THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

APPEAL FROM YORK COUNTY
Court of Common Pleas
Case No. 2016-CP-46-01280

S. JACKSON KIMBALL, II, Special Circuit Court Judge

Appellate Case No. 2017-001530

City of Rock Hill, Appellant,

v.

Nathan Morgan, Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF YORK	)	CASE NO. 2016CP4601280
	)	
CITY OF ROCK HILL	)	
	)	
Respondent,	)	
	)	
vs.	)	ORDER REVERSING CONVICTION AND
	)	REMANDING FOR NEW TRIAL
NATHAN MORGAN	)	
	)	
Appellant.	)	
	)	

This matter came before the court on May 11, 2107, upon an appeal filed by Nathan Morgan ("Appellant") from his conviction for Assault Battery 3rd Degree, following a jury trial held on April 21, 2016. Appellant was represented by Charles H. Rudnick, Assistant Public Defender, and the City of Rock Hill ("City") was represented by Christopher E. Barton, City Solicitor. After consideration of the record and arguments of counsel, I find and conclude as follows.

FACTUAL / PROCEDURAL BACKGROUND

Appellant was charged, and subsequently convicted of Assault and Battery 3rd Degree after a jury trial on April 21, 2016. Appellant timely filed an Appeal to this Court.

During his direct examination at trial, in defense of the charges against him, Appellant testified that Cornelius McCleod ("McCleod"), the alleged victim, aggressively pulled his jacket from behind. Appellant stated that he felt threatened after this occurred, and in response, struck McMcCleod.

On cross-examination, the City confronted the Appellant with McCleod's assertion that Appellant had stolen his chainsaw. Appellant denied the theft and stated, "I don't steal."[1]

Appellant had a prior 1984 conviction of Retail Theft, a 1993 conviction of Burglary 2nd Degree, and a 1996 Theft of Cable conviction. All convictions were twenty to thirty years old.

Appellant objected to the attempted impeachment with these prior convictions, but the trial court found that Appellant "opened the door" to the admission of each of these prior convictions for impeachment purposes. After making this ruling, the trial court did not conduct a

[1] It is important to note that Appellant's statement was made in the present tense, and that it was made in the context of an accusation of a recent theft. It would be unfair to equate the statement to a claim of never having been guilty of theft, especially in view of remoteness of the convictions used to impeach Appellant.

balancing test as required by Rule 609(b), SCRE. The only finding made was that the "prejudicial value was not outweighed by the probative harm (sic)."

LAW / ANALYSIS

Rule 609(a)(2), SCRE, provides that ". . . evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of punishment." However, evidence of such convictions is not admissible if a period of ten years or more has elapsed since the conviction or release, whichever is later. Rule 609(b), SCRE. This prohibition may be overcome, and the conviction admitted, if ". . . the court determines, in the interests of justice, that the probative value of the conviction ***supported by specific facts and circumstances substantially outweighs*** its prejudicial effect." *Id.* (Emphasis added.)

The Rule creates a presumption against the admission of remote convictions, and the State bears the burden to overcome this presumption. *State v. Bryant*, 369 S.C. 511, 516, 633 S.E.2d 152, 155 (2006). A trial court must conduct a balancing test to determine whether remote convictions are admissible under Rule 609(b). *Id.*; *State v. Colf*, 337 S.C. 622, 626, 525 S.E.2d 246, 248 (2000).

Before admitting the remote convictions, a trial judge should consider the following factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity of the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *State v. Colf*, 337 S.C. at 627, 525 S.E.2d at 248.

After conducting the balancing test, ". . . the judge must make a determination and articulate, on the record, the specific reasons for his ruling. Specifically, the trial judge must articulate why the probative value of the prior conviction outweighs its prejudicial effect." *State v. Bryant*, 369 S.C. at 516-517, 633 S.E.2d at 155. The failure to conduct a balancing test, and to articulate for the record specific facts and circumstances to overcome the presumption created by Rule 609(b), is an abuse of discretion. *State v. Colf*, 337 S.C. 622, 626, 525 S.E.2d 246, 248 (2000).

Respondent asserts that the error, if any, was harmless. "Error is harmless where it could not reasonably have affected the result of the trial." *State v. Bryant*, 369 S.C. at 517, 633 S.E.2d at 156 (2006); *In re Harvey*, 355 S.C. 53, 584 S.E.2d 893 (2003). "[A]n 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.; State*

v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989).

In this case, Appellant's credibility was essential to his defense. Appellant asserted self-defense as justification for his actions. While one witness corroborated Appellant's account, only the Appellant could explain whether he felt threatened by Mr. McCleod's conduct in order to justify his own conduct. Admission of Appellant's remote convictions was highly prejudicial to Appellant's credibility. Under the facts of this case, I find and conclude that the error in this instance was not harmless.

In summary, I conclude as a matter of law that Rule 609(b) required that the remote convictions not be admitted to impeach Appellant. I further conclude that, in any event, the Court failed to conduct the balancing test required by Rule 609. Further, the error in admitting the remote convictions for impeachment purposes was highly prejudicial, and was not harmless.

ORDER

Therefore, based on the findings and conclusions herein, it is ordered that Appellant's conviction of Assault and Battery 3rd Degree be reversed, and that this case be remanded to the trial court for a new trial.

IT IS SO ORDERED.

May 22, 2017

S. Jackson Kimball
Special Circuit Court Judge
York County

#3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS

FILED-RECEIVED
2017 JUN 30 AM 9:28
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP4601280

Nathan Morgan		Rock Hill City Of	
RESPONDENT		APPELLANT	
Submitted by:		Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

This matter came before me on June 15, 2017 upon Appellant's motion pursuant to Rule 59(e), SCRCP, asking the Court to alter or amend the Court's Order filed May 23, 2017. Representing the parties were: Christopher E. Barton for Appellant; and, Charles H. Rudnick for Respondent.

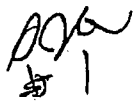
The purpose of Rule 59(e), SCRCP, to alter or amend the judgment, is to request the trial judge to ". . . reconsider matters properly encompassed in a decision on the merits." *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (Citations omitted). A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment, but was not. *See Johnson v. Sonoco Products Co.*, 381 S.C. 172, 672 S.E.2d 567 (2009); and, *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009).

Upon reviewing the record presented, and considering the arguments of counsel, I find no matter presented that was not addressed expressly, or by clear implication, in the prior order. Appellant asserts that the proper remedy in this case was to remand the case to the Municipal to make specific findings in compliance with Rule 609, SCRE, rather than reversal, and the grant of a new trial. I disagree.

I find that the specific facts of this case, and the obvious prejudice, are such that the analysis required under Rule 609 would compel exclusion of evidence of prior convictions in any event. I further find no other basis for reconsideration or amendment of the ruling rendered in the prior order.

Therefore, it is ordered that Appellant's Motion pursuant to Rule 59(e), SCRCP, be denied.

AND IT IS SO ORDERED.



ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Special Circuit Court Judge	Judge Code	Date
	3063	6/28/2017

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Charles Harold Rudnick 1675-1E York Hwy PO Box 691 York, SC 29745

Christopher Edward Barton 201 East Main Street 3Rd Floor Rock Hill, SC 29730

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

State of South Carolina., County of York.	In the Common Pleas Court of York Case No. 2016-CP-46-01280
City of Rock Hill., Plaintiff., -vs- Nathan Morgan., Defendant.	Transcript of Record

May 11, 2017
June 15, 2017
York, South Carolina

B E F O R E:

The Honorable S. Jackson Kimball, III., judge.

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Official Court Reporter
To The Honorable John C. Hayes, III
Sixteenth Judicial Circuit
Union and York Counties

I-N-D-E-X

E-X-A-M-I-N-A-T-I-O-N

I N D E X

E X H I B I T S

NO.	DE--PTION	ID.	EVD.

No Exhibits were received into the record.

THE COURT: This is Case No. 2016-CP-46-1280 City of Rock Hill against Nathan Morgan. Its an appeal from a criminal conviction in the Municipal Court of Rock Hill and Mr. Morgan is the appellate. He's represented by Mr. Charles Rudnick. Present representing the City is Mr. Christopher Barton.

Mr. Rudnick, your appeal.

MR. RUDNICK: Thank you, your Honor, may it please the Court.

Your Honor, the trial court's conviction of Mr. Morgan should be over turned for three reasons based off the two issues of appeal that I've filed with the court.

The first being the prior remote convictions for over ten years were erroneously admitted into evidence in our opinion because the probative value did not substantially out weigh it's prejudicial effect that's required under 609(b). Second, the factors that the court would consider in admitting that prior conviction were not adequately considered in our opinion just as the matter of admitting it into evidence.

THE COURT: On the record you mean at the time?

MR. RUDNICK: Yes. Yes, sir. We specifically on that day we did not discuss the matter but we did discuss it some or argued whether or not the admission of the prior convictions open the door so to speak to evidence. In this

state we argued that the factors that --

THE COURT: The question was whether his saying I don't steal open the door for the prosecution to ask him about these three prior convictions?

MR. RUDNICK: Yes, your Honor.

THE COURT: All of which are more than ten years old?

MR. RUDNICK: Yes, your Honor, that's correct.

And the analysis for the admission of remote convictions requires a finding of whether or not the probative value of those prior convictions would substantially out weigh the prejudicial effect but essentially reverse analysis for what would normally be a 403, Rule 403 analysis. With regard for the last point is that the probative value is substantially outweighed by the risk of confusing the issues in the court.

And briefly for both I'll essentially combine the first two going with the confusion of issues first. The issue in the case was whether or not an assault occurred and whether or not that assault precipitated or whether an affirmative defense of self defense was justified.

The issue of whether or not the chain saws were stolen which precipitated the altercation between Mr. Morgan and Mr. McCloud, delving into that and then in the past convictions that were more than thirty years old I believe from one, well 1984 retail theft, 1993 burglary in the

second degree and 1996 theft of cable, would confuse the jury or our position would be that it confused the jury as to what the actual question in the case was.

But more to the point with regard to the first is the factors that we would consider when introducing an ancient or remote conviction such as this is the impeachment value of a prior crime, the point in time, and the witnesses' subsequent criminal history; similarity between the past crime and the charged crime; the importance of the testimony and the scintrality of the credibility issue.

Its our position that the statement of "I don't steal" when considered with the factors that the court would consider as far as the probative value of it, essentially that the probative value is not substantially outweighed by the prejudicial effect because there the probative value of whether or not the assault occurred was an issue in the case but whether or not these prior convictions --

THE COURT: As I understand it there were only two witnesses; the alleged victim and Mr. Morgan, right?

MR. RUDNICK: There was actually one other witness ---

THE COURT: All right. I missed that.

MR. RUDNICK: --- whose name was I think Michael, Mike Agars.

THE COURT: Is that mentioned in the ---

MR. RUDNICK: Return.

THE COURT: --- court's return?

MR. RUDNICK: Yes, sir.

THE COURT: There it is. Okay. Yeah.

MR. RUDNICK: But the --

THE COURT: It said the victim. Yeah, the victim. If I'm reading it right it was -- I don't know who types these returns up but they're -- some of 'em are a little bit difficult to read.

MR. RUDNICK: Yes, sir.

THE COURT: The victim grabbed the defendant's jacket and the defendant hit him with a cane is what he said?

MR. RUDNICK: Yes, sir.

THE COURT: Okay.

MR. RUDNICK: And just to essentially try to get our point of appeal as concise as possible, that we're arguing that the error was in allowing the admission of these three convictions --

THE COURT: To impeach the witness.

MR. RUDNICK: Yes, your Honor. And that it was the -- the prejudicial effect was enough to where it would not be harmless because at the time the credibility of Mr. Morgan was central to the case because Mr Agars who, while he did corroborate some with regard to a self defense claim, the actual belief or whether or not the person's reasonable belief with regard to actually committing self defense is

part of it and Mr. Morgan's the only person that would be able to testify as to that, so his credibility is essential.

And we would argue that because the factors were not adequately considered and because the probative value of the prior convictions with him being sober amount of time were so low comparted to the prejudicial effect that it would be not harmless error because this extremely old convictions hurt Mr. Morgan's credibility as a witness when he was testifying as to his belief and what precipitated the assault in that case. and for those reasons we would respectfully request the court to over turn the defendant's conviction and remand for a new trial.

THE COURT: Mr. Barton.

MR. BARTON: Your Honor, if it please the court.

Your Honor, just a couple of things, one I think in any jury trial the credibility of the witness is always one of the central issues in any case. The jury's got to believe what they're saying.

THE COURT: Of course.

MR. BARTON: So to the extent that the defendant gets up there and essentially wants to try to have cart blanch because he has a prior history that he can't open the door. South Carolina simply doesn't recognize that.

THE COURT: Well how does that fit into Rule 609?

Well, I mean because here was my impression from reading it. First of all, is there any disagreement about what the record is; what Judge Mobley has signed here?

