Finally, the State qualified LCSC Investigator Thomas Alvin Smith as an expert in firearms examination and he was admitted without objection. Smith explained how bullet examination works, including how he looks through a microscope for unique imperfections called striations, takes photographs, and compares other class characteristics like rifling. Smith specifically examined the bullet removed from Victim's body and a bullet removed from Foulks' car and opined they were fired through the same barrel. (R.p.225-p.245). Smith also examined one copper jacket which was inconclusive and nine expended 9-milimeter cartridges from the crime scene. He opined that all nine expended casings were fired through the same barrel and said there was nothing inconsistent with the theory that there was only one firearm on the scene.

(R.p.245-p.261). On redirect Smith clarified he tested every bullet and every shell casing that was collected from the scene. (R.p.264-p.265). The State then rested. (R.p.265, lines 17-19).

Directed Verdict and Right to Testify

Appellant moved for a directed verdict, and after hearing his argument and the State's response, the trial court denied the motion. (R.p.265-p.267). The trial judge then advised Appellant, outside the presence of the jury, regarding his right to testify or not testify, and the possibility of being impeached with his prior convictions. (R.p.267-p.272).

After a short break and learning Appellant intended to call Tamare Howell as the first defense witness, the State made a motion to be permitted to use Howell's prior convictions to impeach. The prosecutor referenced Rule 609(a)(1), SCRE, as well as the fact that admission of those convictions would be subject to Rule 403, SCRE, and a determination by the trial court regarding the probative value of the evidence, noting credibility was a key issue in the case. (R.p.274, line 10-p.275, line 23). Defense counsel argued against admission, focusing specifically on the Rule 403 balancing test. He stated: "I think 403 clearly makes it inadmissible." (R.p.276). After hearing further arguments, the trial court ruled:

> Well, here's what I'm gonna do. *I'm gonna stick with the rule.* I mean, the issue is, first, whether it's admissible or not, but that - - that gets you to 403, and then the Court has to determine whether it's more prejudicial than probative. . . .
>
> I'm gonna allow - - we're gonna follow the same rule. I'm not gonna allow him to impeach you on the name of the charges. You certainly can ask him if - - however you want to as a trial strategy question. If on impeachment you need to ask him, you can say, for instance, were you convicted of a crime that carried more than one year in 2016? Were you convicted of another crime in 2016? Were you convicted of another crime that carried more than one year in 2018. I'm gonna allow you to - - I'm gonna limit you to what we generally do with defendants, that you can - - I'm not going to rule that it is inadmissible; however, I think you can use that, but I'm gonna limit you on how you [sic] impeachment of

> him to the fact of not naming the crime. I find that Mr. Ervin's rights. Depending - - we don't know what - - the facts and circumstances of the strong arm robbery. It may very well have been a true technical strong arm robbery; however, we're all aware of circumstances where people oftentimes in family situations are accused and convicted of an armed robbery or strong arm robbery. So we're not here to flesh out the specifics of each of those, but I'll allow the State to impeach him with the questions regarding convictions of crimes that carry more than one year.

(R.p.281, line 16-p.282, line 21) (emphasis added). The trial court subsequently clarified its ruling. It quoted Rule 609 and its reference to Rule 403 before concluding:

> I find that in this particular case it's very clear that a large part of this case is based on statements and credibility of up until the point I think three witnesses and may involve the defense witnesses as well, and so I find that under Rule 609 the fact that he was convicted of crimes that carry more than one year, that that is admissible and I find that in weighing those that that goes to the probative value for a jury to determine his credibility.

(R.p.283, line 5-p.284, line 1).

Appellant proceeded to call Howell in his defense. Howell testified that Appellant is his cousin and he that he was with Appellant on the night of the incident, November 9, 2020. He said they drove to Victim's house in a burgundy Ford sedan Appellant borrowed from their cousin Stephanie. Howell noted Donnie and Albert were already there along with a couple of other "homeboys" from the neighborhood and that they all started playing dice for money. He claimed Appellant had won $1,000 from Albert when a disagreement arose, and Appellant decided to quit playing. Howell testified that when Appellant put his hands on the table to walk off, Victim's gun fell off the table and went off accidentally. He claimed everyone then walked outside to leave when he remembered he left his bag in the house. Howell said he went back in to get the bag when he heard someone say, "get a gun." He claimed that when he came back out

with his bag, Albert started shooting at their car, so he ran from the scene. (R.p.285-p.299). Defense counsel did not ask Howell about any prior convictions.

