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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Common Pleas
Appeal from Spartanburg County
Honorable Heath P. Taylor, Circuit Court Judge

Appellate Case No. 2024-002125

DOMINICK A. THOMPSON,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTION ON PETITION FOR CERTIORARI

Did trial counsel's failure to make the proper argument that witnesses' credibility can be impeached with convictions under Rule 609, SCRE, constitute ineffective assistance of counsel under the Sixth Amendment?

COUNTERSTATEMENT OF QUESTION ON PETITION FOR CERTIORARI

Whether the post-conviction relief court properly determined that Petitioner failed to establish trial counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's alleged failure to make the proper argument to impeach witnesses' credibility with prior convictions under Rule 609, SCRE, where Trial Counsel effectively argued for all prior convictions of the two witnesses at issue to be admitted for the purpose of credibility, and was successful on some?

STATEMENT OF THE CASE

During its June 2017 Term, the Spartanburg Grand Jury indicted Petitioner Dominick A. Thompson for possession of a firearm or ammunition by a person convicted of a violent crime (2017-GS-42-02886) and attempted murder (2017-GS-42—2889). During its June 2018 Term, the Spartanburg Grand Jury indicted Petitioner for first-degree burglary (count one) and possession of a weapon during a violent crime (count two) (2017-GS-42-02885). During its August 2018 Term, the Spartanburg Grand Jury indicted Petitioner for first-degree assault and battery (2017-GS-42-02887) and armed robbery (2017-GS-42-02888).

On August 6-9, 2018, Petitioner proceeded to his first jury trial in the Spartanburg County Court of General Sessions with the Honorable Lee S. Alford presiding. Petitioner was represented by E. Joshua Schultz, Esquire. Seventh Circuit Assistant Solicitors Sara B. Bozarth and Spenser H. Smith prosecuted the case. Judge Alford declared a mistrial due to a hung jury.

On June 10, 2019, Petitioner proceeded to his second jury trial in the Spartanburg County Court of General Sessions before the Honorable J. Derham Cole. Petitioner was represented by E. Joshua Schultz, Esquire. Seventh Circuit Assistant Solicitors Lauren G. Brown and Spenser H. Smith prosecuted the case. Petitioner was found guilty as indicted. Judge Cole sentenced Petitioner to life imprisonment for first-degree burglary, armed robbery, assault and battery of a high and aggravated nature¹, and ten years' imprisonment for first-degree assault and battery.

On June 25, 2019, Petitioner, through trial counsel, filed a timely notice of intent to appeal that was perfected by Deputy Appellate Defender Wanda H. Carter by filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), raising the issue, "The trial judge erred in denying defense counsel the opportunity to impeach the state's two main eyewitnesses on their prior

¹ Petitioner was found guilty of ABHAN under the attempted murder indictment because the jury was only permitted to consider the lesser-included offense of ABHAN.

convictions at Appellant's trial."Following the consideration of his *pro se* brief and review pursuant to Anders², the South Carolina Court of Appeals dismissed Petitioner's appeal by unpublished opinion. State v. Thompson, Op. No. 2022-UP-154 (S.C. Ct. App. filed March 30, 2022). The Remittitur was returned to the lower court on April 25, 2022.

On July 27, 2022, Petitioner filed a timely application for post-conviction relief (PCR). The State filed its Return and Motion for a More Definite Statement on September 8, 2022, and requested an evidentiary hearing. Through counsel, Petitioner filed an amended application on May 14, 2024. An evidentiary hearing into the matter convened on May 20, 2024, at the Spartanburg County Courthouse before the Honorable Heath P. Taylor. Petitioner was present at the hearing and represented by Susannah C. Ross, Esquire. Senior Assistant Deputy Attorney General D. Russell Barlow, II represented the State. On December 10, 2024, Judge Taylor denied Petitioner's PCR application and dismissed it with prejudice.

On December 18, 2024, Petitioner timely filed a notice of appeal. On May 30, 2025, Petitioner filed his Petition for Writ of Certiorari and Appendix,

This Return to Petition for Writ of Certiorari follows.

² Anders v. California, 386 U.S. 738 (1967).

