

ORIGINAL

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

Appeal from Richland County
J. C. Buddy Nicholson, Jr., Circuit Court Judge
2006-GS-40-7464; 2006-GS-40-7466

STATE OF SOUTH CAROLINA,

Respondent,

v.

CHRISTOPHER HELLER,

Appellant, .

BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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PETITIONER'S ISSUE PRESENTED

Whether the Court of Appeals erred by holding that any error in allowing petitioner to be impeached with his prior drug convictions pursuant to Rule 609(a)(1), SCRE, was harmless since their unduly prejudicial effect was highlighted by the solicitor admitting the nature of the convictions made them relevant to whether the jury believed petitioner that the police were lying and coerced his statements since this impermissibly invited the jury to find petitioner was acting in character in this case with his past drug convictions, and invited a verdict on an improper basis?

STATEMENT OF THE CASE

On August 25, 2006, Petitioner (Christopher Robert Heller) murdered Gustavo Hernandez Guzman by stabbing him with a knife and attempted to murder Mary Chavis by stabbing her multiple times with the same knife. Both crimes were committed in Richland County.

Heller was arrested in Baxley, Georgia on August 31, 2006. Heller waived extradition and was returned to South Carolina. Heller was charged with murder and assault and battery with intent to kill (ABWIK).

Heller was subsequently indicted by the Richland County Grand Jury for the offenses of murder (Ind. No. 06-GS-40-7464) and ABWIK (Ind. No. 06-GS-40-7466). Heller was represented on the charges by Gregory Collins, Esquire. Assistant Solicitors Margaret Fent and Dolly Justice Garfield prosecuted the case on behalf of the State of South Carolina.

The case was called for trial on January 26, 2009 before the Honorable J.C. "Buddy" Nicholson, Jr., Circuit Court Judge, and a jury. At the trial's conclusion, Heller was convicted of murder and ABWIK. Judge Nicholson sentenced Heller to life imprisonment for murder and twenty (20) years concurrent for ABWIK.

Petitioner appealed raising three (3) issues. On June 13, 2012, his convictions and sentences were affirmed by the Court of Appeals in a published opinion. State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012). A petition for rehearing was denied. Heller then filed a Petition for Writ of Certiorari in this Court. This Court granted certiorari but only as to Issue II. of the Petition. Petitioner has filed his brief. This responsive brief of Respondent follows.

RESPONDENT'S STATEMENT OF FACTS

During the early morning hours of August 25, 2006, while still dark, Neil Schmitz, an ambulance driver and EMT, received a call to go to a mobile home park on Brookhurst Road off Percival Road not far from the Blue Cross/Blue Shield building. The call was in reference to an unknown body. (R. 229-38).

When Schmitz arrived at the location, he found the first (1st) victim, Gustavo Hernandez Guzman ("Chino"), lying in the roadway outside the mobile home park. After determining that Chino was dead, Schmitz notified the Sheriff's Office and backed away from the body so as not to disturb the crime scene. (R. 229-38).

Deputy Joe Clark of the Richland County Sheriff's Office responded to the scene within minutes and confirmed the dead body. Clark then entered a mobile home in the trailer park near where Chino's body was found because Clark could see the door was open to this home from where the body was located, and Deputy Clark heard someone moaning and calling for help from inside. Once inside the home, Clark found a second (2nd) victim, Mary Chavis ("Mary"), lying on the living room floor suffering from numerous stab wounds. (R. 238-46).

Mary had been grievously wounded and was trying to hold her intestines in her body. (R. 241). Schmitz, the EMT, was immediately called inside the mobile home where he began treating Mary. (R. 233-35). Mary was transported by ambulance to the hospital, where after emergency treatment by several doctors, she was able to survive her stab wounds. (R. 234-38, 321, 324-26, 353-73). Mary had to undergo multiple surgeries as a result of the numerous stab wounds to her face, hands, and body. (R. 353-73). Mary remained in the hospital for more than a month as a result of her injuries. (R. 465).

The autopsy on Chino's body determined he died from a direct stab wound to his heart. (R.

596-606). Chino also had four (4) incised or stab wounds to the face, an incised wound to the shoulder, and two (2) defensive wounds to his left hand. (R. 598-99). The pathologist opined at trial that the most likely murder weapon was a pocket knife with a three (3) to four (4) inch blade. (R. 601-02).

After the criminal investigation began, police were able to locate a witness who was actually inside Mary's home when Petitioner, Christopher Robert Heller ("Heller"), assaulted Mary and Chino with his knife. (R. 334-35). This witness, Bille Joe Risinger, known as "Tracy," had hid under a bed in a bedroom when Heller entered the trailer and brutally stabbed the two (2) victims. During the assault, Tracy heard Mary's screams and calls for help, but because of her fear, Tracy remained under the bed until the assaults were over. (R. 337, 373-405). Police also identified another witness, Kevin Nails, who had been present at the crime scene earlier and had actually brought Heller to the mobile home earlier in the night before the assaults. (R. 337-40, 415-43).

Tracy testified that she had been smoking crack cocaine with Heller, Mary, and Chino before the assaults occurred. (R. 379). Tracy testified that later, still during the early morning hours of August 25th, 2006, Mary, the surviving victim, asked Heller to leave the trailer because Heller was "acting weird."¹ (R. 379). Tracy testified that after being asked to leave Heller left, but then he came right back and knocked on the door. (R. 376-383). Tracy testified it was Heller's voice at the door. (R. 380-83). It is clear from Tracy's testimony she sensed something was going to happen, and she told Mary not to open the door; and Tracy fled to a bedroom and locked the

¹Tracy testified Heller gave her "the creeps," was acting like he was "up to something," and tried to follow her out of the trailer on one occasion. (R. 379, 382). She also testified Heller was taking his clothes off and putting them back on. (R. 379). When he did this, she saw several tattoos on him, one of which said "made man" and another that had dollar (\$) signs. (R. 392-93). Heller admitted at trial he had these tattoos. (R. 807). An investigator also testified to the fact Heller had these tattoos on his body after arrest. (R. 691).

door. (R. 380-88).

The assaults occurred when Mary opened the front door and Heller tried to come back into the home. (R. 380-88, 461). Mary placed her hand on Heller's chest but she could not prevent his re-entry into the home. (R. 461). As he was trying to enter and once inside the home, Heller stabbed Mary numerous times and then stabbed Chino after Chino tried to come to Mary's aid. (R. 373-405, 449-86, 661-64).²

After stabbing Mary and then Chino, Heller fled from the crime scene on foot. (R. 663). After the assaults were over and Heller had fled, Tracy left the home and flagged down Kevin Nails who was returning to the home in his car. Nails had left the home earlier, before the assaults, with another friend, Devon Harris ("Devon"), and these two (2) men had gone to the Oasis nightclub, leaving Heller at Mary's home. Nails was returning to the mobile home park to pick up Heller when Tracy flagged him down. Still under the influence of the event, Tracy jumped in Nails' car and told Nails "his boy [Heller] had snapped and was trying to kill everyone." (R. 373-405, 415-43). As a result of Tracy's and other information, police were able to locate and interview Nails. (R. 337-40). Nails confirmed the person he brought to the trailer earlier that night and left there at the scene, while he and Devon went to the "Oasis," was in fact *his cousin*, petitioner Heller. (R. 337-40, 634-35).

