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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-002639

THE STATE, ...RESPONDENT

v.

ISAAC GLENARD LYLES, ...APPELLANT.

INITIAL BRIEF OF RESPONDENT

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ATTORNEYS FOR RESPONDENT

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RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

1. Whether Appellant's claim that the trial court erred in relying on the wrong sub-section of Rule 609, SCRE, in ruling a State's witness' prior convictions were inadmissible for impeachment purposes because they were not crimes of dishonesty is preserved for appellate review where Appellant did not raise this argument to the trial court. Additionally, whether any error by the trial court in excluding the prior convictions was harmless beyond a reasonable doubt where the witness was impeached with other prior convictions.

2. Whether the trial court properly qualified police investigator Kirby as an expert in the street value of drugs, how drugs are sold and packaged, and common behavioral characteristics of drug dealers and users based on his education, training, and experience, and the whether the court properly admitted Kirby's expert testimony pursuant to Rule 702, SCRE, where he possessed technical or specialized knowledge which could assist the jury to understand the evidence or determine a fact in issue.

STATEMENT OF THE CASE

Isaac Glenard Lyles (Appellant) was indicted at the October 7, 2013 term of the grand jury for Spartanburg County for: (1) possession with intent to distribute (PWID) cocaine within one-half mile of a school (2013-GS-42-4570); (2) PWID marijuana within one-half mile of a school (2013-GS-42-4571); (3) PWID cocaine base within one-half mile of a school (2013-GS-42-4572); (4) PWID marijuana (2013-GS-42-4573); (5) trafficking in cocaine (2013-GS-42-4574); (6) trafficking in cocaine base (2013-GS-42-4575: count 1); and (7) possession of a firearm or knife during the commission of a violent crime (2013-GS-42-4575: count 2). He was represented by William S. Bean, IV, Esquire. The State was represented by Assistant Solicitor Scott D. Spivey of the Seventh Circuit Solicitor's Office. Prior to trial, the State served and filed notice of intent to seek life without parole based on Appellant's prior record. (Tr.p.6, line 24-p.8, line 7). On December 4-5, 2013, Appellant proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Roger L. Couch to five concurrent prison terms of life without parole for the two trafficking charges and the three proximity charges; ten (10) years' concurrent imprisonment for PWID marijuana 2nd; and five (5) years' concurrent imprisonment for possession of a firearm during a violent crime. (Tr.p.303, line 18-p.304, line 13; Indictments & Sentencing Sheets). Appellant timely filed a notice of intent to appeal his convictions and sentences and subsequently submitted a Brief in support of his appeal. This Brief of Respondent (the State) follows.

STATEMENT OF FACTS

Appellant was arrested on October 9, 2012, during the Spartanburg City Police Department's execution of a search warrant. As the police entered the front door of a suspected drug house, Appellant exited a back door and tried to run; however, he was immediately caught and detained. Appellant had a gun and small amounts of marijuana and cocaine on his person, and over one thousand dollars in cash fell from his pocket and was found beside him on the ground. The police then found a black bag hanging on the fence between the house and an empty lot next door. The bag contained large quantities of cocaine, cocaine base (crack cocaine), and marijuana, as well as a bottle of caffeine powder and a set of digital scales. Edward Wesson, a second individual who had also tried to run from the house testified that the bag belonged to Appellant. (Tr.p.76-p.89; p.93-p.112; p.140-p.151; p.157-p.175; p.185-p.196; p.203-p.216; p.220-p.228).

At trial, the State called narcotics investigator Michael Secrest to the stand. He described his role in the October 9, 2012, execution of a search warrant on a residence on North Forest Street in the city of Spartanburg. Secrest drove the tactical truck for the SWAT team members who entered the house. He identified a photograph of the house as well as a satellite image of the neighborhood which showed the location of the house in relation to Cleveland Elementary School, which was .348 miles away. After exiting the truck with the rest of the tactical team, Secrest went to the right side of the house to help secure the perimeter. As soon as entry was made at the front of the house, two individuals, including Appellant, came out the side door and tried to run. Secrest caught Appellant three or four steps from the side of the house and as they fell to the ground, money fell out of Appellant's pocket. Secrest noticed Appellant moving his hand down toward his waistline so he grabbed Appellant's hand as he detained him. Secrest

discovered a handgun and a small amount of marijuana in Appellant's pocket. The handgun and bullets from that gun, as well as photographs of the money and marijuana, were identified and then admitted into evidence. (Tr.p.76, line 16-p.89, line 13).

Next, the State called investigator Josh Bagwell to the stand. Bagwell served as the "return officer" for the search warrant and described each of the items discovered at the scene. He first described the items found on or near Appellant, including a Hi-Point .380 handgun which was loaded with six rounds, two small containers of a green plant-like material, a small bag containing a white powder-like substance, and one thousand two hundred and eighty-one dollars ($1,281) in cash. (Tr.p.93, line 6-p.101, line 11). Bagwell next described a black tote bag the police found on the fence along the side of the residence, and the contents of that bag. This included more green plant-like material, a set of digital scales, a white rock-like substance, a powder-like substance, a bottle filled with crystalline powder, and a set of goggles. Bagwell testified he remembered three males being at the residence; however, Appellant was the only one who had drugs. (Tr.p.101, line 15-p.112, line 11).