STATEMENT OF FACTS

At Petitioner's trial, witness Summer Hall ("Summer") testified that she was at Crossland Studios, a hotel on Mobile Drive in Spartanburg County, in the late night of November 23, 2016. Summer testified she was there with her husband Russell Donahue ("Russell"), her sister-in-law Christine Richard ("Christine"), her brother-in-law Brandon Logan ("Brandon"), and other friends. (App. p. 77, ll. 1 – 10). While at the hotel, Christine received a Facebook message from her cousin, Makayla Richard ("Makayla"), inquiring about buying marijuana from Christine. Christine told Makayla that she would have to come to Crossland Studios to buy marijuana from another individual in a separate room at the hotel. Sometime later, Makayla informed Christine she had arrived outside the hotel, and Christine left the hotel room alone to go retrieve Makayla. Summer testified that the group in the hotel room began to wonder where Christine was, as they did not expect her to take so long outside. (App. p. 77, ll. 11 – pp. 78, ll. 12).

Christine walked outside into the breezeway area and downstairs to retrieve Makayla. Christine stated that she attempted to call Makayla on Facebook multiple times to see if she had arrived, but Makayla did not answer the calls. After a black car passed by Christine, she asked Makayla if this was her, to which she replied affirmatively. Makayla said she was parking and would meet her at the steps of the hotel. (App. p. 107, ll. 2 – 14). Makayla approached Christine by herself, and they began walking up the stairs when three men started running up the stairs behind them. The men were attempting to pull their hoods over their faces as they were running towards the women. Petitioner stole Christine's phone and ripped her necklace from her neck. The group of men pushed Makayla out of the way and pointed their guns towards Christine's back and stomach, threatening to shoot her and everyone else if Christine did not show them to the hotel room. Christine walked Makayla and the three men to the hotel room door. (App. pp. 107, ll. 15 – pp. 108, ll. 8).

The group then heard a panicked knock at the hotel room door, and Russell stated there were “a lot of people over there. It’s Christine, but there is a lot of people.” Christine’s knocking became more panicked, and Russell opened the door after Brandon told him to because something was wrong. When the door was opened, three men pushed Christine and Makayla through the doorway. (App. p. 78, ll. 13 – 23). Summer stated that the group was initially confused because the men were laughing, but she then saw that the men were armed with guns. Summer testified that when she stood up from the bed she was sitting on, Petitioner grabbed her by the throat and put his gun in her mouth. Petitioner then laid Summer on the bed while he was on top of her with his hands around her throat and moved the gun from Summer’s mouth to the side of her head while smiling at her. (App. pp. 79, ll. 22 – pp. 80, ll. 7).

While this was occurring, another man was towards the corner of the room pistol whipping Brandon in the head. The gun that was being used to pistol whip Brandon ultimately went off, resulting in Christine being shot in the abdomen. After hearing the gunshot, Makayla and the three men fled the scene. (App. pp. 80, ll. 8 – pp. 81, ll. 25).

STANDARD OF REVIEW

The standard of review for post-conviction relief depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the post-conviction relief court's factual findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. However, pure questions of law will be reviewed *de novo* without deference to the post-conviction relief court. Id. Appellate courts will only reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

ARGUMENT

- I. **The post-conviction relief court properly determined that Petitioner failed to establish Trial Counsel's representation was deficient or establish the requisite prejudice necessary to reverse his conviction and grant him a new trial based on Trial Counsel's alleged failure to make the proper argument to impeach witnesses' credibility with prior convictions under Rule 609, SCRE, because Trial Counsel effectively argued for admission of all prior convictions of the two witnesses at issue for the purpose of impeaching credibility, and was successful on some.**

On appeal, Petitioner asserts the post-conviction relief court erred in not finding Trial Counsel's representations constitutionally ineffective for failing to make the proper argument under Rule 609, SCRE, to admit prior convictions of witnesses, Summer Hall and Christine Richard, for purposes of impeaching their credibility, and that the post-conviction court erred in not finding Petitioner suffered prejudice from Trial Counsel's performance. Respondent submits that the post-conviction relief court properly analyzed Trial Counsel's performance without the distorting effects of hindsight, giving credence to Trial Counsel's reasonable strategy under the circumstances. It follows that without deficiency, prejudice cannot be reached. However, upon consideration of the record, the PCR court properly found elicitation of the prior convictions to be fruitless.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee all criminal defendants the right to "assist[ance] by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 668, 685 (1984). In post-conviction relief actions, the reviewing court applies the two-part test outlined in Strickland to determine whether counsel's conduct "was so [ineffective] as to require reversal" of the Petitioner's conviction. Id. at 687. To obtain relief, a post-conviction relief Petitioner must prove (1) counsel's performance fell below an objective standard of reasonableness; *and* (2) there

