STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Frank R. Addy, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

RODNEY JEROME FURTICK,

APPELLANT

APPELLATE CASE NO. 2019-001920

FINAL BRIEF OF APPELLANT

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Whether the trial court erred in Appellant's trial for criminal sexual conduct and burglary where it allowed the prosecution to impeach Appellant with "sanitized" convictions (two convictions for second-degree assault and battery referred to as misdemeanors and one conviction for third-degree burglary referred to as a felony), where the convictions were inadmissible under Rule 609(a)(1), SCRE and *Colf*[1], since the court's approach implicitly determined that it would not exclude evidence of prior convictions under Rule 609(a)(1)?

[1] *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

STATEMENT OF THE CASE

On June 5, 2017, a Lexington County Grand Jury indicted Appellant for criminal sexual conduct in the first degree. R. 515. Appellant was also indicted for burglary in the first degree. R. 151, ll. 5-8. Appellant was tried before the Honorable Frank R. Addy, Jr., and a jury, from November 4 – 6, 2019. R. 1; R. 14. Appellant was represented by Elizabeth Fullwood and Robert Madsen. R. 14. The State was represented by Suzanne Mayes and Rhonda Patterson. R. 14.

Appellant was found guilty of the lesser-included offense of criminal sexual conduct in the second degree and he was found not guilty of burglary in the first degree. R. 503, ll. 6-14. The court sentenced Appellant to twenty years' imprisonment. R. 513, ll. 8-10; R. 517.

This appeal follows.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. *State v. Wilson*, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001). This court is bound by the trial court's factual findings unless they are clearly erroneous. *Id*. at 6, 545 S.E.2d at 829. On review, we are limited to determining whether the trial judge abused his discretion. *Id*. This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. *Id*. The admission and exclusion of evidence is largely a matter of trial judge discretion and his rulings will not be overturned on appeal unless he manifestly abuses his discretion and the defendant suffered prejudice as a result. *State v. Thompson*, 305 S.C. 496, 502, 409 S.E.2d 420, 424 (Ct. App. 1991).

"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." *State v. Robinson*, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (internal alterations and quotations omitted) (quoting *State v. Dunlap*, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001)).

ARGUMENT

The trial court erred in Appellant's trial for criminal sexual conduct and burglary where it allowed the prosecution to impeach Appellant with "sanitized" convictions (two convictions for second-degree assault and battery referred to as misdemeanors and one conviction for third-degree burglary referred to as a felony), where the convictions were inadmissible under Rule 609(a)(1), SCRE and *Colf*[2], since the court's approach implicitly determined that it would not exclude evidence of prior convictions under Rule 609(a)(1).

Appellant's convictions fell under Rule 609(a)(1) but the trial court determined they should be "sanitized" so that their admission would not be precluded by the evidence rules. The court's decision to admit Appellant's prior convictions as unnamed felonies and misdemeanors was an improper application of Rule 609, SCRE. By adopting this approach, the trial court implicitly determined that it would not exclude convictions under Rule 609(a)(1).

The court's ruling also failed to recognize that even if the convictions were probative of Appellant's credibility, admitting the convictions in such a blatantly "sanitized" form stripped them of probative value and did little to mitigate prejudice.

Relevant facts

J.H. (Complainant), who was from Wisconsin, moved to Cayce with her husband and one-year-old child in August of 2015. R. 167, l. 1 – 168, l. 23. Complainant had no car, she had limited access to a telephone, and she had been medicated for depression for many years. R. 169, ll. 14-17; R. 171, ll. 21-22; R. 195, ll. 18-24. Complainant was soon-to-be both evicted and divorced. R. 167, ll. 12-19; R. 198, ll. 4-25.

[2] *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

As defense counsel would later argue, "She was unhappy in [her] marriage." R. 473, ll. 20-21.

Appellant was friendly with Complainant's husband and came over regularly. R. 195, l. 25 – 196, l. 2; R. 170, ll. 15-17. Appellant would testify at his trial that on November 18, 2015, he had consensual sex with Complainant. R. 408, l. 9 – 412, l. 24. Appellant would also reveal that he and Complainant had consensual sex on a prior occasion in October. R. 391, l. 21 – 398, l. 19.

Complainant denied she ever had consensual sex with Appellant and she claimed that he pushed his way into her home and raped her on the evening of November 15, 2018. R. 174, l. 4 – 182, l. 18; R. 194, l. 13 – 195, l. 12. According to Complainant, she did not try to resist the rape because Appellant threatened to hurt her child if she did so. R. 179, l. 18 – 182, l. 25.

