

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 15 2017

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

S.C. SUPREME COURT

Appellate Case No. 2017-000100

ORIGINAL

Kristopher Wilmont Berry,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

APR 15 2019

S.C. SUPREME COURT

CERTIORARI TO DARLINGTON COUNTY
Court of Common Pleas
Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2017-000100

Kristopher Wilmont Berry,

Petitioner,

v.

State of South Carolina,

Respondent.

BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ISSUE PRESENTED..... iii

STATEMENT OF THE CASE..... 1

STATEMENT OF THE FACTS 3

 a. Summary of Facts Adduced at Trial 3

 b. Relevant Facts Adduced at Evidentiary Hearing 5

STANDARD OF REVIEW 6

ARGUMENT 7

 THE PCR COURT PROPERLY DENIED RELIEF BECAUSE THE PRIOR BAD ACT EVIDENCE WOULD HAVE COME IN ON OTHER GROUNDS, AND BECAUSE THE PRIOR BAD ACT EVIDENCE WAS OF MINIMAL IMPACT AS COMPARED TO THE SUBSTANTIVE EVIDENCE AGAINST BERRY 7

 a. Berry suffered no prejudice because the prior bad acts were either admissible under Rule 608(b) or utterly inconsequential, and the military records were never admitted to the jury. 7

 b. Evidence exists to show Counsel had prior notice of the State’s intent to use the court martial for computer theft. 9

 c. Berry suffered no prejudice because his guilt and total lack of credibility was absolutely established by other evidence. 10

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases	Page(s)
<u>Sellner v. State,</u> 416 S.C. 606, 787 S.E.2d 525 (2016)	6
<u>Smalls v. State,</u> 422 S.C. 174, 810 S.E.2d 836 (2018)	6
<u>State v. Al-Amin,</u> 353 S.C. 405, 578 S.E.2d 32 (Ct. App. 2003).....	8
<u>State v. Broadnax,</u> 414 S.C. 468, 779 S.E.2d 789 (2015)	8
<u>State v. Bryant,</u> 369 S.C. 511, 633 S.E.2d 152 (2006)	9
<u>State v. Kelsey,</u> 331 S.C. 50, 502 S.E.2d 63 (1998)	7
<u>State v. Martucci,</u> 380 S.C. 232, 669 S.E.2d 598 (Ct. App. 2008).....	8
<u>State v. Reggen,</u> 214 S.C. 370, 52 S.E.2d 708 (1949)	8
<u>State v. Vaughn,</u> 268 S.C. 119, 232 S.E.2d 328 (1977)	8
 Rules	
Rule 404(b), SCRE	1
Rule 608, SCRE.....	iv, 4, 7, 8, 9
Rule 609, SCRE.....	iv, 1, 3, 4, 7, 8

ISSUE PRESENTED

Petitioner's Issue Presented

Did the PCR judge err in refusing to find trial counsel ineffective for not properly objecting to the admission, pursuant to Rule 609, SCRE, of three prior acts when two of the prior acts led to Petitioner's other-than-honorable discharge from the United States Marine Corp but did not result in convictions and the third act that did result in a conviction was over ten years old, the State failed to provide written notice and the conviction was more prejudicial than probative?

Respondent's Issue Presented

Did the PCR judge properly deny post-conviction relief where trial counsel timely objected and argued against the admission of certain prior bad acts, where the prior acts would have validly come in under Rule 608(b), SCRE, where the prior acts at issue were not comparable to the acts for which Berry was being prosecuted, where the conviction clearly rested upon other substantial evidence, and where the jury was clearly not tainted given Berry's acquittal on one of his two charges?

STATEMENT OF THE CASE

Petitioner Kristopher Berry is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Berry was indicted at the September 2010 term of the Darlington County Grand Jury for criminal solicitation of a minor (2010-GS-16-01364) and lewd act on a minor (2010-GS-16-01363). Paul V. Cannarella, Esq. represented Berry at trial. Kendall Burch, Patti McKenzie-Parker, and John W. Holt, IV, Esqs., each of the Fourth Circuit Solicitor's Office, prosecuted the case. On July 18, 2011, Berry proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury acquitted Berry of lewd act on a minor, but found him guilty of criminal solicitation of a minor on July 21, 2011. Judge Baxley sentenced Berry to imprisonment for a term of ten years, suspended to five years of incarceration and five years of probation.

