STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Oconee County

Honorable R. Lawton McIntosh, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

CLIFTON EUGENE SMITH,

APPELLANT.

APPELLATE CASE NO. 2019-001975

# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Did the trial judge abuse his discretion by refusing to allow Appellant to impeach the complainant with his prior convictions for possession of methamphetamine, first and second offense, failure to stop for a blue light, the use of communication facility in commission of a felony involving controlled substance, and fleeing or attempting to elude a police officer since such convictions were extremely probative of the complainant's credibility and admissible pursuant to Rule 609, SCRE, and State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019)?

<u>**STATEMENT OF THE CASE**</u>

An Oconee County grand jury indicted Appellant for assault and battery of a high and aggravated nature (ABHAN). R. * (Indictment). His case was called to trial on November 18, 2019 before the Honorable R. Lawton McIntosh, and a jury. Tr. 1. Assistant Solicitor Jason Alderman represented the state, and Lee Cole represented Appellant. Tr. 1.

On November 19, 2019, the jury found Appellant guilty as indicted. Tr. 274, ll. 6-10. He was sentenced to fifteen years imprisonment. Tr. 279, l. 10.

This appeal follows.

## STATEMENT OF FACTS

Appellant and Varia Galbreath dated on and off for several years. Tr. 150, ll. 2-18; Tr. 176, l. 19 – 177, l. 12. On December 26, 2017, Galbreath drove Appellant and her adult son, Michael Todd Reid, to Galbreath's daughter's house for a Christmas celebration. Tr. 150, l. 19 – 151, l. 16; Tr. 178, ll. 3-12. Present during the small family gathering were Galbreath, Appellant, Reid, Galbreath's daughter, Hanna, and Hanna's boyfriend and young child. Tr. 151, ll. 15-19. The family ate pizza and exchanged gifts. Tr. 151, l. 20 – 152, l. 3.

Hanna gave Appellant "mini bottles of alcohol." Tr. 151, l. 20 – 152, l. 1. Appellant drank the alcohol during the party. Galbreath testified that within thirty minutes of drinking the alcohol, Appellant "started acting up." Tr. 152, ll. 2-5. Reid went outside because he could not "handle" Appellant's behavior. Tr. 152, ll. 5-7; Tr. 179, ll. 6-17. Galbreath was "upset" with Appellant. In her anger, Galbreath said the word "shit." Hanna told her, "Don't talk like that in front of my baby." Tr. 152, ll. 7-10. Given the situation, Galbreath decided it would be best if they left. Tr. 152, ll. 10-11.

Galbreath, Appellant, and Reid left the party. Tr. 179, ll. 18-19. Galbreath was driving, Appellant was in the front passenger seat, and Reid was in the backseat directly behind Appellant. Tr. 152, ll. 14-18; Tr. 180, ll. 4-8. As they were driving, Galbreath and Reid were both "irritated" because Appellant had "ruined" the "little Christmas party." Tr. 153, ll. 1-5. Appellant was "over there in his own little world." Tr. 153, ll. 5-6.

Reid "started saying what [he] needed to say about" Appellant "mooching" and "not working" and being "overbearing" toward Galbreath. He also commented on Appellant not being able to "handle the alcohol." Tr. 180, ll. 15-19. Appellant responded, "Well, you [Reid]

do drugs." Tr. 180, ll. 20-21. "That's when [Reid] struck [Appellant]." Reid testified, "I struck him like, 'Shut, your mouth,' pretty much." Tr. 180, ll. 22-23.

Galbreath immediately stopped the car. She grabbed Appellant's shirt and said, "Y'all don't. Stop. What are you doing? Stop." Tr. 180, l. 24 – 181, l. 1. Both Galbreath and Reid claimed the altercation ended at this point and Galbreath started driving again. Tr. 154, ll. 8-11; Tr. 181, ll. 9-12.