Nails testified that when he and Devon left the mobile home park to go to the Oasis nightclub, Heller wanted to remain at the mobile home to have sex with Tracy. Nails testified that when he returned to the mobile home park in an attempt to find his cousin, Tracy jumped in his car

²Chino was not in the home when the assault on Mary began; he lived in another mobile home across from Mary's home. (R. 379-80, 386, 452, 460). From the record, it appears Chino came to help Mary when he also heard her screams and cries for help. (R. 384, 386, 661-63, 464).

and made the excited utterance.

Nails also testified at trial that *late the evening following the murder and ABWIK*, his cousin, Heller, called him and told him he needed a ride back home.³ Nails testified he went and picked Heller up, at a location not far from the crime scene, and took Heller to another location where Heller got out of Nails' car and got into a car driven by Nails' mother. Nails did not see Heller any more. (R. 415-43).

On August 30, 2006, police placed Heller's photograph in a photographic line up, and Mary positively identified Heller as the person who stabbed her numerous times. Mary made the identification in her hospital room while still recuperating from her injuries. (R. 468-69, 640-42). Mary also testified that after she was stabbed, when Chino came in the home, she saw some type of arm movement, Chino ran from her home, and Heller ran after Chino. (R. 464, 471). Also on August 30, 2006, Tracy was also shown a photographic line-up by police. She also positively identified Heller. She identified Heller as the man Nails brought to the trailer, the man who Mary asked to leave, and as the man who returned and committed the murder and ABWIK. (R. 186-87, 637-39). Based on the information gained through the investigation, police obtained arrest warrants on Heller for murder and ABWIK. (R. 642).

After committing these brutal crimes, Heller eventually fled to his home in the State of Georgia. Through investigation, police were able to determine that Heller was a resident of Appling County. (R. 337-40). Police traveled to Baxley, Georgia, located in Appling County, on August 31, 2006. While there, assisted by the Appling County Sheriff's Office, police obtained a

³Heller was from Georgia. (R. 642, 797). Heller was in Columbia because he and Nails were supposed to take a trip to Harrah's Casino in Cherokee, North Carolina. (R. 664). After the assaults, which occurred in the early morning hours of August 25th, Heller hid in an abandoned mobile home until the sun came up and all of the remaining day. (R. 663). Around 9 p.m., still on August 25th, Heller left the trailer and contacted Nails by borrowing a phone from a woman who lived near the abandoned trailer. (R. 663, 790).

search warrant for Heller's residence. Police searched Heller's home and recovered clothing they believed Heller was wearing when the murder and ABWIK were committed. Heller was arrested later that day in the town of Baxley.

Before returning to South Carolina with investigators, Heller was read his Miranda rights and executed a Voluntary Waiver of Rights Form. Heller was questioned there in Baxley by two (2) investigators from the Richland County Sheriff's Office.

After executing the Voluntary Waiver of Rights Form, Heller gave police a written confession to the murder of Chino and to the attempted murder of Mary Chavis. (R. 661-65). In his confession, consistent with the other witnesses' statements, Heller admitted that he went to Mary Chavis' mobile home with his cousin [Nails] and another black male [Devon]. (R. 661). Heller explained that they were with a white girl [Tracy] and they entered a home where there was a white lady [Mary] and a Mexican man [Chino]. (R. 661). Heller stated that he, Nails, and the white girl started smoking crack. Heller stated that after he smoked crack, he was asked to leave the home by the lady [Mary]. (R. 661). Heller stated he told Mary he was just waiting on Nails to come back and pick him up. (R. 661-62).

Heller then admitted to both investigators that he started stabbing people. (R. 662). Heller was asked where he got the knife, and he stated the knife was his. (R. 662). Heller told police the knife was a fold up knife with a brown handle, and the knife had about a two (2) or three (3) inch long blade. (R. 662). During his confession, Heller was asked by police who he stabbed first. Heller stated he stabbed the lady [Mary] first. (R. 662). Heller stated the man [Chino] jumped on his back inside the trailer. (R. 662).

Heller was asked what he did after stabbing the lady and the man. (R. 663). Heller stated

he ran, found an old empty trailer and hid there until about dark. (R. 663).⁴ Heller stated he then asked another lady if he could use her phone to call someone to pick him up. She allowed him to use the phone, and he then called his cousin Nails, and Nails came and picked him up. (R. 663). Heller stated that Nails called Nails' mother, Carolyn Robinson, who met them on the interstate, and she took him home to Georgia. (R. 663). Heller was then asked what he did with the knife. (R. 663). Heller stated he threw it somewhere after leaving "the girl's" trailer. (R. 663). Heller told police the reason he was in Columbia, S.C. on the date of the murder was because his aunt Carolyn was supposed to take he and Nails to the casino in Cherokee, North Carolina. (R. 664). When asked if there was anything else he would like to add to the statement, Heller responded, "No, sir. Everything I told you was the truth." (R. 663).

Heller had an opportunity to review the statement, and he then signed the written confession as true and correct. (R. 663-64). Heller also accompanied investigators back to his mother's home and pointed out additional clothing he claimed he was wearing when he murdered Chino and stabbed Mary. (R. 663, 672-74). Heller waived extradition to South Carolina to face the charges of murder and ABWIK. (R. 675).

On the return trip to Columbia, S.C., investigators took Heller by the crime scene. Heller pointed out to investigators where he spent the remainder of the early morning hours of the 25th and the following daylight hours after the assault on Mary and the deadly assault on Chino. (R. 676). Heller told police he stayed in an abandoned trailer on Percival Road the day following the murder and ABWIK. (R. 676-77). Heller also told police the general area where he threw the

⁴It was dark when the crimes were committed around 3 to 4 a.m. in the morning. As previously stated, Heller fled the crime scene and stayed in an abandoned trailer until the sun came up, all of the following daylight hours, and remained in the abandoned trailer until about 9:00 p.m. still on the 25th of August. (R. 663-64). He then walked to another residence and asked a lady there if he could use her telephone. (R. 663-64).

murder weapon. (R. 678).

On September 4, 2006, an investigator took Heller back out to the crime scene and surrounding area. (R. 680). Heller was again read his Miranda rights, and Heller again executed a Voluntary Waiver of Rights Form. (R. 682-83). Heller again showed an investigator the path he took from the crime scene after the murder and ABWIK. Heller again showed an investigator where he hid during the early morning hours of August 25, 2006 and during the following day. Heller also attempted to show an investigator where he threw the murder weapon and how he threw it. (R. 681-88). Police searched for the weapon, but were unable to locate it. (R. 688-89). Additionally, Heller's DNA was also forensically matched to a cigarette butt found in an ashtray inside the crime scene. (R. 578).

At trial, over two (2) years after his confession to law enforcement, Heller testified and denied he told police that he stabbed anyone. Heller denied he told police he had a two (2) to three (3) inch knife or where he threw the knife. Contrary to his signed confession, Heller claimed he left the home before the assaults occurred and did not know who committed the murder or ABWIK.