Complainant reported the alleged rape to her neighbor and the neighbor called 911. R. 210, l. 12 – 212, l. 2; R. 217, ll. 6-8. Complainant was taken to the hospital and she was given a sexual assault examination. R. 261, l. 13 – 280, l. 4. She provided police officers with Appellant's description and first name. R. 292, l. 2 – 293, l. 1. When officers questioned Appellant, he denied knowing Complainant and her husband, and he said there was no reason his DNA would be at their home. R. 307, l. 24 – 312, l. 25.

Months later, DNA analysis confirmed that Appellant and Complainant did have sex. R. 313, l. 7 – 314, l. 19; R. 367, l. 1 – 368, l. 13. According to SLED, DNA was found in semen collected during Complainant's sexual assault examination and it matched Appellant's DNA. R. 367 l. 1 – 368, l. 11.

Appellant's trial took place in 2019. Prior to Appellant's testimony, the solicitor moved to impeach Appellant with prior convictions: (1) third-degree burglary from 2010; (2) petit

larceny from 2012; (3) second-degree assault and battery from 2012; (4) second-degree assault and battery from 2012; and (5) property offense, third or greater from 2015. R. 376, ll. 5-14.

The court noted that the petit larceny and the property offense were crimes involving dishonesty and defense counsel agreed. The parties agreed to refer to the property offense, third or greater as a petit larceny. R. 376, l. 15 – 377, l. 6.

However, defense counsel objected to the admissibility of Appellant's third-degree burglary and second-degree assault and battery convictions and asked the court to "keep [those convictions] out under Rule 609(a)(1)." R. 377, ll. 10-20. Defense counsel argued the burglary and assault convictions were "very similar in nature" to the crimes for which Appellant was on trial. R. 377, ll. 10-20.

The court noted that *State v. Bryant*, 369 S.C. 511, 633 S.E.2d 152 (2006), "holds that a conviction for burglary is not probative of truthfulness." R. 378, ll. 7-9. "[T]hen you've got the problem with State versus Howard[3] with the similarity of prior convictions." R. 378, ll. 12-14.

The court also cited *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000). R. 378, ll. 15-16. The court indicated that it was familiar with *State v. Robinson*, 426 S.C. 579, 828 S.E.2d 203 (2019), and stated that, "where you have a swearing contest between two people the impeachment value of the crime is all the more important as opposed to less important." R. 382, l. 16 – 383, l. 4. The court offered that it believed of Appellant's trial: "it is a swearing contest." R. 380, ll. 6-7.

As to Appellant's conviction for burglary in the third degree, the court decided that the solicitor could not "specifically say a burglary," but could refer to the conviction as a "felony that carries more than one year." R. 379, ll. 4-19. The court stated its decision was because "the

[3] *State v. Howard*, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011).

issue of credibility is quite important in this case" but that since Appellant was standing trial for burglary, the offense was of too "similar [a] nature." R. 378, l. 25 – 379, l. 6.

As to Appellant's convictions for assault and battery in the second degree, the court found they were "fair game." "[T]hey're not so similar as to warrant exclusion" and "since it is a swearing contest . . . that makes the use of those convictions all the more valuable to the State." R. 380, ll. 3-10. Defense counsel initially responded to the ruling by asking the convictions be referred to as misdemeanors but quickly changed course and asked the court to exclude the assault and battery convictions since they were not probative of credibility. R. 380, l. 11 – 381, l. 23. Defense counsel argued that assault "doesn't have anything to do with truthfulness." R. 381, ll. 16-17. Defense counsel pointed out that prior convictions may not be admitted to show "habit." R. 381, ll. 17-19. "It's just for the truthfulness, the ability to impeach his current testimony, and we don't think under 403 that the assault . . . there's just no way that those are more probative than prejudicial." R. 381, ll. 19-23.

The solicitor argued the convictions should be admitted because: "They're simply allowed under the rule because they carry more than a year." R. 381, l. 24 – 382, l. 2; R. 378, ll. 7-11. Although the solicitor offered no facts or circumstances about the assault and battery convictions (or about the burglary conviction), she would later say, during sentencing, that Appellant's convictions for second-degree assault and battery "were pled down from criminal sexual conduct with a minor second degree." R. 508, ll. 11-15.