Reid testified that he was looking down at his phone "trying to get ahold of somebody." Tr. 181, ll. 3-4. The group was traveling down a dark road when Appellant "whirled around in the seat." Tr. 154, ll. 22-25. He was "turned around completely in his seat on his knees facing the rear." Tr. 181, ll. 21-22. Galbreath thought Appellant was "hitting" Reid. Tr. 154, l. 22 – 155, l. 1. Reid thought he was being "slapped." Tr. 181, ll. 14-15. Galbreath stopped the car again in the middle of the road. Tr. 154, l. 22 – 155, l. 1; Tr. 181, l. 19. She grabbed Appellant's shirt and yelled, "Just stop. Just stop." Tr. 155, ll. 1-2. Galbreath was trying to pull Appellant back toward the front of the car. Tr. 181, ll. 19-24.

According to Reid, he eventually realized Appellant had something sharp in his hand. Tr. 181, ll. 24-25. There was little "room in the backseat to go anywhere." Tr. 183, ll. 13-14. However, Reid was able to open the back door and get out of the car. Tr. 155, ll. 2-3. When he got out, he realized he had been "sliced." Tr. 181, ll. 13-14. Reid said, "You cut me." Tr. 155, ll. 3-4.

Galbreath claimed that as soon as Reid got out of the car, Appellant turned around and sat back down in the front passenger seat. Tr. 155, ll. 4-6. Galbreath called 911. Tr. 156, ll. 1-8. Reid laid down in the middle of the road. Tr. 156, l. 11. He was treated by paramedics and

ultimately transported to the hospital. Tr. 156, l. 25 – 157, l. 2; Tr. 187, ll. 13-25; Tr. 135, l. 11 – 137, l. 15.

When first responders arrived, Appellant was standing at the back of the car. He was "agitated" and shouting. Tr. 128, l. 22 – 129, l. 16. The first responder asked Appellant if he had any weapons. Appellant admitted he had a knife in his pocket. The first responder asked Appellant to put the knife on top of the trunk and Appellant complied. Tr. 130, ll. 1-9. He was "very compliant" and cooperated with law enforcement. Tr. 139, ll. 14-19. The knife was a pocketknife. Tr. 148, ll. 9-14. The blade was about two to four inches long. Tr. 148, ll. 15-17.

When questioned, Appellant told law enforcement that he acted in self-defense. Appellant said there was an argument, that Reid attacked him with a knife, that he was able to take the knife from Reid and ultimately stab Reid with his own knife. Tr. 210, l. 14 – 211, l. 10; Tr. 213, ll. 7-11.

Reid was thirty years old at the time of the altercation, weighed over two hundred pounds, and was approximately six feet tall. Tr. 189, ll. 4-20. Reid testified he was "physically perfect" at the time and has "always been pretty fit, healthy." Tr. 189, ll. 14-25.

Despite Galbreath's testimony that there was a pause between when Reid originally struck Appellant and when Appellant turned around in his seat and began hitting Reid, she was later impeached with the written statement she gave to law enforcement the night of the incident in which she admitted it was one continuous altercation and that there was no gap of time between when Reid struck Appellant and when Appellant began to defend himself. Tr. 158, l. 20 – 162, l. 12.

The judge charged the jury on self-defense. Tr. 266, l. 4 – 269, l. 10. After deliberating for an hour and a half, the jury found Appellant guilty as indicted. Tr. 273, l. 13 – 274, l. 15.

## STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only." State v. Robinson, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court's] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law." Id. (quoting State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001)) (alterations in original) (internal quotation marks omitted). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. (quoting State v. Douglas, 369 S.C. 424, 429-430, 632 S.E.2d 845, 848 (2006)) (internal quotation marks omitted).

# ARGUMENT

The trial judge abused his discretion by refusing to allow Appellant to impeach the complainant with his prior convictions for possession of methamphetamine, first and second offense, failure to stop for a blue light, the use of communication facility in commission of a felony involving controlled substance, and fleeing or attempting to elude a police officer since such convictions were extremely probative of the complainant's credibility and admissible pursuant to Rule 609, SCRE, and *State v. Robinson*, 426 S.C. 579, 828 S.E.2d 203 (2019).