is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. Williams v. State, 363 S.C. 341, 343, 611 S.E.2d 232, 233 (2005) (citing Strickland, 466 U.S. 668). Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

Petitioner bears the heavy burden of establishing both prongs of the Strickland standard. Hughes v. State, 346 S.C. 554, 558, 552 S.E.2d 315, 317 (2001); Rule 71.1(e), SCRPC. To prove deficient performance, the Petitioner must establish that, in light of all the circumstances, the acts or omissions complained of "fell below an objective standard of reasonableness" as measured by "prevailing professional norms." Strickland, 466 U.S. at 688. Reviewing courts should be deferential in this inquiry and apply "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. at 689.

With respect to prejudice, the Petitioner must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Id. When evaluating this probability, the reviewing court "should consider the specific impact counsel's error had on the outcome of the trial" coupled with "the strength of the State's case in light of . . . the [totality of the] evidence presented to the jury." Smalls, 422 S.C. at 188, 810 S.E.2d at 843. Significantly, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 696.

Petitioner contends Trial Counsel was deficient for failing to make the proper argument that witnesses' credibility can be impeached with convictions under Rule 609, SCRE. Petitioner fails to acknowledge the strong presumption that counsel acted reasonably. Courts must be wary of second-guessing counsel's trial tactics, and where counsel articulates a valid reason for employing such strategy, such conduct is not ineffective assistance of counsel. Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992). The post-conviction relief court properly found Trial Counsel's testimony regarding his strategy for arguing for the admittance of the witnesses' prior convictions to be credible, and his strategy for doing so at trial was effective.

RELEVANT TESTIMONY

On the second day of Petitioner's second trial before the jury was present, Trial Counsel and the State had a bench conference with Judge Cole regarding the admission of prior convictions for the purposes of impeaching Hall and Richard. In Petitioner's case, there was evidence of a drug deal occurring prior to the burglary. Summer had a prior conviction for possession of methamphetamine, to which Trial Counsel wanted admitted for purposes of impeachment. When asked what the probative value of the prior methamphetamine conviction would be, Trial Counsel replied that it tends to prove the use of drugs at the crime scene that night. (App. p. 68, ll. 3-6).

Regarding Summer Hall's prior conviction of possession of methamphetamine, the following colloquy took place with the Court at Petitioner's second trial:

THE COURT:	Anything before we bring in the jury?
MR. SMITH:	Your Honor, with regard to Summer Hall, we believe the defense will ask her about a prior drug charge, possession of meth. The State is admitting with regard to this trial, there was a drug deal present. It's the State's position that addressing a prior drug charge by this witness will only serve to be prejudicial to the jury.
THE COURT:	Has it been expunged?

MR. SMITH: She completed the discharge on her treatment program, but it's still on her rap sheet.

THE COURT: Mr. Schultz, are you going to ask about that?

MR. SCHULTZ: I am, Your Honor, especially if it's not expunged.

THE COURT: Mr. Smith.

MR. SMITH: Your Honor, I don't understand what probative value it has. It's a different drug than what is being alleged. It's just an attempt to sully her reputation. It has nothing to do with the case.

THE COURT: Mr. Schultz.

MR. SCHULTZ: Thank you, Your Honor. I would believe – especially if it's not expunged or pardoned or anything like that. Possession of meth – it's my understanding that it carries up to three years. I think, obviously, it would meet the definition of something that could be brought up under 403.

THE COURT: Subject to 403. Tell me what the probative value is.

MR. SCHULTZ: The probative value, at least in my opinion, would be that there had been some evidence of drug use at the room that night. So I would believe that would be the probative value of the introduction of the prior conviction.

THE COURT: How so?