Rule 609: Impeachment by Evidence of Conviction of Crime

Before calling Edward Wesson as the next State's witness, the solicitor handed up a copy of this Court's published opinion in State v. Broadnax[1] and asked the trial judge to address whether Appellant would be permitted to attack Wesson's credibility with his prior convictions. The judge commented that pursuant to Broadnax it appeared the court would have to determine if the underlying crime involved some type of dishonesty or false statement before it could be used to impeach. The judge said he would review the

[1] 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013), certiorari granted June 12, 2014.

case and would rule after the State proffered Wesson's testimony and Appellant had the chance to cross-examine on the specifics of the crimes. (Tr.p.121, line 10-p.124, line 12).

Wesson then took the stand outside the presence of the jury. He admitted having a 1996 conviction for armed robbery in which he pulled a gun on an old woman in a grocery store parking lot and took money from her purse. He testified he did not try to trick her in any way and merely showed her his gun. Next, Wesson admitted having a 2006 conviction for burglary in the third degree in which he unlawfully entered a construction site trying to find a place to sleep. He testified he did not lie to anybody to gain entry. (Tr.p.127, line 12-p.130, line 24). On cross-examination, Appellant was asked if he was "hidin[g]" in the parking lot before he robbed the old lady and he said "yes." He testified he knew the robbery was wrong and admitted he took off running after taking the woman's money. In regard to the burglary, Wesson testified he walked into the construction site through a gap in the gate. He said he was not going in to take anything and was only looking for a place to sleep. (Tr.p.131, line 1-p.135, line 16).

After the proffer, the solicitor moved to prohibit Appellant from using Wesson's convictions for burglary and armed robbery to impeach. He argued that, under Broadnax, they should not be admissible because there were no additional acts of dishonesty or deceit beyond the crimes themselves. The solicitor noted that regardless of the court's ruling on the two crimes in question, Wesson's prior convictions for fraudulent check would be admissible to impeach. Appellant responded that he believed Wesson's armed robbery and burglary clearly involved dishonesty and should therefore be admitted against him as well. Specifically relying on Broadnax, the trial court concluded there was not sufficient evidence to find that the two crimes were crimes of dishonesty or false

statement and therefore excluded them from trial. Appellant never argued the trial judge's reliance on Broadnax was somehow improper or otherwise challenged the analysis undertaken by the court. He did not argue the prior crimes should have been admitted against Wesson regardless of whether they were crimes of dishonesty, and he never requested a Rule 609 analysis outside the Broadnax framework utilized by the trial judge. (Tr.p.138, line 10-p.140, line 9).

After the ruling, the jury returned to the courtroom and Wesson took the stand. At the beginning of his testimony Wesson admitted he had five 2006 convictions for fraudulent check. (Tr.p.140, line 17-p.142, line 21). He then described his relationship

statement and therefore excluded them from trial. Appellant never argued the trial judge's reliance on Broadnax was somehow improper or otherwise challenged the analysis undertaken by the court. He did not argue the prior crimes should have been admitted against Wesson regardless of whether they were crimes of dishonesty, and he never requested a Rule 609 analysis outside the Broadnax framework utilized by the trial judge. (Tr.p.138, line 10-p.140, line 9).

After the ruling, the jury returned to the courtroom and Wesson took the stand. At the beginning of his testimony Wesson admitted he had five 2006 convictions for fraudulent check. (Tr.p.140, line 17-p.142, line 21). He then described his relationship with Appellant and explained he was living at the residence on North Forest Street when the police conducted the search. Wesson testified he met Appellant in the summer of 2012 when Wesson was moving into the apartment and said he saw Appellant nearly every day after moving in. Wesson testified Appellant asked if he could use Wesson's apartment to sell drugs and Wesson agreed. He testified Appellant sold drugs from the residence every day from the summer of 2012 through October and during that time Appellant always carried a black bag. Wesson identified State's Exhibit 14 as the bag belonging to Appellant and the bag was admitted into evidence over Appellant's objection. The items discovered in the bag were also admitted over Appellant's objection. Wesson identified the goggles from the bag as belonging to Appellant and testified he had seen Appellant with the goggles before. According to Wesson, Appellant paid him with crack cocaine in exchange for the use of Wesson's residence to sell drugs. Wesson testified he had seen Appellant take drugs out of the bag to sell, and that most of the time Appellant kept the bag hanging on the fence outside the residence.

Wesson insisted the bag belonged to Appellant. (Tr.p.142, line 22-p.151, line 7). Appellant cross-examined Wesson in regard to inconsistencies in his testimony and inconsistencies between the testimony and a previous statement he had given to the police but did not ask any questions about Wesson's prior convictions. (Tr.p.151, line 13-p.164, line 7).