**Relevant Facts**

Before Michael Todd Reid testified, defense counsel informed the judge that he sought to impeach Reid, the alleged victim, with several of his prior convictions. Specifically, Appellant sought to impeach Reid with his 2019 conviction for possession of methamphetamine, second offense, and his 2018 conviction for failure to stop for a blue light, both from South Carolina. He also sought to impeach Reid with three 2017 convictions from Georgia: possession of methamphetamine, first offense, "the use of communication facility in commission of a felony involving controlled substance," and fleeing or attempting to elude a police officer. Tr. 163, l. 24 – 174, l. 2.

The trial judge relied on State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019) and read aloud portions of the case concerning the admission of prior convictions pursuant to Rule 609, SCRE. He asserted, "And the way they break it down, if it's a witness as opposed to being the accused, and it's for a crime punishable by more than a year, then it may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, undue delay, waste of time, and cumulative evidence. The State has the burden of establishing inadmissibility, and then the Colf, C-o-l-f, factors have to be

considered as well, and that is the impeachment value of the prior crime, the point in time of the conviction, and the witnesses' subsequent history, similarity between the past crime and the crime charged – that's more for the defendant - - import of the defendant's testimony – again that's for the defendant – or the accused and centrality of credibility is an issue." Tr. 164, l. 12 – 165, l. 11.

The assistant solicitor argued Reid's 2019 conviction for possession of methamphetamine, second offense, should be excluded because "it tends to confuse the issue. There's been no factual allegation that, specifically in this case, methamphetamine on his prior record was any factor or had anything to do with the events of that night, and at the same time, just saying methamphetamine tends to prejudice that individual. It's kind of a hot button issue, particularly in this county, Judge, and I think that it's more prejudicial than it could possibility be probative." Tr. 166, ll. 4-14.

Defense counsel argued Reid's 2019 conviction for possession of methamphetamine, second offense, should be admissible because "it adds probative value as to . . . the truthfulness of his [Reid's] statements." Counsel also argued it was relevant because he intended to question Reid about the cause of the altercation, including the fact that Appellant discussed Reid's drug use immediately before Reid struck Appellant. Tr. 166, ll. 17-24.

The trial judge found possession of methamphetamine was not a crime of dishonesty and concluded the conviction would fall under Rule 609(a)(1). Tr. 167, l. 18 – 168, l. 15. He ultimately ruled Appellant could not impeach Reid with this conviction. He asserted, "I'm not going to allow you to do that, Mr. Cole [defense counsel], in all due candor. I think it's just unduly prejudicial to the State in this matter. Doesn't have any probative value to the case or the issues in this case. *Credibility is a big issue in this case; however, because a swearing contest*

*between the victim and his mom and defendant about what actually occurred in that car, nobody knows but them.* It's close to the point in time [the conviction to the date of the offense], it's April [2019]. Impeachment value . . . I don't think it has a whole lot of value except for what we all know is that it will - - from a jury standpoint, they are going to think, whoever has this charge, is a bad person." Tr. 168, l. 19 – 169, l. 6 (emphasis added).

As far as failure to stop for a blue light, defense counsel argued the conviction fell under Rule 609(a)(1) because it carried more than one year. He argued it was probative for impeachment purposes because there is "dishonesty involved" when one refuses to stop for a blue light and evades law enforcement. Tr. 169, ll. 16-22. After discussing which type of offenses constitute crimes of dishonesty pursuant to Rule 609(a)(2), the trial judge merely asserted, "I'm not going to allow that either" without conducting any of the analysis required by Rule 609(a)(1). Tr. 169, l. 23 – 170, l. 24.

The parties then discussed Reid's 2017 convictions from Georgia for "the use of communication facility in commission of a felony involving a controlled substance" and possession of methamphetamine. Tr. 171, ll. 1-23. The judge clarified that the first offense meant Reid "used a phone to order drugs or facilitate a drug deal." Tr. 171, ll. 13-18. Again, without conducting the analysis required by Rule 609(a)(1), the judge merely ruled, "The ruling is going to be the same." Tr. 171, ll. 24-25.

Lastly, defense counsel argued Reid's 2017 conviction from Georgia for fleeing or attempting to elude a police officer should be admitted because "if he's fleeing or attempting to elude, that does carry dishonesty with it." Tr. 172, ll. 6-12. The trial judge found this offense was not a crime of dishonestly and therefore fell under Rule 609(a)(1). However, again without

conducting the proper analysis as required by the rule, the judge merely asserted, “I’m going to find that it’s not admissible.” Tr. 172, l. 16 – 173, l. 8.