On cross-examination, Heller was impeached with the written confession he signed which set forth clearly his admitting to the stabbing of the two (2) victims and that he signed the statement as true. (R. 799-805). Heller was also impeached with the fact that he could read and write. (R. 795-96, 801). Heller was also impeached with the Voluntary Waiver of Rights Form he executed. (R. 794-98). Heller also admitted on cross-examination that when his father called him at the Richland County Detention Center after his arrest and asked him what he had done, he told his father that he could not tell him over the phone. (R. 816). Heller also admitted on cross-examination, that before the crimes occurred, he wanted to have sex with Tracy, and did

have an argument with Tracy on the night in question. (R. 786-87). Heller further admitted Mary asked him to leave the home because he was arguing with Tracy. (R. 788). Heller also admitted he went next door and tried to use a telephone to call Nails to come and pick him up at Mary's home. (R. 788). Heller also admitted he stayed in a vacant trailer all of the following day until it was dark or almost dark. (R. 789-90). Heller admitted he stayed in this trailer the entire day of August 25th even though it was the end of August in Columbia, S.C., and there was no air conditioning in the abandoned trailer. (R. 789-90). Heller also admitted, that after he left the abandoned trailer, he called Nails around 9 p.m. and told him he needed a ride. (R. 789-91). Heller further admitted his aunt met he and Nails, and she took him to Georgia. (R. 791-92). Heller also admitted that he, Nails, and his aunt never traveled to Cherokee, North Carolina, the reason he was in Columbia on the date of the crimes, but he instead returned to Georgia. (R. 792).

ARGUMENT

The trial court did not err in allowing the impeachment of Heller with his prior convictions, because the probative value of the prior convictions outweighed any prejudicial effect in this case where Heller directly challenged his confession as involuntary and coerced and admitted that he possessed crack cocaine on the night in question, and smoked crack on the night in question; and, the testimony established he was accompanying a drug dealer on the night in question, was arguing with an eyewitness on the night in question over drugs or money the witness owed him, and smoked crack with another witness who paid him money for the drugs he smoked with the first witness and gave him additional money after smoking crack with Heller; and, even assuming *arguendo* some error in the admission of these prior convictions for impeachment purposes, their admission was harmless given the overwhelming evidence of Heller's guilt and the other impeachment of his testimony.

What Occurred at Trial

At trial, Heller alleged both Richland County investigators were lying when they testified he admitted to stabbing the victims. Heller directly challenged the voluntariness of his confession and testified it was coerced. He did so in a Jackson v. Denno⁵ hearing and before the jury. Heller contended at trial he really only admitted to investigators to being at the scene and then leaving before anyone was assaulted. Heller contended he signed his confession, within which he admitted to stabbing both victims, without reading it and was also coerced into signing the statement by threats investigators made against his mother and fiancé.

The investigators testified Heller's confession was given freely and voluntarily, and Heller was not coerced or threatened in any fashion. (R. 519-27, 649-75). The investigators also testified *Heller did tell them* he attacked the victims with a knife, and he read over his confession before signing it. (R. 519-28, 649-75, 694). The investigators denied that they threatened Heller with charges against his mother and fiancé. (R. 543-44, 649-75). In fact, Sheriff Deloach, from Baxley, Georgia, testified at the Denno hearing, that the South Carolina investigators had nothing to do with the harboring a fugitive charges Heller's mother and fiancé were initially arrested for and

⁵ 378 U.S. 368 (1964).

were not consulted regarding the same. (R. 92-100).⁶ Sheriff Deloach also testified that after Heller turned himself in, his mother and his fiancé were released from custody and no warrants were ever served on them. (R. 96).

How the issue was raised

Prior to the defense beginning its case, the trial judge was conducting an *in camera* hearing when *the Solicitor* broached the need to go over Heller's criminal record if Heller was going to testify, to determine the admissibility of any prior convictions for impeachment purposes. (R. 749-53). The State proposed to impeach Heller with prior convictions for possession with intent to distribute (PWID) marijuana, trafficking in crack within one half-mile of a public park, and distribution of narcotics. (R. 749-51). Heller had *no other convictions* with which the State could impeach his claim officers fabricated his confession, that he signed, and his claim he was coerced into signing the statement he alleged he did not make. (R. 749-51). In justifying the admissibility of the convictions for impeachment purposes, the State specifically referred to Heller's Denno testimony alleging his confession was false and coerced. The Solicitor stated that the convictions should be admitted so the jury could judge his credibility regarding the confession and judge his credibility versus the other witnesses who testified. (R. 752).⁷

Heller *argued* against the admissibility of the prior convictions. (R. 751-53). Heller argued the convictions fell under Rule 609(a)(1) and Rule 403's *balancing test*, and the prejudicial value far outweighed any probative value these convictions could have. (R. 751). The defense argued

⁶Heller's mother and fiancé were taken into custody by Appling County detectives during the morning when police went to Heller's residence with the search warrant. Heller turned himself into police in the afternoon. (See Denno testimony)

⁷The State satisfied its initial requirement to show the probative value in support of the admission of the prior convictions for impeachment purposes. (R. 749-53). State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001); State v. Scriven, 339 S.C. 333, 529 S.E.2d 246 (2000).

the probative value of these charges was nothing, and the evidence was offered strictly as propensity evidence. (R. 751).⁸

The State argued the convictions were admissible for impeachment purposes because Heller was not on trial for drug violations but for murder and ABWIK, and therefore the prejudice to Heller was minimal. (R. 751-52). The State also argued the probative value of the convictions outweighed their prejudicial effect, because credibility of the witnesses regarding the credibility of the confession was directly placed in issue by Heller. (R. 751-52). Also, the State noted the prejudice was minimal because Heller was admittedly with his cousin, a drug dealer, on the night in question, and Heller was admittedly using drugs on the night in question. (R. 749-53).

After hearing the argument of both sides, regarding the reason for the admission of the impeachment evidence and the probative value of its admission versus its prejudicial effect, the court ruled that the Solicitor would be allowed to impeach Heller with the prior convictions and denied Heller's "motion" to prevent the use of the prior convictions.⁹ (R. 753). Heller raised no objection to the court's *in limine* or *in camera* ruling. (R. 753). Heller raised no objection that the trial court did not engage in an on the record balancing test under State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (Ct. App. 2000). (R. 753).¹⁰

Heller's mother was then called as a witness and testified for twelve (12) pages of the trial

⁸The defense also stated: "This case isn't about drug dealers." (R. 751). This statement will become important later.

⁹The record shows trial counsel did not make a motion to prohibit the use of the convictions for impeachment purposes, but simply argued against their admissibility. The subject was actually broached by the Solicitor. The trial judge treated defense counsel's argument as a motion. (R. 749-53).

¹⁰The current state of the law does not mandate the trial court make an on-the-record specific finding 'as long as the record reveals that the trial judge did engage in a meaningful balancing of the probative value and the prejudicial effect before admitting a non-609(a)(2) prior conviction under 609(a)(1).'" State v. Elmore, 368 S.C. 230, 628 S.E.2d 721 (Ct. App. 2006), *cert. denied*, quoting State v. Scriven, 339 S.C. 333, 341, 529 S.E.2d 71, 75 (Ct. App. 2000).

transcript. (R. 754-66). Counsel then called Heller to the stand. (R. 766).¹¹

On *direct examination* of Heller, defense counsel elicited from Heller that he had previously been convicted of *drug violations and drug dealing*. (R. 767).¹² However, Heller did not tell the jury the extent or seriousness of his convictions. (R. 767). On *direct examination*, Heller also testified he was at a job interview on the day police were looking for him in Georgia because it was hard to get a job when you are someone *with a criminal record* like him. (R. 773).¹³

On cross-examination, the State impeached Heller with his prior convictions and their dates. (R. 815-16). Once Heller admitted to the convictions and their dates, the Solicitor asked no further questions of Heller in this regard. (R. 816). The Solicitor also impeached Heller in numerous other ways independent of the prior convictions. (R. 783-819).

Standard of Review

In criminal cases, this court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, this court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Landis, 362 S.C. 97, 101, 606 S.E.2d 503, 504 (Ct. App.