Is it in order?

MR. BARTON: Judge, as far as the City's concerned no. And, again, I wasn't present for this case but I have no reasons to doubt what the properness and correctness of this --

THE COURT: And here's what the testimony was.

The victim says, We argued - argued that a chain saw was and he hit me. I threw up my arm I think he said. Maybe the defendant said that the guy threw up his arm. Yeah, he threw his hands up. I did not hit him. So McCloud says he was hit. Agars says that -- that McCloud grabbed the defendant's black-leather jacket which would qualify as an assault, could qualify as an assault under these circumstances. And then the defendant hit him with a cane which is -- And then Morgan says I didn't hit him. He threw his hands up. I tried to walk away, he grabbed me by the coat from the back, I felt threatened swung a stick and got him off me. He threw his hands up I did not hit him; I did not hit his head. I didn't hit his head.

Here's what - Here's what concerns me about this one.

And I had to dig into 609. It seems like that first of all what he said is I don't steal. Okay. That's stated

in the present tense. He didn't say I have never stole. I think I could say today -- I could say today for myself if accused of shoplifting I don't steal. That is not to say I haven't stolen before as a kid, stolen candy from somebody or something like that. So one, I think that the statement is in the present tense, not a statement of this is always been my character. Then I tried to plug that under -- plug that into 609. Here's where I need your help.

It seems like -- there is a case -- And I read a case, there is a case *State versus Bryant*, Supreme Court case, and Justice Toal says in that case that prior convictions involving dishonesty of dishonest which what these would have been to hold convictions, must be admitted. But in that case those convictions were not ten years old or more.

Where I'm having trouble is it looks like what my concern is the rule says evidence of any -- It's paragraph one, there is the evidence of a crime, shall be admitted if the court determines probative value and all that.

Number two says evidence that a witness, a crime committed, if it involved dishonest is admitted. Then does (b) apply to botn of those? 609(b) does it apply to both of those? It seems to me that's the question I have.

If I've rambled too much and you need to catch up that's fine. You see 609(b), have you got it?

MR. BARTON: I'm almost there. I just pulled up

Bryant and unfortunately it doesn't have a high link to 609 so I got to do it the old fashion way.

Well, Judge, I guess if you don't -- If I can come back to that for just a moment, I want to get back there.

THE COURT: All right.

MR. BARTON: I'm looking at just -- Again, I'm not sure that I completely agree with the court's analysis about the present tense especially sometimes some of the folks that we work with are not the most sophisticated in terms of their verbal skills so when they say I don't steal they may very well be saying that I don't steal before present tense, current tense, and future tense. They're saying they don't steal period. So they're not saying I'm not stealing right now. They're meant to make that statement as being said in the context of --

THE COURT: That is one possible construction of it, yes, sir.

MR. BARTON: But I guess the real question is this, is that in looking at the return the judge initially did the balancing and said that that stuff's not gonna be admissible.

THE COURT: Well the question is, said it's not going to be -- Oh, yeah, the pretrial thing.

MR. BARTON: Yes, sir.

THE COURT: Yes.

MR. BARTON: The judge clearly did that balancing. But from the City's position once the defendant -- if the court finds that the defendant opened the door as the trial court did in this case by saying I don't steal there is no balancing to be had at that point in time. South Carolina has clearly recognized the opening the door rule and says and this is when party introduces evidence on the matter that the other party would not had been allowed to raise initially the opposing party is allowed to go into that matter because the first party has opened the door to what otherwise would have been protected. And it's citing to *State versus Stroman* -- -

THE COURT: I don't disagree with that.

MR. BARTON: --- which is 316 S.E. 2d 395. And *State versus McFadden* 458 S.E. 2d 61.

It talks about if the party chooses to forego the protection of the rule by introducing evidence the opposing party would not be permitted to go into then it is not unfair to allow the opposing party to go into that matter and provide more information to the fact finder.

THE COURT: Well let me ask you this? When that occurred -- Well you weren't at the trial.

Well, Mr. Rudnick you were weren't you?

MR. RUDNICK: Yes, your Honor, I was.

THE COURT: When he said I don't steal, what happened

at the trial?

MR. RUDNICK: The -- I think immediately after that there was a conference and whether or not the prior convictions would be admitted.

THE COURT: This was a jury trial wasn't it?

MR. RUDNICK: Yes, sir.

THE COURT: Did she send the jury out and then talked to you about it or what?

MR. RUDNICK: She might have. I do know that we all discussed it like sometimes we'll approach the bench --

THE COURT: I understand.

MR. RUDNICK: Yes, your Honor. But she did -- The judge finally did discuss whether or not there was an opening of the door and she kind of --

THE COURT: Discussed what?

MR. RUDNICK: That whether or not the door was opened for a prior conviction. I objected as far as them being entered and whether or not the door was opened. But I can't remember if the juror's actually specifically taken out but I do know that at first we at least went up to the bench for a bench conference, myself, the solicitor, and Judge Mobley.

THE COURT: I guess the question I have is what was put on the record. Did the judge put that ruling on the record?

MR. RUDNICK: She did, your Honor. She as far as whether the door was opened she at least made it clear to me, my client, and --

THE COURT: Here's what she said. Here's what the return says. The prosecutor then moved to impeach the defendant with three prior convictions all of which were thefts. The defense objected that the defendant did not open the door; that it would be inflammatory and confusing to the jury and that the prejudicial harm outweighed the probative value. The court allowed the impeachment of the prior convictions and so on on the basis of opening the door. What did she put on the record in terms of her ruling at that time?

MR. RUDNICK: I think it was similar to what Mr. Barton explained.

THE COURT: Was the thing recorded?

MR. RUDNICK: I believe it was. I'm not certain because at the point there was recording or there wasn't at one point and then they put in a recording system, so, I'm not sure at that time that there was a recording system in place, there might a been. But she did at least put it on -- made it known to all of us what the ruling was. It was based on the opening the door essentially as Mr. Barton explained.

MR. BARTON: Your Honor, I apologize, but attachment

five is a DVD of -- it says of – I think there is a type-o; it says DVD or proceedings, I'm assume that to be a DVD of the proceedings, so I'm assuming that's the audio recording.

MR. RUDNICK: Yeah, that must be.

THE COURT: Yeah, I know, and I did not listen to it because it seemed to me this was all a matter of law. And I'm just trying to focus on what was really was going on.

MR. RUDNICK: Yes, sir.

THE COURT: All right, go ahead, Mr. Barton.

MR. BARTON: Your Honor, I guess the other thing I want to go back to is just from a standard of review standpoint --

THE COURT: Do you think that -- Do you think that open the door trumps 609(b)?

MR. BARTON: Yes, your Honor, I think it does. Because initially that would be the analysis at the front end that the judge did in this case.

THE COURT: Well I disagree with that. The judge can make a pretrial ruling but what -- whether or not to allow the impeachment has to depend on what happened during the trial to raise the question. So I think she -- I believe that she should have made a -- put some sort of analysis on the record at the time the prosecution sought to impeach the witness on his three ancient convictions all of which

had to do with stealing which is what he was accused -- well he wasn't accused of. This trial was for assault and battery third degree, not theft.

MR. BURTON: Your Honor, I guess going back to just from the City's analysis of this, one, I think, the defendant clearly opened the door. Two, if you look at Rule 404 it says about character evidence it says evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity there with on a particular occasion except character of the accused. It says the evidence of a pertinent trait of character offered by the accused or by the prosecution rebut the same. And then it talks about other crimes, wrongs, acts, evidence of other crimes, wrongs, or acts, is not admissible to prove the character of a person in order to show an action in conformity therewith it may however be admissible to show motive, identity, existence of a common scheme of plan, absence of a state or intent similar to the 609 exceptions.

But in this case, your Honor, when a witness opens the door by saying I don't steal and there is prior evidence that in fact they have stolen --

THE COURT: Twenty years ago?

MR. BARTON: Whether its twenty years ago or fifty years ago, your Honor.

THE COURT: If I had been accursed of that when I was thirty-five I might have -- You know I may have stolen something at age fifteen.

MR. BURTON: What the rule -- It's essentially the rule of fairness. You can't just get up there and tell something you know is not true to the jury when the credibility of the witness is one of the fundamental things they got to say, to judge. That person got up there told something they knew wasn't true. They knew it wasn't true.

THE COURT: But it didn't have ---

MR. BARTON: They told that to the jury --

THE COURT: It didn't have -- Listen to me.

MR. BURTON: --- in the presence of the jury.

THE COURT: It didn't have a thing to do with the charge. The charge was assault and battery in the third degree.

MR. BARTON: I agree but --

THE COURT: It had only to do with whether or not this witness is to be believed about the assault and battery.

MR. BARTON: But the witness was the one that spontaneously raised it. That's how they opened the door.

THE COURT: Well, that's debatable from my view.

MR. BARTON: Your Honor, looking then, again, at it says specific incidences of conduct can be brought up -- and this under 405 -- on cross-examination. So in other

words if that person got up there and says in my opinion I don't steal, he said I don't steal, the rule says on cross-examination inquiry's allowable to relevance specific instances of conduct that prove otherwise. Because again, their credibility, their believability, is always the essential issue in a trial. And the fact that he spontaneously raised that issue --

THE COURT: The very reason, it is not automatic. Under the rule there still must be an analysis on the record with findings that the prior conviction admitting evidence of the prior conviction is not so prejudicial as to deprive the defendant of a fair trial.

MR. BARTON: Your Honor, I just want to, there is a number of cases I think that the court just needs to take a look at before it makes a ruling. One is *State versus Major*. This is 391 S.E. 2d 235. This is the one where the defendant opened the door for a prior possession of a cocaine conviction and in this case --

THE COURT: What did the witness say and how old was the conviction?

MR. BARTON: The court -- I'll read just the over view part of this --

THE COURT: Well I just want to know what did the witness say and how old was the conviction.

MR. BARTON: It said the court held the defendant

placed his good character into the issue such that his prior conviction was properly. The count found that the defendant's testimony on direct examination demonstrated a clear attempt to communicate to the jury that he was not the sort of individual who would become involved in the drug trade. Having introduced evidence of his own good character on an issue of involvement in drugs the defendant was subject to cross-examination on that assertion.

Your Honor, let me see if I can see --

THE COURT: So he was charged with a drug offense, right?

MR. BARTON: That is correct, your Honor. He was convicted of distribution of cocaine and distribution of cocaine within a half mile of a school. And again, obviously that's not the normal thing that you can get into. In fact our Supreme Court said that that's exactly what the rule is designed to prevent is to have people convicting someone just because they've been a drug dealer in the past. So that normally wouldn't have been allowed to be opened, gotten into by the prosecution, but in this case when the defendant opened the door prosecution was allowed to do that. If I can look here I'm gonna see the approximate -- It doesn't -- I'm not sure if it gives a date on when the prior conviction had occurred.

It said --

THE COURT: Well I dug up a case on the similarity of offenses. It's *State versus C-o-l-f, Colf* I guess it is.

Golf with a C. And the essence of it is the similarity of offenses weighs into the equation and certainly in that case the man claims -- charged with a drug offense and claimed that he wouldn't do such a thing but he had.

MR. BARTON: Judge, this is another case of the defendant opening the door. This is with respect to a domestic violence conviction and in that case the court found that the state may not attack the accused on character unless he first places that at issue. However when one introduces evidence as to a particular fact or transaction the other party's entitled to introduce evidence in explanation or rebuttal thereof. Even though the later would not have been -- would have been incompetent or irrelevant if it had initially been offered.

An accused may be cross-examined as to all matters which he is himself has brought up on direct examination.

So I don't think that the ten year time limit --

THE COURT: What did he bring up?

MR. BARTON: I'm sorry, your Honor.

THE COURT: What did he bring up?

MR. BARTON: This is one where he opened the door about a relationship with his wife. The solicitor was

entitled to cross-examine him about that relationship even if the response brought up the appellant's prior domestic violence conviction.

THE COURT: Okay. A similarity.

MR. BARTON: Your Honor, in *State versus Dunlap* and this is an appeal actually from York County when Judge Floyd was the City circuit court judge. They found in that case the defense counsel opened the door during his opening argument such as that convictions that were otherwise inadmissible since that they were mentioned in opening, so even a defense attorney can open that, raise that in an opening argument.

THE COURT: I agree.

MR. BARTON: And then lastly I'm looking at *State versus Young* where the defendant opened the door as to convictions for criminal sexual conduct and criminal domestic violence, where they were charged with ABHAN and kidnaping. Again, it says a party cannot complain about the admission of evidence where he opened the door to the evidence. Further when a party introduces evidence about a particular matter the other party is entitled to explain or rebut it even if the later evidence would not have been -- would have been incompetent or irrelevant had it been offered initially. A party may not complain of error because of his own conduct.