The judge then inquired whether Reid had any “bad check charges, anything like that?” Tr. 173, ll. 9-12. His question suggested he would not allow Appellant to impeach Reid with any convictions that were not defined as crimes of dishonesty and, therefore, admissible pursuant to Rule 609(a)(2). Ultimately, Appellant was not permitted to impeach Reid with any of his prior convictions.

**Discussion**

The trial judge abused his discretion by refusing to allow Appellant to impeach Reid with his prior convictions for possession of methamphetamine, first and second offense, failure to stop for a blue light, the use of communication facility in commission of a felony involving a controlled substance, and fleeing or attempting to elude a police officer since such convictions were admissible pursuant to Rule 609, SCRE, and State v. Robinson, 426 S.C. 579, 828 S.E.2d 203 (2019).

“Rule 609 of the South Carolina Rules of Evidence governs the admissibility of a witness’s prior convictions for purposes of impeachment.” Robinson, 426 S.C. at 592, 828 S.E.2d at 209. “Rule 609 prescribes varying standards for admissibility of evidence of prior convictions.” Id. at 592, 828 S.E.2d at 209-210. In pertinent part, Rule 609 provides:

> (a) General Rule. For the purpose of attacking the credibility of a witness,
>
> (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

> (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

"Rule 609(a) invokes three impeachment scenarios." Robinson, 426 S.C. at 593, 828 S.E.2d at 210. "First, under Rule 609(a)(1), evidence that a witness other than an accused has been convicted of a crime punishable by death or imprisonment for more than one year (in the jurisdiction where the conviction occurred) is admissible, subject to Rule 403, SCRE." Id. "Under Rule 403, evidence of such a conviction 'may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" Id. "The Rule 403 test places the burden upon the opponent of the evidence to establish inadmissibility pursuant to Rule 403." Id. "Second, under Rule 609(a)(1), when the accused chooses to testify during his trial, if the State seeks to introduce impeachment evidence that the accused has been convicted of a crime punishable by imprisonment for more than one year, the evidence is admissible if the State establishes the probative value of admitting the evidence outweighs its prejudicial effect upon the accused." Id. "Third, under Rule 609(a)(2), if a witness, even an accused, has been convicted of a crime involving dishonesty or false statement, evidence of such a conviction shall be admitted regardless of the maximum punishment and regardless of the probative value or prejudicial effect of the evidence." Id. (citing State v. Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006)).

In State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000), our Supreme Court adopted the five factor analysis employed by federal courts when weighing the probative value of prior convictions against the prejudicial effect to the accused. These factors include: (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 between the past crime and the charged crime; (4) The

importance of the defendant's testimony; and (5) The centrality of the credibility issue. Id. "These factors are not exclusive; trial courts should exercise their discretion in light of the facts and circumstances of each particular case." Id. Although Colf focused on the admission of prior convictions more than ten years old under Rule 609(b), our courts have also consistently applied these factors for purposes of a Rule 609(a)(1) analysis. Robinson, 426 S.C. at 594, 828 S.E.2d at 211 (citing State v. Bryant, 369 S.C. 511, 517 n.1, 633 S.E.2d 152, 155 n.1 (2006)).

Relevant to this case is Rule 609(a)(1) as all five of Reid's prior convictions were punishable by imprisonment for more than one year, but did not constitute crimes of dishonesty pursuant to Rule 609(a)(2) as define by this state's case law. "[U]nder Rule 609(a)(1), if the witness is someone other than the accused and has a prior conviction of a crime punishable by death or imprisonment for more than one year, the trial court must balance the Colf factors and determine whether, under Rule 403, the probative value of the conviction is substantially outweighed by the danger of unfair prejudice and/or other relevant considerations set forth in Rule 403. *The burden of establishing inadmissibility of the conviction is upon the opponent of the evidence*." Robinson, 426 S.C. at 595, 828 S.E.2d at 211 (emphasis added).