The court broke for the evening, and when the parties reconvened, the court advised that as to the second-degree assault and battery convictions,

> I've looked at the five factors, I've considered it. Doing a 403 balancing analysis, I think that the **impeachment value mostly outweighs but I cannot say substantially outweighs the danger**

> **of unfair prejudice**[4] and the key to . . . my reasoning is that **by allowing the jury to hear that he was convicted of assault and battery in the second degree is tantamount to basically suggesting improperly to the jury that the [d]efendant has a propensity towards violence, a propensity to assault people, and, of course, sexual assault is one of the charges that he's facing**.
>
> So I'll ask the State to simply limit your inquiry of the [d]efendant as it relates to that conviction; that he was convicted in 2012 of two misdemeanor offenses that carry more than a year in prison . . .
>
> . . . .
>
> . . . [T]he way that I would allow the State to go into this, and it's how it's done in other parts . . . of the state **in order to sanitize the conviction**, but **the burglary third from 2010 I will allow the State to characterize that as a felony punishable by greater than a year**, a petit larceny from 2012. **The 2012 assault convictions may be referred to as two counts—two misdemeanors carrying more than a year**, and then the 2015 larceny. So that's how that can be elicited.

R. 385, l. 19 – 387, l. 14 (emphasis added).

Defense counsel objected to the "sanitization" of the offenses.

> [**O**]**ur objection at the end for the burglary and the assault and battery** . . . **the word 'sanitize," our position would be if the rules don't allow it**, if you can't fit a square box into a round hole, then why should we sand off the corners of the square box and now push it through the hole? I didn't see anything where that was addressed in any of our caselaw and so our position would be if the rules don't allow it, **then it just shouldn't come in, it shouldn't be, quote unquote, sanitized.** In other words, hey, let's do the

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[4] This ruling was a misapplication of Rule 609. When analyzing whether the conviction of a defendant should be admitted under Rule 609(a)(1), the court must consider whether "the **probative** value of admitting this evidence outweighs its prejudicial effect to the accused," not whether the **impeachment** value outweighs prejudicial effect. Rule 609(a)(1), SCRE (emphasis added). While impeachment value is a component of probative value, impeachment value is merely one factor to be considered pursuant to *Colf*. However, the analysis of probative value versus prejudicial effect considers all five of the *Colf* factors. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. Moreover, where the witness is the accused, as here, the test is simply whether the probative value of the conviction outweighs its prejudicial effect, not whether the probative value is "substantially" outweighed by the danger of unfair prejudice. Rule 609(a)(1), SCRE.

> State a solid and even though it doesn't comply to the rules, let's let them do something that the rules don't necessarily allow them to do . . .

R. 387, l. 16 – 388, l. 7 (emphasis added).

Defense counsel reiterated that per the reasoning in *Bryant, supra*, the offenses "are just not probative of truthfulness, and so that is ultimately our objection . . ." R. 388, ll. 12-15. Defense counsel clarified that although the defense would bring out Appellant's prior convictions in the manner specified by the court during Appellant's direct testimony to lessen the impact, "we certainly want to preserve our objections with that . . ." R. 386, l. 19 – 387, l. 4.

The court ruled,

> I understand your position and you do have a running objection. My—my opinion is that the prejudice flows from the similar nature of the crime, so calling something a burglary when you're on trial for burglary or calling something a rape when you're on trial for rape is what creates the prejudice if they have that prior conviction for that similar type of offense and **the prejudice is substantially lessened if you're simply allowed to inquire as to a nameless felony or a nameless misdemeanor**, and so that's the reasoning that this court is employing it and I think other judges has employed routinely.

R. 388, l. 21 – 389, l. 7 (emphasis added).

When Appellant testified, defense counsel brought out Appellant's prior convictions during direct examination in accordance with the court's ruling. R. 391, ll. 1-10. The solicitor brought the sanitized convictions out again during her cross examination of Appellant. R. 419, l. 24 – 420, l. 18. After closing arguments, the court gave a limiting instruction to the jury that evidence of Appellant's prior convictions could be considered for credibility but not as proof of guilt. R. 492, l. 20 – 493, l. 2.

The jury deliberated for three and a half hours, and it ultimately acquitted Appellant of burglary in the first degree. R. 501, l. 19 – 503, l. 10. It also acquitted Appellant of criminal

sexual conduct in the first degree but found him guilty of criminal sexual conduct in the second degree. R. 503, ll. 11-14. The court sentenced Appellant to twenty years in prison. R. 513, ll. 8-10.

Discussion

I. Rule 609 and *Colf*

The admissibility of Appellant's prior convictions for third-degree burglary and second-degree assault and battery is governed by Rule 609(a), SCRE, which provides:

> 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.
>
> For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of *nolo contendere* or a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

(emphasis added).