It says when a party introduces evidence of a particular fact or transaction the other party is entitled to introduce evidence in explanation or rebuttal thereof even though ---

THE COURT: Well the party didn't do that.

MR. BARTON: --- the later evidence again would have been incompetent or irrelevant had it initially been offered.

THE COURT: All right. I've made up my mind.

MR. BARTON: And, your Honor, I guess the other thing I just want to put on just for the purposes of the record is, it's an abuse in discretion standard. The fact that you may have ruled differently the question is is there evidence in the record to support Judge Mobley's ruling. I think there is.

THE COURT: Well it depends on how you read Rule 609 seems to me and this is the way I read it.

The general rule is stated in Rule 609(a) and it provides for how to handle dealing with prior crimes. Subsection (1) introduces the -- at that stage the issue of a weighing of the probative value and the prejudice. But then Subsection (2) says, evidence that a witness is being convicted of a crime shall be admitted if it involved dishonesty or false statement regardless of the punishment, which seems to be a much broader or a much more relaxed

standard for crimes involving dishonesty and stealing is certainly I would put in that category.

Then there is Subsection (b). It says evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed. Unless the court determines in the interest of justice that the probative value of the conviction supported by specific facts and circumstances substantially out weighs it's prejudicial effect. However, evidence of a conviction more than ten years old as calculated here is not admissible unless the opponent gives to the adverse parties sufficient advance written notice of intent to use such evidence.

I think the rule divides these things into different categories and places a much higher standard on convictions that are more than ten years old. I think that when coupled with what Mr. -- Mr. Morgan said which was simply I don't steal in the present tense when what we're talking about is convictions that are twenty years old the prejudicial value -- the probative value -- or the prejudicial value in my view out weighs -- the prejudicial effect outweighs the probative value then in this case.

That doesn't mean it's reversed. It just means that shouldn't a been admitted. And there is no evidence that the trial judge conducted a specific hearing on the record giving her reasons for admitting -- giving her reasons for

finding that the probative value outweighed the prejudicial effect. She did find on the record that the defendant opened the door. But that's not a -- that's not an analysis of prejudice versus probative value.

So I reverse the conviction and remand the case to the City court for retrial. Now if she can be -- If the same thing happens again she can conduct -- and there is a specific analysis of probative value versus prejudice and it may be admissible again but in this instance that's not there in my view.

MR. RUDNICK: Thank you, your Honor.

MR. BARTON: Your Honor, if I can just for the record, just put on from the City's perspective. One: On an appeal these matters are not to be reviewed de novo.

THE COURT: They're not?

MR. BARTON: The question is, is there evidence in the record --

THE COURT: It's a question of law, Mr. Barton.

MR. BARTON: I agree, Your Honor. So the question is, is there evidence in the record from --

THE COURT: I ruled as a matter of law that 609(b) does not admit prior convictions of any de--ption more than ten years old unless there's a specific finding that the probative value outweighs -- substantially outweighs it's prejudicial effect and that didn't happen.

MR. BARTON: Your Honor, just so I understand, so you're respective of whether the defendant opens the door you're saying the ten year time limit still applies?

THE COURT: Yes, sir.

MR. BARTON: Okay. I think just from --

THE COURT: I think it's questionable whether he opened the door but that's not what I'm ruling on. I'm saying 609(b) requires a certain -- a certain process and that didn't happen.

MR. BARTON: Just --

THE COURT: And the convictions are twenty years old.

MR. BARTON: I understand, your Honor. I guess just for the record given the City's position that once the defendant --

THE COURT: You don't need to put any more on the record.

MR. BARTON: Once the defendant opened the door that that ten year time limit does not apply. Once - If and when he was --

THE COURT: I disagree. Here's the rule.

609. Impeachment by evidence of conviction of crime. That applies to what happened in this case. The prosecution sought to impeach this defendant by evidence of conviction of a crime. The rule clearly says you can't do that if it's more than ten years old unless the probative

value substantially outweighs its prejudicial effect. So open door doesn't answer the question. Open door simply invokes the procedure under Rule 609 in my opinion as a matter of law.

MR. BARTON: Your Honor, again, if the court applies 609, looking at the notes it says the adoption of the general ten-year time limit for use of a conviction of impeachment constitutes a change in South Carolina law of a former case law did not set forth --

THE COURT: Mr. Barton, you can argue that on appeal. We've heard enough and we're gonna hear the next case.

MR. BARTON: Well --

THE COURT: Mr. Barton, that's the end of that.

MR. BARTON: Your Honor, the only thing --

THE COURT: That's the end of that.

MR. BARTON: I'm just trying to --

THE COURT: I have ruled.

MR. BARTON: I agree, your Honor.

THE COURT: You can appeal it. If you think I wouldn't let you put something on the record appeal that. I'm not gonna hear anymore about it. Period.

All right, Mr. Rudnick, I want you to email me an order that contains specific findings that I just stated.

MR. RUDNICK: Yes, sir.

THE COURT: And email it in Word format so that I can

be sure I said what I meant to say.

MR. RUDNICK: Yes, sir.

THE COURT: Any question about that?

MR. RUDNICK: The basis of it is that the analysis on 609(b) in the --

THE COURT: That's right.

MR. RUDNICK: Yes, sir.

THE COURT: And the fact that open door, the open door rule, does not trump 609(b). 609(b) is the analysis that occurs when you open the door.

MR. RUDNICK: Yes, your Honor, thank you.

THE COURT: All right.

MR. RUDNICK: Thank you.

THE COURT: That will conclude that case.

(COURT IN RECESS.)

(COURT BACK IN SESSION THURSDAY, JUNE 15, 2017 AT 11:02 AM IN THE MATTER OF CITY OF ROCK HILL VERSUS NATHAN MORGAN.)

THE COURT: Okay. Next City of Rock Hill against Nathan Morgan. Mr. Barton, Mr. Rudnick, ready to go?

MR. RUDNICK: Yes, your Honor.

MR. BARTON: Yes, your Honor.

THE COURT: This is the City's motion to reconsider my prior order. Let me pull it out here before we get started. All right, Mr. Barton, if you're ready.

MR. BARTON: Your Honor, if it please the court.

I realize we were before the court previously on this matter and I'm not sure if I did the most articulate job of trying to state the City's position with respect to this. And I also think I probably aggravated the court so for that I apologize.

THE COURT: No, you didn't aggravate the court and you did state the City's position in a way that at least I could understand it.

MR. BARTON: But I guess I just wanted to provide the court with just what the City believes is a little bit of additional guidance. And I know the court was concerned with respect to looking at Rule 609, and while I would agree that 609 applies at the outset, in other words, whether in a motion in limine or whether the defendant takes the stand there has to be a Rule 609 balancing at the outset of whether prior convictions can be brought in.

And obviously if they are more than ten years old there's additional special considerations and the scale tips even in less favor of the government being able to use that type of evidence.

THE COURT: Right.

MR. BARTON: However, South Carolina as I've cited to in the motion clearly recognizes the concept of opening the door. Some people call it curative admissibility. Its

been referred to in both fashions in South Carolina. There is actually an article on it by Judge Anderson who calls it fighting fire with fire.

THE COURT: I bet that's a long article.

THE COURT: It's a relatively interesting article. It's a good article from Judge Anderson.

THE COURT: I'm sure it is.

MR. BURTON: But the City's concern in this case is, is obviously we believe that the judge was correct or at least there was certainly evidence in the record that supports the judge's position that when the defendant said I don't steal that he opened the door to what previously would have been inadmissible evidence.

And again, the cases I've cited to says that. South Carolina Supreme Court and Court of Appeals have indicated that the normal Rule 609 balancing test kind of goes out the door and the evidence can be admitted.

I think if you look at the Fourth Circuit Court of Appeals case that I cited I think they give a little bit better guidance in terms of how the courts should interpret that and that's the Levous case your Honor, and in the Levius case where it --

THE COURT: I had no ability to read that.

MR. BARTON: I'm sorry, your Honor.

THE COURT: I did not read that case.

MR. BARTON: Okay. Your Honor, in that case what the court talked about was in Levus, again the Rule 609 doesn't apply but the general Rule 403 still applies so there is still some balancing test that has to take place but it is much more favorable to the government to be able to meet that threshold requirement under Rule 403 than it would be under Rule 609 (b).

Your Honor, and so from the City's perspective I think there is certainly evidence in the record that the defendant did in fact open the door when he made the statement I don't steal when he in fact had I think at least two or three prior convictions for some form of theft.

THE COURT: All of which were ten, twenty and thirty years old.

MR. BARTON: All be it. And again no doubt from the City's perspective the court properly ruled ahead of time that those weren't gonna - not gonna be able to be brought up. But again from the City's perspective when he made that statement he has now opened the door to what would previously be inadmissible evidence and the opening the door doctrine applies.

Your Honor, even assuming the court were not to find that argument satisfactory I think when you look at Colf which the court did cite to that case where it talks about

and both in --*vens* and in *Martin* they all talk about the fact that clearly a case can be sent back to a lower court for that trial judge to do the judge's job. In other words to put on the record --

THE COURT: Well let me -- I read that. Let me stop you and ask you a question about that. If I understood it correctly what you were -- the relief, that alternative relief that you're asking for would have the appellate court return the -- simply return to the lower court, the trial court, that one issue to make a determination under Rule 609, and if the court -- if the trial court ruled that Rule 609 excluded the evidence of prior crimes, that would be the end of it? In other words it would make a determination after the fact, after the barn door's been opened.

MR. BARTON: Yes, sir. If you look at *State versus Martin* which was a case where Judge Alford was taken -- the case was token up from appeal from where Judge Alford was sitting as the trial court judge, it was sent back to Judge Alford with a instruction for him to look at the record, hear arguments from counsel, make an explicit formal ruling on the record as to that Rule 609 issue.

If he found that Rule 609 applied and 609(b) applied in favor of the defendant he then could grant the new trial right then and there; give the defendant the relief they

wanted. If he ruled against the defendant then the defendant -- the record is clear at that point in time so they could go up on appeal; so that an appellate court could then make the determination whether the judge abused his discretion in admitting that evidence or not.

THE COURT: But that case doesn't require that type of relief does it?

MR. BARTON: Well I think if you look at *Colf*, *Martin*, and --*ven* together I think they are pretty clear in indicating that that's the preferred method of relief in terms of -- the appropriate method of relief if you find that Rule 609 especially where the record is not clear, and in this case I'm not sure that the record is clear, as to how the judge balanced that out.

THE COURT: But you don't -- You're not arguing that the appellate court whether it be, you know, the circuit court as in this case or the court of Appeals also can rule that the -- Let me say it this way.

Are you saying that the Appellate Court can't make it's own review of the record and findings about whether the lower court was in error and therefore just grant a new trial?

MR. BARTON: The appellate court whether it's this court or the Court of Appeals, of our State Supreme Court, clearly has that authority where the record is clear.

THE COURT: Okay.

MR. BARTON: And I think that's what *Martin, --vens,* and *Colf* talk about. But where the record is unclear, where there is not an explicit ruling, an explicit stating of how the judge balanced the equities in making that determination then the appropriate remedy is to send it back down to the trial court to make that on the record ruling. And then the matter can proceed from there depending on how the judge rules.

THE COURT: So there are two levels. One's the Appellate Court could say no, that contravenes 609, new trial, or, could say well let's let the trial court redetermine?

MR. BARTON: If the appellate court finds that the record is clear and does not need to be further enhanced then the court can make that ruling at this level.

THE COURT: Okay.

MR. BARTON: If the court finds that for some reason that appellate record is lacking then can send it back down to trial court.

THE COURT: Gotcha. Okay. Anything else?

MR. BARTON: No, your Honor.

THE COURT: All right. Mr. Rudnick.

MR. RUDNICK: Thank you, your Honor, may it please the court. Your Honor, just in regards to the *Colf* case

and the requested remedy or alternative relief requested by the City, in *Colf* which was a similar situation in that it's under the same rule of evidence and it delineated the balancing test so it would have to go through, the court actually granted a new trial in that case. The last -- essentially the last sentence of the opinion says it was remanded for a new trial so in that regard we would respectfully request the court to keep the granted relief as it is, if your Honor were to essentially agree with our position from the previous order which was the reversal and the granting a new trial.

With regard to the other arguments that were liniated in Mr. Barton's written motion to alter or amend the judgment, the first -- Well it's my position still that there should have been some type of balancing test done and that there was none done that should have been that was in error and prejudicial or it was not a harmless error.

With regard to opening the door, the cases that I have looked at that were cited, and I'm not sure if I looked at every single one but I looked at at least four or five, the door was open either through direct examination by a defendant's counselor or defendant on direct examination or during -- in opening statement I think was one other place where defense counsel opened the door to otherwise incompetent evidence.

In this case the door was opened on -- if the door was open which I would not concede that it was -- but if assuming arguendo that it was, the door would have been opened on state's cross-examination of my client in effect opening the door in and of itself; not through any action or direct examination or opening statement which is something that I think is --

THE COURT: Response to a question.