The trial judge recognized that "credibility is a big issue in this case" and that it ultimately came down to a "swearing contest between the victim [Reid] and his mom [Galbreath] and the defendant [Appellant] about what actually occurred in that car, nobody knows but them." Tr. 168, l. 23 – 169, l. 1. The probative value of Reid's prior convictions was thus extremely high because they reflected on Reid's credibility, the central issue in the case, and the truthfulness of his statements and testimony.

An analysis of the relevant Colf factors also demonstrates the probative value of these prior convictions. The first factor concerns the "impeachment value of the prior crime." Both

failure to stop for a blue light and fleeing or attempting to elude a police officer involve a level of dishonesty that reflect poorly on Reid's credibility and the truthfulness of his statements. Thus, their impeachment value was great. While generally less probative of truthfulness than Reid's other convictions, his convictions for possession of methamphetamine and the use of a communication facility in commission of a felony involving a controlled substance, nonetheless reflect on Reid's credibility and were relevant to the reason for the altercation, namely Appellant's accusation that Reid used drugs. See Robinson, 426 S.C. at 599, 828 S.E.2d at 213 ("Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1).")

Additionally, all of Reid's prior convictions were close in time to both the altercation, which occurred on December 26, 2017, and Appellant's trial, which was held November 18, 2019, as all five convictions occurred between 2017 and 2019. Moreover, as already argued and acknowledged by the trial judge, credibility was central to the case. Consequently, the Colf factors support the admission of Reid's prior convictions.

As far as prejudice, there was little, if any, prejudice to the state. The trial judge was concerned that Reid's prior drug convictions would make him appear to be a "bad person" to the jury. Tr. 169, ll. 2-6. However, Reid admitted during his testimony before the jury that the altercation started after Appellant said, "Well, you [Reid] do drugs." Tr. 180, ll. 20-23. Therefore, the jury knew Reid used drugs or at a minimum that Appellant believed Reid used drugs, which reduced any prejudice to the state. Moreover, neither the state, who had the burden of proof to establish inadmissibility, nor the trial judge, alleged any other grounds for why the admission of Reid's prior convictions would be prejudicial to the state. No reason whatsoever

was given for why Reid's convictions for failure to stop for a blue light and fleeing or attempting to elude a police officer were unfairly prejudicial.

Lastly, the judge's comments concerning dishonesty throughout the argument on the admissibility of Reid's prior convictions and his inquiry at the end of the discussion about whether Reid had any "bad check charges, anything like that" suggested the judge would not allow Appellant to impeach Reid with any convictions that were not defined as crimes of dishonesty and, therefore, automatically admissible pursuant to Rule 609(a)(2). See Tr. 173, ll. 9-12. However, our Supreme Court made clear in Robinson that just because an offense is not defined as a crime of dishonesty and, thus admissible pursuant to Rule 609(a)(2), does not mean such convictions have no impeachment value under Rule 609(a)(1). See Robinson, 426 S.C. at 599, 828 S.E.2d at 213. Otherwise, as the Supreme Court emphasized, "no convictions would ever have impeachment value under Rule 609 unless they were crimes of dishonesty or false statement admitted under Rule 609(a)(2)." Id.

Here, a proper balancing of the Colf factors and an analysis pursuant to Rule 403 demonstrate that the trial judge abused his discretion by refusing to allow Appellant to impeach Reid with all five of his prior convictions. Respectfully, this Court should reverse Appellant's convictions and sentence and remand for a new trial.

## CONCLUSION

Based on the foregoing argument, Appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.

Respectfully submitted,

s/ Lara M. Caudy_____________
Appellate Defender

ATTORNEY FOR APPELLANT

This 14th day of August, 2020.

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SC Court of Appeals

STATE OF SOUTH CAROLINA

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Honorable R. Lawton McIntosh, Circuit Court Judge

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CERTIFICATE OF SERVICE

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency" dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS); and a copy of the Initial Brief of Appellant and Designation of Matter has been served upon Clifton Eugene Smith, #259061, at Evans Correctional Institution, 610 Highway 9 West, Bennettsville, SC 29512, this 14th day of August, 2020.

s/ Lara M. Caudy____________
Appellate Defender

ATTORNEY FOR APPELLANT