To admit Appellant's prior convictions for burglary and assault here, the trial court was required to find the probative value of the prior convictions outweighed their prejudicial effect. "[U]nder 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." *State v. Robinson*, 426 S.C. 579, 593, 828 S.E.2d 203, 210 (2019).

Here, the State made no presentation or argument as to the probative value of Appellant's prior convictions. Instead, the solicitor merely argued the convictions should be admitted because: "They're simply allowed under the rule because they carry more than a year." R. 381, l. 24 – 382, l. 2; R. 378, ll. 7-11.

Similarly, the court articulated no findings as to why the prior convictions were probative of credibility. Instead, the court only ruled the convictions had "impeachment value" but were prejudicial due to their similarity to the offenses for which Appellant was on trial. R. 385, l. 9 – 386, l. 10; R. 388, l. 21 – 389, l. 7. *See State v. Elmore*, 368 S.C. 230, 238–39, 628 S.E.2d 271, 275 (Ct. App. 2006) (current state of the law does not mandate trial court make on-the-record specific finding as long as record reveals trial judge did engage in a meaningful balancing of probative value and prejudicial effect before admitting a prior conviction under 609(a)(1)).

"However, as we have urged trial courts, when balancing the probative value of a prior conviction under Rule 609(a)(1) against the prejudicial effect, meaningful appellate review is best achieved when the trial court articulates its ruling and the basis for it." *Elmore*, 368 S.C. at 239, 628 S.E.2d at 275 (alterations and quotations omitted). "An on-the-record balancing test is particularly important for prior similar convictions under Rule 609(a)(1) because the similarity of a prior crime to the crime charged heightens the prejudicial value of the crime." *State v. Howard*, 384 S.C. 212, 221, 682 S.E.2d 42, 47 (Ct. App. 2009) (internal alterations and quotations omitted) (citing *Elmore, supra*).

In *State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000), the South Carolina 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." *Robinson*, 426 S.C. at 594, 828 S.E.2d at 211. "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. 5) The centrality of the credibility issue." *Id*. (hereinafter, *Colf* factors).

These factors are not exclusive. *Id*. The burden of establishing admissibility is upon the State, the proponent of the evidence." *State v. Howard*, 396 S.C. 173, 180, 720 S.E.2d 511, 515 (Ct. App. 2011).

1. Impeachment value of prior convictions

The first factor the trial court must consider when weighing prejudice and probative value is the extent to which the prior crimes have impeachment value. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. "Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility of the witness." *State v. Black*, 400 S.C. 10, 21-22, 732 S.E.2d 880, 887 (2012).

"[A] conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness." *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006). However, "[a]lthough 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)." *State v. Robinson*, 426 S.C. at 599, 828 S.E.2d at 213. "A rule of thumb is that convictions that rest on dishonest conduct relate to credibility, whereas crimes of violence, which may result from a myriad of causes, generally do not." *State v. Black*, 400 S.C. at 22, 732 S.E.2d at 887.

In *Colf*, the South Carolina Supreme Court helpfully explained that federal cases may be persuasive since our rule is identical to the federal rule. *Colf*, 337 S.C. at 626, 525 S.E.2d at 248. In *United States v. Estrada*, 430 F.3d 606, 617 (2d Cir. 2005), the Second Circuit explained, "[A]ll Rule 609(a)(1) felonies are not equally probative of credibility . . ." "The distinction between crimes falling outside Rule 609(a)(2) but nonetheless ranking high on the scale of probative worth on credibility, including, for example, theft and escape crimes, and those ranking low on that scale, including crimes of violence, appears in cases from many jurisdictions." *Id*. at 618.

Here, there was no showing that Appellant's prior convictions for burglary and second degree assault and battery reflected dishonesty. As seen, the burden is on the State to show admissibility under Rule 609. Here, the State did not meet its burden to show how Appellant's 2010 third-degree burglary or 2012 second-degree assault and battery convictions had impeachment value. This factor therefore weighed in favor of exclusion.

2. Point in time of conviction and subsequent history

The second *Colf* factor addresses the point in time of the convictions and the witness's subsequent history. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. This factor considers the "temporal proximity" of prior convictions to current charges and whether that proximity reveals a "pattern of behavior" that evokes questions of credibility. *State v. Robinson*, 476 S.C. at 600, 828 S.E.2d at 214. Here, the State sought to impeach Appellant in 2019 with convictions from 2010 (third-degree burglary) and 2012 (two counts of second-degree assault and battery). The State also impeached Appellant with two other offenses the parties agreed to refer to as petty larcenies, from 2012 and 2015.