MR. RUDNICK: Yes, your Honor, which I think is a distinguishing factor as far as with opening the door or when opening the door is concerned.

Second, the *State v. Foster* which was cited in the City's motion is a case where they distinguish pre South Carolina Rules of Evidence law and post South Carolina Rules of Evidence Law and in that case I think it was a similar argument where --

THE COURT: Is that the one, is that Judge Alford's case?

MR. RUDNICK: I'm not certain.

THE COURT: Mr. Barton, what was the name of Judge Alford's --

MR. BARTON: Yes, *Martin* was Judge Alford's case, your Honor.

THE COURT: Do I have that?

MR. BARTON: It's cited to in my brief, Its 347 S.C.

522, your Honor.

THE COURT: Do you have a copy of it?

MR. BARTON: I'm sorry, and I apologize, yeah, it was. Yes I do, if you'll give me just one moment, your Honor.

(DOCUMENTS RECEIVED UP BY THE COURT.)

THE COURT: Thank you.

MR. BARTON: Yes, sir.

THE COURT: Go ahead, Mr. Rudnick.

MR. RUDNICK: Thank you, your Honor. In *State v. Foster* where it was regarding a prior inconsistent statement, and I think the state in that case tried to get the prior inconsistent statement that otherwise would have bene hearsay into evidence, the court found that under post South Carolina Rules of Evidence Law that that would not be admissible. I think there is a distinction in that that I think was used in a substantive manner but in this case it is our position and I think *Colf* and *Bryant* makes it clear that some type of balancing test must be done.

THE COURT: Well that's what -- Alternatively that's what Mr. Barton says, send it back and let us balance it.

MR. RUDNICK: Oh, yes, your Honor.

THE COURT: How do you feel about that?

MR. RUDNICK: Well, your Honor, we respectfully disagree with that. In the context of this case it was for

cross-examination after the City's case and after the direct examination of the defendant and for it to go back into kind of a vacuum and looked at in a vacuum by a lower court without the other attended circumstances that surrounding the ruling on that day that it wouldn't -- it would be -- it wouldn't make sense in our view or it wouldn't be the desired remedy in our view for it to --

THE COURT: Certainly not the desired remedy.

MR. RUDNICK: Yes, your Honor. But it wouldn't be able to take in all of the other circumstances that happened over a year ago in April of last year in the balancing test. Now if it were to be done we would be confident that it -- those prior convictions shouldn't be admitted. But it's also a situation where we don't have the same jury or I'm not exactly certain of the practical considerations on how to handle a jury or we would just do it as an in-camera pretrial hearing.

But I think the *Colf* case specifically granted a new trial. I'm not gonna read too much into it because I'm not sure if it was to -- because of the practical consideration but in that case where it was a similar situation where no such balancing test was actually performed that it remanded for a new trial in that case. And I think if I remember correctly *Bryant* was similar but I don't have that one right in front of me so I can't say for certain.

So we would respectfully request that because it was error and it was not harmless that your Honor's previous order and relief as stated in your previous order should stand. We think it was appropriate in this case considering the circumstances surrounding the admission of the convictions and we feel that the only way for it to get proper consideration would be if the same circumstance were to arise in a new trial. And that's all I have, your Honor.

THE COURT: All right. Anything in reply, Mr. Barton, briefly?

MR. BARTON: The only thing I would reply one of the reasons I cited to one of the Rules of Evidence was adopted is that there is a number of South Carolina decisions post the adoption of rules of evidence that indicated that the doctrine of whether we call it curative admissibility or opening the door is still alive and well in South Carolina.

THE COURT: Okay. Here's what I think. From reading the record that was submitted and I recognize that - and the record was sufficient I felt to rule. From reading the record it did not appear to me that there was any effort in the lower court to balance all of this at all so there wasn't -- I find there wasn't that, I'm gonna stick by that.

My main concern when I heard it the first time was

this, this man was charged with assault and battery, the exchange he had with the victim, alleged victim, was about -- I've forgotten what he took now or what they say he took -- but somebody said the -- whatever his last name was -- Mr. Morgan's -- the Morgan's always steal. The Morgan's steal. And Mr. Morgan's response in cross -- this was all in cross-examination that that was -- somehow or another that came up and his response was I don't steal, present tense.

You know if an alcoholic said I don't drink and he'd been sober for twenty years, but he was a drunk twenty years ago, he doesn't drink. He does not now drink. So the -- and that's all he said, I don't steal. He didn't attempt to elaborate on that in any way. It was brief and over with and so I don't view it as an attempt to -- I didn't view it -- Let me say it this way. There was every inference that it was a present -- intended as a present tense statement from the record.

Now about the open door thing. Certainly the two rules coexist, 609 and open door. But if you read 609 it doesn't say you don't make this analysis if the defendant opens the door. It pre--bes a way for dealing with very old convictions that may not be properly used to impeach a defendant. And the *Colf* case says that only rarely should those kinds of convicting -- of convictions being admitted

in the first place.

So I think that 609 is not trumped, and I think that's what I said when we had this before, by the open door rule because it doesn't exclude the open door rule from the analysis. And lastly as I've already said it was literally a credibility thing. It had nothing to do with the crime for which Mr. Morgan was charged and convicted.

So I have done the balancing. I have done the balancing. I'm not gonna -- I don't think it's -- it's clear enough to me that in my view the admission of the testimony was done in -- Oh, and there was no curative instruction either. I think there was one.

Am I right, Mr. Barton, didn't the -- somebody -- did the judge say she would give a curative instruction and the defendant said, Mr. Rudnick said one was not necessary or something? I can't remember that now. Something about that.

MR. RUDNICK: There was --

MR. BARTON: I don't know if that's reflected in the record, your Honor.

THE COURT: I can't remember. Maybe I -- You know I hear a lot of these, maybe I'm thinking of another case.

Anyway, I'm gonna let my ruling stand on balance. I think that the circumstances of the response in cross-examination that Mr. Morgan made did not warrant going back

into offenses that were literally ten, twenty, and thirty years old, so I'm gonna deny your motion.

MR. BARTON: Thank you, your Honor.

THE COURT: And I'll do a Form Order.

MR. RUDNICK: Thank you, your Honor.

(END OF TRAN--PT OF RECORD.)

(HEARING ENDED AT 11:37 AM.)

CERTIFICATE

I, Wanda S. Nelson, CVR-M, Official Court Reporter and Notary Public in and for the State of South Carolina, do hereby certify that the foregoing Page 4 through 27, line 15 is an accurate tran--pt produced, to the best of my ability, from a recording of the York County Master In Equity Court/Common Pleas Court, furnished to me by Special Circuit Court Judge Jackson Kimball.

I further certify that I am not personally interested in the outcome of this action, a relative, employee, attorney or counsel of any of the parties, not a relative or employee of such attorney or counsel.

Witness, my hand and seal, this date: August 5, 2017.

Wanda Nelson

Wanda Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: August 4 / 2017

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Tran--pt of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 15th day of June, 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda Nelson

Wanda Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: August 4 / 2017

STATE OF SOUTH CAROLINA)	**IN THE COURT OF COMMON PLEAS**
)	
COUNTY OF YORK)	**SIXTEENTH JUDICIAL CIRCUIT**
)	
STATE OF SOUTH CAROLINA)	
)	
- vs -)	**NOTICE OF APPEAL**
)	**Ticket No.: 2015C4620300331**
)	**Assault and Battery 3rd Degree**
NATHAN MORGAN,)	
)	
Defendant.)	
)	

2016CP4601980

FILED-RECEIVED
2016 APR 29 PM 12:00
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, S.C.

TO THE CITY OF ROCK HILL AND THE MUNICIPAL COURT

PLEASE TAKE NOTICE that the Defendant herein appeals her conviction on the above captioned ticket that was rendered on April 21, 2016.

The Defendant appeals her conviction and sentence and respectfully requests reversal on the following ground objected to during trial:

1. The trial court erred by allowing the admission of three prior convictions that occurred over 10 years prior to the trial and by failing to conduct the proper balancing test required prior to the admission of remote criminal convictions.
2. The trial court erred by failing to find the probative value of the remote criminal convictions were substantially outweighed by the danger of unfair prejudice and confusion of the issues.

FACTS

On April 21, 2016, the trial of Nathan Morgan was heard in the Rock Hill Municipal Court. The City alleged that Mr. Morgan committed the crime of Assault and Battery 3rd Degree. At the outset of trial, both the City and defense counsel agreed that Mr. Morgan's prior convictions, both crimes of dishonesty and crimes with sentences of one year or more, fell outside the 10 year time limit described in Rule 609(b). The trial court ruled that these convictions were inadmissible.

During the City's case, Cornelius McCleod, the alleged victim, testified on direct examination that Mr. Morgan assaulted him after an argument over missing chainsaws. Mr. McCleod testified that he accused Mr. Morgan of stealing the chainsaws and after a brief argument on that issue, Mr. Morgan hit him with a cane.

In response, Mr. Morgan alleged self-defense. On direct examination, Mr. Morgan denied any theft and explained that Mr. McCleod aggressively pulled his jacket from behind. Due to Mr. Morgan's poor health, also explained on direct examination, Mr. Morgan feared physical injury from the unwanted physical contact and hit Mr. McCleod to free himself from his restraint.

On cross-examination, the City questioned Mr. Morgan about the alleged theft of the chainsaws. During questioning, Mr. Morgan denied the theft and explained that he had no reason to steal the chainsaws because his wife purchased two chainsaws. After he denied the theft, Mr. Morgan stated, "I don't steal."

After this statement, the City approached defense counsel and stated that he had opened the door to any and all past convictions for crimes of dishonesty. The crimes of dishonesty included a 1984 conviction of Retail Theft, a 1993 conviction of Burglary 2nd degree, and a 1996 Theft of Cable conviction. Once the City presented this assertion to the Court, defense counsel objected and argued that the statement did not open the door to the past convictions and that the convictions should not be admitted because any probative value was substantially outweighed by unfair prejudice and the threat of confusing the issue. The Court found the statement opened the door and permitted the admission of the convictions into evidence. Mr. Morgan was subsequently convicted of Assault and Battery 3rd degree.

ANALYSIS

Under South Carolina law, "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)(2), SCRE. However, evidence of the conviction is not admissible if a period of 10 years or more has elapsed since the conviction or release, whichever is later. Rule 609(b), SCRE. This prohibition may be overcome and the conviction admitted if the Court determines, in the interest of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. Rule 609(b), SCRE. The State holds the burden to overcome the presumption. *State v. Bryant*, 369 S.C. 511, 516 (2006) (citing *State v. Colf*, 622, 626 (2000)). Prior to the introduction of remote convictions, the Court must consider the following factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity of the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Id.*

In *Colf*, the Court held that the trial court abused its discretion and remanded the case for a new trial because the trial court failed to conduct the balancing test outlined in 609(b) prior to the introduction of the remote criminal convictions. 337 S.C. 622 (2000). In that case, the trial court admitted remote criminal convictions of larceny, attempted larceny, breaking and entering, and attempted breaking and entering without articulating the specific facts and circumstances in support of its ruling. *Id.* at 626. The Court proclaimed that such convictions should only be admitted in "exceptional circumstances." *Id.* The Court also declared that even if the remote convictions go to credibility of the witness, the trial court must conduct some balancing test. *Id.*

628. The credibility and the importance of credibility to the jury are factors the trial court should consider during the balancing test. *Id.*

In this case, the trial court failed conduct such a test and failed to consider the above factors prior to the admission of the remote criminal convictions. Under this test, the prior convictions should have been held inadmissible. The trial court's omission prejudiced Mr. Morgan because the remote convictions seriously affected his credibility to the jury.

While the convictions were probative of credibility, the most recent conviction, theft of cable, occurred 20 years prior. The Retail Theft and Burglary 2nd degree convictions were 32 and 24 years old, respectively, and neither were indicative of Mr. Morgan's credibility since the time of the offenses. Since those convictions, Mr. Morgan had not been convicted a crime of dishonesty. His subsequent criminal history and the passage of time severely limit any value to credibility the convictions may hold. Nevertheless, the introduction of such convictions, no matter the time limit, has a severe impact on the jury. In other words, the convictions held little actual value to credibility, but the prejudicial effect of the introduction of such convictions was very high.

Prior to the introduction of the convictions, Mr. Morgan had categorically denied stealing the chainsaws and provided a detailed account of the incident. While Mike Agurs, Mr. Morgan's friend, observed the altercation and testified to the events in question, only Mr. Morgan could explain that he actually felt threatened and responded based on that fear. Consequently, Mr. Morgan's testimony and his credibility were critical to his defense and the criminal convictions were the main source of impeachment to his testimony.