Berry filed a timely notice of appeal and a direct appeal was perfected by Dayne C. Phillips, Esq., who raised the following issues:

1. Did the trial court abuse its discretion in admitting a naked photograph of Appellant with his genitalia partially covered by not allowing the State to crop the photograph above Appellant's waist or defense counsel to stipulate to Appellant's ownership of the cell phone that contained the photograph at Appellant's trial for lewd act upon a minor and criminal solicitation of a minor when the photograph was not sent to the minor child, thereby making the prejudicial photograph inflame the emotions of the jury and establish that Appellant had a general sexually deviant disposition?
2. Did the trial court err in finding the acts which led to Appellant's other than honorable discharge from the military admissible under Rule 609(a)(2), SCRE, when: Appellant's actions were not prosecuted criminally; Appellant's military discharge constituted as an administrative separation and not as a conviction under Rule 609; and the trial court failed to conduct any Rule 404(b), SCRE, analysis?

The parties proceeded to oral arguments on September 12, 2013. Berry was represented by Mr. Phillips, as well as Carmen V. Ganjehsani, Esq. The State was represented by Christina J. Catoe,

of the South Carolina Attorney General's Office. By unpublished opinion decided October 30, 2013, the South Carolina Court of Appeals affirmed Berry's convictions. State v. Berry, Op. No. 2013-UP-396 (S.C. Ct. App. filed Oct. 30, 2013). The Remittitur was issued on November 18, 2013.

Berry filed his application for post-conviction relief on December 19, 2013 (2013-CP-16-01002). He alleged the following grounds for relief in his application:

1. "Ineffective assistance of counsel"
2. "Rule 5 violations by State"
3. "Brady and progeny violations by State"
4. "Criminal Violations of SC Code of Law § 16-9-10 Perjury and Subornation of perjury by the State as well as Rules 407(8.4) and 402(k) violations."
5. "Rule 403 violation of Rules of Evidence."
6. "Rule 609(b) violation of Rules of Evidence."
7. "Sentencing guidelines violation."

Berry expanded upon his allegations in an ten page handwritten attachment. Respondent made its return on November 19, 2014, and an evidentiary hearing into the matter was convened on January 11, 2016, before the Honorable Roger E. Henderson. Berry was present at the hearing and represented by Tristan M. Shaffer, Esq. Jessica E. Kinard, Esq., of the South Carolina Attorney General's Office, represented Respondent. Berry testified on his own behalf, and Mr. Canarella, also testified. By written order dated November 10, 2016, and filed November 28, 2016, Judge Henderson denied and dismissed the application.

This appeal follows.

STATEMENT OF THE FACTS

a. Summary of Facts Adduced at Trial

Berry, who was the fourteen-year-old victim's gymnastics coach, purchased a prepaid cell phone for the victim so that he and the victim could secretly send private text messages to one another. (Appx. 129-30; 168-70). The victim's parents had previously prohibited her from exchanging texts with Berry for any reason. (Appx. 149, ll. 10-17). Berry told the victim that he and his wife had an "open relationship" and at one point sent a text message stating that he wanted to get the victim "out of her panties." (Appx. 169, ll. 2-10; p. 178-79, 408-09). There were also several text messages from Berry regarding setting up a time and location for a sexual encounter with the victim and asking if they could "take pics when we play." (Appx. 178-80). Berry also texted that he would try to get the victim alone at the gym that week so that he could kiss her, and he warned her that his hands would "wander" when they kissed. (Appx. 180-81, 215, 223). In one text message, Berry stated, "I can see us having sex, but the kiss should be interesting." (Appx. 180-81, 414-15). The victim testified that Berry kissed her in the gym the day before the secret phone was discovered by the victim's father and the matter reported to law enforcement. (Appx. 173-76). The victim further explained Berry propositioned to teach her a gymnastic maneuver, a double-back, in exchange for sex. (Appx. 183-84).

Berry also gave the victim a digital camera and instructed her to take naked pictures of herself and provide them to him. (Appx. 169-70; p. 176-77; p. 219-22). At one point, Berry texted the victim the following: "Do I get my camera full of good pics tomorrow?" (Appx. 235, ll. 21-23). Berry assured the victim that no one would see the pictures except him. (Appx. 176-77). When Berry learned that the victim's father had found the prepaid phone containing the incriminating material and requests for pictures, Berry told the victim to go along with his cover

story that he was requesting pictures of the victim's ex-boyfriend so that he could identify him if he came to the gym looking for the victim. (Appx. 172-73).