¹¹Heller did not renew his "motion" before or during Heller's testimony. (R. 766-83). Heller made no objection and did not renew his "motion" during Heller's cross-examination. (R. 783-819). Heller did not renew his motion during his redirect examination of Heller. Only after the defense rested its case, did Heller make a general motion renewing all prior motions and objections and move for a directed verdict. (R. 821-22). The renewal of all motions and the motion for a directed verdict were denied. (R. 822). Heller did renew his "motion" regarding the admissibility of the prior convictions after the verdict was returned.

¹²This issue may be preserved pursuant to State v. Mueller, 319 S.C. 266, 460 S.E.2d 409 (Ct. App. 1995)(issue preserved where party receives a ruling just prior to witness testifying and he elicits the prior convictions on direct examination, ruling was final); *but see* Ohler v. United States, 529 U.S. 753, 760, 120 S.Ct. 1851, 1855 (2000)(holding that "a defendant who preemptively introduces evidence of a prior conviction on direct examination may not appeal claim that the admission of such evidence was error"), *and see* State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997)(*in camera* ruling was not final where two witnesses testified after ruling and objection was not renewed).

¹³It was not necessary to elicit this testimony in anticipation of the Solicitor cross-examining Heller on his criminal record. Counsel had already elicited from Heller that he had prior convictions for drugs and drug dealing. (R. 767). It is clear Heller elicited this testimony for his own strategic purposes. (R. 767, 773).

2004). On appeal, this court is limited to determining whether the trial court abused its discretion. State v. Walker, 366 S.C. 643, 653, 623 S.E.2d 122, 127 (Ct. App. 2005). The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed absent a prejudicial abuse of discretion. State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982).

The admission or exclusion of evidence is within the sound discretion of the trial judge and is reversible only for an abuse of discretion. State v. Morris, 376 S.C. 189, 205, 656 S.E.2d 359, 368 (2008). The scope of cross examination is also within the discretion of the trial court, and the court's decision regarding it will not be reversed absent a showing of prejudice. State v. Colf, 337 S.C. 622, 625, 525 S.E.2d 246, 247-48 (Ct. App. 2000). This Court cannot disturb the trial judge's decision regarding the scope of cross-examination of a witness unless an appellant shows both prejudice and an abuse of discretion. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991). *See also* State v. Sprouse, 325 S.C. 275, 478 S.E.2d 871, 873 (Ct. App. 1996)(an appellate court will not disturb a trial judge's ruling concerning the scope of cross-examination of a witness to test his or her credibility, or to show possible bias or self-interest in testifying, absent a manifest abuse of discretion). The admission of prior convictions to impeach the credibility of a defendant is a matter within the sound discretion of the trial court, and thus, its decision will not be reversed absent an abuse of discretion. Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000). An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law. State v. Wilson, 345 S.C. 1, 5-6. 545 S.E.2d 827, 829 (2001). Further, any error in the trial court's failure to conduct the proper balancing test in determining the admissibility of convictions may be harmless. *See* State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005).

The Lack of Merit of Heller's Issue

The court did not abuse its discretion in admitting the prior convictions for impeachment purposes. Heller has failed to show an abuse of discretion in this regard. The convictions were admissible for the purpose for which they were admitted, to impeach Heller's assertions at trial he did not confess, did not read his confession before signing it, and that he was coerced into signing his confession. The evidence was not admitted to show Heller acted in conformity with his prior convictions as he alleges above. Given this record, the probative value of the convictions for impeachment purposes outweighed its limited prejudicial impact to Heller. Rule 609(a)(1) S.C.R.E.. Regardless, the admission of the prior convictions for impeachment purposes was harmless given the overwhelming evidence of Heller's guilt and the other impeachment of Heller's testimony.

Legal Analysis

The Ruling was Correct Given the Basis of the Objection

The trial court's ruling was correct *given the basis of Heller's objection* at trial. Heller stated below that the issue was under 609(a)(1) *and Rule 403's balancing test*, and still argued on appeal (See B.O.A. p. 10.) that the court erred in admitting his prior convictions *under Rule 403 S.C.R.E.'s balancing test*. Heller is wrong. Rule 403's balancing test is applied when a conviction is offered to impeach a witness *who is not the defendant*. See Rule 609(a)(1) S.C.R.E. Rule 609(a)(1) provides convictions of crimes carrying more than one (1) year in prison are admissible for impeachment purposes against a defendant provided they meet the appropriate balancing test. Since the evidence was offered against the defendant, Rule 609(a)(1) provides its own balancing test which states the evidence probative value must outweigh its prejudicial effect to be admissible.

State v. Martin, 347 S.C. 522, 556 S.E.2d 706 (Ct. App. 2001).¹⁴ Heller objected below and continued to object on appeal under the wrong rule.¹⁵ The trial court could not have erred in denying the motion because Rule 403 does not apply to convictions of a defendant offered for impeachment purposes.

The Evidence was Admissible under Rule 403's or Rule 609's Balancing Test

Additionally, even if the trial court did not deny the motion because Heller objected under the wrong rule, and instead applied the Rule 403 balancing test *as appellant asserts it should have*, the court did not err. "If judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal." State v. Hamilton, 344 S.C. 344, 358, 543 S.E.2d 586, 598 (Ct. App. 2001). *See also*, Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (Ct. App. 2003)(a trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of highly subjective factors of the probative value or the prejudice presented by evidence).

Rule 403 provides 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 delay, waste of time, or needless presentation of cumulative evidence. This is a more difficult standard for Heller to meet. To *exclude evidence* under Rule 403, the probative

¹⁴Under Rule 609(a)(1), *a defendant's prior convictions may be* admitted for the purposes of impeachment. Rule 609(a)(1) provides a two (2) part test for determining whether *a defendant's prior convictions* can be used to impeach him: (1) the prior crime must have been punishable by death or imprisonment in excess of one year; and (2) the court must determine the probative value of admitting the evidence outweighs its prejudicial effect to the accused. State v. Rollins, 348 S.C. 649, 560 S.E.2d 450 (Ct. App. 2002); State v. Martin, *supra*

¹⁵Heller's mistake at trial and on appeal would not be uncommon. A mistaken reference to Rule 403's balancing test for witness' convictions instead of Rule 609(a)(1)'s balancing test for a defendant's prior convictions has even occurred in our appellate courts. *See State v. Young*, 378 S.C. 101, 661 S.E.2d 387 (2008)("...the State was limited to presenting evidence admissible under Rule 609, SCRE, to impeach Young's credibility. Pursuant to Rule 609(a)(1), such evidence is limited to prior convictions for crimes punishable by imprisonment in excess of one year, subject to *Rule 403.*") *emphasis added*. This italics portion of this quotation by this Court is clearly a mistake and appears to be a common one because both Rules involve balancing probative value against prejudice.

value of the evidence must be *substantially outweighed*, not merely outweighed by the danger of prejudice. The court did not err in admitting the prior convictions for impeachment purposes under the Rule asserted by Heller below and in his brief or *under the appropriate standard* set forth in Rule 609(a)(1). A trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). The alleged prejudice to Heller did not substantially outweigh the probative value of these dissimilar convictions. Nor, given this record, did it outweigh the probative value of these convictions. Colf, *supra* (approving five factor analysis for weighing the probative value for impeachment of prior convictions against the prejudice to the accused, but noting there may be other factors which a judge should, in the exercise of discretion, consider under facts and circumstances of each particular case); Elmore, *supra*; Scriven, *supra*.