Also, even if Mr. Morgan opened the door to prior convictions, the trial court should have conducted the balancing test outlined in 609(b). The dangers of prejudice and low probative

value exist regardless of how the convictions are introduced. In order to properly gauge the convictions' probative value and avoid the improper admission of convictions, the trial court must consider the factors outlined in *Colf*.

In the alternative, the trial court erred by admitting the criminal convictions because the probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues..." Rule 403, SCRE. As explained above, the criminal convictions had little probative value, but did hold serious prejudicial effect. That prejudicial effect was not only central to cross examination, but also held the danger of invoking unfair prejudice.

Unfair prejudice evokes an emotional response from the jury. In other words, the jury reacts based off of emotion rather than the facts and issues of the case. In this case, the introduction of the heretofore unmentioned criminal convictions had a risk of implying to the jury Mr. Morgan attempted to hide their existence by not mentioning them on direct examination. The jury never heard the discussion regarding the remote nature of the convictions and the minimal probative value. Instead, the jury heard the defendant admit to crimes of theft, from decades prior, immediately after stating he doesn't steal.

Moreover, the introduction of the convictions ran the danger of confusing the issues. During the City's case, Mr. McCleod spent a large amount of time discussing the alleged theft of his chainsaws. The missing chainsaws were the basis of the argument between Mr. Morgan and Mr. McCleod. Outside that fact, the chainsaws held little probative value. The City's decision to focus on the chainsaws placed Mr. Morgan's propensity to steal, rather than assault, into issue.

Through the introduction of past remote crimes of theft, the jury could reasonably believe that Mr. Morgan stole the chainsaws, but not that he assaulted Mr. McCleod. In other words, the convictions' probative value went to the alleged theft rather than the assault, which was not the crime alleged.

CONCLUSION

In conclusion, the trial court erred because it did not conduct the proper balancing test, as required by Rule 609(b), prior to the introduction of the remote criminal convictions. In addition, the trial court erred because it failed to properly balance the probative value of the convictions against the danger of unfair prejudice and confusion of the issues.

For the reasons stated above, the Defendant requests that his conviction for Assault and Battery 3rd degree be reversed and remanded for a new trial.

Respectfully Submitted by:

Charles H. Rudnick
Assistant Public Defender
P.O. Box 691
York, SC 29745
(803) 628-3031
Attorney for Appellant

This 29 day of April, 2016.
York, South Carolina

2016CP4601980

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
CITY OF ROCK HILL)
)
- vs -)
)
NATHAN MORGAN,)
)
Defendant.)
)

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

AMENDED NOTICE OF APPEAL
Ticket No.: 2015C4620300331
Assault and Battery 3rd Degree

FILED
2016 APR 29 PM 3:30
DAVID HAMILTON
CLERK OF C.C.&G.S.
YORK COUNTY, S.C.

TO THE CITY OF ROCK HILL AND THE MUNICIPAL COURT

PLEASE TAKE NOTICE that the Defendant herein appeals her conviction on the above captioned ticket that was rendered on April 21, 2016.

The Defendant appeals her conviction and sentence and respectfully requests reversal on the following ground objected to during trial:

1. The trial court erred by allowing the admission of three prior convictions that occurred over 10 years prior to the trial and by failing to conduct the proper balancing test required prior to the admission of remote criminal convictions.
2. The trial court erred by failing to find the probative value of the remote criminal convictions were substantially outweighed by the danger of unfair prejudice and confusion of the issues.

FACTS

On April 21, 2016, the trial of Nathan Morgan was heard in the Rock Hill Municipal Court. The City alleged that Mr. Morgan committed the crime of Assault and Battery 3rd Degree. At the outset of trial, both the City and defense counsel agreed that Mr. Morgan's prior convictions, both crimes of dishonesty and crimes with sentences of one year or more, fell outside the 10 year time limit described in Rule 609(b). The trial court ruled that these convictions were inadmissible.

During the City's case, Cornelius McCleod, the alleged victim, testified on direct examination that Mr. Morgan assaulted him after an argument over missing chainsaws. Mr. McCleod testified that he accused Mr. Morgan of stealing the chainsaws and after a brief argument on that issue, Mr. Morgan hit him with a cane.

In response, Mr. Morgan alleged self-defense. On direct examination, Mr. Morgan denied any theft and explained that Mr. McCleod aggressively pulled his jacket from behind. Due to Mr. Morgan's poor health, also explained on direct examination, Mr. Morgan feared physical injury from the unwanted physical contact and hit Mr. McCleod to free himself from his restraint.

On cross-examination, the City questioned Mr. Morgan about the alleged theft of the chainsaws. During questioning, Mr. Morgan denied the theft and explained that he had no reason to steal the chainsaws because his wife purchased two chainsaws. After he denied the theft, Mr. Morgan stated, "I don't steal."

After this statement, the City approached defense counsel and stated that he had opened the door to any and all past convictions for crimes of dishonesty. The crimes of dishonesty included a 1984 conviction of Retail Theft, a 1993 conviction of Burglary 2nd degree, and a 1996 Theft of Cable conviction. Once the City presented this assertion to the Court, defense counsel objected and argued that the statement did not open the door to the past convictions and that the convictions should not be admitted because any probative value was substantially outweighed by unfair prejudice and the threat of confusing the issue. The Court found the statement opened the door and permitted the admission of the convictions into evidence. Mr. Morgan was subsequently convicted of Assault and Battery 3rd degree.

ANALYSIS

Under South Carolina law, "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)(2), SCRE. However, evidence of the conviction is not admissible if a period of 10 years or more has elapsed since the conviction or release, whichever is later. Rule 609(b), SCRE. This prohibition may be overcome and the conviction admitted if the Court determines, in the interest of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. Rule 609(b), SCRE. The State holds the burden to overcome the presumption. *State v. Bryant*, 369 S.C. 511, 516 (2006) (citing *State v. Colf*, 622, 626 (2000)). Prior to the introduction of remote convictions, the Court must consider the following factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity of the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Id.*

In *Colf*, the Court held that the trial court abused its discretion and remanded the case for a new trial because the trial court failed to conduct the balancing test outlined in 609(b) prior to the introduction of the remote criminal convictions. 337 S.C. 622 (2000). In that case, the trial court admitted remote criminal convictions of larceny, attempted larceny, breaking and entering, and attempted breaking and entering without articulating the specific facts and circumstances in support of its ruling. *Id.* at 626. The Court proclaimed that such convictions should only be admitted in "exceptional circumstances." *Id.* The Court also declared that even if the remote convictions go to credibility of the witness, the trial court must conduct some balancing test. *Id.*

628. The credibility and the importance of credibility to the jury are factors the trial court should consider during the balancing test. *Id.*

In this case, the trial court failed conduct such a test and failed to consider the above factors prior to the admission of the remote criminal convictions. Under this test, the prior convictions should have been held inadmissible. The trial court's omission prejudiced Mr. Morgan because the remote convictions seriously affected his credibility to the jury.

While the convictions were probative of credibility, the most recent conviction, theft of cable, occurred 20 years prior. The Retail Theft and Burglary 2nd degree convictions were 32 and 24 years old, respectively, and neither were indicative of Mr. Morgan's credibility since the time of the offenses. Since those convictions, Mr. Morgan had not been convicted a crime of dishonesty. His subsequent criminal history and the passage of time severely limit any value to credibility the convictions may hold. Nevertheless, the introduction of such convictions, no matter the time limit, has a severe impact on the jury. In other words, the convictions held little actual value to credibility, but the prejudicial effect of the introduction of such convictions was very high.

Prior to the introduction of the convictions, Mr. Morgan had categorically denied stealing the chainsaws and provided a detailed account of the incident. While Mike Agurs, Mr. Morgan's friend, observed the altercation and testified to the events in question, only Mr. Morgan could explain that he actually felt threatened and responded based on that fear. Consequently, Mr. Morgan's testimony and his credibility were critical to his defense and the criminal convictions were the main source of impeachment to his testimony.

Also, even if Mr. Morgan opened the door to prior convictions, the trial court should have conducted the balancing test outlined in 609(b). The dangers of prejudice and low probative

value exist regardless of how the convictions are introduced. In order to properly gauge the convictions' probative value and avoid the improper admission of convictions, the trial court must consider the factors outlined in *Colf.*

In the alternative, the trial court erred by admitting the criminal convictions because the probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues..." Rule 403, SCRE. As explained above, the criminal convictions had little probative value, but did hold serious prejudicial effect. That prejudicial effect was not only central to cross examination, but also held the danger of invoking unfair prejudice.

Unfair prejudice evokes an emotional response from the jury. In other words, the jury reacts based off of emotion rather than the facts and issues of the case. In this case, the introduction of the heretofore unmentioned criminal convictions had a risk of implying to the jury Mr. Morgan attempted to hide their existence by not mentioning them on direct examination. The jury never heard the discussion regarding the remote nature of the convictions and the minimal probative value. Instead, the jury heard the defendant admit to crimes of theft, from decades prior, immediately after stating he doesn't steal.

Moreover, the introduction of the convictions ran the danger of confusing the issues. During the City's case, Mr. McCleod spent a large amount of time discussing the alleged theft of his chainsaws. The missing chainsaws were the basis of the argument between Mr. Morgan and Mr. McCleod. Outside that fact, the chainsaws held little probative value. The City's decision to focus on the chainsaws placed Mr. Morgan's propensity to steal, rather than assault, into issue.

Through the introduction of past remote crimes of theft, the jury could reasonably believe that Mr. Morgan stole the chainsaws, but not that he assaulted Mr. McCleod. In other words, the convictions' probative value went to the alleged theft rather than the assault, which was not the crime alleged.

CONCLUSION

In conclusion, the trial court erred because it did not conduct the proper balancing test, as required by Rule 609(b), prior to the introduction of the remote criminal convictions. In addition, the trial court erred because it failed to properly balance the probative value of the convictions against the danger of unfair prejudice and confusion of the issues.

For the reasons stated above, the Defendant requests that his conviction for Assault and Battery 3rd degree be reversed and remanded for a new trial.

Respectfully Submitted by:

Charles H. Rudnick
Assistant Public Defender
P.O. Box 691
York, SC 29745
(803) 628-3031
Attorney for Appellant

This 29 day of April, 2016.
York, South Carolina

2016CP4601380

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas

APPEAL FROM ROCK HILL MUNICIPAL COURT

Jane Pittman Modla, Municipal Court Judge

Case No. 2015C4620300331

CITY OF ROCK HILL,

Respondent,

v.

NATHAN MORGAN,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by depositing a copy of it in the United States Mail, postage prepaid, on April 29, 2016, addressed the attorney of record, Anna T. Thomas, 200 E. Main St. Suite 300 Rock Hill, South Carolina 29730.

April 29, 2016

Charles H. Rudnick
Assistant Public Defender
1675-1E York Hwy.
Post Office Box 691
York, South Carolina 29745
(803) 628-3031
Attorney for Appellant

2016CP4601280

STATE OF SOUTH CAROLINA	)	IN THE YORK COUNTY COURT OF COMMON PLEAS
COUNTY OF YORK	)	
CITY OF ROCK HILL	)	RETURN TO APPEAL
VS.	)	
NATHAN MORGAN, DEFENDANT.	)	

This matter is an Appeal from a jury trial on April 21, 2016 in the Rock Hill Municipal Court, Jane Pittman Modla, presiding Judge.

APPEARANCES:

For the City:	Cornelius McCleod – victim Anna Thomas – City Prosecutor Chisa Putman – Prosecutor in training
For the Defense:	Mike Agurs – witness Nathan Morgan – defendant Charles Rudnick – Defense Attorney

CHARGE:

Assault & Battery 3rd degree
CSW#: 2015C4620300331
Date of Incident: 9/25/15

PROCEEDINGS:

At trial, on April 21, 2016, the defendant made a Pre-Trial Motion to determine whether he be allowed to impeach the victim with a Forgery Conviction from 2004 in which Probation was revoked in 2008. The City objected that the conviction was over 10 years old. The Court agreed and ruled impeachment with that crime was not allowed.

On cross examination of the victim, the defense impeached him on this ground. The City did not object. Later it was determined that the defense attorney had misunderstood the Court's ruling. The prosecutor indicated she misunderstood also, although her co-chair said she had understood the Court's ruling that the victim could not be impeached with the Forgery.

City:

Witness #1: Cornelius McCleod, the victim, testified that he had known the defendant since 8th grade, that they often worked together and for each other over the years in heavy equipment. In June 2015, the day before McCleod left for a 3 week job in Georgia, the defendant asked to borrow his chain saw. McCleod said "yes, reluctantly, because it was new."

McCleod testified that he left a voicemail for his cousin to expect Morgan who would be coming to borrow the chainsaw. When McCleod returned on July 4th, two (2) chain saws and a weed eater were missing. To this point, he never saw them again.