As to subsequent history, Appellant had a lengthy criminal history prior to 2010 (the date of the earliest offense with which the State sought to impeach him) but this factor addresses a witness's subsequent criminal history, not his prior criminal history. Appellant's criminal history subsequent to 2010 consisted of convictions in 2012 and 2015, and additional arrests in 2015. R. 507, l. 22 – 508, l. 16.

Appellant's burglary and assault and battery convictions were remote in time—nine years and seven years prior to trial—approaching the degree of remoteness presumptively barring their admissibility under Rule 609(b). Although Appellant did have a subsequent criminal history, the remoteness of the offered convictions meant that this factor also weighed in favor of exclusion.

3. Similarity between past crimes and charged crimes

The third *Colf* factor looks to the nature and details of the past crimes compared with the crimes for which an accused stands trial. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. Where the past convictions are similar to the case at trial, this factor weighs in favor of exclusion rather than admission. *Id*. at 628, 525 S.E.2d at 249.

"Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him." *United States v. Beahm*, 664 F.2d 414, 418 (4th Cir. 1981). "[W]hen the prior offense is similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission." *State v. Bryant*, 369 S.C. at 517–18, 633 S.E.2d at 156. "[T]he prejudicial effect of admitting prior convictions for the exact same offense is often very high." *State v. Broadnax*, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015).

"We take this opportunity to remind and caution the bench and bar of the inherent prejudice that flows from the use of similar prior convictions for impeachment purposes under

Rule 609(a)(1), SCRE." *State v. Elmore*, 368 S.C. at 238, 628 S.E.2d at 275. *See Colf*, 337 S.C. at 628, 525 S.E.2d at 249 (trial court "erred in treating the prior crimes as if their similarity heightened their probative value when it actually increased their prejudicial effect").

Appellant was on trial for criminal sexual conduct in the first degree and burglary in the first degree. The State sought to impeach him with a third-degree burglary conviction and two second-degree assault and battery convictions. These convictions appear extremely similar to the crimes for which Appellant was on trial—in a trial for burglary in the first degree, a prior conviction for burglary in the third degree. In a trial for criminal sexual conduct in the first degree, two prior convictions for assault and battery in the second degree which had been pled down from criminal sexual conduct with a minor in the second degree. The consideration of this factor alone was enough to tip the scales in favor of exclusion.

However, although the court found Appellant's prior convictions were prejudicial due to their similarity to the charges at trial, it decided simply to sanitize them. R. 388, l. 21 – 389, l. 7. This was error. The trial court is required to consider all of the *Colf* factors and compare prejudice with probative value before it may admit prior convictions against an accused pursuant to Rule 609(a)(1). *Colf*, 337 S.C. at 627, 525 S.E.2d at 248; Rule 609, SCRE. The court may not simply short-circuit the Rule 609 analysis.

"If the nature of the crime makes the conviction prejudicial, ordinarily the trial judge should prevent the prejudice by excluding the conviction instead of admitting it in denatured form." ROGER PARK & TOM LININGER, THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 3.4 (1st ed. Cum. Supp. 2020). This factor weighed heavily in favor of exclusion, and the court erred when it decided sidestep the proper remedy—exclusion—and instead merely sanitize the convictions.

4. Importance of defendant's testimony

The fourth *Colf* factor looks at the importance of the defendant's testimony. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. "[E]vidence that a witness is a convicted criminal can [] seriously prejudice the defense, especially when the witness is the defendant himself." *United States v. Lipscomb*, 702 F.2d 1049, 1062 (D.C. Cir. 1983).

In *Lipscomb*, the D.C. Circuit Court of Appeals discussed the legislative history of Fed. R. Evid. 609, and observed per *Luck v. United States*, 348 F.2d 763, 769 (D.C. Cir. 1965), that the trial court should consider "the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction." *Lipscomb*, 702 F.2d at 1065. "There may well be cases where the trial judge might think that the cause of truth would be helped more by letting the jury hear the defendant's story than by the defendant's foregoing that opportunity because of the fear of prejudice founded upon a prior conviction." *Luck v. United States*, 348 F.2d at 768.

In some cases, the defendant's testimony may be cumulative rather than important, if other evidence supports the defense. But, given that the defense was consent here, it was important for the jury to hear Appellant's side of the story. Appellant's testimony was important, too, since there were no other witnesses who corroborated his version of events. This factor weighed in favor of exclusion since it was more important that the jury hear Appellant's testimony than it was that the jury hear of his convictions, in this criminal sexual conduct case where the issue was consent.