As soon as the State started its cross-examination, the prosecutor said: "All right. Mr. Howell, before we get into what happened that night, I want to go over a couple of things. And without telling us what they are, you have, in fact, been convicted of a crime in 2016 that carries more than a year imprisonment; is that right?" (R.p.299, lines 8-14). Howell answered: "Yes ma'am;" and Appellant's counsel renewed his objection. (R.p.299, lines 15-16). The trial court overruled the objection, and the following exchange occurred:

> Q. I'm gonna ask that again. You were, in fact, convicted of a crime in 2016 that carried more than a year imprisonment, right, sir?
>
> A. Yes, ma'am.
>
> Q. Okay. And, again, in 2018, right?
>
> A. 2018? Yes, ma'am.
>
> Q. Okay. And, again, in 2019, right?
>
> A. Yes, ma'am.

(R.p.299, line 20-p.300, line 2). The State continued its cross-examination with no further mention of Howell's prior convictions. (R.p.300-p.311). Defense counsel also did not mention the prior conviction on redirect. (R.p.311-p.312).

After Howell was excused and Appellant was questioned about his right to testify, Appellant took the stand to testify in his own defense. (R.p.313-p.316). He essentially mirrored Howell's testimony, claiming that on November 9, 2020, he and Howell borrowed Stephanie's burgundy car and drove it to Victim's house where they participated in gambling with Victim, Albert, Donnie, and others. Appellant provided additional details about the game itself, claiming

he was making side bets with Albert and won $1,000, which Albert paid in $100 bills. He claimed he lent $200 back to Albert so Albert could keep betting; however, following an argument over another bet, Donnie grabbed Appellant, so he got up to leave. Again mirroring Howell's testimony, Appellant claimed that as he was getting up, Victim's gun dropped off the table and went off. He said this caused everyone to start evacuating the house. Appellant said he was walking towards the car when he noticed Howell did not have his bag, so he told him to go back in and get it. Meanwhile, Appellant claimed he was sitting in the car counting his money and holding his phone. Appellant testified that when Howell came back out with the bag, he warned Appellant that "they" were about to shoot, so Appellant jumped out of the car to the ground, dropping his phone and some money. Appellant said he then heard six gunshots, followed by at least four more gunshots. He claimed that he then got up and saw Albert running across the yard towards another house, carrying a gun. Appellant claimed he later discovered two bullet holes in the burgundy car. He testified he never had a gun on the night of the shooting. (R.p.316-p.333).

As his third and final witness, Appellant called his cousin, Stephanie Glover, to the stand. Glover testified she used to own a burgundy Ford Focus which she often lent to Appellant, including on the night of the incident. She said when she lent Appellant the car that day it did not have any bullet holes in it, but when it was returned the following day, it had one bullet hole in the front. (R.p.347-p.349). On cross-examination, Glover claimed she took a picture of the bullet hole, but the screen of her phone later cracked, so there was no way to retrieve it to share with the police. She also claimed she no longer owned the car and never told law enforcement about the bullet hole because nobody ever reached out to her. (R.p.349-p.352). The defense then rested. (R.p.352, lines 17-22).

The following morning after a charge conference, the parties made closing arguments. During the State's close, the prosecutor described the elements of the offenses, the State's burden of proof, and the evidence introduced throughout the trial. (R.p.359-p.367). The prosecutor also noted that when the defense calls witnesses, the jury had to listen to their testimony and decide if it makes sense. The State first critiqued Appellant's story, then briefly critiqued Howell's testimony in support of that story, but only as to how their story did not match the physical evidence from the scene. The prosecutor never mentioned Howell's prior convictions. (R.p.367-p.375). During Appellant's closing argument, counsel attacked the State's theory of the case and argued: "Credibility of the defense. There was not one moment when the State impeached or questioned the credibility of the three defense witnesses. Not once. She tried. Yes, ma'am. Correct. Correct. Correct. Unflappable testimony as to what happened. Barely any inconsistencies in the minor details." (R.p.381, line 22-p.382, line 2). Finally, during the State's rebuttal the State again did not mention Howell's prior convictions. (R.p.383-p.388).