Rule 702: Testimony by Experts

Before Wesson was called as a witness, the solicitor handed up a copy of this Court's published opinion in State v. Robinson[2] and advised that later in the trial the State would be seeking to offer narcotics investigator Jeff Kirby as an expert witness in typical methods of packaging, selling, and using drugs. (Tr.p.125, line 18-p.126, line 16). When Wesson finished testifying, the State called investigator Kirby to the stand. Kirby worked for the city police department for eleven-and-a-half years and had been assigned to the narcotics unit for nine-and-a-half years. His day-to-day activity during that time involved attempting to disrupt and stop drug activity within the city limits of Spartanburg. Kirby described the "fairly extensive" training he received as a narcotics officer including drug classes, search warrant classes, and drug recognition classes. He attended seven to ten classes in 2012 alone and the classes ranged between eight hours and 40 hours each. Kirby testified the substance of his narcotics training included how to detect and identify drug dealers, drug weights and amounts in regard to sales or personal use, and drug paraphernalia. He learned about the wholesale value and street value of drugs, typical drug dealer behaviors, items and tactics used to sell drugs, packaging of drugs, and evasive tactics dealers might use. (Tr.p.157, line 15-p.170, line 6).

[2] 396 S.C. 577, 722 S.E.2d 820 (Ct. App. 2012).

Kirby testified he learned about the habits of a drug user and how much drug of each type a user might have or use at a time. He explained he served as the chief investigator in an average of 80 narcotics investigations a year and participated in 320 to 400 total investigations a year during the nine years he worked in narcotics. Kirby testified that during these investigations he dealt with drug dealers and drug users and noticed specific differences between the two. He described some of those differences including the likelihood a dealer would keep large amounts of drugs and currency and would have weapons to protect it. Kirby testified he had been involved in a number of undercover operations with drug dealers and had then watched videos of those transactions. He said he testifies about narcotics investigations approximately five to ten times a year in general sessions or federal court, and five to seven times a month in magistrate or municipal court. Kirby testified he had never been qualified as an expert witness before but believed his experience and training gave him special knowledge about the value of narcotics on the street, the manner in which they are packaged and sold, and the typical intoxicating dosages of illegal drugs. (Tr.p.170, line 7-p.175, line 1).

The State then offered Kirby as an expert in the street value of narcotics, how they are packaged and sold, typical intoxicating dosages, and the different habits between an addict and a dealer. Appellant objected to Kirby's qualification as an expert. The jury was excused and the parties argued their respective positions. Appellant acknowledged Kirby is "certainly more knowledgeable that perhaps others on, those on the jury, myself, uh, maybe most of the people in the courtroom" but argued this did not qualify him as an expert, particularly if the purpose of the qualification was to elicit an opinion that Appellant is a drug dealer. The trial judge listened to the solicitor's further explanation

of the areas of alleged expertise and considered the specific language of Rule 702, SCRE, before ruling:

> Alright. I will allow him to be qualified as an expert concerning the street value of drugs, uh, typical habits of a drug user as opposed to a dealer, uh, the packaging a – the normal means of packaging and selling of certain drugs or drugs, uh, I'll also let him testify concerning what are typical dosages, uh, that he might find on the street and I realize these dosages may be different than you get from a doctor, uh, so street dosages, uh, and I'm not sure I'm going to allow him to give opinions concerning avoidance meth – methods, certainly from his experience he can state what avoidance methods he may have observed in the past . . . so I'll allow him to do that as well.

(Tr.p.181, lines 2-15). The jury then returned to the courtroom and the judge explained his ruling. The trial judge also noted he would be giving a specific instruction to the jury in regard to the expert witness at the end of the trial. (Tr.p.175, line 3-p.182, line 8).

Kirby proceeded to give detailed testimony on the wholesale cost of cocaine, methods of adding a cutting agent to increase total weight of the drugs prior to sale, and how cocaine is made into crack-cocaine. He described the use of caffeine powder as a cutting agent and the use of scales to weight the product. Kirby also testified as to the street value of crack and the profit that could be made when selling it to individual users. He described the dosages typically smoked by an individual user, the frequency of ingesting those doses, and the paraphernalia associated with the use of crack. Kirby then gave similar testimony regarding the sale and use of marijuana. He testified that drug dealers typically carry cash and that it is not unusual for a dealer to sell drugs from someone else's house. (Tr.p.185, line 10-p.195, line 7).

The solicitor then asked for an opinion on whether Kirby thought the amount of drugs found on Appellant's person was to be sold or was for personal use; however, the trial judge sustained Appellant's objection to the form of the question. Instead, the

solicitor asked Kirby for an opinion in the form of hypothetical by asking whether someone who had 1.06 grams of powder cocaine, no paraphernalia for use, $1,200 in cash and a gun on his person was likely a user or a drug dealer. Kirby testified he would qualify that individual as a drug dealer. (Tr.p.195, line 8-p.196, line 7).