5. Centrality of the credibility issue

The fifth *Colf* factor considers the centrality of the credibility issue. *Colf*, 337 S.C. at 627, 525 S.E.2d at 248. "[W]hen credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate." *State v. Robinson*, 426 S.C. at 606, 828 S.E.2d at 217. "If the jury must choose between the defendant's credibility and that of another witness, there would be a high probative value in admitting evidence of prior convictions to impeach the defendant's credibility." *Id*.

Here, this factor initially weighed in favor of admitting prior convictions that would impeach Appellant's credibility since credibility was the central issue of the case. However, as will be discussed *infra*, the court's sanitization of the prior convictions meant the jury was not informed of the essential facts of the convictions, and the essential facts of convictions—including their nature or name—are what allows a jury to use prior convictions to weigh credibility.

Applying Rule 609's balancing test to these five factors, the court should have found the probative value of the convictions did not outweigh their prejudicial effect. Four of the five factors weighed heavily in favor of exclusion, as discussed above. Although the fifth factor initially weighed in favor of admission, the form of admission the court chose to take neutralized the probative value and, since, as will be discussed *infra*, the sanitization was blatant it increased the likelihood the jury would improperly speculate about the nature of the crimes and simply take them as evidence that Appellant's past was blameworthy.

Under Rule 609 and *Colf*, the prior convictions should have been excluded. The court found that Appellant's convictions for second degree assault and battery would improperly suggest to the jury that Appellant had "a propensity for violence, a propensity to assault people,

and of course, sexual assault is one of the charges that he's facing." R. 385, l. 24 – 386, l. 5. The court also noted that Appellant's burglary conviction was not probative of truthfulness. R. 378, ll. 7-9. The solicitor offered no facts or argument as to why the convictions had impeachment value. Appellant's testimony was important since the defense was consent. The prior convictions were remote in time.

The State offered no argument as to why the convictions were probative of Appellant's credibility, merely maintaining they should be admitted because they carried more than one year. The court found the convictions were similar to the crimes for which Appellant was being tried. R. 378, ll. 12-14. Their admission here was error.

II. *"Sanitization"*

The trial court's "sanitization" of Appellant's convictions for assault and burglary was an improper end-run around Rule 609 and *Colf*. Sanitizing the convictions was not a substitute for the requisite balancing process, and it rendered the convictions improper propensity evidence.

Moreover, the record did not show that the court considered probative value vis-à-vis prejudicial effect once the convictions had been scrubbed of information that could bear on credibility. All felonies and misdemeanors are not equally probative of credibility, and so the trial judge's approach here left the convictions indistinguishable from a myriad of other crimes and left the jury to speculate about their nature.

"Sometimes courts will 'sanitize' a conviction by requiring that the impeaching party ask about the 'mere fact' of a felony conviction, without naming the crime. However, this practice is not generally followed, and has been specifically disapproved by some courts." ROGER C. PARK AND AVIVA ORENSTEIN, TRIAL OBJECTIONS HANDBOOK 2d § 7:12 (Sept. 2019 update). "'Sanitizing' the conviction can backfire, because the jury's imagination may furnish worse

crimes than those that are being concealed. Also, the concealment by 'sanitizing' is blatant and visible to the jury . . . It may cause jurors to wonder what else is being concealed, and to base decisions on speculation about what is being kept from them." ROGER PARK & TOM LININGER, THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 3.4 (1st ed. Cum. Supp. 2020).

"In the case law, one can find statements suggesting that the practice of sanitizing convictions is routine countered by statements from other courts asserting that it is unprecedented and unwise." *Id.* "In sum, the case law indicates that ordinarily the trial judge should admit the name of the crime as well as the fact of conviction. If the nature of the crime makes the conviction prejudicial, ordinarily the trial judge should prevent the prejudice by excluding the conviction instead of admitting it in denatured form." *Id.*

The appellate courts of this State have not directly addressed the issue of whether a conviction that would be otherwise inadmissible under Rule 609 may be "sanitized" and admitted against the defendant over his objection. In *State v. Elmore*, 368 S.C. 230, 239, 628 S.E.2d 271, 276 (Ct. App. 2006), however, this Court suggested sanitization under some circumstances was "permissible" in dicta. In *Elmore*, the defendant appealed the trial judge's ruling that his prior convictions could be used for impeachment. However, Elmore never actually testified at his trial and so this Court found the issue unpreserved. *Id*. at 237-38, 628 S.E.2d at 274-75. After so finding, this Court "strongly encourage[d] trial courts to engage in an on-the-record analysis when admitting such [prior similar] convictions because of the presumption against their admission." *Id*. at 239, 628 S.E.2d at 276. This Court then stated in a footnote,