To the extent this Court finds Heller mis-spoke or mistakenly referred to Rule 403 when the intent of the trial judge was to conduct the appropriate balancing test under Rule 609(a)(1), the court still did not err. *See Adams* (a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only under exceptional circumstances).

Respondent submits the learned trial judge understood the balancing test to be whether the probative value of the evidence outweighed its prejudicial effect. *See generally Ray v. State*, 310 S.C. 431, 427 S.E.2d 171 (1993) (judges are presumed to know the law), *citations omitted*. (See also argument of counsel and the court's ruling). (R. 749-753). "The current state of the law does not mandate the trial court make an on-the-record specific finding 'as long as the record reveals that the trial judge did engage in a meaningful balancing of the probative value and the prejudicial

effect before admitting a non-609(a)(2) prior conviction under 609(a)(1).” State v. Elmore, 368 S.C. 230, 628 S.E.2d 721 (Ct. App. 2006), *cert. denied*, quoting Scriven, 339 S.C. at 341, 529 S.E.2d at 75.¹⁶ The record of the argument and the court’s ruling shows this occurred. It is also clear from the court’s charge to the jury, the trial judge understood Heller’s prior record was relevant and admissible on the issue of the voluntariness of his confession. (See R. 866-67). The record shows the court did not abuse its discretion in admitting the prior convictions for impeachment purposes under Rule 609. Heller claimed below and continues to complain on appeal that the convictions were prejudicial because they were drug convictions and were offered to show propensity, and therefore, there was a significant danger that the jury would convict him of murder and ABWIK because he had previously been convicted of PWID, Trafficking, and Distribution. This argument is spurious, as the trial record shows.

The convictions *were admitted* solely for the purposes of impeachment. (R. 749-53). Heller *was asked* by the State whether he had been convicted of these crimes solely for impeachment purposes. (R. 749-53, 815-16). No one argued Heller had previously been convicted of a crime of violence, and therefore, he was more likely to have committed the crimes for which he was on trial. (R. 815-16, 824-36, 847-59). Nor is there any such inference in the record. When Heller admitted the convictions, the State asked no further questions regarding them. (R. 815-16). Furthermore, these questions came right on the heels of asking Heller about an inconsistent statement he made during the Denno hearing regarding the voluntariness of his confession. (See R. 815). The timing of the Solicitor’s questions regarding the convictions clearly

¹⁶*But see State v. Johnson, supra* (finding when considering the admission of *remote* prior convictions a trial judge must conduct the Colf balancing test), and State v. Martin, supra (remanding this issue to the trial court where this Court could not tell from the record that any meaningful balancing of the probative value versus the prejudicial effect had taken place as required by Rule 609(a)(1)).

shows the State's intent was solely to impeach Heller regarding his claims about the confession.

In fact, the only mention of the convictions during the State's closing argument was Heller's confession was voluntary, and as a result his claim that he was coerced was not credible, because this was not Heller's first time being involved with the criminal justice system, i.e. argument with regard to the totality of the circumstances of the confession. (See R. 835). This was a proper argument given the convictions were admitted for this purpose pursuant to Rule 609(a)1. In fact, the trial judge properly charged the jury that in determining whether the defendant's confession was voluntary under the totality of the circumstances, one (1) factor the jury could consider was Heller's background and environment. (R. 866-67). There was no other reference to Heller's prior convictions by the State. (See R. 824-36, 847-59). The record shows, the prior convictions were not offered or argued as propensity evidence as Heller claims, but as impeachment evidence regarding his claim his confession was not voluntary and coerced.

Under the second part of Rule 609(a)(1),¹⁷ the trial court must weigh the probative value of the prior convictions against their prejudicial effect to the accused, and determine, in its discretion, whether to admit the evidence. Green v. State, *supra*. The following factors, among others relevant to the case, should be considered by the trial judge when undertaking this analysis:

- (1) The impeachment value of the prior crime(s);
- (2) The point in time of the conviction and the witness subsequent history;
- (3) The similarity between the past crime and the charged crime;
- (4) the importance of the defendant's testimony; and

¹⁷The prior convictions were admissible under the first part of the 609(a)(1) test. Heller's prior convictions for PWID marijuana, trafficking in crack, and distribution of narcotics would have carried more than one (1) year in prison. This was, in essence, conceded below, not argued below, and is not argued on appeal by Heller. (See Brief of Appellant). This issue is therefore waived and abandoned. State v. Benton, 338 S.C. 151, 526 S.E.2d 228 (2000).

(5) the centrality of the credibility issue.

State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (Ct. App. 2000); Elmore; Scriven.

The prior convictions clearly had impeachment value regarding Heller's claim his confession was fabricated, involuntary, and coerced. While generally prior drug convictions have little impeachment value,¹⁸ when a defendant challenges the voluntariness of his confession and directly asserts that the confession was coerced, his prior criminal history becomes probative and relevant under the totality of the circumstances. See State v. McLoed, 303 S.C. 420, 401 S.E.2d 175 (1991)(holding voluntariness of a statement is based on the totality of the circumstances, and noting defendant had been arrested three times prior to the crime for which he was on trial and knew his rights); State v. Linnen, 278 S.C. 175, 293 S.E.2d 851 (1982)(voluntariness determination is based on the totality of the circumstances including the background, experience, and conduct of the accused, and noting the defendant was not unfamiliar with court proceedings because at the time of his interrogation he was on probation from another state for housebreaking); State v. Patterson, 263 S.C. 176, 209 S.E.2d 39 (1974)(considering defendant's prior experience as an accused law breaker as a factor in the voluntariness of his confession); In re Christopher W., 285 S.C. 329, 329 S.E.2d 769 (Ct. App. 1985)(considering defendant's prior experiences with law enforcement as a factor in determining juvenile defendant's statement was voluntary).¹⁹ The

¹⁸See State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) wherein *in dicta* the Court made the following statement; "Furthermore, a conviction for robbery, burglary, theft and drug possession, beyond the basic crime itself, is not probative of truthfulness." *Citing only* United States v. Smith, 181 F.Supp.2d 904 (N.D. Ill. 2002). See also State v. Cheeseboro, 348 S.C. 526, 552 S.E.2d 300 (2000)(narcotics offenses are generally not considered probative of truthfulness), *citing* State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000); Green, *supra*; Scriven, *supra*; Elmore, *supra*; Martin, *supra*.

¹⁹The trial judge determines initially the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Miller, 375 S.C. 370, 378, 652 S.E.2d 444, 448 (Ct. App. 2007)(*citing* State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977); State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007). If admitted, *the jury* must determine whether the statement was given freely and voluntarily *beyond a reasonable doubt*, otherwise it cannot

probative value of the convictions for impeachment purposes was enhanced by Heller's direct challenge to the voluntariness of his confession and his assertion his confession was coerced.

In State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App. 2008), the Court considered as one factor in the voluntariness of a confession that the defendant had spent four (4) years at the Department of Juvenile Justice prior to making the confession in the murder case on trial. As the Court pointed out in Parker, the voluntariness of a confession is based on the totality of the circumstances, including, but not limited to, the background and experience of the accused. *Id.*, (numerous citations omitted). In Parker, the Court noted that *background and experience* includes prior dealings with law enforcement and incarcerations. *Id.*, referencing Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560 (1979)(considering teenager's prior arrest and time spent in juvenile camp as a factor in whether he understood the consequences of waiving his Miranda rights), and In re Christopher W., *supra* (confession of eleven-year-old who had prior experiences with police was voluntary).