When confronted, the defendant's story was he already had a chainsaw. So when asked why he had asked to borrow one he became irate. On the day in question, McCleod testified he was hanging out with their friends at a fish fry with lots of drinking. He had been there 5 minutes when defendant arrived and said, "Do you need to talk to me?" "Defendant started talking about chainsaws". "He stood , turned his cane upside down and back swung it at me. It would've hit my face but I blocked it with my elbow. Then 3-4 guys grabbed him and escorted him away. So I called the police because this had gotten out of hand."

Defense:

Witness #1: Mike Agurs testified that the victim grabbed the defendant's black leather jacket trying to get his attention or something and then defendant hit him with the cane.

Witness#2: Nathan Morgan, the defendant, testified that on the day in question he sat at the picnic table with McCleod. Morgan said McCleod would not stop talking about chainsaws and kept accusing him saying "you got it, you got it." "I told him since I asked him to use it, my wife bought me 2 chainsaws, not as good but they work. I didn't need to borrow them". "He wouldn't listen to me. He cursed me "F you". I tried to walk away and he grabbed me by my coat from the back. I felt threatened, vulnerable. I swung the stick and got him off me. He threw his hands up. I did not hit him. I didn't hit his head."

On cross examination the prosecutor asked "Isn't it true you were angry because McCleod was telling everyone you stole his chainsaw and you said, "Ray, I don't have your chainsaw", and Ray said, "You got it, you a Morgan and you got it. All you Morgan's steal...." At that time the defendant blurted out in court "I don't steal!"

The prosecutor than moved to impeach the defendant with 3 prior convictions – a 1984 retail theft, a 1993 Burglary 2nd and a 1996 Theft of Cable. The defense objected that the defendant did not open the door, that it would be inflammatory and confusing to the jury and that the prejudicial harm outweighed the probative value.

The Court allowed the impeachment with the prior convictions as they were crimes of moral turpitude, the defendant clearly opened the door and there was nothing confusing about it. The prejudicial value was not outweighed by the probative harm.

The issue was who assaulted whom first based on testimony alone. The jury heard that both sides had ancient criminal convictions. The defendant told the jury those crimes were 20 years ago, that since then, his life had changed drastically, that he had joined the Lodge, that he had turned his life over to God and attended narcotic AA meetings. He reiterated, "I am not a thief. That's a lie. I'm saying I did not take his chainsaws." All the men were outside drinking, the victim was mad and accused defendant of taking his saws. The defendant was mad because the victim accused his family of being thieves. The victim claims defendant then stood up, flipped his cane and swung at defendant's head and he deflected it with his arm, hitting his elbows. Defendant said he got up to leave, defendant grabbed his jacket, he felt threatened and swung in self-defense.

The jury found the defendant guilty of A&B as charged and he was sentenced to $1092.50 fine which he paid.

ATTACHMENTS:

1. Notice of Appeal
2. Courtesy Warrant
3. Criminal histories on McCleod
4. Verdict form
5. DVD or proceedings

Date: 1-24-17

Respectfully Submitted,

Jane Pittman Modla
Rock Hill Municipal Court Judge

ATTACHMENT 1

STATE OF SOUTH CAROLINA)	2016CP4601380 IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)	SIXTEENTH JUDICIAL CIRCUIT
STATE OF SOUTH CAROLINA)	
- vs -)	NOTICE OF APPEAL Ticket No.: 2015C4620300331 Assault and Battery 3rd Degree
NATHAN MORGAN,)	
Defendant.)	

FILED-RECEIVED
2016 APR 29 PM 12:00
DAVID HARRISON
C.C.C.A.S.O.S.
YORK COUNTY, SC

TO THE CITY OF ROCK HILL AND THE MUNICIPAL COURT

PLEASE TAKE NOTICE that the Defendant herein appeals her conviction on the above captioned ticket that was rendered on April 21, 2016.

The Defendant appeals her conviction and sentence and respectfully requests reversal on the following ground objected to during trial:

1. The trial court erred by allowing the admission of three prior convictions that occurred over 10 years prior to the trial and by failing to conduct the proper balancing test required prior to the admission of remote criminal convictions.
2. The trial court erred by failing to find the probative value of the remote criminal convictions were substantially outweighed by the danger of unfair prejudice and confusion of the issues.

FACTS

On April 21, 2016, the trial of Nathan Morgan was heard in the Rock Hill Municipal Court. The City alleged that Mr. Morgan committed the crime of Assault and Battery 3rd Degree. At the outset of trial, both the City and defense counsel agreed that Mr. Morgan's prior convictions, both crimes of dishonesty and crimes with sentences of one year or more, fell outside the 10 year time limit described in Rule 609(b). The trial court ruled that these convictions were inadmissible.

During the City's case, Cornelius McCleod, the alleged victim, testified on direct examination that Mr. Morgan assaulted him after an argument over missing chainsaws. Mr. McCleod testified that he accused Mr. Morgan of stealing the chainsaws and after a brief argument on that issue, Mr. Morgan hit him with a cane.

In response, Mr. Morgan alleged self-defense. On direct examination, Mr. Morgan denied any theft and explained that Mr. McCleod aggressively pulled his jacket from behind. Due to Mr. Morgan's poor health, also explained on direct examination, Mr. Morgan feared physical injury from the unwanted physical contact and hit Mr. McCleod to free himself from his restraint.

On cross-examination, the City questioned Mr. Morgan about the alleged theft of the chainsaws. During questioning, Mr. Morgan denied the theft and explained that he had no reason to steal the chainsaws because his wife purchased two chainsaws. After he denied the theft, Mr. Morgan stated, "I don't steal."

After this statement, the City approached defense counsel and stated that he had opened the door to any and all past convictions for crimes of dishonesty. The crimes of dishonesty included a 1984 conviction of Retail Theft, a 1993 conviction of Burglary 2nd degree, and a 1996 Theft of Cable conviction. Once the City presented this assertion to the Court, defense counsel objected and argued that the statement did not open the door to the past convictions and that the convictions should not be admitted because any probative value was substantially outweighed by unfair prejudice and the threat of confusing the issue. The Court found the statement opened the door and permitted the admission of the convictions into evidence. Mr. Morgan was subsequently convicted of Assault and Battery 3rd degree.

ANALYSIS

Under South Carolina law, "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)(2), SCRE. However, evidence of the conviction is not admissible if a period of 10 years or more has elapsed since the conviction or release, whichever is later. Rule 609(b), SCRE. This prohibition may be overcome and the conviction admitted if the Court determines, in the interest of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. Rule 609(b), SCRE. The State holds the burden to overcome the presumption. *State v. Bryant*, 369 S.C. 511, 516 (2006) (citing *State v. Colf*, 622, 626 (2000)). Prior to the introduction of remote convictions, the Court must consider the following factors: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity of the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. *Id.*

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628. The credibility and the importance of credibility to the jury are factors the trial court should consider during the balancing test. *Id.*

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While the convictions were probative of credibility, the most recent conviction, theft of cable, occurred 20 years prior. The Retail Theft and Burglary 2nd degree convictions were 32 and 24 years old, respectively, and neither were indicative of Mr. Morgan's credibility since the time of the offenses. Since those convictions, Mr. Morgan had not been convicted a crime of dishonesty. His subsequent criminal history and the passage of time severely limit any value to credibility the convictions may hold. Nevertheless, the introduction of such convictions, no matter the time limit, has a severe impact on the jury. In other words, the convictions held little actual value to credibility, but the prejudicial effect of the introduction of such convictions was very high.

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In the alternative, the trial court erred by admitting the criminal convictions because the probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues..." Rule 403, SCRE. As explained above, the criminal convictions had little probative value, but did hold serious prejudicial effect. That prejudicial effect was not only central to cross examination, but also held the danger of invoking unfair prejudice.

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Moreover, the introduction of the convictions ran the danger of confusing the issues. During the City's case, Mr. McCleod spent a large amount of time discussing the alleged theft of his chainsaws. The missing chainsaws were the basis of the argument between Mr. Morgan and Mr. McCleod. Outside that fact, the chainsaws held little probative value. The City's decision to focus on the chainsaws placed Mr. Morgan's propensity to steal, rather than assault, into issue.

Through the introduction of past remote crimes of theft, the jury could reasonably believe that Mr. Morgan stole the chainsaws, but not that he assaulted Mr. McCleod. In other words, the convictions' probative value went to the alleged theft rather than the assault, which was not the crime alleged.

CONCLUSION

In conclusion, the trial court erred because it did not conduct the proper balancing test, as required by Rule 609(b), prior to the introduction of the remote criminal convictions. In addition, the trial court erred because it failed to properly balance the probative value of the convictions against the danger of unfair prejudice and confusion of the issues.

For the reasons stated above, the Defendant requests that his conviction for Assault and Battery 3rd degree be reversed and remanded for a new trial.

Respectfully Submitted by:

Charles H. Rudnick
Assistant Public Defender
P.O. Box 691
York, SC 29745
(803) 628-3031
Attorney for Appellant

This 29 day of April, 2016.
York, South Carolina

2016CPA6012280

PROOF OF SERVICE OF A NOTICE OF APPEAL

THE STATE OF SOUTH CAROLINA
In The Court of Common Pleas

APPEAL FROM ROCK HILL MUNICIPAL COURT

Jane Pittman Modla, Municipal Court Judge

Case No. 2015C4620300331

THE STATE OF SOUTH CAROLINA,

Respondent,

v.

NATHAN MORGAN,

Appellant.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the State by depositing a copy of it in the United States Mail, postage prepaid, on April 29, 2016, addressed the attorney of record, Anna T. Thomas, 200 E. Main St. Suite 300 Rock Hill, South Carolina 29730.

April 29, 2016

Charles H. Rudnick
Assistant Public Defender
1675-1E York Hwy.
Post Office Box 691
York, South Carolina 29745
(803) 628-3031
Attorney for Appellant

ATTACHMENT 2

Courtesy Summons

2015C4620300331

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of ROCK HILL 10-13-2015 @ 9am

THE STATE

against

MORGAN, NATHAN

Address: [redacted]

Phone: [redacted] SSN: [redacted]

Sex: M Race: B Height: _____ Weight: _____

DL State: _____ DL#: _____

DOB: [redacted]

Offense: ASSAULT AND BATTERY THIRD

Offense Code: _____

Code/Ordinance Sec. 16-3-600 (E) (1)

This courtesy summons is CERTIFIED FOR SERVICE

in the ☐ County/ ☒ Municipality of ROCK HILL. The Accused is to be served and given a court date to appear before the Issuing Judge to be dealt with according to the law.

_____ (L.S.)
Signature of Countersigning Judge

Date: _____

RETURN

A copy of this Summons was delivered to defendant Nathan Morgan on 10-7-15

Stanston #55
Signature of Constable/Law Enforcement Officer

RETURN SUMMONS TO: R.T.

STANESHA LONERGAN
ROCK HILL MUNICIPAL COURT
ROCK HILL SC 29730

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of ROCK HILL)

AFFIDAVIT

Form Approved by S.C. Attorney General August 5, 2008 SCCA 519

Personally appeared before me the affiant MCCLEOD, CORNELIUS who being duly sworn deposes and says that defendant MORGAN, NATHAN did within this county and state on or about (date of incident) 09/25/2015 at (location of incident) 1100 BLOCK OF FLINT ST. EXT. violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of ROCK HILL) in the following particulars:

DESCRIPTION OF OFFENSE:

ASSAULT AND BATTERY THIRD DEGREE - 16-3-600 (E) (1)

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

ON 9/25/2015 WHILE AT THE 1100 BLOCK OF FLINT STREET EXT SUSPECT NATHAN MORGAN ASSAULTED AFFIANT CORNELIUS MCCLEOD WITH A WALKING CANE. THE TWO WERE HAVING A DISAGREEMENT OVER TOOLS WHEN THE SUSPECT STOOD UP, TURNED HIS CANE UPSIDE DOWN, AND MADE A BACK RIGHT HANDED SWING TOWARD THE AFFIANT'S HEAD. WHEN THE AFFIANT PUT HIS ARMS UP TO BLOCK THE SWING THE CANE STRUCK BOTH THE AFFIANT'S ELBOWS. THERE ARE WITNESSES TO THIS EVENT.

CASE NUMBER: 1509250775
REPORTING OFFICER: BAILEY, SM
AFFIANT STATEMENT

Signature of Affiant Cornelius R McCleod

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of ROCK HILL)

Affiant's Address [redacted]

Affiant's Telephone [redacted]

Courtesy Summons

YOU ARE SUMMONED TO APPEAR BEFORE THE COURT:

at ROCK HILL MUNICIPAL COURT
120 E. BLACK STREET
ROCK HILL SC 29730

on [Date] 10-13-15
at [Time] 9AM

IF YOU FAIL TO APPEAR A WARRANT WILL BE ISSUED FOR YOUR ARREST

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to serve the defendant and require that the defendant appear at the date, time, and place provided above to be dealt with according to law. A copy of this courtesy summons shall be delivered to the defendant at the time of its execution.