After Kirby completed his testimony, the State called city police department's property and evidence technician, Mylnor Beach, to the stand. He was qualified as an expert in marijuana analysis and testified the two quantities of green plant-like substance found on Appellant's person were marijuana in amounts of 3.85 grams and 1.86 grams. He further testified the green plant-like substance discovered in the black bag was 52.73 grams of marijuana. The marijuana was admitted into evidence. (Tr.p.203, line 22-p.216, line 12). Next, city police department chemist Mary Elizabeth Stuart was qualified as an expert in the analysis of cocaine and crack cocaine. She described her testing procedures and testified she confirmed four separate quantities of drugs submitted for testing including: 1.06 grams of cocaine, 25.87 grams of cocaine, 6.27 grams of crack cocaine, and 18.04 grams of crack cocaine. The cocaine and crack cocaine were also admitted into evidence. (Tr.p.220, line 15-p.228, line 11). After the State rested, Appellant moved for a directed verdict in regard to the charges stemming from the drugs discovered in the bag. The trial court denied the motion and questioned Appellant in regard to his right to testify. Appellant elected not to testify and the defense rested. (Tr.p.229, line 13-p.237, line 14).

During his closing argument, the solicitor acknowledged that as a drug user and a hopeless addict, Wesson was not totally innocent; however, he argued Wesson's testimony was nevertheless consistent with the evidence. The solicitor then discussed

Investigator Kirby's experience and training and his knowledge about drugs, dealers and users, and paraphernalia to argue Appellant "ain't a drug user, he's a drug dealer." (Tr.p.237, line 22-p.250, line 4). Appellant responded by focusing on the lack of physical evidence tying him to the bag and various problems with Wesson's credibility; however, he did not mention Wesson's convictions for fraudulent check. (Tr.p.250, line 8-p.255, line 17). Following a charge conference, the trial court charged the jury on the law. The court included standard charges on the presumption of innocence, the State's burden of proof, reasonable doubt, the roles of the judge and jury, direct and circumstantial evidence, the jury's duty to assess the credibility of witnesses, and the crimes and the elements of those crimes. (Tr.p.265, line 3-p.286, line 13). The judge gave the following charge on expert witnesses:

> Now during the trial we had a couple a witnesses who were qualified as experts and I told you when we did the first one that I'd talk to you a little bit more about that when I charged you on the law and I told you at that time the rules that govern evidence and the introduction of evidence ordinarily do not permit witnesses to state opinions from the witness stands or or draw conclusions from from, uh, their testimony. An exception to that rule is made for what, uh, witnesses that we call "experts" (coughs), excuse me, that's a witness who because of their education or experience, uh, has become an expert in some art, science, field or profession, uh, and as to those witnesses they're allowed under the rules to state an opinion, uh, as to relevant and material matters which were – are within the area of their expertise, they also have the right to state their reasons for their opinions. You, the jury, should consider expert testimony received in evidence in this case just like any other testimony or evidence you've heard in the case, you give it the weight you think it ought to re – ought to receive. If you decide that the opinion of an expert is not based on sufficient education or experience or if you just conclude that the reasons given by an expert in support of his opinions or her opinions are not sound or if you decide that the opinion is outweighed by other evidence, you may disregard an opinion by an expert in its entirety; in fact, you're not required to accept an expert's opinion even though it might not be contradicted by other evidence in the case. As the sole judge of the facts, you should, uh, give the statements or testimony of all witnesses, including experts the weight you think that testimony deserves.

(Tr.p.277, line5-p.278, line 9). Upon deliberating for thirty-two minutes, the jury found Appellant guilty of all charges. After hearing from Appellant and the solicitor, the trial court sentenced Appellant to five concurrent prison terms of life without parole for the two trafficking charges and the three proximity charges; ten (10) years' concurrent imprisonment for PWID marijuana 2nd; and five (5) years' concurrent imprisonment for possession of a firearm during a violent crime. (Tr.p.303, line 18-p.304, line 13; Indictments & Sentencing Sheets).

ARGUMENT

I.

Appellant's claim that the trial court erred in relying on the wrong sub-section of Rule 609, SCRE, in ruling a State's witness' prior convictions were inadmissible for impeachment purposes because they were not crimes of dishonesty is not preserved for appellate review because Appellant did not raise this argument to the trial court. Additionally, any error by the trial court in excluding the prior convictions was harmless beyond a reasonable doubt where the witness was impeached with other prior convictions.

Appellant contends the trial court erred in refusing to allow him to impeach a State's witness with the witness' prior convictions for armed robbery and third degree burglary pursuant to Rule 609, SCRE. He argues the prior convictions should have been admissible but were improperly excluded because the trial judge erroneously relied on the wrong sub-section of Rule 609 and found they were inadmissible because they were not crimes of dishonesty or false statement. The State submits Appellant's argument is not preserved for appellate review because it was not raised to or ruled upon by the trial court. Furthermore, to the extent the issue is preserved any error in excluding the two convictions was harmless beyond a reasonable doubt where the witness was impeached with five other prior convictions which were crimes of dishonesty. Appellant's convictions in this matter should be affirmed.