MR. SCHULTZ: Well, I think that if either Mr. Smith and I were to elicit testimony that there was at least some consumption of some illegal substances in that hotel room on night or they were waiting for someone to deliver drugs to them at the same time. If there was no evidence of any kind of drug use whatsoever, I'd say maybe the State would have a point as to the probative nature of it, but there was. I think I will elicit testimony that there was some kind of drug use there.

THE COURT: The event that led to the conditional discharge is totally unrelated to this, is it not?

MR. SMITH: She was charged with the drugs before this incident happened. She was actually on bond before this incident happened.

THE COURT: The charge that resulted in a conditional discharge was unrelated to this event?

MR. SMITH: Yes. She had already been charged at the time of this event. Not pled yet, but she had been charged.

THE COURT: Anything else?

MR. SCHULTZ: My thinking on it – I think it is relevant. In the last proceeding that we did, I, at least, elicited testimony that there was some possession of loud, which is a

more potent form of marijuana. I am not sure if that will come up again. It probably will.

THE COURT: What was going on during the event is one thing. Ordinarily, most everything is part of the res gestae that is admissible. But something that occurred prior to and is unrelated, is a different issue altogether.

MR. SCHULTZ: I still think I should be allowed to impeach her on that. Just because of the nature of the charges.

THE COURT: That is what makes it prejudicial, the nature of the charge unrelated to this case.

MR. SCHULTZ: I think it does bear some relation to the case. I think that there will be evidence of drug use by the parties in the room.

THE COURT: How does that conviction tend to prove that?

MR. SCHULTZ: It tends to prove that she, at least, got arrested and convicted of a drug charge back in 2017.

THE COURT: Anything else? You will agree with me, would you not, that it has nothing to do with the credibility or the likelihood of truth. It's not a crime of dishonesty or false statement or deceit.

MR. SCHULTZ: I don't believe it falls under those exceptions. I do believe that either me or Mr. Smith will elicit testimony that there had been drug use at the hotel.

THE COURT: That is a different issue altogether. I am not excluding that. I am just talking about a prior conviction.

MR. SCHULTZ: It comes out of the truthfulness. If it comes out of the truthfulness, I will agree with the Court.

THE COURT: It doesn't make her testimony more or less likely to be true because of that conviction. Is that what I am understanding you to agree with?

MR. SCHULTZ: That would be my understanding of the way the evidence rules are drafted.

THE COURT: Okay. So then, otherwise, it's admissible if the probative value is not substantially outweighed by the danger of unfair prejudice.

MR. SCHULTZ: Then I would believe the probative value would outweigh that way because of the prejudicial nature of it. There was drug use or about to be drug use at the hotel room that night. That would be my argument there.

THE COURT: Without more, I do find that the probative value of that testimony is substantially outweighed by the nature of unfair prejudice. So it will be excluded unless there are other circumstances that will otherwise make it more probative than prejudicial.

(App. pp. 65, ll. 7 – pp. 69, ll. 19).

Regarding Christine Richard's prior convictions of shoplifting and child neglect³, the following colloquy took place with the Court during Petitioner's second trial:

MR. SMITH: Your Honor, the next witness that the State would be calling also has some prior record. This one I don't believe we are going to oppose it coming in.

THE COURT: Which witness is that?

MR. SMITH: Christine Richard. She will be going after Ms. Hall. She [has] two shopliftings, one from 2013 and one from 2014 that are convictions on her rap sheet.

THE COURT: Even under a broad analysis, that is a crime of dishonesty.

MR. SMITH: Yes, sir, within ten years. We are not disputing that. The only other charge she has is neglect – legal custodian child neglect charge. That is the one that we would object to getting into. She has a shoplifting conviction from 2017 as well. She has three shoplifting convictions in the last ten years. We do not have an argument against those. I think they come in under the rules, but the child neglect charge, we would ask that that be excluded.

THE COURT: All right. Mr. Schultz.

MR. SCHULTZ: Thank you, Your Honor. The child neglect, if it's not under Magistrate Court carries up to ten years. So I would ask that the Court allow me to impeach on that.

THE COURT: Again, if the probative value cannot be substantially outweighed by the advantage of unfair prejudice, those convictions, at least for impeachment, are those that bear upon a person's likelihood and ability to tell the truth. What do you perceive the probative value to be for a conviction of child neglect?