> One permissible approach, advocated by the United States Fourth Circuit Court of Appeals, is to allow the prosecutor to ask the witness about the existence of a prior similar conviction under Rule 609(a)(1) without disclosing to the jury the nature of the prior

> offense. *See United States v. Boyce*, 611 F.2d 530, 531 n. 1 (4th Cir. 1979). The *Boyce* approach was approvingly referenced by our supreme court in *Green v. State*, 338 S.C. 428, 433 n. 5, 527 S.E.2d 98, 101 n. 5 (2000). The *Boyce* approach still requires a meaningful balancing of the probative value and prejudicial effect before admission of the prior conviction, although the prejudice occasioned by the similarity of the prior crime to the crime charged is removed.

Id. at 239, 628 S.E.2d at 276, n. 5.

A close reading of *Boyce*, however, supports Appellant's position. In *United States v. Boyce*, 611 F.2d at 530, the Fourth Circuit Court of Appeals held: "In proving the felony conviction on cross-examination, the United States Attorney may ask about the **name of the crime**, the time and place of conviction, and the punishment." (emphasis added) (internal quotations omitted). "It follows that there was no plain error in permitting the United States Attorney to inquire about the number and nature of defendant's felony convictions, particularly since the defendant himself had already testified that he had been convicted of a felony and there was no objection at trial, *See United States v. Wolf*, 561 F.2d at 1381." *Boyce*, 611 F.2d at 530–31.

The Fourth Circuit then added as dicta, "In the special case, where the prior conviction is for the same offense as that for which the defendant is being tried, the trial court generally will not permit the Government to prove the nature of the offense on the ground that to do so would amount to unfair prejudice. This, however, is not such a case." *Boyce*, 611 F.2d at 531, n. 1.

Similarly, the other case referenced by this Court in *Elmore—Green v. State*, 338 S.C. 428, 433, 527 S.E.2d 98, 101 n. 5 (2000)—only referred to *Boyce* in dicta.

As seen, in *Colf*, the South Carolina Supreme Court explained that federal cases may be persuasive since our rule is identical to the federal rule. *Colf*, 337 S.C. at 626, 525 S.E.2d at 248. In *United States v. Estrada*, 430 F.3d 606, 615 (2d Cir. 2005), Justice Sotomayor, who was then

writing for the Second Circuit Court of Appeals, helpfully provided a detailed analysis on the issue of "whether Rule 609(a)(1) requires district courts to admit evidence of the statutory names of a witness's offenses of conviction by looking at the language and structure of the rule."

The facts underlying *Estrada* were the district court's refusal to allow defense counsel to impeach three government witnesses with their actual convictions—the district court instead limited cross-examination to "the fact of an unnamed felony conviction." *Id*. at 609. The Second Circuit explained that pursuant to Fed. R. Evid. 609(a)(1), "inquiry into the 'essential facts' of the conviction, including the nature or statutory name of each offense, its date, and the sentence imposed is presumptively required by the Rule, subject to balancing under Rule 403."[5] *Id*. at 616.

The Second Circuit reasoned, "This interpretation of Rule 609 is consistent with both the Rule's structure and the insight that different felonies, even those that do not constitute *crimen falsi*, bear on credibility to varying degrees." *Id*. at 616. All Rule 609(a)(1) felonies are not "equally probative" of credibility. *Id*. at 617.

"District courts must thus undertake an individualized balancing analysis under Rule 609(a)(1) before excluding evidence of the statutory name of a witness's crime. Applying a generalized heuristic is simply improper." *Id*. at 616.

The Second Circuit explained the impropriety of the district court's admission of "aseptic" convictions as follows.

> Here, by following a policy that presumptively excluded the statutory names of the cooperating witnesses' Rule 609(a)(1) convictions, the district court essentially applied a *per se* rule that all felony convictions not determined to be *crimen falsi* for purposes of Rule 609(a)(2) are equally probative of credibility. By permitting to go before the jury only evidence of an aseptic, unnamed "felony" conviction for Rule 609(a)(1) crimes of which

[5] *Estrada* involved the impeachment of the government's witnesses rather than impeachment of the accused, as here.