Argument not Preserved

Initially, the State submits Appellant's argument is not preserved for appeal because it was neither raised to nor ruled upon by the trial court. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003). At trial, after the proffer of Wesson's testimony, the solicitor moved to prohibit Appellant from using Wesson's convictions for burglary and armed robbery to impeach. He argued that, under Broadnax, the convictions

should not be admissible because they were not crimes of dishonesty and there were no additional acts of dishonesty or deceit beyond the crimes themselves. Appellant responded that he believed Wesson's armed robbery and burglary did involve dishonesty and should therefore be admitted against him to impeach. Appellant never argued the trial judge's reliance on Broadnax was somehow improper or otherwise challenged the analysis undertaken by the court. He did not argue the prior crimes should have been admitted against Wesson regardless of whether they were crimes of dishonesty, and he never requested a Rule 609 analysis outside the Broadnax framework utilized by the trial judge. (Tr.p.138, line 10-p.140, line 9). He now argues, for the first time, that the trial judge erred because: "Rule 609 permits the use of any crime punishable by death or imprisonment in excess of one year to attack a witness's credibility regardless of whether the crime involves dishonesty or false statement." (Brief of Appellant, p.9). Because this argument was neither raised to nor ruled upon by the trial court it is not preserved and should not be addressed in this appeal. In any event, to the extent this Court finds the current argument is sufficiently preserved, any error by the trial in excluding the two convictions was harmless.

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The appellate court is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). The admission of evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Jennings, 394 S.C. 473, 477, 716 S.E.2d 91, 93 (2011); State v. Morris, 376 S.C. 189,

205-06, 656 S.E.2d 359, 368 (2008). An abuse of discretion occurs when the trial court's ruling is based on an error of law or when grounded in factual conclusions, is without evidentiary support. Jennings, 394 S.C. at 477-78, 716 S.E.2d at 93; State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012). "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." State v. Singleton, 395 S.C. 6, 13-14, 716 S.E.2d 332, 335-36 (Ct. App. 2011) (quoting Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005)).

Rule 609(a)(1), SCRE

Rule 609 of the South Carolina Rules of Evidence provides that for the purpose of attacking the credibility of a witness:

> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Rule 609(a), SCRE (emphasis added). Thus, there are three basic groupings of prior convictions that may be admitted depending first on the nature of the underlying crime (those involving dishonesty versus those that do not) and second on the nature of the witness against whom the prior crime is offered (the accused or someone other than an accused). Under Rule 609(a)(2), SCRE, if a crime is viewed as one involving dishonesty,

the court must admit the prior conviction because prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect. State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006). By comparison, where prior convictions do not involve dishonesty and they are offered against the accused, their probative value should be weighed against their prejudicial effect prior to their admission. Id. at 516, 633 S.E.2d at 155-56; Rule 609(a)(1), SCRE. However, where prior convictions do not involve dishonesty and they are offered against a witness other than the accused, they "shall be admitted, subject to Rule 403, SCRE." Rule 609(a)(1), SCRE. Rule 403 provides in part that: "Although relevant, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice." Rule 403, SCRE (emphasis added). Thus, when prior convictions which do not involve dishonesty are offered against a witness other than the accused, they must be admitted unless the court determines the danger of unfair prejudice substantially outweighs the probative value. Rules 403 & 609, SCRE.

Appellant first argues that regardless of whether armed robbery and third degree burglary are crimes of dishonesty or false statement, they should have been admitted against Wesson under Rule 609(a)(1) because they were offered against someone other than the accused and they were crimes punishable by imprisonment in excess of one year. The State does not dispute Appellant's general interpretation of admissibility under the "witness other than an accused" portion of Rule 609(a)(1), SCRE, and the limitations on the trial court's ability to exclude such convictions. However, as explained above, Appellant never made this argument at trial and instead argued the trial court should admit the prior convictions as crimes of dishonesty under Rule 609(a)(2), SCRE. As a

result, the argument about admissibility under Rule 609(a)(1), SCRE, is not preserved. In any event, where five other prior convictions were admitted against Wesson and those convictions were crimes of dishonestly, the probative value of the two excluded convictions is virtually non-existent. Consequently, under Rule 403, SCRE, their probative value would be substantially outweighed by the danger of unfair prejudice to the State and exclusion was appropriate under Rule 609(a)(1). For this same reason, and as explained in detail below, Appellant suffered no prejudice from the exclusion of Wesson's prior armed robbery and third degree burglary convictions. Thus any error under Rule 609(a)(1) was harmless.

Rule 609(a)(2), SCRE

Appellant alternatively argues that even when considered solely in the context of Rule 609(a)(2), the trial court's reliance upon Broadnax for concluding the prior armed robbery and burglary convictions were not crimes of dishonesty, was erroneous. He contends he showed Wesson engaged in acts of deceit beyond the basic crimes themselves which proved those crimes involved dishonesty and mandated admission their admission against Wesson under Rule 609(a)(2). The State disagrees. In regard to the burglary conviction, absolutely no evidence was presented that Wesson engaged in deceit, dishonesty, or false statement. Wesson testified he simply entered a construction site looking for a place to sleep. In regard to the armed robbery conviction, Wesson agreed he was "hiding" in the parking lot prior to the armed robbery; however, the word "hiding" was supplied by Appellant's attorney in the form of a leading question meant to paint the manner in which Wesson was waiting in the parking lot in a negative light. It was never directly used by Wesson and there was no testimony explaining how it was