The trial judge then charged the jury on the roles of the judge and jury, the indictments, the presumption of innocence, the State's burden of proof, reasonable doubt, direct and circumstantial evidence, credibility of witnesses, expert witnesses, criminal intent, the elements of each offense, and the verdict forms. (R.p.386-p.399). At the end of trial, the jury found Appellant guilty as indicted. (R.p.401-p.402). He was sentenced by Judge Hall to thirty (30) years' imprisonment for murder and five (5) years' concurrent imprisonment for possession of a weapon during commission of a violent crime. (Sentencing Sheets; Tr.p.1; p.411-p.413; p.415-418).

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. *State v. Brown*, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012), *cert. denied*, 569 U.S. 1023 (2013); *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001). Our appellate courts give great deference when reviewing the evidentiary ruling of the trial court. The admission or exclusion of evidence is left to the sound discretion of the trial judge. *State v. Edwards*, 373 S.C. 230, 234, 644 S.E.2d 66, 68 (Ct. App. 2007). The trial court's ruling on the admissibility of evidence will not be reversed on appeal absent abuse of discretion or the commission of legal error which results in prejudice to the defendant. *Id.*; *State v. Adams,* 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003). An abuse of discretion occurs when the ruling lacks evidentiary support or is controlled by an error of law. *Brown*, 401 S.C. at 87, 736 S.E.2d at 265; *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011); *State v. Morris*, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008); *State v. McDonald*, 343 S.C. 319, 540 S.E.2d 464 (2000). To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); *State v. Howard*, 396 S.C. 173, 178, 720 S.E.2d 511, 514 (Ct. App. 2012).

ARGUMENT

I.

The trial court did not abuse its discretion in admitting the prior convictions of defense witness Tamare Howell for impeachment under Rule 609(a)(1), SCRE, because: (1) a period of less than ten years had passed since the date of the convictions; (2) the convictions were for crimes punishable by more than one year's imprisonment; and (3) the

probative value of the convictions was *not* substantially outweighed by the danger of unfair prejudice.

Appellant argues the trial court erred in admitting, for impeachment purposes, defense witness Tamare Howell's convictions for strong-arm robbery and possession of less than one gram of methamphetamine or cocaine base (2016); failure to stop for a blue light (2018); and first offense possession with intent to distribute (2019), under Rule 609(a)(1), SCRE, "by not conducting a Rule 403 balancing analysis . . . given their probative value was substantially outweighed by their danger of undue prejudice." (Brief of Appellant, p.4). He acknowledges the convictions in the case were not more than ten years old but argues none "had a tendency to prove or show the witness's propensity for truthfulness or credibility" and therefore, "should have been found to be unduly prejudicial after a proper Rule 403 analysis." (Brief of Appellant, p.14). Appellant further contends the "vague but prejudicial manner" in which the convictions were conveyed to the jury—with the State being ordered to only refer to them as crimes that carried more than a year imprisonment—permitted the jury to engage in speculation that "was equally if not more prejudicial" than had the crimes been identified. (Brief of Appellant, p.14-p.15). The State disagrees and submits Appellant's arguments are without merit.