Prior to Berry's testimony, Trial Counsel brought to the trial court's attention the State's intention to impeach Berry by way of acts detailed in a number of military records. (Appx. 341-46). In particular, Counsel noted three acts: (1) misappropriation of the computer, construed by Counsel as "use of a computer without permission;" (2) falsifying government documents; and (3) trespassing. (Appx. 342, ll. 3-12). The State argued all three "[made] a difference" regarding "truth and veracity," and argued they constituted convictions. (Appx. 343, ll. 3-17). When the trial court prompted the solicitor to argue under Rule 609, SCRE, the solicitor replied "I was looking at Rule 608" before arguing all three acts involved dishonesty or false statement such that they could be admitted under Rule 609(a)(2), SCRE. (Appx. 344, ll. 5-15). The trial court found all three acts involved dishonesty and admitted under Rule 609, but excluded any reference to the adulterous purpose for the trespass. (Appx. 345-46).

Towards the end of Berry's direct examination, Counsel preemptively addressed the circumstances of Berry's separation from the United States Marine Corps. (Appx. 382-86). Berry testified he "left by choice" because as a recruiter he "was instructed on the proper ways to lie, and didn't like it, because it is not the way the Marine Corp. is founded." (Appx. 383, ll. 6-9). Berry admitted to misrepresenting an unqualified recruit's weight and medical history, to misappropriating a computer in order to facilitate a "close combat program" he was teaching in the Corps, and to trespassing at a recruiting office at a mall while suspended. (Appx. 384-86). In particular, while explaining the computer theft, Berry explained he "did not report it when [he] was asked about it." (Appx. 385, ll. 11-13). On cross-examination, upon questioning by the State, Berry further explained he "chose to leave the Marine Corp. rather than facing a court-

martial and hurting my family.” (Appx. 390, ll. 1-8). The State segued away from the subject shortly thereafter. The extrinsic military records were not introduced to the jury, but admitted only as a court exhibit.

b. Relevant Facts Adduced at Evidentiary Hearing

Berry testified at the evidentiary hearing that he received an “other than honorable” administrative discharge in lieu of facing a court martial for adultery, for which he could present no defense. (Appx. 586, ll. 6-15). Berry opined Counsel was not prepared to deal with the adverse elements of his military service and that, since the discharge was not a conviction, its use for impeachment should have been objected to. (Appx. 586-87). Berry asserted Counsel did not object. (Appx. 587, ll. 8-11). Berry conceded he was convicted for wrongfully appropriating a computer “in 1994-95,”¹ but asserted the State was obligated to inform him ahead of time that the conviction would be used for impeachment and that he had no written information regarding that intent. (Appx. 587-88). Berry again asserted Counsel did not object. (Appx. 588, ll. 3-4). On cross-examination, Berry denied remembering any argument by Counsel, at which point Respondent pointed out Counsel’s argument. (Appx. 598-99 (citing Appx. 341-46)).

Counsel testified he could not recall whether Berry’s military records were provided as part of discovery. Counsel testified “I think the week before trial we might’ve been provided with the military stuff or even before that or the day of trial. I don’t remember.” (Appx. 609, ll. 18-20). Upon refreshing his memory, Counsel recalled arguing at trial that the prior acts were not “crimes of dishonesty” and that the issue went to Berry’s credibility. (Appx. 623-25).

¹ Berry’s military records, which were a part of the record before the PCR court as part of the appellate records provided with Respondent’s return, include a “Record of Conviction by Court-Martial.” (Supp. Appx. 6). That record indicates Berry stole a computer, monitor, and keyboard, between February 1999 and May 1999. That record further indicates a finding of guilt on July 7, 1999. Id.

STANDARD OF REVIEW

The post-conviction relief court's findings of fact receive great deference during appellate review and will be upheld if "any evidence of probative value" exists in the record to support the lower court's findings. Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016). Questions of law are reviewed *de novo*, and appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Id.; Smalls v. State, 422 S.C. 174, 180-81, 810 S.E.2d 836, 839 (2018).

ARGUMENT

THE PCR COURT PROPERLY DENIED RELIEF BECAUSE THE PRIOR BAD ACT EVIDENCE WOULD HAVE COME IN ON OTHER GROUNDS, AND BECAUSE THE PRIOR BAD ACT EVIDENCE WAS OF MINIMAL IMPACT AS COMPARED TO THE SUBSTANTIVE EVIDENCE AGAINST BERRY

Berry argues (1) the conviction for computer theft couldn't be brought in under Rule 608, SCRE, and was too old to come in under Rule 609, SCRE, (2) argues the trespassing was neither a conviction nor probative of truthfulness, and (3) notes the falsification of documents was not a conviction but is otherwise silent as to the applicability of Rule 608 to the deliberate falsehood. The PCR court's Order of Dismissal meets the "any evidence" standard because record shows that Berry suffered no conceivable prejudice because cross-examination on the prior bad acts would have been permitted under the grounds originally advanced by the State, and because even if such cross-examination had been prohibited, Berry's guilt as to solicitation and utter lack of credibility were fully established by other evidence.