even possible to have been "hiding" in a wide-open grocery store parking lot. In any event, it is factually impossible to "hide" during an armed robbery because it requires that property of value by taken "from the person of another or in his presence by violence or putting such person in fear." State v. Frazier, 386 S.C. 526, 532, 689 S.E.2d 610, 613 (2010). Thus, by its very nature committing an armed robbery involves the opposite of hiding. While Wesson's testimony arguably might show deceit prior to the commission of the crime, it does not show any additional facts of dishonesty or false statement during the commission of the armed robbery itself. If Wesson was covering his face or wearing a mask or disguise, or approached the victim from the back and ordered her not to turn around to look at him, or lied to get the victim to come to the parking lot, such additional facts could weigh more heavily in Appellant's favor. But here the only evidence was Wesson's explanation that he was waiting in the parking lot to commit an armed robbery, and then ran away after that robbery. These same or very similar events happen in virtually every armed robbery. The trial court made a factual finding that the evidence presented was insufficient to qualify the armed robbery as a crime of dishonesty and this Court is bound by that factual finding because it was not clearly erroneous. Baccus, 367 S.C. at 48, 625 S.E.2d at 220. Thus, the trial court did not abuse its discretion and the decision should be affirmed.

Harmless Error

Regardless of whether this Court considers Appellant's claim as a challenge under Rule 609(a)(1) or 609(a)(2), any error by the trial court was harmless under the circumstances of this case. "Error is harmless where it could not reasonably have affected the result of the trial." Bryant, 369 S.C. at 5 18, 633 S.E.2d at 156 (citing In re

Harvey, 355 S.C. 53, 63, 584 S.E.2d 893, 897–98 (2003)). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result." Id. (citing State v. Sherard, 303 S.C. 172, 175, 399 S.E.2d 595, 596 (1991)). "Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached." Id. (citing State v. Bailey, 298 S.C. 1, 4–5, 377 S.E.2d 581, 583–84 (1989)). "The circumstances of each individual case are to be considered." Id.

Here, Wesson admitted he had five 2006 convictions for fraudulent check. (Tr.p.140, line 17-p.142, line 21). These convictions all were crimes of dishonesty and certainly must have been considered by the jury in assessing Wesson's credibility. The additional admission of the armed robbery and burglary convictions would have added nothing significant to that assessment; therefore, any error by the trial court was harmless.

II.

The trial court properly qualified police investigator Kirby as an expert in the street value of drugs, how drugs are sold and packaged, and common behavioral characteristics of drug dealers and users based on his education, training, and experience, and the court properly admitted Kirby's expert testimony pursuant to Rule 702, SCRE, because he possessed technical or specialized knowledge which could assist the jury to understand the evidence or determine a fact in issue.

Appellant argues the trial court erred in qualifying narcotics investigator Kirby as an expert in the street value of drugs, the typical habits of a drug user as opposed to a drug dealer, the normal means of packaging and selling certain drugs, typical dosages of street drugs, and avoidance methods persons involved in drug activity use to avoid detection. He contends Kirby was not qualified to be deemed an expert under Rule 702, SCRE, and complains that the Rule is not intended to allow police officers to essentially testify that they are doing their jobs correctly and have correctly charged the defendant with drug possession and trafficking. Appellant argues Kirby offered opinion testimony that improperly usurped the jury's fact finding role by declaring that a hypothetical person with drugs and items similar to those discovered on Appellant would be considered a drug dealer.

To the contrary, the trial court acted well within its discretion in qualifying investigator Kirby as an expert in the street value of drugs, how drugs are sold and packaged, and common behavioral characteristics of dealers and users based on his education, training, and experience. Furthermore, the trial court properly admitted Kirby's expert testimony pursuant to Rule 702, SCRE, because he possessed technical or specialized knowledge which could assist the jury to understand the evidence or determine a fact in issue.

Relevance

As a general rule, all relevant evidence is admissible. State v. Aleksey, 343 S.C. 20, 34, 538 S.E.2d 248, 255 (2000); Rule 402, SCRE. Evidence that assists the jury in arriving at the truth of an issue is relevant and admissible unless otherwise incompetent. State v. Sweat, 362 S.C. 117, 126, 606 S.E.2d 508, 513 (Ct. App. 2004). Evidence is relevant if it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. In the Matter of Care and Treament of Corley, 353 S.C. 202, 205, 577 S.E.2d 451, 453 (2003); State v. King, 349 S.C. 142, 153, 561 S.E.2d 640, 645 (Ct. App. 2002); Rule 401, SCRE ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). It is not required that the inference sought should necessarily follow from the fact proved. See Sweat, 362 S.C. at 127, 606 S.E.2d at 513. Indeed, evidence is relevant if "logically relevant" to establish a material fact or element of the crime; it need not be "necessary" to the State's case in order to be admitted. Id. (citing State v. Bell, 302 S.C. 18, 393 S.E.2d 364 (1990)).