Here, the trial court acknowledged the general rules governing the admissibility of a witness's prior convictions for purposes of impeachment, as well as the parameters of such admissibility under Rule 609(a)(1), SCRE. Judge Hall stated: "I'm gonna stick with the rule." (R.p.281, lines 16-17)—a rule that begins with these convictions being admissible for impeachment, unless certain circumstances exist which create a substantial danger of unfair prejudice. The trial court specifically acknowledged admission was "subject to Rule 403," which provides that evidence of a qualifying 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 . . . ." The trial court then conducted a Rule 403 analysis before concluding, admittedly without extensive elaboration, the probative value of the convictions outweighed the danger of *any* prejudice, much less *unfair* prejudice. Although the trial court did not specifically list or reference the five factors set forth by our supreme court in *State v. Colf*,[1] its analysis addressed at least one of those factors directly, clearly touched on others, and was fully supported by any consideration of all five factors, particularly given the trial court's efforts to "sanitize" any possible prejudice by limiting the State to merely eliciting testimony that Howell had four recent prior convictions carrying more than one year in prison, rather than by identifying those crimes. Indeed, this effort to sanitize the prior crimes arguably eliminated any need for further Rule 403 balancing. Nevertheless, the trial court *did* conduct an adequate Rule 403 balancing analysis in this case. Further, its decision to admit the convictions for impeachment of Howell after conducting the analysis had sufficient evidentiary support and therefore did not constitute an abuse of discretion. Additionally, if there was any error, it was harmless because, beyond a reasonable doubt, it could not have contributed to the jury's verdict where the eyewitness testimony and physical evidence of guilt was overwhelming. Finally, even if this Court concludes it was error and was not harmless, the proper remedy is remand for a more thorough Rule 403 balancing analysis, not remand for a new trial as requested by Appellant. (Brief of Appellant, p.16).

A. Law / Analysis

Rule 609 of the South Carolina Rules of Evidence governs the admissibility of a witness's prior convictions for purposes of impeachment, and it prescribes varying standards for admissibility depending on the type of witness (accused versus other than an accused) and/or the

[1] 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000) (adopting the five-factor test used by federal courts to assist in determining whether the probative value of a prior conviction outweighs its prejudicial effect for purposes of impeachment under Rule 609, SCRE).

type of crime (crime involving dishonesty or false statement versus crime not involving dishonesty or false statement). *State v. Robinson*, 436 S.C. 579, 592-93, 828 S.E.2d 203, 209-10 (2019); Rule 609, SCRE. If a period of ten years or less has elapsed since the date of conviction or of the release of the witness from the confinement imposed for that conviction, Rule 609(a)(1), SCRE, provides that evidence that a witness other than an accused has been convicted of a crime punishable by death or imprisonment for more than one year's imprisonment "shall be admitted," subject to Rule 403, SCRE. *Robinson*, 426 S.C. at 593, 828 S.E.2d at 210; Rule 609(a)(1), 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." *Id.* (quoting Rule 403, SCRE). Thus, Rule 609(a)(1) requires the trial court to balance the probative value of evidence of a prior conviction and the degree of prejudice to the opponent of the evidence. *Id.* at 594, 828 S.E.2d at 210.

Our supreme court has approved the five-factor analysis generally employed by the federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. Even though the three Rule 609 admissibility tests differ from one another, the supreme court has, through *Colf*, provided a uniform set of factors for the trial court to consider when applying each test. *Robinson*, 426 S.C. at 594, 828 S.E.2d at 210. The following factors, along with any other relevant factors, should be considered by the trial court: (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 [or witness's] testimony; and

(5) the centrality of the credibility issue. *Id.* at 594, 828 S.E.2d at 211; *Colf*, 337 S.C. at 627, 525 S.E.2d at 248.

Initially, the State notes the prior convictions at issue here all fit squarely within the time limits for admission of impeachment evidence under the Rules of Evidence. Rule 609 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 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.

Rule 609(b), SCRE. Appellant's trial took place on September 5-7, 2023. Howell's prior convictions for strong-arm robbery and possession of less than one gram of methamphetamine or cocaine base occurred in 2016; his conviction for failure to stop for a blue light occurred in 2018; and his conviction for first offense possession with intent to distribute occurred in 2019. Because these convictions were respectively within seven, five, and four years of Patterson's trial, they clearly fall within the ten-year time limit provided by Rule 609(b), SCRE, and therefore were admissible to impeach Howell at trial *unless* the trial court determined the probative value was *substantially* outweighed by the danger of unfair prejudice.