MR. SCHULTZ: If it's child neglect that involved – I am not sure the facts of the case, but if the child neglect involved any consumption of illegal drugs, that can be a reason to bring it up.

³ The PCR evidentiary hearing transcript refers to a prior burglary conviction for Christine Richards, however her prior convictions at issue during Petitioner's trial were child neglect and shoplifting.

THE COURT:

I understand. I will address these issues in the event that the witness testifies in a fashion that would make those convictions relevant, but until that has been shown – number one, I don't think they are relevant. If even if they are, the probative value is substantially outweighed by the danger of unfair prejudice. So we might have to address that again. I am not certain. Nevertheless, right now, the shoplifting charges are probative on the issues of credibility and truth telling, because they are crimes of dishonesty. I will allow those in.

(App. pp. 69, ll. 20 – pp. 71, ll. 17.)

At Petitioner's PCR hearing, Petitioner's trial counsel explained his strategy for arguing for the admittance of the witnesses' prior convictions in the following colloquy:

- Q. Okay. And moving onto the next allegation, it is failure to impeach Summer Hall and Christine Richard based off 403 and 609. Do you recall that?
- A. I do.
- Q. And do you recall the Court – do you recall arguing 403 to the Court?
- A. I don't have anywhere in the transcript that I impeached –
- Q. Well, let me ask you this. Do you recall –
- A. Yeah.
- Q. Do you recall arguing to be allowed to impeach them based off their prior record and Judge Cole ruling against you?
- A. Could you point that out?
- Q. Sure. That's gonna be Page 68. I believe it starts on Line 12.
- A. Thank you.
- Q. I apologize. It's 65 of the record is where it actually starts and it starts at Line 23 or actually it starts at the very beginning.
- A. Could you repeat the question again?
- Q. Well, my, my question was now that you refreshed your memory, do you recall that argument you made to the Court?
- A. I do.
- Q. And what did the judge ultimately find?
- A. Well, I'm looking here. I argued vociferously for it, for its introduction.

- Q. Well –
- A. “I think it does bear some relation to the case.” I said that to the Court.
- Q. But it – but what happened – let me ask you this way. Would you agree with me that the judge determined that their drug charges were not related to this crime? They also did not go to the truth of their statement where prior or there were other witnesses with shoplifting crimes which goes to their truth?
- A. Yes.
- Q. Okay.
- A. Especially – well, for Ms. Richard.
- Q. Right.
- A. For Ms. Richards.
- Q. Okay. And –
- A. In the, in the Court’s ruling, just to answer your question, the Court – and this is from Page 69. Without more, I do find that the probative value of that testimony is substantially outweighed by the nature of unfair prejudice. So, it will be excluded.

(App. pp. 504 – 506).

The record reflects that Trial Counsel argued for the admission of all prior convictions of both witnesses, Summer Hall and Christine Richard at Petitioner’s second trial. Trial Counsel argued that he should be allowed to use Summer’s prior methamphetamine charge to impeach her pursuant to Rule 609(a)(1), SCRE, subject to Rule 403, SCRE. After conducting an analysis subject to Rule 403, the trial court found that the probative value of testimony on that charge was “substantially outweighed by the nature of unfair prejudice.” (App. p. 69). Trial Counsel also argued for the admission of Christine’s prior shoplifting and child neglect convictions. The trial court found the prior shoplifting convictions of Christine fell under rule 609(a)(2)’s exception because those crimes were ones of dishonesty, and they would be admissible without a balancing test pursuant to Rule 403. (App. p. 69 – 70). However, the trial court found that Christine’s prior convictions for child neglect were irrelevant to the case at hand and further failed the balancing

test under Rule 403 as the “probative value being substantially outweighed by the danger of unfair prejudice.” (App. pp. 70 -71).

Petitioner contends Trial Counsel was deficient for failing to make the proper argument that witnesses’ credibility can be impeached with convictions under Rule 609, SCRE. Specifically, Petitioner contends that Trial Counsel and Judge Cole had a fundamental misunderstanding of the way Rule 609(a)(1) operates alone and in conjunction with Rule 403, in that “trial counsel and Judge Cole operated under the mistaken belief that prior convictions needed to be crimes of dishonesty or specifically probative regarding the facts of the case being tried, [and] trial counsel mistakenly agreed with Judge Cole that prior convictions were not related to credibility”.