Federal authority is in agreement with this reasoning. See Correll v. Thompson, 63 F.3d 1279, 1288 (4th Cir. 1995)(confession voluntary despite low I.Q. because defendant had numerous experiences with law enforcement and was "streetwise"); United States v. Collins, 40 F.3d 95, 98 (5th Cir. 1994)(confession was voluntary because defendant had extensive criminal history and was familiar with the criminal justice system); United States v. Haynes, 301 F.3d 669, 684 (6th Cir. 2002)(confession voluntary because 43 year old defendant informed of his rights and had "ample experience with the criminal justice system"); United States v. Morris, 247 F.2d 1080, 1090 (10th Cir. 2001)(confession voluntary in part because 19 year old defendant had 5 prior arrests). See

consider the confession. State v. Parker, 381 S.C. 68, 671 S.E.2d 619 (Ct. App.2008); Washington, 296 S.C. at 55-56, 370 S.E.2d 612.

also Martin v. Wainwright, 770 F.2d 918, 925-26 (11th Cir. 1985) ²⁰

Rule 609(a)1 *does not prohibit the admission of drug convictions for impeachment purposes*. If that were the case, the drafters could have clearly said so, *which they did not*. In fact, the Rule states *any conviction* carrying more than one (1) year in prison can be used for impeachment purposes against a defendant, provided it meets the appropriate test.²¹ Under this Rule, the trial judge is reserved the right to admit such convictions if their probative value outweighs their prejudicial effect to the accused in the particular case on trial.

Furthermore, the murder and ABWIK charges for which Heller was interrogated were not his first experience with law enforcement regarding a serious criminal offense. The convictions used for impeachment were not for simple drug possession or usage. These convictions were for possession with intent to distribute, trafficking, and distribution. The serious nature of the convictions increased their probative value for impeachment purposes regarding Heller's claim his confession was involuntary and coerced by police investigators. This was not Heller's first time in a custodial situation for a serious criminal offense.²²

²⁰ As an additional sustaining ground, Heller's prior convictions were admissible directly on the issue of the voluntariness of his confession, especially where he directly challenged the confession as involuntary and coerced. *See McCloed; Linnen; Patterson; Parker*. And especially where the State must prove the voluntariness of the statement to a jury beyond a reasonable doubt and Heller directly challenged his confession as involuntary and coerced. *See State v. Parker* (jury must find confession was voluntary beyond a reasonable doubt before it may consider the confession as evidence); State v. Washington.

²¹In fact, the Court of Appeals, conducting a 609(a)(1) balancing test found the admission of prior drug convictions to impeach a defendant in a drug case was not an abuse of discretion in State v. Dunlap, 346 S.C. 312, 550 S.E.2d 889 (Ct. App.2001); *however*, this Court subsequently reversed that portion of the Court of Appeals opinion finding the 609 analysis was unnecessary because the defendant opened the door to the admissibility of his prior convictions in his opening statement. State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003). Respondent is not citing the Court of Appeals opinion in Dunlap as authority or binding precedent, simply illustrating that Rule 609(a)1 does not prohibit the admission of drug convictions for impeachment purposes.

²²Furthermore, the cases cited by petitioner for the proposition that drug convictions are generally not probative of truthfulness, and those discussing this issue are distinguishable from the facts of this case. In Cheesboro, in addition to noting the general proposition, the Court found there was no reason to allow the ten year rule of remoteness to be overridden to allow impeachment of a witness with a 1968 drug conviction in a trial in the late 1990s, especially where the witness' honesty was not challenged but only his memory). *Id., supra*. In Scriven, this Court did

As the record shows, the prior convictions were not offered, admitted, or argued as propensity evidence as Heller claims. They directly impeached his claim that his confession was not voluntary and was coerced. The probative value of the convictions as impeachment evidence was enhanced by Heller's direct challenge to the voluntariness of his confession and his assertion it was coerced. This factor weighs in favor of the admissibility of the prior convictions for impeachment purposes.

Nor were the convictions remote. They occurred in 1999 and 2001. The crimes for which Heller was on trial occurred in 2006. See State v. Cooper, 386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009)(considering the time when the defendant committed the crimes he was on trial for).²³ His trial was in January of 2009. The convictions were within the ten (10) year rule commonly used to define remote convictions. Rule 609(b) SCRE. See also State v. Al-Amin, 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003)(finding that where defendant was convicted of armed robbery in 1988,

not reverse the case but remanded the case to the trial judge to determine whether the State met its burden to show admissibility and to make a finding whether the probative value of the prior drug convictions outweighed their prejudicial effect, and this Court noted that *similar prior convictions* (the defendant was on trial for a drug violation and drug convictions were admitted) should be admitted sparingly. *Id., supra*. In Bryant, the defendant was on trial for murder and *prior gun convictions* were admitted for impeachment purposes, so the prior convictions were similar. *Id., supra*. In Green, the defendant was on trial for distribution of drugs and was impeached with prior drug convictions. The Court found their *prior similar nature* prejudicial to the defendant's current trial. *Id., supra*. In Dunlap, the defendant was also on trial for a drug violation, and again prior drug convictions were used to impeach his credibility. State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003)(finding the Court of Appeals' 609 analysis unnecessary because the defendant opened the door to the admissibility of his convictions in his opening statement). In Elmore, once again, the issue was the propriety of impeaching a defendant with prior similar drug convictions when he was on trial for a drug violation. *Id., supra* (finding the issue was not preserved where the defendant did not testify). In Martin, this Court dealt with the impeachment of the defendant with three *prior similar offenses*. *Id., supra*. In Aleksey, the issue was whether a witness could be impeached with prior narcotics offenses which the witness *had not been convicted of*. The analysis fell under 608(b) not 609(a). *Id., supra, referencing United States v. Turner*, 104 F.3d 217, 223 (8th Cir. 1997)(misconduct involving narcotics laws is not an act involving dishonesty or untruthfulness and therefore may not be inquired into under Federal Rule 608(b)). The Court also found the dismissed indictments were not admissible as evidence of bias under 608(c). Aleksey, supra. As set forth above, each of these cases is distinguishable from the present case, where the prior convictions were dissimilar, the convictions were not remote (see discussion, *infra*), Heller directly challenged the voluntariness of his confession and alleged it was coerced, and the analysis is under Rule 609(a)(1).

²³ Contra State v. Johnson, Op. No. 2003-UP-188 (Ct. App. filed March 12, 2003)(*unpublished opinion*), affirmed 363 S.C. 53, 609 S.E.2d 520 (2005)(measuring remoteness of convictions under 609(b) from the time of trial). Heller did not contend below the convictions were remote or that they fell under Rule 609(b). (See R. 749-753).

was released from confinement in 1991, remained on parole until 1994, and trial was in 2000, said conviction was within the ten-year time limit of 609(b)). *But see State v. Scriven, supra* (finding that even though prior drug convictions were under ten years old they were fairly remote); *State v. Martin, supra* (three of the convictions used to impeach the defendant were fairly remote).²⁴ While Heller had not been convicted of any crime since 2001, these were the closest convictions in time that the State could use to impeach Heller's credibility at trial regarding the voluntariness of his confession, and Heller had been incarcerated awaiting trial since his arrest in *August of 2006*. Furthermore, Heller *was on parole* at the time of the commission of the crimes for which he was on trial. *See State v. Scott*, 326 S.C. 448, 484 S.E.2d 110 (Ct. App. 1997)(1977 robbery conviction was admissible in a 1995 prosecution under the common law rule, and would have probably been admissible under Rule 609, where the witness had been on parole since 1986, and had committed other subsequent crimes), *citation omitted*. It necessarily follows from this that Heller was incarcerated for some period of time as a result of some of these convictions. Additionally, Heller's 1999 conviction was followed by several convictions in 2001 for similar activity. *See Colf, supra* ("The point in time of the witness' conviction *and the subsequent history*")(emphasis added). This factor weighs in favor of the admissibility of the prior convictions for impeachment purposes.