Here, the trial judge was clearly cognizant of the requirement that he balance the probative value of admitting the prior convictions against the prejudicial effect to Appellant and made the requisite determination in this case. Indeed, when the State made its motion to use Howell's prior convictions to impeach, the prosecutor properly referenced Rule 609(a)(1) as well as the fact that admission of those convictions was subject to Rule 403 and a determination regarding the probative value of the evidence where credibility was a key issue in the case. (R.p.274, line 10-p.275, line 23). Defense counsel then focused his argument against admission

on the Rule 403 balancing test arguing: "I think 403 clearly makes it inadmissible." (R.p.276). After hearing further arguments, the trial court ruled:

> Well, here's what I'm gonna do. I'm gonna stick with the rule. I mean, the issue is, first, whether it's admissible or not, but that - - that gets you to 403, and then the Court has to determine whether it's more prejudicial than probative. . . . I'm gonna allow - - we're gonna follow the same rule.

(R.p.281, lines 16-23). The trial court subsequently clarified its ruling. It quoted Rule 609 and its reference to Rule 403 before concluding:

> I find that in this particular case it's very clear that a large part of this case is based on statements and credibility of up until the point I think three witnesses and may involve the defense witnesses as well, and so I find that under Rule 609 the fact that he was convicted of crimes that carry more than one year, that that is admissible and I find that in weighing those that that goes to the probative value for a jury to determine his credibility.

(R.p.283, line 5-p.284, line 1). Thus, the court clearly made the determination required by Rule 609(a)(1) for admission of the prior convictions, and it clearly balanced the probative value of the evidence against its prejudicial impact before ruling it should be admitted. Although the trial court did not specifically list or reference the five *Colf* factors, its analysis addressed at least one of those factors directly, clearly touched on others, and was fully supported by *any* consideration of all five factors, particularly given the court's efforts to "sanitize" any possible prejudice by limiting the State to merely eliciting testimony that Howell had four recent prior convictions carrying more than one year in prison, rather than by identifying those crimes. Each factor is addressed below.

1. The impeachment value of the prior crimes.

The trial court clearly concluded the four prior crimes had impeachment value even if it did not extensively describe this finding on the record—otherwise, it would not have ruled them

admissible. Whatever the case, it certainly did not abuse its discretion in finding Howell's prior convictions had impeachment value that supported admission under Rule 609(a)(1). While the concept of crimes of moral turpitude arguably "became irrelevant for impeachment of witnesses" following the adoption of Rule 609 of the South Carolina Rules of Evidence,[2] the State submits it still has relevance in determining the impeachment value of prior crimes when a trial court is considering admission under Rule 609(a)(1) rather than 609(a)(2), where the prior crimes at issue are not explicitly crimes of dishonesty or false statement. Moral turpitude involves an act of baseness, vileness, or depravity in the social duties which a man owes to his fellow man or to society in general, contrary to the accepted and customary rule of right and duty between man and man. *State v. Harvey*, 275 S.C. 225, 227 n.1, 268 S.E.2d 587, 588 n.1 (1980) (quoting Miller on Criminal Law 24 (1934)). "Most offenses found to involve moral turpitude seem to include some form of *dishonest* behavior." McAninch, Fairey, & Coggiola, *The Criminal Law of South Carolina* 50, (6th Ed. 2013) (emphasis added). Consequently, crimes of moral turpitude would typically carry some impeachment value. Indeed, logic dictates that where honesty is one of the "accepted and customary rules of right and duty between man and man," a person's credibility might be negatively impacted where he or she has been convicted, beyond a reasonable doubt, of committing an act of moral turpitude.

a. Strong-Arm Robbery

As noted by our supreme court in *Robinson*, although the crime of strong-arm robbery is not a crime of dishonesty or false statement which would result in automatic admissibility under Rule 609(a)(2), it is nonetheless a crime that carries impeachment value because it implies the witness is not someone to be trusted – that he might not be credible. *Robinson*, 426 S.C. at 599-

[2] McAninch, Fairey, & Coggiola, *The Criminal Law of South Carolina* 49, (6th Ed. 2013).