Rule 403 of the South Carolina Rules of Evidence provides:

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.

Rule 609(a) of the South Carolina Rules of Evidence addresses the impeachment of by evidence of conviction of crime. Rule 609(a)(1)-(2) provides:

- (a) General Rule. For the purpose of attacking the credibility of a witness:
 - (1) evidence that a witness other than the 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.
 - (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment.

Rule 609(b) of the South Carolina Rules of Evidence imposes a time limitation regarding the admission of prior convictions for purposes of impeachment. Rule 609(b) 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. 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.

Petitioner relies on the holding in United States v. Lipscomb⁴, asserting that “all prior convictions have some probative value regarding credibility.” However, the holding in Lipscomb states, “all prior convictions that meet the Rule 609(a)(1) threshold are at least somewhat probative of credibility,” in addition to holding the trial court has discretion to decide how much background information, if any, it needs to perform Rule 403’s balance of the evidence’s probative value against prejudice to the defendant.

Lipscomb involved a defendant who was charged with possession of heroin with intent to distribute. Similarly to Petitioner, Lipscomb was tried twice for his charge with the first trial resulting in a hung jury and the second trial resulting in a conviction. The prosecution and defense offered “radically” different versions of the events leading up to the crime at the second trial compared to the first trial, meaning that credibility was central in the Lipscomb case. In the first trial, Lipscomb testified in his own defense. His credibility was impeached at his first trial by an eight-year-old prior conviction for armed robbery and would have been in the second trial should he had testified. Lipscomb, 702 F.2d at 1053. Defense witnesses’ credibility was also impeached with prior convictions, including a 1980 prior conviction for armed robbery, a 1976 prior conviction for accessory after the fact to manslaughter, and another with a 1976 robbery conviction. The only information regarding the prior convictions of the defense witnesses that the

⁴ United States v. Lipscomb, 702 F.2d 1049 (D.C. Cir. 1983).

district court had before it was the name of the crimes and the dates of their occurrences. Id. at 1054.

Petitioner also relies on State v. Robinson⁵, specifically the balancing test utilized within the case pursuant to State v. Colf⁶. Robinson involved a defendant who was charged with first-degree burglary and possession of a weapon during the commission of a violent crime. Robinson's prior convictions for strong arm robbery, first-degree burglary, and breaking and entering automobiles were used to impeach him during his testimony at trial, and Robinson was ultimately convicted. Robinson appealed, and the Court of Appeals found that Robinson's prior convictions were not subject to a meaningful balancing test under Rule 403. His case was remanded to the trial court to conduct an on-record balancing test for certain prior convictions that were used to impeach Robinson's credibility⁷. Robinson again appealed, and the Court of Appeals issued an unpublished opinion holding that although the trial court erred in its application of two of the five Colf factors, the error in application was harmless⁸.

The Supreme Court in Robinson held: (1) the fact that strong arm robbery and breaking and entering automobiles were not crimes involving dishonesty or false statement, by itself, was not dispositive as to whether prior convictions for these offenses lacked impeachment value; (2) trial court did not abuse its discretion in comparing defendant's releases from confinement on prior convictions to dates he committed charged crimes, in considering point in time of prior convictions and defendant's subsequent history; (3) prior convictions for strong arm robbery, first-degree burglary, and breaking and entering into vehicle, were not similar to charged crimes as would

⁵ State v. Robinson, 426 S.C. 579 (2019).

⁶ State v. Colf, 337 S.C. 622 (2000).

⁷ State v. Robinson, Op. No. 2014-UP-068 (S.C. Ct. App. filed Feb. 19, 2014).

⁸ State v. Robinson, Op. No. 2017-UP-065 (S.C. Ct. App. filed Feb. 1, 2017).

warrant exclusion of prior convictions for impeachment purposes; (4) importance of defendant's testimony was not significant, as factor in determining admissibility of prior convictions for impeachment purposes; and (5) credibility of defendant and other witnesses was central to case, as factor in determining admissibility of prior convictions for impeachment purposes. Id.