Additionally, and most importantly, the crimes for which Heller was on trial were *dissimilar to the crimes* he was impeached with. Heller was on trial for *murder* and *ABWIK*. Heller was impeached with convictions for PWID marijuana, Trafficking in Crack, and

²⁴Under the *former common law rule*, the use of former convictions older than ten (10) years was permitted where periods of incarceration were deemed to have tolled the time period for excluding the conviction. *See State v. Hyman*, 276 S.C. 559, 281 S.E.2d 209 (1981); *State v. Mueller*, 319 S.C. 266, 460 S.E.2d 409 (1995); *State v. Johnson*, 271 S.C. 485, 248 S.E.2d 313 (1978); *State v. Jones*, 271 S.C. 287, 247 S.E.2d 43 (1978); *State v. Sarvis*, 317 S.C. 102, 450 S.E.2d 606 (Ct. App. 1994).

Distribution of Narcotics, *totally dissimilar offenses*.²⁵ There was no contention by anyone, including the Solicitor, that Heller was on trial for distribution of narcotics, trafficking in crack cocaine, and PWID marijuana. Nor was there any argument by the Solicitor that Heller should be convicted because he had shown a propensity to be a criminal. (See R. 534-547). This factor, that the crimes used to impeach *were dissimilar* to the crimes for which Heller was on trial, weighs heavily in favor of the admissibility of the prior convictions for impeachment purposes. Cf Green v. State, *supra* (similarity of prior convictions to crime for which defendant is on trial weighs against the crimes admissibility due to increased prejudice); State v. Howard, 384 S.C. 212, 682 S.E.2d 42 (Ct. App. 2009).²⁶

With regard to the importance of Heller's testimony, the admission of the prior convictions did not dissuade Heller from testifying. He testified before the jury to his version of events. Heller's testimony was important in that it raised a credibility issue regarding his confession and entitled him to a jury charge on identity, however, it was not critical because the evidence against Heller was overwhelming. (See harmless error discussion, *infra*). However, the introduction of the prior convictions was necessary for impeachment purposes on the issue of the voluntariness of his statement in response to his direct challenge to it. This factor weighs in favor of the admission of the prior convictions for impeachment purposes.

Credibility was an issue in the case, because Heller raised the issue he was not the perpetrator, and was coerced into confessing, however, again, the evidence of Heller's guilt was

²⁵In fact, as previously shown, defense counsel unwittingly conceded the crimes were *dissimilar* from the crimes for which Heller was on trial. (See R. 750). Additionally, at sentencing, defense counsel stated the following: "He does have some prior convictions for drugs, but he has no prior convictions, anything of this nature." (R. 889).

²⁶Furthermore, in this regard, the jury clearly knew that petitioner was convicted of drug offenses. They heard exactly what petitioner was convicted of. (R. 767, 815-16). The jury knew Heller *had not* been *previously convicted* of a crime of violence against another individual. This third factor clearly weighs in favor of their admissibility for impeachment purposes.

overwhelming. Respondent submits his credibility was not critical in this case. *See Green v. State, supra* (indicating where it was defendant's word against police officers' his credibility was critical and this weighed against the admissibility of two prior similar convictions). Heller was identified by a surviving victim, and a witness. Heller was also placed at the crime scene by his cousin and his DNA. Heller's testimony regarding the events of the night in question was impeached several different ways. (R. 783-819). And, Heller was not asserting self-defense, but simply that he was not present when the crime was committed. *See Bryant, supra* (prior similar gun convictions were improperly admitted where the defendant was asserting self-defense).²⁷ The State was entitled to present, and the jury should have had, all of the available evidence to judge Heller's credibility, especially given Heller's direct attack on his confession as involuntary and coerced. This factor, given this record, weighs in favor of the admissibility of the prior convictions.

Additionally, as the State correctly stated below, the prejudice to Heller from the admission of these convictions would be negligible under this record. *Colf, supra* (court may consider other factors in addition to those enumerated); *Elmore*; *Scriven*. Heller admitted that on the night in question he accompanied his cousin to the victim's residence. (R. 784). Tracy testified Nails was a drug dealer and was one of her sources for drugs. (R. 376-77). *Heller* also admitted *he* smoked crack cocaine with Tracy and Nails before the assaults occurred. (R. 785). There was testimony from Mary that *Heller* was arguing with *Tracy* over drug money for some of Heller's drugs that Tracy smoked. (R. 787-88, 457-58). Heller admitted at trial he and Tracy were arguing over his

²⁷*But see Scriven, supra* (noting Scriven's defense was predicated on alibi, substantiated by his wife, and indicating as a result, his prior similar drug convictions would not be admissible under *Rule 403* to rebut a false impression he was never involved with drugs), *citation omitted*. This language in *Scriven* is clearly distinguishable from this case. Heller was not on trial for drug crimes, and the State was not seeking to admit the convictions to rebut a false impression he had never been involved with drugs. The State used Heller's prior convictions to impeach his claim that his statement was involuntary and coerced.

drugs. (R. 769). Mary testified she paid Heller for the drugs so he would stop arguing with Tracy. (R. 458). Mary also testified she smoked crack with Heller and gave him thirteen (\$13.00) extra dollars in cash. (R. 458).²⁸ Also, there was testimony from Tracy that prior to going to Mary's home, she, Nails, Devon and Heller went to serve somebody else drugs. (R. 376-77). The jury already knew Heller had distributed drugs to at least one person, Mary or Tracy, and possibly was involved in another sale to another person with Nails, Tracy, and Devon.

The prejudice to Heller from the admission of the prior drug convictions in light of this testimony was minimal. The trial court did not err in admitting the impeaching evidence because the probative value of the evidence did outweigh its limited prejudicial impact. Rule 609(a)1 S.C.R.E.

A balance of the Colf factors, and others, weighs in favor of the admission of the prior convictions. The probative value of the convictions for impeachment purposes was not substantially outweighed by the danger of unfair prejudice. The trial judge did not err in admitting the prior convictions for the purposes of impeachment *under Rule 403 as appellant alleged below and still alleges in his brief*. Nor, given this record, did the prejudicial effect of the evidence outweigh its probative value under Rule 609(a)(1). This ground of Heller's appeal is without merit.

Harmless Error

Even assuming *arguendo* error in admission of the impeaching evidence, it was harmless given the State did not argue these convictions as propensity evidence, the other more damaging impeachment of Heller's testimony, Heller's admissions regarding drugs on the night in question, and the overwhelming evidence of petitioner's guilt. State v. Mitchell, 286 S.C. 572, 336 S.E.2d

²⁸It must also be remembered at this point that Heller had a tattoo on his body that said "made man" and two (2) dollar (\$) signs tattooed on his arm. Heller was unemployed at the time of the commission of these offenses. (R. 773). The jury knew these facts in conjunction with the other testimony above of drug dealing and use.

150 (1985)(trial errors are harmless when they could not reasonably have affected the result of the trial). The determination of whether an error is harmless depends on the circumstances of each particular case. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). No definite rule of law governs this finding. Id. Rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Mitchell, *supra*. A case should not be reversed where a review of the entire record establishes the error is harmless beyond a reasonable doubt. State v. Pickens, 320 S.C. 528, 466 S.E.2d 364 (1996).²⁹ An error is harmless where it could not reasonably have affected the result at trial. Mitchell.