- a. Berry suffered no prejudice because the prior bad acts were either admissible under Rule 608(b) or utterly inconsequential, and the military records were never admitted to the jury.**

The PCR court was justified in denying relief because *had* Counsel argued the acts resulting in Berry's other-than-honorable discharge did not constitute convictions,² and if the State had not advanced the court martial under Rule 609, SCRE, the course of argument would have returned to the question of whether the specific instances of conduct concerned Berry's character for truthfulness, as indicated by the State's remark to that effect. (See Appx. 344, line 9: "I was looking at Rule 608."). "Under Rule 608(b), SCRE, specific instances of the conduct

² The falsification of documents and trespassing which each formed part of the basis of Berry's discharge-in-lieu-of-court-martial do not constitute convictions.

of a witness may be inquired into on cross-examination if probative of the witness's character for truthfulness or untruthfulness." State v. Kelsey, 331 S.C. 50, 75, 502 S.E.2d 63, 75 (1998).

Falsifying federal documents is an offense in the nature of *crimen falsi*, and even if the act did not result in a conviction, such falsification remains probative for untruthfulness under Rule 608(b). To put it tautologically: lying on a federal form is lying.

As for the computer theft, at the time of the 2011 trial, prior larceny still reflected upon credibility. State v. Vaughn, 268 S.C. 119, 124, 232 S.E.2d 328, 330 (1977) (citing State v. Reggen, 214 S.C. 370, 374, 52 S.E.2d 708, 709 (1949) ("Guilt of larceny goes to the credibility of a witness and may be properly proved in order to discredit the witness.")); State v. Al-Amin, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003) ("It is the larcenous element of taking property of another which makes the action dishonest."). Honest thievery was not firmly recognized until State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015). As such, the State could have inquired about the acts during cross-examination without the introduction of extrinsic evidence under Rule 608(b), SCRE. As the military records were never admitted to the jury, the case functionally proceeded as though the impeachment were admitted under Rule 608(b).³ Additionally, Barry in his own testimony noted that the theft of the laptop involved an element of deception, namely lying to his superiors when they came looking for the computer. To again put it tautologically: lying to one's superiors is lying.

As for the "unlawful entry," it would not appear to be probative of truthfulness or untruthfulness in and of itself. However, the prior act was presented to the jury in a light so

³ That the military records *were not* put before the jury, as would have been allowed given the trial court's admission under Rule 609(a)(2), is no small benefit to Berry. The charges to which Berry pled in exchange for his non-conviction includes an admission that his story that he was coached to lie by superiors (see Appx. 383, ll. 6-9; p. 421, ll. 17-25) was a complete fabrication and known to be a fabrication by Berry. (Supp. Appx. 18, 25-26).

favorable to Berry as to appear to be a military technicality, rather than an act in conjunction with adultery, and could not be said to have prejudiced Berry in any material way. (See Appx. 385, ll. 1-5).

To whatever extent any one, or perhaps even two, of the prior acts should not have been admitted under Rule 608(b), SCRE, such evidence would have been merely cumulative to whichever other act or acts of falsehood were admissible under Rule 608(b), SCRE. See State v. Martucci, 380 S.C. 232, 261, 669 S.E.2d 598, 614 (Ct. App. 2008) (“The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence.”).

To the extent that any of the acts would *not* have been valid subjects for cross-examination under Rule 608(b), SCRE, Counsel’s argument preserved the issue for appeal by arguing that they were not probative of untruthfulness. Furthermore, Berry suffered no prejudice from the examination on the prior acts because they were in no way similar to the offenses for which Berry was on trial. Compare State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) (admission of prior convictions is highly prejudicial where the offenses are similar to the ones for which the defendant is on trial). Additionally, Berry suffered no prejudice from the examination on the prior acts because Counsel pre-emptively addressed them during the direct examination of Berry, at which time Berry provided his all-too-convenient explanations that he was always well-intended, but that the military wanted him to lie.

b. Evidence exists to show Counsel had prior notice of the State’s intent to use the court martial for computer theft.

Berry argues that he did not see written notice provided in the discovery provided to him. Counsel’s testimony on this ground was somewhat inconclusive, but indicated receiving notice of the intent to use the military records up to a week before trial. Though the written notice was not produced at the hearing, Counsel’s testimony that he was provided noticed up to a week in

advance provides the “any evidence” upon which the PCR court may rest its ruling. Further, as noted above, substantially the same evidence could have come in under Rule 608(b), SCRE.

c. Berry suffered no prejudice because his guilt and total lack of credibility was absolutely established by other evidence.