Robinson outlines the five Colf factors that courts use for a balancing analysis for the admission of prior convictions for purposes of impeachment under Rule 403:

- (1) The impeachment value of the prior crime.
- (2) The point in time of the conviction and the witnesses' 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.

Colf, 337 S.C. 622.

Colf involves a defendant charged with burglary and larceny. At Colf's trial, his prior convictions for attempted breaking and entering, attempted larceny, breaking and entering, larceny, and larceny of a vehicle were admissible for purposes of impeachment. The primary issue in the case was that all prior convictions introduced were more than ten years old. The jury ultimately convicted Colf of burglary. Colf appealed, and the Court of Appeals held that the trial court erred in allowing the State to use evidence of Colf's prior breaking and entering conviction and prior larceny conviction for purposes of impeachment, as they were greater than ten years old and there were no specific facts to support a proper balancing test for each prior conviction. The Court of Appeals additionally considered each prior conviction, and the probative value compared to the prejudicial effect thereof. Colf's conviction was reversed and remanded for a new trial⁹.

The State then filed a petition for writ of certiorari to review the Court of Appeal's decision regarding the admissibility of remote crimes. The Supreme Court in Colf affirmed the Court of

⁹ State v. Colf, 332 S.C. 313, 504 S.E.2d 360.

Appeals' opinion as modified and remanded the case for a new trial, stating that the Court of Appeals was not the proper court to conduct the balancing test pursuant to Rule 403, and rather should have remanded it to trial court, where they are in a more appropriate position to conduct the balancing test¹⁰.

Here, the record reflects that the trial court did properly analyze the Colf factors for the purposes of Rule 403, where each necessary prior conviction was subject to a meaningful balancing test to determine admissibility. None of the prior convictions at issue were greater than ten years in age, so Rule 609(b) was not at issue. The trial court went through a lengthy analysis of both Summer and Christine's prior convictions for possession of methamphetamine and child neglect that did not automatically satisfy Rule 609(a)(2), and properly determined that the prior convictions were inadmissible considering their probative value was substantially outweighed by the danger of unfair prejudice. (App. pp. 64, ll. 8 – pp. 71, ll. 12).

Christine's prior convictions for shoplifting were admitted because they satisfy Rule 609(a)(2) as a crime of dishonesty and therefore were not subject to a balancing test under Rule 403, but rather automatically admitted as evidence for purposes of impeachment. Christine's prior conviction for child neglect does not satisfy Rule 609(a)(2), because does not constitute a crime of dishonesty. Under Rule 609(a)(1), the prior conviction for child neglect shall be admitted pursuant to a balancing test under Rule 403, and the conviction must be punishable by death or imprisonment for more than one year. Christine's prior conviction for child neglect does meet the punishment requirement, however it failed under the Rule 403 balancing test as the probative value was substantially outweighed by the danger of unfair prejudice and was therefore not admitted for purposes of impeachment. (App. pp. 69, ll. 24 – pp. 71, ll. 12).

¹⁰ State v. Colf, 337 S.C. 622, 525 S.E.2d 246.

Summer's prior conviction for possession of methamphetamine does not satisfy Rule 609(a)(2), because it is not a crime of dishonesty. Under Rule 609(a)(1), the prior conviction for possession of methamphetamine shall be admitted pursuant to a balancing test under Rule 403, and the conviction must be punishable by death or imprisonment for more than one year. Summer's prior conviction for methamphetamine does meet the punishment requirement, however it failed under the Rule 403 balancing test as its probative value was substantially outweighed by the danger of unfair prejudice and was therefore not admitted for purposes of impeachment. (App. pp. 64, ll. 8 – pp. 69, ll. 19).

While Trial Counsel was successful on some and not successful on others, the record shows that Trial Counsel argued arduously and effectively for the admission of all prior convictions of Summer and Christine. Trial Counsel cannot be deficient when a well-reasoned argument is presented to the trial court, and the trial court rejects the argument. See Mazzell v. Evatt, 88 F.3d 263, 269 (4th Cir. 1996). The post-conviction relief court properly found that Trial Counsel effectively argued for the admission of all prior convictions of witnesses Summer Hall and Christine Richard.