600, 828 S.E.2d at 213-14. Thus, the trial court did not abuse its discretion in finding Howell's conviction for strong-arm robbery had impeachment value.

b. Possession of less than one gram of methamphetamine or cocaine base

Although it previously held otherwise,[3] our supreme court later concluded that simple possession of cocaine is indeed a crime of moral turpitude even though it primarily involves self-destructive behavior, because the harmful impact of the cocaine business on society as a whole is fostered by each individual's use of it. *State v. Major*, 301 S.C. 181, 184-85, 391 S.E.2d 235, 237-38 (1990). Consequently, one who possesses cocaine base is derelict in his "duty to society and fellow men." *Id.*; *See also Green v. Hewitt*, 305 S.C. 238, 242, 407 S.E.2d 651, 652 (1991) (retaining the focus of a moral turpitude analysis on the social duties one owes to society and one's fellow man). Because it is a crime of moral turpitude, the trial court did not abuse its discretion in finding Howell's conviction for possession of less than one gram of methamphetamine or cocaine base had impeachment value.

c. Failure to stop for blue light

Where a witness has previously been convicted of failing to stop for a blue light it implies, in a similar fashion to a conviction for strong-arm robbery, the witness is not someone to be trusted. *Cf. Robinson*, 426 S.C. at 599-600, 828 S.E.2d at 213-14 (finding a conviction for strong-arm robbery implies a witness might not be credible). Indeed, stopping for a law enforcement officer who has engaged the blue lights on his or her vehicle and is in pursuit clearly implicates social duties a person, as a member of society, owes to his fellow man or to society in general. Fleeing or failing to stop for those blue lights is contrary to the accepted and customary rule of right and duty between man and man. Not only is it a base and vile act that

[3] *State v. Ball*, 292 S.C. 71, 354 S.E.2d 906 (1987) (holding possession of cocaine is not a crime of moral turpitude), overruled by *State v. Major*, 301 S.C. 181, 391 S.E.2d 235 (1990).

places all other drivers at risk of death or great bodily injury, more importantly it shows fraudulent behavior through evasion and dishonesty. *See State v. Horton*, 271 S.C. 413, 414-15, 248 S.E.2d 263, 263-64 (1978) (finding the offense of "hit and run" involves moral turpitude and was properly admitted into evidence as bearing on credibility). In *Horton*, the supreme court explained: "An act in which fraud is an ingredient involved moral turpitude. One who leaves the scene of an accident is fraudulently attempting to relieve himself of any liability." *Id.* (internal citation omitted).[4] Similarly, one who fails to stop for a blue light is fraudulently attempting to relieve himself of any liability. Because failing to stop for a blue light involves moral turpitude, the trial court did not abuse its discretion in finding Howell's conviction for that crime had impeachment value.

d. Possession with intent to distribute

Our supreme court has held that a trial court correctly allowed the prosecution to attempt to impeach the defendant with evidence of his earlier conviction for possession with intent to distribute marijuana. *State v. Lilly*, 278 S.C. 499, 500, 299 S.E.2d 329, 330 (1983). It concluded possession with intent to distribute marijuana is a crime of moral turpitude because it involves the duty which a person owes to other people and to society in general. *Id.*; *See also In the Matter of Byrd*, 308 S.C. 470, 419 S.E.2d 228 (1992) (finding, in an attorney disciplinary matter, that an attorney who pled guilty to possession of cocaine with intent to distribute: "By his conduct, respondent has violated the Rules of Professional Conduct by committing a criminal act that reflects adversely on his *honesty*, *trustworthiness*, or fitness as a lawyer and by engaging in

[4] In a civil case, this court affirmed a trial court's exclusion of evidence of a prior conviction for failure to stop for a blue light; however, this decision was made under the abuse of discretion standard of review where the record failed to disclose the trial judge's reasons for excluding the evidence. It was *not* a finding that failure to stop for a blue light is not a crime of moral turpitude. *State v. Novich*, 300 S.C. 334, 336-37, 387 S.E.2d 704, 705-06 (Ct. App. 1989).

conduct involving moral turpitude.") (emphasis added). Thus, the trial court did not abuse its discretion in finding Howell's conviction for possession with intent to distribute had impeachment value.