Sworn to and subscribed before me on 10/2/2015

_____ (L.S.)
Signature of Issuing Judge

Judge Code: TL 80606

Judge's Address ROCK HILL MUNICIPAL COURT, ROCK HILL SC 29730

Judge's Telephone 803-329-5695

Issuing Court: ☐ Magistrate ☒ Municipal

ORIGINAL

ATTACHMENT 3

Reference: UNKNOWN
Msg Key : CR
Date/Time: 20160421100227
Source : NLETS

UNKNOWN.NLETS.CR.20160421100227.
TO: RCHPD001-00260520 20160421 10:02:27 00089BB751
FROM: NLETS 20160421 10:02:27
CR.NJIII0000
07:02 05454
04/21/2016 03448 SC0460300
*202401620A
TXT

HDR/2L01202401620A2QR
ATN/BUCHANAN, SAM
THIS RECORD IS BASED ON THE SID NUMBER IN YOUR REQUEST-SID/NJ150003B
NEW JERSEY CRIMINAL HISTORY DETAILED RECORD
USE OF THIS RECORD IS GOVERNED BY FEDERAL AND STATE REGULATIONS.
UNLESS FINGERPRINTS ACCOMPANIED YOUR INQUIRY, THE STATE BUREAU OF
IDENTIFICATION CANNOT GUARANTEE THIS RECORD RELATES TO THE PERSON WHO IS
THE SUBJECT OF YOUR REQUEST. USE OF THIS RECORD SHALL BE LIMITED SOLELY TO
THE AUTHORIZED PURPOSE FOR WHICH IT WAS GIVEN AND IT SHALL NOT BE
DISSEMINATED TO ANY UNAUTHORIZED PERSONS. TO ELIMINATE A POSSIBLE
DISSEMINATION VIOLATION, AND TO COMPLY WITH FUTURE EXPUNGEMENT ORDERS,
THIS RECORD SHALL BE DESTROYED *IMMEDIATELY* AFTER IT HAS SERVED ITS
INTENDED AND AUTHORIZED PURPOSES. ANY PERSON VIOLATING FEDERAL OR STATE
REGULATIONS GOVERNING ACCESS TO CRIMINAL HISTORY RECORD INFORMATION
MAY BE SUBJECT TO CRIMINAL AND/OR CIVIL PENALTIES. THIS RECORD IS
CERTIFIED AS A TRUE COPY OF THE CRIMINAL HISTORY RECORD INFORMATION
ON FILE FOR THE ASSIGNED STATE IDENTIFICATION NUMBER.
STATE ID NO. [redacted] FBI NO. [redacted] DATE REQUESTED. 04/21/2016
NAME: [redacted]
SEX RACE BIRTH DATE HEIGHT WEIGHT EYES HAIR BIRTH PLACE
[redacted]

RECEIVING AGENCY: SC0460300 U.S. CITIZEN: YES
FPC: 21PMPM171516POPM1516 AFIS NO: III: MULTI STATE
DNA SAMPLE STATUS:
COLLECTION NOT REQUIRED

SOCIAL SECURITY NUMBERS
[redacted]

********** ARREST 001 **********
ARRESTED 08/03/1983 AGENCY CASE NO: 19641
AGENCY: NJ0070600 EAST ORANGE PD ESSEX
001 CNT NJ2C20-7 POSSES STOLEN PROP
001 CNT NJ2C39-5 POSS WEAPON
SUMMONS/WARRANT AOC NUMBER:
NO: W134208 DISPOSITION DATE: 02/02/1984
AGENCY: NJ007013A ESSEX COUNTY PROSECUTOR
DISPOSITION: NO BILL
001 CNT: NJ2C:20-7 DEG: POSSES STOLEN PROP
DISPOSITION: NO BILL
001 CNT: NJ2C:39-5B DEG: POSS WEAPON
****
DEPARTMENT OF CORRECTIONS DATA NOT FOUND FOR THIS SID NUMBER
****
CRIMINAL HISTORY DIVERSION PROGRAM AND FELONY CONVICTION SUMMARY
PRE-TRIAL INTERVENTION: 000
CONDITIONAL DISCHARGE: 000
FELONY CONVICTIONS: 000
VIOLATION OF PROBATION: 000
COURT DISPOSITION INFORMATION CONTAINED IN THIS RECORD IS REPORTED
ELECTRONICALLY FROM THE SENTENCING COURT. QUESTIONS CONCERNING DISPOSITION
INFORMATION SHOULD BE DIRECTED TO THE MUNICIPAL OR SUPERIOR COURT LISTED ON
THE RECORD. INFORMATION REGARDING CORRECTIONS TO THIS RECORD MAY BE DIRECTED
TO THE COURT OF SENTENCING.
END OF CCH RECORD
END OF RECORD

****

OFFENSE DATE-05/14/2004
PHOTOGRAPH AVAILABLE
PALM PRINTS AVAILABLE

WARR-F916553
CIT-16-13-10-MISDEMEANOR

ARREST CHARGE 2-FORGERY
OFFENSE DATE-05/14/2004

WARR-F916554
CIT-16-13-10-MISDEMEANOR

ARREST CHARGE 3-FORGERY
OFFENSE DATE-05/14/2004

WARR-F916556
CIT-16-13-10-MISDEMEANOR

ARREST CHARGE 4-FORGERY
OFFENSE DATE-05/14/2004

CIT-16-13-10(B)(2)-FELONY
DOC-04GS4602002
WARR-F916552

COURT CHARGE 01-FORGERY MORE THAN $1000 BUT LESS THAN $5,000
COURT DISP-CONVICTED;5YRS S/O TIME SERVED & 5YRS PROBATION;CFTS;CONC
COURT DATE-07/30/2004
ATN-

CIT-16-13-10(B)(2)-FELONY
DOC-04GS4602003
WARR-F916553

COURT CHARGE 02-FORGERY MORE THAN $1000 BUT LESS THAN $5,000
COURT DISP-CONVICTED;5YRS S/O TIME SERVED & 5YRS PROBATION;CFTS;CONC
COURT DATE-07/30/2004

CIT-16-13-10(B)(2)-FELONY
DOC-04GS4602006
WARR-F916556

COURT CHARGE 03-FORGERY MORE THAN $1000 BUT LESS THAN $5,000
COURT DISP-CONVICTED;5YRS S/O TIME SERVED & 5YRS PROBATION;CONC;CFTS
COURT DATE-07/30/2004

CIT-16-13-10(B)(2)-FELONY
DOC-04GS4602004
WARR-F916554

COURT CHARGE 04-FORGERY MORE THAN $1000 BUT LESS THAN $5,000
COURT DISP-CONVICTED;5YRS S/O TIME SERVED & 5YRS PROBATION;CONC;CFTS
COURT DATE-07/30/2004

[redacted] D05/14/2004

SC0460000 YORK CNTY SO
CASE-242415
ATN-
WARR-F916555
CIT-16-13-10-MISDEMEANOR

ARREST CHARGE 1-FORGERY
OFFENSE DATE-05/14/2004
PHOTOGRAPH AVAILABLE
PALM PRINTS AVAILABLE

CIT-16-13-10(B)(2)-FELONY
DOC-04GS4602005
WARR-F916555

COURT CHARGE 01-FORGERY MORE THAN $1000 BUT LESS THAN $5,000
COURT DISP-CONVICTED;5YRS S/O TIME SERVED & 5YRS PROBATION;CONC;CFTS
COURT DATE-07/30/2004
ATN-

[redacted] 08/12/2004

SC0460000 YORK CNTY SO
CASE-200400004162
ATN-
WARR-H061857
CIT-44-53-375(A)-FELONY

ARREST CHARGE 1-POSS LESS THAN ONE GRAM ICE/CRACK COCAINE 1ST
OFFENSE DATE-08/12/2004

PHOTOGRAPH AVAILABLE
PALM PRINTS AVAILABLE

CIT-44-53-375(A)-FELONY
DOC-00GS46
WARR-H061857

COURT CHARGE 01-POSS LESS THAN ONE GRAM ICE/CRACK COCAINE 1ST
COURT DISP-NON-CONVICTION;NO BILL
COURT DATE-10/13/2004
ATN-

[redacted] 09/30/2008

SC0460300 ROCK HILL PD
CASE-0809301678
ATN-46D300509883
WARR-57869EO
CIT-56-1-460-MISDEMEANOR

ARREST CHARGE 1-DUS (LICENSE NOT SUSP DUI)-2ND
OFFENSE DATE-09/30/2008
PHOTOGRAPH AVAILABLE
PALM PRINTS AVAILABLE

WARR-57877EO
CIT-16-13-180(1)-MISDEMEANOR

ARREST CHARGE 2-RECEIVING STOLEN GOODS
~~OFFENSE DATE-09/30/2008~~

SC040015C SC DEPT CORRECTIONS 11/13/2008
CASE-111320
CIT-16-13-10(B)(2)-FELONY

CUSTODY STATUS-RECEIVED
START DATE-11/13/2008

COURT CHARGE 01-FORGERY LESS THAN $5,000
COURT DISP-CONVICTED;17 CTS 30 MOS EA CC
COURT DATE-11/13/2008
ATN-500200060378

[redacted] 04/22/2010

SC0460000 YORK CNTY SO
CASE-201000002395
ATN-46D200010922
WARR-064329FE
CIT-56-1-460-MISDEMEANOR

ARREST CHARGE 1-DRIVING UNDER SUSPENSION
OFFENSE DATE-04/22/2010
PHOTOGRAPH AVAILABLE
PALM PRINTS AVAILABLE

[redacted] 10/24/2010

SC0460000 YORK CNTY SO
CASE-201000007264
ATN-46D200015690
WARR-62438FE
CIT-56-1-460(A)(1)(B-MISDEMEANO

ARREST CHARGE 1-DUS (LICENSE NOT SUSP DUI) 2ND
OFFENSE DATE-10/24/2010
PHOTOGRAPH AVAILABLE
PALM PRINTS AVAILABLE

BASED ON SEARCH OF SCLED CJIS CCH FILE USING FBI/[redacted]
REQUESTED FOR CRIMINAL JUSTICE PURPOSES

SCLED CJIS RECORD INDICATES SUBJECT HAS OUT OF STATE ARREST INFORMATION
REQUEST FORWARDED TO NCIC FOR OUT-OF-STATE INFORMATION
INFORMATION FROM OTHER STATES TO FOLLOW THRU NLETS VIA YOUR TERMINAL

INQUIRY WILL BE FORWARDED TO: N C I C W A N T E D P E R S O N S

INDIVIDUAL PROHIBITED FROM POSSESSING OR ACQUIRING FIREARM OR AMMUNITION PURSUANT TO FEDERAL GUN CONTROL ACT OF 1968

INFORMATION SUBMITTED TO SLED CCH INDICATES THIS INDIVIDUAL HAS BEEN CONVICTED OF A FELONY ACCORDING TO THE SOUTH CAROLINA CODE OF LAWS. THEREFORE, THIS PERSON IS INELIGIBLE TO SHIP, TRANSPORT, OR RECEIVE ANY

Reference: UNKNOWN
Msg Key : QR
Date/Time: 20160421100226
Source : III

UNKNOWN.III.QR.20160421100226.
TO: RCHPD001-00260519 20160421 10:02:26 0035759BD0
FROM: III 20160421 10:02:25
EL01202401620A2QR
SC0460300
THIS INTERSTATE IDENTIFICATION INDEX RESPONSE IS THE RESULT OF YOUR
RECORD REQUEST FOR FBI/[redacted] INDIVIDUAL'S RECORD WILL BE
COMPLETE WHEN ALL RESPONSES ARE RECEIVED FROM THE FOLLOWING SOURCES:
NEW JERSEY - STATE ID/[redacted]
TEXAS - STATE ID/[redacted]
GEORGIA - STATE ID/[redacted]

AN ADDITIONAL RECORD MAY BE OBTAINED FROM FILES WITHIN YOUR STATE.
END

****

ATTACHMENT 4

STATE OF SOUTH CAROLINA
COUNTY OF YORK

THE STATE OF SOUTH CAROLINA

AND

THE CITY OF ROCK HILL

VS.

Nathan Morgan
DEFENDANT

CASE# 2015C4620300331

OFFENSE Assault + Battery 3rd

JUDGE Jane Pittman Modla

TRIAL DATE April 21, 2016

VERDICT [redacted] guilty

FOREMAN/LADY [redacted]

SENTENCE/ORDER _____

STATE OF SOUTH CAROLINA	**IN THE COURT OF COMMON PLEAS**
	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	
	C.A. No.: 2016-CP-46-01280
The City of Rock Hill	
Plaintiff/ Respondent	
	MOTION TO ALTER OR AMEND JUDGMENT
v.	
Nathan Morgan,	
Defendant/ Appellant	

This matter involves the Defendant's appeal from his conviction for Assault and Battery 3rd degree in the City of Rock Hill Municipal Court on April 21, 2016 and this Court's subsequent order reversing the conviction. The City is requesting that this Court alter or amend the judgment and issue a more definitive ruling specifically addressing the issues outlined below pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. The hearing before this Court was held on May 11, 2017 and the order from this Court was signed on May 22, 2017, filed with the Clerk of Court on May 23, 2017 and subsequently received by the City of Rock Hill Solicitor's Office on May 25, 2017.