A trial judge's failure to conduct the appropriate balancing test regarding the admissibility of a prior conviction for impeachment purposes is subject to a harmless error analysis. State v. Johnson, 363 S.C. 53, 60, 609 S.E.2d 520, 524 (2005). The State's case against Heller did not hinge on the contested evidence. "Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006). This Court will not set aside a conviction for an insubstantial error not affecting the result when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached. State v. Kelley, 319 S.C.173, 460 S.E.2d 368 (1995).

The Overwhelming Evidence of Heller's Guilt

A review of the entire record in this case shows the evidence against Heller was overwhelming. Heller's guilt was conclusively proven by competent evidence, such that no other rational conclusion could be reached. The admission of the prior convictions for impeachment purposes, even if erroneous, was harmless beyond a reasonable doubt.

²⁹See United States v. Hastings, 461 U.S. 499, 509, 103 S.Ct. 1974, 1980 (1983)("It is the duty of the reviewing court to consider the record as a whole and ignore errors that are harmless, including most constitutional violations").

Heller was positively identified by the surviving victim, Mary Chavis, as the man who she evicted from her home, and as the man who returned and stabbed her and the deceased victim. Mary positively identified Heller out of a photographic line-up while recovering from her injuries in her hospital room. Mary positively identified Heller to police as the man who stabbed her numerous times. Mary also positively identified Heller *in court* as the man who stabbed her numerous times and as the man who murdered her friend and neighbor Chino. (R. 449-85).

Heller was also positively identified by Tracy Risenger as the man who Mary evicted from the home and who returned and knocked on the door. (R. 374-94). Tracy picked Heller out of a photo line-up as the man who committed the murderous assault. (R. 392-94). She also identified Heller in-court as the man who was acting weird, who was evicted from Mary's home, and who returned and knocked on the door, and then committed the murderous assaults. (R. 374-94). Tracy identified Heller by both his face, and by his voice. (R. 374-94).

Heller was also identified as the man who remained at the scene with Mary, Tracy, and Chino prior to the crimes, by his own cousin, Nails. Heller was also identified by Nails as the person who called him the next evening needing a ride from the area near the crime scene. Nails also testified that shortly thereafter, Heller left the state and returned to Georgia. (R. 415-43). The evidence showed that after Heller committed these brutal crimes he eventually fled to Georgia.³⁰

Heller was also identified as the perpetrator of these crimes by two (2) different investigators who testified under oath Heller admitted to them and signed a statement to the effect that after he was evicted from Mary's home, he returned and started stabbing people. (R. 512-44, 651-94).

The *written confession* of Heller also identified him as the murderer of Chino and the

³⁰See State v. Odems, 385 S.C. 399, 684 S.E.2d 573 (Ct. App. 2009)(Flight is evidence of guilt.).

assailant of Mary. The Waiver of Rights Form and the signed confession of Heller were before the jury. Heller admitted he signed the confession, but denied that he knew what was in it. However, Heller admitted he could read and write. Heller's confession sets forth he not only stabbed the victims, but also the order in which he stabbed them, and he stabbed them with a pocket knife. (R. 651-71). These details were corroborated by other testimony. (R. 601-02, 449-85). Heller's subsequent statements upon revisiting the crime scene and surrounding area also identified him as the perpetrator of the crimes. Heller showed investigators where he hid in the early morning hours of August 25th and the entirety of the following day. (R. 512-44, 651-94). Heller also showed investigators where he believed he had thrown *the pocket knife* he used to commit the crimes. The evidence of Heller's guilt was overwhelming.

The Other Impeachment of Heller's Testimony

In addition to the overwhelming evidence of his guilt, Heller's testimony and credibility were impeached by other evidence independent of his prior convictions. He was impeached with the Waiver of Rights Form, which he executed. (R. 793-99). He was impeached with his prior statements given to the two (2) Richland County investigators in Georgia including his signed confession. (R. 799-806). He was impeached by prior sworn testimony he gave in the Denno hearing. (R. 815). Heller was also impeached by the fact he wrote a letter to Nails, after his arrest, and told Nails to "trash it," the letter. (R. 817). His testimony was impeached by the oral statements he gave investigators on his return from Georgia regarding where he threw the murder weapon, and by his subsequent statement to one (1) investigator upon his return to the area where he told the investigator where he threw the murder weapon. (R. 790). His testimony was also impeached by his admitted use of drugs on the night in question shortly before the crimes. Heller's testimony was impeached by his admission he was arguing with Tracy before the murder and

ABWIK and was evicted by Mary prior to the crimes, establishing a motive for the crimes. (R. 785, 787). His testimony was also impeached by his flight to Georgia. (R. 792). Heller's credibility was impeached by his admission he told his father from jail that he could not talk about what he had done over the telephone. (R. 817-19). His credibility was also impeached by the fact that the sole reason he was in Columbia was to take a trip to North Carolina, and after the crimes he fled to Georgia and never made the planned trip. (R. 792). His testimony was impeached by the fact he hid in an abandoned home in late August, in Columbia, S.C., all the following day after the crimes and waited until dark to leave and call his cousin for a ride. (R. 790). Heller's credibility and testimony were thoroughly impeached independent of the challenged evidence.

Heller was convicted of murder and ABWIK based on the overwhelming evidence of his guilt. Any error in the admission of the evidence was harmless given the evidence of his guilt and the other impeachment of his credibility. Heller's guilt was conclusively proven without regard to *the contested* impeaching evidence. No other rational conclusion could have been reached given the evidence of Heller's guilt. See State v. Young (wherein the Court found erroneous admission of improper impeachment convictions harmless where there was substantial evidence of appellant's guilt on non-similar charges of kidnapping and ABHAN of which he was convicted); State v. Bryant (finding admission of inadmissible similar convictions for gun possession was not harmless where appellant asserted self-defense, defense hinged entirely on his own testimony and his credibility, the only witnesses to the shooting were appellant and the deceased victim, and while there was evidence that may discredit self-defense, there was evidence in the record supporting the defense theory); State v. Johnson (admission of prior convictions was harmless where appellant introduced the convictions on direct examination, State placed no other emphasis on them, other testimony was more damaging to appellant's credibility than prior convictions, and

there was overwhelming evidence of guilt). There was overwhelming evidence in the record Heller was guilty of murder and ABWIK and *abundant evidence impeaching his testimony at trial*. Mitchell. “There is no reversible error in the admission of evidence that is cumulative to other evidence properly admitted.” State v. Griffin, 339 S.C. 74, 77-78, 528 S.E.2d 668, 670 (2000). Heller’s late assertion he was not the perpetrator was thoroughly impeached with inconsistent statements and by Heller’s own actions after the crimes. The Court of Appeals did not err in finding the admission of Heller’s prior convictions was harmless on this record. This appeal must be dismissed.

CONCLUSION

For the above stated reasons, Heller’s convictions and sentences for murder and ABWIK should be affirmed.

Respectfully submitted,

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July 23, 2014

CERTIFICATE OF SERVICE

I, **Anthony Mabry**, hereby certify that I have served the *Brief of Respondent* in the foregoing action by depositing copies in the Interagency Mail to Robert M. Dudek, Chief Appellate Defender, Division of Appellate Defense, 1330 Lady Street, Suite 401, Columbia, SC 29201 this 23rd day of July, 2014.



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