2. The point in time of the conviction and the witness's subsequent history.

In *Robinson*, our supreme court found Robinson's prior convictions, which occurred four years and two years before the trial, "revealed a continuing pattern of criminal behavior that could legitimately impact his credibility in the eyes of the jury." *Robinson*, 426 S.C. at 600, 828 S.E.2d at 214. A similar analysis here illustrates both a close temporal proximity between Howell's prior offenses themselves— four offenses with impeachment value that were committed every year or so from 2016 through 2019—and a close temporal proximity between those prior offenses and the offense for which Appellant was on trial—a crime for which Howell was also present. Howell's prior offenses were committed seven years, five years, and four years before Howell testified at Appellant's trial. As in *Robinson*, these two sets of points in time reveal a pattern of continuing criminal behavior that could legitimately evoke questions of Howell's credibility in the eyes of the jury. The State submits the trial court did not abuse its discretion in weighing this factor as it did even if it did not explicitly reference it from *Colf*.

3. The similarity between the past crime and the charged crime.

Here, Howell's prior convictions had very little or no similarity to the charges for which Appellant was on trial. Consequently, they would have had minimal prejudicial impact even if they were identified. In any event, the trial judge effectively "sanitized" any possible prejudice to Appellant by limiting the State to eliciting testimony only that Howell had prior convictions carrying more than one year in prison. Consequently, the introduction of the convictions should not even be an issue in this appeal. *See Robinson*, 426 S.C. at 597, 828 S.E.2d at 212 ("As

previously noted, the 2009 second-degree burglary conviction was "sanitized" when the trial court allowed the State to elicit testimony that Robinson had a prior felony conviction carrying more than one year in prison. The introduction of this conviction is not an issue in this appeal.").

4. The importance of the witness's testimony

Here, Appellant testified in his own defense. He claimed Victim had a gun sitting on the table beside him during the dice game and that later, after he heard gunshots, he saw Albert running across the yard carrying a gun. (R.p.326, line 7-p.329, line 24). Appellant claimed he never had a gun at all. (R.p.333, lines 12-13). Howell offered similar testimony, claiming that when he came out of the house after retrieving his bag, Albert started shooting at their car. (R.p.290-p.295). Thus, Howell's testimony was largely cumulative to Appellant's testimony, rendering Howell's testimony less important to Appellant's case. *Robinson*, 426 S.C. at 603, 828 S.E.2d at 215-16. Indeed, Howell's testimony was not necessary to Appellant's defense. With or without Howell's testimony, the jury had to resolve the issue of Appellant's credibility, as well as the issue of Strother's and Albert's credibility, which provided direct evidence of Appellant's guilt. The State submits that under all of these circumstances, the trial court did not abuse its discretion in analyzing this factor in favor of admissibility even if it did not explicitly reference this factor from *Colf*.

5. The centrality of the credibility issue.

The trial court concluded credibility of the witnesses was central to the case. It specifically noted: ". . . a large part of this case is based on statements and *credibility of* up until the point I think three witnesses and may involve the defense witnesses as well, and so I find that under Rule 609 the fact that he was convicted of crimes that carry more than one year, that that is admissible and I find that in weighing those that that goes to *the probative value for a jury to*

determine his credibility." (R.p.283, line 5-p.284, line 1) (emphasis added). The trial court clearly concluded the four prior crimes had impeachment value even if it did not extensively describe this finding—otherwise, it would not have ruled them admissible. Because credibility was central to the 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.

In conclusion, in regard to the five-factor *Colf* analysis, the State submits the record demonstrates the trial court sufficiently considered each of the *Colf* factors in making its decision under Rule 609(a)(1), SCRE, and in determining the probative impeachment value of Howell's prior convictions was *not* substantially outweighed by the danger or undue prejudice. That decision was not an abuse of discretion and should be affirmed.

B. Harmless Error

To the extent this Court finds the trial court erred in failing to conduct a sufficiently thorough on-the-record balancing of the *Colf* factors, the State submits the conviction should nevertheless be affirmed because that error was harmless in light of: (1) the eyewitness testimony presented at trial, (2) the physical evidence and expert testimony presented at trial; (3) the cumulative nature of the evidence; and (4) the absence of any effort by the State to highlight or reference the convictions during closing arguments.