The State submits evidence supporting Appellant's alleged drug dealing was of consequence to the jury's determination of Appellant's guilt or innocence at trial. The State was entitled to introduce evidence to help explain facts or behaviors that were unfamiliar to the jurors. Expert testimony describing street value of drugs, how drugs are sold and packaged, and the common behavioral characteristics of drug dealers and users had a tendency to make a determination of whether Appellant was a drug dealer more

probable than it would be without such testimony; therefore, the expert testimony was relevant. Rule 401, SCRE.

Expert Testimony

In criminal cases, the appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001). The conduct of a criminal trial is left largely to the sound discretion of the presiding judge and the appellate court will not interfere unless it clearly appears that the rights of the complaining party were abused or prejudiced in some way. State v. Commander, 396 S.C. 254, 262, 721 S.E.2d 413, 417 (2011) (quoting State v. Bridges, 278 S.C. 447, 448, 298 S.E.2d 212, 212 (1982)). Thus, the admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice. State v. Kromah, 401 S.C. 340, 349, 737 S.E.2d 490, 494-95 (2013); State v. Brown, 401 S.C. 82, 87, 736 S.E.2d 263, 265 (2012); State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847-48 (2006); State v. Rice, 375 S.C. 302, 314, 652 S.E.2d 409, 415 (Ct. App. 2007). Indeed, the qualification of an expert witness and the subsequent admission of the expert's testimony are matters within the sound discretion of the trial court. Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1997); State v. Anderson, 407 S.C. 278, 285, 754 S.E.2d 905, 908 (Ct. App. 2014). A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of that discretion. State v. White, 382 S.C. 265, 269, 676 S.E.2d 684, 686 (2009); State v. Price, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006). An abuse of discretion occurs when the conclusions of the trial court either

lack evidentiary support or are controlled by an error of law. Kromah, 401 S.C. at 349, 737 S.E.2d at 495; Gooding, 326 S.C. at 252, 487 S.E.2d at 598; Lee v. Suess, 318 S.C. 283, 457 S.E.2d 344 (1995).

The South Carolina Rules of Evidence provide:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702, SCRE. Thus, there are several criteria that must be considered by the court in deciding whether to admit expert testimony. First, the court must determine if the scientific, technical, or specialized knowledge purportedly held by the witness would assist the jury to understand the evidence or determine a fact in issue. Second, the court must determine if the proffered witness in fact possesses scientific, technical, or specialized knowledge to qualify as an expert. Finally, in its general gatekeeping function, the court must determine if the type of expert testimony offered meets a "reliability threshold" for the jury's ultimate consideration. White, 382 S.C. at 269-70, 676 S.E.2d at 686; State v. Martin, 391 S.C. 508, 513, 706 S.E.2d 40, 42 (Ct. App. 2011).

There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App.1997); State v. Goode, 305 S.C. 176, 178, 406 S.E.2d 391, 393 (Ct. App.1991). The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. Wilson v. Rivers, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004). For a court to find a witness

competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony. Mizell v. Glover, 351 S.C. 392, 406, 570 S.E.2d 176, 183 (2002); Crawford v. Henderson, 356 S.C. 389, 404, 589 S.E.2d 204, 212 (Ct. App.2003); see also Gooding, 326 S.C. at 252-53, 487 S.E.2d at 598 ("To be considered competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.'"). An expert is not limited to any class of persons acting professionally. Gooding, 326 S.C. at 253, 487 S.E.2d at 598; Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 410, 563 S.E.2d 109, 113 (Ct. App. 2002). There is no exact requirement concerning how knowledge or skill must be acquired. Honea v. Prior, 295 S.C. 526, 530, 369 S.E.2d 846, 849 (Ct. App. 1988).

The party offering the expert testimony has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. State v. Von Dohlen, 322 S.C. 234, 248, 471 S.E.2d 689, 697 (1996); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); Henry, 329 S.C. at 274, 495 S.E.2d at 466. Generally, however, defects in the amount and quality of the expert's education or experience go to the weight to be accorded the expert's testimony and not to its admissibility. Von Dohlen, 322 S.C. at 248, 471 S.E.2d at 697; Mizell, 351 S.C. at 406, 570 S.E.2d at 183; Morris, 376 S.C. at 203, 656 S.E.2d at 366; Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 580, 560 S.E.2d 624, 629 (Ct. App. 2001).

The State proffered testimony from investigator Kirby. Kirby worked for the city police department for eleven-and-a-half years and had been assigned to the narcotics unit for nine-and-a-half years. He had "fairly extensive" training as a narcotics officer including drug classes, search warrant classes, and drug recognition classes, and he attended seven to ten classes in 2012 alone. The substance of Kirby's training included how to detect and identify drug dealers, drug weights and amounts in regard to sales or personal use, and drug paraphernalia. He learned about the wholesale value and street value of drugs, typical drug dealer behaviors, items and tactics used to sell drugs, packaging of drugs, and evasive tactics dealers might use. (Tr.p.157, line 15-p.170, line 6). Kirby learned about the habits of a drug user and how much drug of each type a user might possess or use at any given time. He served as the chief investigator in an average of 80 narcotics investigations a year and participated in 320 to 400 total investigations a year during the nine years he worked in narcotics. During these investigations Kirby dealt with both drug dealers and drug users and noticed specific differences between the two. He testifies about narcotics investigations approximately five to ten times a year in general sessions or federal court and five to seven times a month in magistrate or municipal court. (Tr.p.170, line 7-p.175, line 1).