I. The Balancing Test of Rule 609 of the South Carolina Rules of Evidence Does Not Apply When the Defendant Testifies and Opens the Door.

When a defendant introduces evidence on a matter that the government would not be allowed to raise initially, the government is allowed to go into the matter because the defendant has opened the door to what would otherwise have been protected. See, State v. Stroman, 281 S.C. 508, 316 S.E.2d (1984) and State v. McFadden, 318 S.C. 404, 458

D.E.2d 61 (Ct.App.1995). South Carolina has recognized the evidentiary concept of "opening the door" as early as 1898 where the South Carolina Supreme Court found that the door was opened where the representative of the estate asked about matters otherwise excluded by the dead man's statute. Martin v. Jennings, 52 S.C. 371, 29 S.E. 807 (1898). "The jurisprudence of this State contains a plethora of enlightening cases establishing and explicating the proposition that a defendant may open the door to what would otherwise be improper evidence." State v. Young, 364 S.C. 476, 485, 613.S.E.2d 386, 391 (Ct. App. 2005). South Carolina precedent has firmly established that otherwise inadmissible evidence may be properly admitted when opposing counsel "opens the door" to that evidence. State v. Rice, 375 S.C. 302, 329, 652 S.E.2d 409, 422 (Ct. App. 2007).

There is evidence in the record to support the trial court's finding that the Appellant opened the door when he stated on cross-examination "I don't steal." The trial court did not abuse its discretion in finding that "the defendant clearly opened the door and there was nothing confusing about it. The prejudicial value (sic) [harm] was not outweighed by the probative harm (sic) [value]." City Of Rock Hill Municipal Court's Return to Appeal, page 2. Whether a person opens the door to the admission of otherwise inadmissible evidence during the course of a trial is addressed to the sound discretion of the circuit court." State v. McCray, 413 S.C. 76, 92-93, 773 S.E.2d 914, 923 (Ct. App. 2015).

"In South Carolina, the doctrine of curative admissibility has been applied to admit: (1) evidence of the defendant's participation in other crimes when the defendant raised the issue while cross-examining an accomplice who testified for the prosecution,

State v. Stroman, 281 S.C. 508, 316 S.E.2d (1984)." South Carolina Evidence, 2nd Edition, Danny R. Collins, page 38.

Following the adoption of the South Carolina Rules of Evidence, South Carolina continues to recognize the "opening the door" doctrine. The Rules of Evidence in South Carolina became effective in September 3, 1995 and both the South Carolina Supreme Court and South Carolina Court of Appeals continue to recognize the "opening the door" doctrine.

The South Carolina Supreme Court in State v. Taylor, 333 S.C. 159, 508 S.E.2d 870 found that the defendant on trial for the murder of his wife opened the door to his prior conviction for domestic violence. "[B]ecause appellant "opened the door" about his relationship with his wife, the solicitor was entitled to cross-examine him about the relationship, even if the responses brought out appellant's prior criminal domestic violence conviction. State v. Stroman, supra (since defendant questioned accomplice about his prior robberies, the State was permitted to inquire into facts of prior robberies, including whether defendant had participated in the robberies); State v. Allen, supra **(where defendant testified he had not previously harmed anyone with a deadly weapon, prosecutor was permitted to inquire into extent of previous assaults)**; see also State v. Faulkner, 274 S.C. 619, 621, 266 S.E.2d 420, 421 (1980) ("while State may not attack a criminal defendant's character unless he has placed it at issue, relevant evidence admissible for other purposes need not be excluded merely because it incidentally reflects upon the defendant's reputation.") (internal citation omitted). State v. Taylor, 333 S.C. 159, 175, 508 S.E.2d 870, 878 (1998) (emphasis added).

The South Carolina Court of Appeals in State v. Young, 364 S.C. 476, 613 S.E.2d 386 (Ct. App. 2003) cited approvingly to State v. Taylor and found that the defendant in that case had opened the door to his convictions for criminal domestic violence and criminal sexual conduct.

The admissibility determination normally required by SCRE 609 is not applicable when a party opens the door to otherwise inadmissible evidence. In State v. Dunlap, 353 S.C. 539, 579 S.E.2d 318 (2003) the defense counsel's opening argument created the impression that the defendant was merely a drug user and had no prior involvement with the sale of illegal drugs. The South Carolina Supreme Court on appeal found "that counsel opened the door to the admission of petitioner's prior drug record." Id. at 541. Since the door had been opened the Dunlap Court went on to find that "**we need not reach the issue whether these convictions were admissible to impeach petitioner's credibility under Rule 609, [SCRE].**" Id. 541-542. See also, State v. Young, 364 S.C. 476, 613 S.E.2d 386 (Ct. App. 2003) analysis under Rule 609, SCRE is unnecessary where the defendant opened the door.

South Carolina's view of the doctrine of "opening the door" is consistent with the federal court's view. Evidence of a conviction offered to contradict specific statements made by a witness rather than solely for Rule 609 purposes may be allowed. United States v. Leavis, 853 F.2d 215, 220 (4th Cir. 1988). In Leavis the defendant testified and denied he had any prior contact with drugs. The defendant in Leavis objected to the district court's admission of evidence of his 1973 felony conviction for possession of marijuana, arguing that that evidence was barred by Fed. R. Evid. 609(b) as it was over ten years old. The 4th Circuit Court of Appeals found that "[t]he evidence to which

Leavis objects, however, was not introduced on the general Rule 609 theory "that people who do certain bad things are not to be trusted to tell the truth." United States v. Johnson, 542 F.2d 230, 235 (5th Cir. 1976). Rather, it was introduced to contradict specific statements made by Leavis on direct examination. This is not the type of situation to which Rule 609(b) was meant to apply. United States v. Babbitt, 683 F.2d 21, 25 (1st Cir. 1982); Johnson, 542 F.2d at 234-35. Instead, admission is analyzed under Fed. R. Evid. 403 and subject to the broad exercise of the district court's discretion." United States v. Leavis, 853 F.2d 215, 220 (4th Cir. 1988).

Other states follow South Carolina's view of "opening the door" as barring review of the evidence under Rule 609. In Tennessee '[i]rrespective of admissibility under Rule 609 of Tennessee Rules of Evidence, a conviction may be used to contradict a witness who "opens the door" and testifies on direct examination that he or she has never been convicted of a crime, or to counter some other facet of direct testimony.'" State v. Smith, No. E2013-01162-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 1064, at *17-18 (Crim. App. Nov. 24, 2014).

Indiana follows the "opening the door" doctrine. "It is well settled that a defendant may open the door to questions otherwise not admissible under Rule 609. Moffatt v. State, 542 N.E.2d 971, 974 (Ind. 1989); Allen v. State, 495 N.E.2d 180, 181 (Ind. 1986). In addition, a defendant who, through direct testimony, leaves the trier of fact with a false or incomplete impression of his criminal record may open the door to inquiries into his complete criminal history." Wales v. State, 768 N.E.2d 513, 519 (Ind. Ct. App. 2002).

New Hampshire likewise follows the "opening the door" doctrine. "The opening-the-door doctrine is an exception to the general ban on the use of extrinsic evidence to impeach a witness's testimony on a collateral matter. See id. at 665; see also Jones v. Southern Pacific R.R., 962 F.2d 447, 450 (5th Cir. 1992). Thus, when a witness "opens the door" to a collateral issue, extrinsic evidence may be admissible to impeach her by contradiction." State v. Letarte, 169 N.H. 455, 465, 151 A.3d 533, 541 (2016).

Lastly, North Carolina, our sister state follows the "opening the door" doctrine. "However, a trial court may permit otherwise inadmissible evidence to be admitted if the opposing party opens the door through cross-examination of the witness. Baymon, 336 N.C. at 752, 446 S.E.2d at 3. "Opening the door" is the principle where one party introduces evidence of a particular fact and the opposing party may introduce evidence to explain or rebut it, even though the rebuttal evidence would be incompetent or irrelevant, if offered initially." State v. Thaggard, 168 N.C. App. 263, 273, 608 S.E.2d 774, 782 (2005).

In this case the Appellant "opened the door" when he stated "I don't steal". The trial court properly found that Appellant could be impeached with his prior convictions to counter his assertion that would leave the trier of fact with a false or incomplete impression of the Appellant. Both South Carolina and the Fourth Circuit Court of Appeals continue to apply the "opening the door" doctrine. In applying the "opening the door" doctrine there is no balancing test to be applied per SCRE 609. There is evidence in the record that the trial court properly found that the prejudicial harm was outweighed by the probative value and Appellant's conviction should be affirmed.

II. Remand for an Admissibility Determination to the Trial Court is the Appropriate Remedy for Alleged SCRE Rule 609 Violation

Where the record on appeal is absent or does not provide appropriate details regarding a determination of whether the probative value of the evidence substantially outweighed the prejudice, the appropriate remedy on appeal is to remand the matter back to the trial court. Upon remand the order should direct the trial court to conduct a hearing on admissibility of the prior convictions pursuant to the South Carolina Rules of Evidence Rule 609, along with instructions to order new trial, if upon remand the prior convictions are ruled inadmissible.

In State v. Colf, 337 S.C. 622, 633 S.E.2d 246 (2000) the South Carolina Supreme Court found that the appellate court should not conduct a hearing on appeal on the issue of the balancing test pursuant to Rule 609 of the South Carolina Rules of Evidence. "The Court of Appeals should not have undertaken the Rule 609(b) balancing test itself, but should have remanded the question to the trial court. In Cavender, the Fourth Circuit noted that it is precisely this absence of specific facts and circumstances that causes such cases to defy appellate review. 578 F.2d at 531. It is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision." Id. at 629.

"The balancing test required by Rule 609(b) must be conducted by the trial court. . . . Whether the probative value of the evidence substantially outweighs that prejudice is a determination the trial court should make after carefully balancing the interests

involved and articulating for the record the specific facts and circumstances supporting its decision." Id.

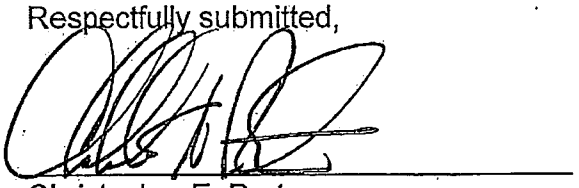
In an appeal from York County, the South Carolina Court of Appeals found that the trial court failed to properly weigh the probative value of the defendant's prior convictions against the prejudicial effect of the evidence in admitting prior drug convictions and the appropriate remedy was to remand the case back to the trial court. "We therefore remand this issue to the trial court for a hearing on the admissibility of each of Martin's prior convictions, with instructions for the trial judge to apply the proper burden of establishing admissibility, and carefully weigh the probative value of the prior convictions for impeachment purposes against their prejudicial effect. See Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000); Scriven, 339 S.C. 333, 344, 529 S.E.2d 71, 77 (2000) (**appellate court should not undertake a rule 609 balancing test, but should remand the issue to the trial court**)." State v. Martin, 347 S.C. 522, 532, 556 S.E.2d 706, 711-12 (Ct. App. 2001) (emphasis added).

This Court's order makes a finding "as a matter of law that Rule 609(b) required that the remote convictions not be admitted to impeach Appellant." This finding is precisely in contradiction of the South Carolina Supreme Court guidance in Colf that an appellate court not engage in a SCRE 609 balancing test on appeal. Absent this Court affirming Appellant's conviction based on the argument above, Respondent requests that this matter be remanded for a hearing regarding the admissibility of the evidence versus an outright reversal of his conviction and the granting of a new trial which is an inappropriate remedy per Colf, Scriven and Martin.

Conclusion

The City of Rock Hill requests that the conviction of the Defendant be affirmed or in the alternative, that the matter be remanded back to the trial court for a hearing regarding the admissibility of the Appellant's convictions and additional findings of fact.

Respectfully submitted,



Christopher E. Barton
Senior City Solicitor
City of Rock Hill Solicitor's Office

This 26th day of May, 2017.
Rock Hill, South Carolina

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the City of Rock Hill's Motion to Alter or Amend Judgment was served on the Defendant/Appellant by placing a copy in the regular U.S. Mail to Charles H. Rudnick, Attorney for Defendant/Appellant Post Office Box 691, York, South Carolina 29745 on the 26th day of May, 2017.

Christopher E. Barton
Senior City Solicitor
201 E. Main Street, Suite 300
Rock Hill, South Carolina 29730
(803) 329-5619
Attorney for Plaintiff/Respondent