Appellate courts will generally not set aside a judgment based on insubstantial errors not affecting the result. *State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). Only errors so substantial that they result in a verdict which would not otherwise have been rendered require reversal. *State v. Jolly*, 304 S.C. 34, 39, 402 S.E.2d 895, 898 (Ct. App. 1991). "A harmless error analysis is contextual and specific to the circumstances of the case." *State v. Byers*, 392 S.C. 438, 447, 447–48, 710 S.E.2d 55, 60 (2011). "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. Error is harmless when it could not reasonably have affected the result of the trial." *Id.* at 447–48, 710 S.E.2d at 60 (quoting *State v. Reeves*, 301 S.C. 191, 193–94, 391 S.E.2d 241, 243 (1990)). A defendant seeking reversal based on error in admission of evidence has the burden of showing that evidence was prejudicial. *State v. McElveen,* 280 S.C. 325, 327, 313 S.E.2d 298, 299 (1984).

The State presented overwhelming evidence of Appellant's guilt. Two eyewitnesses saw Appellant shooting a gun towards Victim. (R.p.74-p.80; p.160-p.171; p.178-p.179). Expert testimony established that every bullet and shell casing collected from the scene was fired through the same gun barrel. (R.p.245-p.261). Appellant's phone was recovered from the crime scene, surrounded by the spent shell casings, the night of the shooting. (R.p.195, lines 12-19). Additionally, Howell's testimony was cumulative to Appellant's testimony. Given the overwhelming evidence of guilt and the nature of Howell's testimony, the State submits the mention of Howell's prior convictions could not reasonably have affected the result of the trial, and any error was harmless. *Byers*, 392 S.C. at 447-48, 710 S.E.2d at 243; *See State v. Watts*, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict).

C. Remand

To the extent this Court disagrees with all of the arguments above and concludes the trial court's failure to conduct a detailed on-the-record balancing of the *Colf* factors was error, and that the error was *not* harmless, the proper remedy is remand to the trial court for an on-the-record *Colf* balancing test rather than immediate remand for a new trial. *State v. Howard*, 384 S.C. 212, 220, 682 S.E.2d 42, 47 (Ct. App. 2009).

D. Conclusion

In Appellant's case, the trial court considered the appropriate *Colf* factors and ultimately determined that the probative value of Howell's prior convictions was *not* substantially outweighed by the prejudice to Appellant. This is all that was required under Rule 609(a)(1), SCRE. Accordingly, where the trial court considered the appropriate factors and ruled that the prior convictions were more probative than prejudicial, the court did not abuse its discretion, and its ruling should be upheld. To the extent this Court determines the analysis was insufficient and constitutes error, it was harmless beyond a reasonable doubt. Even if not harmless, the appropriate remedy at this stage is simply a remand for a more thorough analysis of the *Colf* factors. The trial court did not abuse its discretion. For all of these reasons, Appellant's convictions should either be affirmed or this matter should be remanded for further proceedings.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that Appellant's convictions and sentence be affirmed. Alternatively, the State requests that this matter be remanded to the trial court with instructions to conduct a more thorough, on-the-record application of the *Colf* balancing test.

Respectfully submitted,

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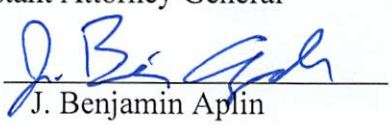
BY: 
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Columbia, South Carolina
February 21, 2025

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Daniel D. Hall, Circuit Court Judge

Appellate Case No. 2023-001474

The State, ...Respondent,

v.

James J. Patterson, III, ...Appellant.

PROOF OF SERVICE

I, Susan Spencer, Legal Assistant, hereby certify that I have served the *Final Brief of Respondent*, dated February 21, 2025, on Appellant by sending an electronic copy via email to Robert M. Dudek, counsel of record for Appellant, at the address listed for counsel in AIS.

I further certified that all parties required by Rule to be served have been served. This 21st day of February, 2025.

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From: Susan Spencer
Sent: Friday, February 21, 2025 4:30 PM
To: rdudek@sccid.sc.gov
Cc: Warren, Kaylynn; Ben Aplin
Subject: The State v. James J. Patterson, III (2023-001474)
Attachments: PATTERSON James - Final Brief of Respondent.pdf

Good Afternoon Mr. Dudek,

Attached please find the Final Brief of Respondent in The State v. James J. Patterson, III (2023-001474). This brief will be filed today with the Court of Appeals via the AIS OneDrive system. If you will, please confirm receipt.

Thank you.

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