Further, although unnecessary considering Petitioner failed to prove deficiency, the post-conviction relief court properly found that Petitioner failed to meet his burden of proving prejudice. In a post-conviction relief action, the Petitioner bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRPC; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Petitioner asserts that he was prejudiced by Christine and Summer being impeached in Petitioner's first trial, but not his second trial. This contention is directly refuted by the record and is also meritless.

The fact that [an] issue may have been ruled upon in the first trial does not preclude the defendant from making the same, different, or additional arguments to the trial court on retrial regarding admission or exclusion and does not preclude a different ruling. State v. Woods, 382, S.C. 153, 158, 676 S.E.2d 128, 131 (2009). (“A mistrial is the equivalent of no trial and leaves the cause pending in the [trial] court.”); State v. Smith, 336 S.C. 39, 43-44, 518 S.E.2d 294, 296 (Ct. App. 1999). (“Because a mistrial is the equivalent of no trial, the trial [court] could not rely on any evidentiary rulings from the nugatory proceeding.”). “When a mistrial occurs because of the inability of a jury to agree on a verdict, it is the same as if no trial took place.” Grooms v. Zander, 246 S.C. 512, 514, 144 S.E.2d 909, 910 (1965) (finding that rulings of a trial judge in a proceeding ending in mistrial represent no binding adjudication upon the parties as the mistrial leaves the parties in *status quo ante*).

Petitioner cannot prove prejudice by claiming that his second trial resulted in his conviction while his first trial resulted in a hung jury, as his mistrial was equivalent of having no trial at that point. The fact that different and/or additional prior convictions of defense witnesses were admitted as evidence for purposes of impeachment in Petitioner’s second trial cannot be a ground to prove prejudice, as comparing it to the first trial is fruitless considering it is as if the first trial never occurred. Further, each trial court had the discretion and authority to rule on the admissibility of the evidence presented pursuant to the South Carolina Rules of Evidence, and neither abused their discretion in doing so.

Additionally, prior convictions of defense witnesses were admitted for purposes of impeachment. Demetrius Stevenson’s prior convictions for shoplifting in 2011 and 2013 were admitted under Rule 609(a)(2). Sherill Mills’ prior conviction for shoplifting in 2020 was admitted under Rule 609(a)(2). LaToya Thompson’s prior conviction for shoplifting in 2011 was admitted

under Rule 609(a)(2). Detria Mills' prior conviction for shoplifting in 2016 was admitted under Rule 609(a)(2), while the other shoplifting conviction was excluded for being outside of the ten-year range of Rule 609(b), where the Court found that the probative value was substantially outweighed by the danger of unfair prejudice. (App. p. 273; p. 287; p. 300; p. 314).

The nondisclosure of Summer's prior conviction for possession of methamphetamine and of Christine's prior conviction for child neglect did not prejudice Petitioner, because the nondisclosure did not change the outcome of Petitioner's trial. Christine's credibility was impeached by her prior conviction for shoplifting being introduced, in addition to both her and Summer being impeached with prior inconsistent statements. See State v. Cheeseboro, 346 S.C. 526, 553-554, 552 S.E.2d 300, 314-315 (2001) (finding the nondisclosure of evidence did not deprive Cheeseboro of a fair trial where the evidence had limited impeachment value and the witness was thoroughly impeached with other evidence); See also State v. Gunn, 313 S.C. 124, 137, 437 S.E.2d 75, 82 (1993) ("The exclusion of impeaching evidence is not prejudicial where it has no meaningful impact on a witness's credibility. In light of the abundance of other evidence detailing Roxanne's unabashed disrespect for the law, appellants cannot establish that the trial court's ruling denied them a fair trial." (citations omitted)). Additional impeaching evidence would not have changed the outcome of Petitioner's trial. Duncan v. State, 281 S.C. 435, 439, 315 S.E.2d 809, 811 (1984) (concluding "the *additional* impeaching evidence of the inconsistent statement would not have had a meaningful impact on Davis' credibility." (emphasis added)).

Therefore, the post-conviction relief court properly found that Petitioner failed to meet his burden of proving both deficiency and prejudice and the Court should deny certiorari to this issue.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the post-conviction relief court's denial of relief. Should this Court grant certiorari, Respondent requests the opportunity to brief the issues discussed above fully.

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