To whatever extent Counsel could have or should have objected or argued differently, there is no reasonable probability that, but for the alleged deficiency, the jury would have had a reasonable doubt respecting guilt. The evidence summarized in the statement of the case is provides that Berry secretly gave the victim a phone and camera without telling her parents, by which Berry communicated to the victim in over fifty text messages a desire to get her out of her panties, get pictures of her naked, take pictures when they “played,” that he wanted to kiss the victim and that his hands would wander when he did, and that he could see having sex with the victim. Berry tried to coax the victim into adopting the same cover story Berry deployed at trial, to wit: that he very secretly wanted pictures of a boy on whom the victim had a crush. Berry’s explanations ranged from merely self-serving claims of typos, to conspiratorial claims of mysteriously missing texts, to entirely implausible claims that his most explicit messages were simply jokes. Berry’s story was internally inconsistent, at once condemning gymnastic “play” and arguing he merely wanted pictures of the victim’s gymnastic “play.” Berry never denied sending the texts. Berry denied the phone presented at trial was his, which was revealed to be plainly untrue through the introduction of a nude photograph of Berry pulled from the phone in question.

Finally, the jury did not blindly convict Berry. The jury acquitted Berry of his charge for lewd act on a minor despite the examination on the prior acts. It cannot be said that the jury was improperly “lured” to convict based upon Berry’s military offenses where Berry was found not guilty of the more serious offense. To the contrary, Berry was convicted because the

considerable and incontrovertible evidence showed him grooming a minor gymnastics student for a sexual encounter.

CONCLUSION

Kristopher Berry endeavored to coax an innocent into lying with him. In responding to Berry's efforts to shroud himself in the valor of his military service, the State was justified in pointing out under Rule 608(b), SCRE, his failings and deceptions as a Marine, such that Counsel's failure to object to the admission of those failings under Rule 609, SCRE, was of no consequence. Accordingly, and for the foregoing reasons, this Court should deny his appeal and affirm the lower court's denial of post-conviction relief.

Respectfully submitted,

ALAN WILSON
Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

JOHNNY ELLIS JAMES JR.
S.C. Bar No. 101260
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

15 April, 2019

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Darlington County

The Honorable Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2017-000100

Kristopher Wilmont Berry, Petitioner,

v.

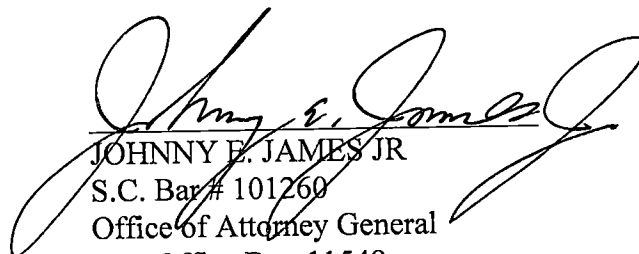
State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Johnny E. James Jr, certify that I have today served the within Brief of Respondent upon Petitioner by depositing a copy through a courier and addressed to:

**Kathrine H. Hudgins, Esquire
SC Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia SC 29211-1589**

I further certify that all parties required by Rule to be served have been served. This 15th day of April, 2019.



JOHNNY E. JAMES JR
S.C. Bar # 101260
Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737
ATTORNEY FOR RESPONDENT



RECEIVED

APR 15 2019

S.C. SUPREME COURT

ALAN WILSON
ATTORNEY GENERAL

April 15, 2019

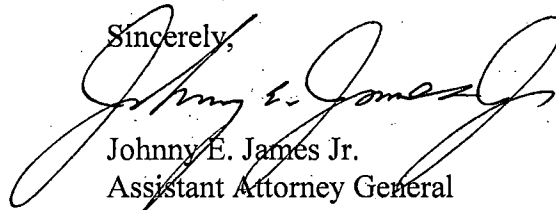
The Honorable Daniel E. Shearouse
Clerk of Court - SC Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

Re: Kristopher Wilmont Berry v. State of South Carolina
Appellate Case No. 2017-000100
Lower Court Case No. 2013-CP-16-1002

Dear Mr. Shearouse:

Attached are the original and fourteen (14) copies of the **Brief of Respondent** in the above referenced case for filing in your office.

Sincerely,



Johnny E. James Jr.
Assistant Attorney General
SC Bar #101260

JEJ/mm

cc: Kathrine H. Hudgins, Esquire
Victim Advocacy Division (without enclosure)