After the proffer, the trial court qualified Kirby as an expert concerning the street value of drugs, the typical habits of a drug user as opposed to a dealer, and the normal means of packaging and selling of certain drugs. The court ruled that based on his experience he could also testify concerning typical dosages that he might find on the street and what avoidance methods he may have observed in the past. (Tr.p.181, lines 2-15).

The State submits that in light of the evidence proffered, the trial court clearly did not abuse its discretion in qualifying Kirby as an expert in these areas. Street values of drugs, how drugs are sold and packaged, and common behavioral characteristics of drug dealers and users are not within the range of knowledge of the average juror. Indeed, Kirby had acquired by study or practical experience such knowledge of these topics as would enable him to give guidance and assistance to the jury in resolving a factual issue which was beyond the scope of the jury's good judgment and common knowledge, namely whether Appellant intended to distribute or traffic the cocaine, crack-cocaine, and marijuana, or only possessed it for personal use. This is all that was required for the trial court to qualify him as an expert and to admit his testimony. Mizzell, supra; Gooding, supra. In fact, both this Court and courts in other jurisdictions have so held. See State v. Robinson, 396 S.C. 577, 586-87; 722 S.E.2d 820, 825 (Ct. App. 2012) (finding a police officer's thirty years of experience in narcotics enforcement coupled with his involvement in hundreds of crack cocaine cases sufficient to qualify him as an expert in how crack cocaine was sold and packaged); Brooks v. State, 700 So.2d 473, 474 (Fla. Dist. Ct. of App. 1997) ("It is proper for an appropriately trained and experienced law enforcement officer to offer expert opinion concerning packaging of drugs for sale versus personal use."); United States v. Gastiaburo, 16 F.3d 582, 589 (4th Cir. 1994) ("We have repeatedly upheld the admission of law enforcement officers' expert opinion testimony in drug trafficking cases."); United States v. Garcia, 447 F.3d 1327, 1335 (11th Cir. 2006) (recognizing the well-established rule that an experienced narcotics agent may testify as an expert to help a jury understand the significance of certain conduct or methods of operation unique to the drug distribution business); United States v. Foster, 939 F.2d 445,

451-52 (7th Cir. 1991) (approving of expert testimony from a police officer regarding methods used by drug dealers).[3]

Furthermore, because Kirby was properly qualified as an expert witness, any further objections to Kirby's qualifications went to the weight of his testimony, not its admissibility. Martin, 391 S.C. at 515-16, 706 S.E.2d at 44. Additionally, the State submits that in light of the trial court's jury charge on expert witnesses, Kirby's testimony could not have been given greater weight than that of a lay witness and, therefore, could not have been unduly prejudicial to Appellant. State v. Douglas, 380 S.C. 499, 503, 671 S.E.2d 606, 609 (2009). Indeed, the trial court made it abundantly clear that rather than letting the Kirby usurp the jury's fact finding role, the jurors were the "sole and exclusive judges of the facts" and that they should only give the testimony of experts "the weight you think that testimony deserves." (Tr.p.272, line 16-p.273, line 22; p.277, line 5-p.278, line 9). Because the testimony was not prejudicial, any possible error in the trial court's qualification of Kirby as an expert and admission of his testimony was likewise harmless beyond a reasonable doubt. Bryant, 369 S.C. at 518, 633 S.E.2d at 156 ("Error is harmless where it could not reasonably have affected the result of the trial.").

For all of these reasons, the State submits the trial court's qualification of Kirby as an expert in the street value of drugs, how drugs are sold and packaged, and common behavioral characteristics of dealers and users, as well as the admission of Kirby's testimony under Rule 702, SCRE, did not constitute an abuse of discretion. Additionally,

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[3] In his brief, Appellant complains that Kirby "had never testified as an expert before." (Brief of Appellant, p. 12). However, as recognize by the Fourth Circuit Court of Appeals: "[T]he precise number of years of an investigator's experience, or the number of investigations on which [he] has worked, is not necessarily dispositive. Every expert has a first time. It is the quality of [the] experience . . . on which the district court properly focused . . . ."

Appellant suffered no prejudice from his testimony and any possible error on the part of the trial court was harmless. Appellant's convictions should be affirmed.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the judgment, conviction, and sentence of the lower court be affirmed.

Respectfully submitted,

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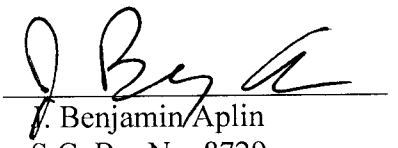
BY: 
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Columbia, South Carolina
March 6, 2015

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Roger L. Couch, Circuit Court Judge

Appellate Case No. 2013-002639

THE STATE, ...RESPONDENT

v.

ISAAC GLENARD LYLES, ...APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter* , both dated March 6, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served. This 6th day of March, 2015.

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