> government witnesses had been convicted, **the district court acknowledged the generic probative value of felony convictions**. **By interpreting the Rule to require nothing more**, **however**, **the district court failed to undertake the balancing prescribed by the Rule**, which requires assessment of the probative value of a particular conviction on a witness's propensity for truthfulness in light of the risk of prejudice, confusion, and delay. Rather, **the district court short-circuited the balancing prescribed by the Rule, determining first whether a crime fell under Rule 609(a)(1) or (a)(2) and, if the former, foreclosing the typical Rule 403 analysis by admitting evidence only of an unnamed felony**.
>
> **Equally important, the district court's approach implicitly determined that it would not exclude evidence of prior felony convictions under Rule 609(a)(1)**. While the district court indicated that the fact of a witness's felony convictions was admissible under Rule 609(a)(1) "unless there is a 403 balancing problem," it obviated the need for such balancing **by scrubbing the convictions of any factors that would be relevant to a Rule 403 analysis**.

United States v. Estrada, 430 F.3d at 620.

The Second Circuit found this was error. "What is crucial is that the district court perform the Rule 403 analysis with respect to the essential facts of conviction and admit or exclude the evidence, rather than merely determining whether a crime falls under Rule 609(a)(1) or 609(a)(2) before applying a general rule as a matter of policy." *Id*. at 621.

In *United States v. Burston*, 159 F.3d 1328, 1335 (11th Cir. 1998), the Eleventh Circuit Court of Appeals has explained, "The implicit assumption of Rule 609 is that prior felony convictions have probative value. Their probative value, however, necessarily varies with their nature and number." "Evidence of a murder conviction says something far different about a witness' credibility than evidence of a conviction for a minor drug offense, although both may constitute a prior felony conviction." *Id*.

Similarly, the Tenth Circuit Court of Appeals has held that, ordinarily, impeachment of the defendant with prior convictions "should be confined to a showing of the essential facts of convictions, the nature of the crimes, and the punishment." *United States v. Wolf*, 561 F.2d 1376, 1381 (10th Cir. 1977). *And see United States v. Gordon*, 780 F.2d 1165, 1176 (5th Cir. 1986) (impeachment pursuant to Rule 609 "is limited to the number of convictions, the nature of the crimes and the dates and times of the convictions").

See also People v. Garth, 287 N.W.2d 216, 219 (Mich. Ct. App. 1979) ("Without knowledge of the nature of the felony, the trier of fact has no probative evidence to consider, merely an amorphous suggestion that defendant's past is blameworthy"); *Bells v. State*, 759 A.2d 1149, 1154 (Md. Ct. Spec. App. 2000) ("A sanitized prior conviction is not merely 'ill-defined,' but totally undefined. A jury would be completely unable to assess what, if any, impact a 'prior felony conviction' has upon a witness's veracity"); *State v. Taylor*, 993 S.W.2d 33, 35 (Tenn. 1999) ("Identifying the nature of the prior conviction avoids confusion and speculation on the part of the jury and permits the jury to properly evaluate the conviction's probative value on the issue of credibility"); *State v. Hardy*, 946 P.2d 1175, 1181 (Wash. 1997) (internal citations and quotations omitted) ("unnaming a felony is not a substitute for the balancing process required under ER 609(a)(1) . . . it is generally the nature of the prior felony which renders it probative of veracity"); *State v. Crawford*, 206 P. 717, 719 (Utah 1922) ("jurors are entitled to know of what particular felony a witness has been convicted . . . Some convictions on felony charges affect the credibility of witnesses much more than others").

The proposition that different felonies bear on credibility to different degrees—and thus, that a trial court's general insertion of an aseptic term is improper—is supported by South Carolina law. In *State v. Black*, the Supreme Court explained that a consideration of the nature of

the crime, not the mere fact of a conviction, is what is relevant to a determination of impeachment value. "Under the Rule, the pivotal issue of the probative value of a conviction turns largely on a consideration of the nature of the conviction itself." *Black*, 400 S.C. at 22, 732 S.E.2d at 887 (citing *United States v. Cavender*, 578 F.2d 528, 534 (4th Cir. 1978)).

"This follows because the purpose of impeachment is not to show that the witness who takes the stand is a 'bad' person but rather to show background facts which bear directly on whether jurors ought to believe him. Accordingly, in general it is a conviction which bears on whether jurors ought to believe the witness or party that qualifies for impeachment purposes." *Black*, 400 S.C. at 22, 732 S.E.2d at 887 (internal alterations and quotations omitted) (quoting *Cavender*, *supra*).

The trial court's "sanitization" here was improper under South Carolina law, since it precluded a full application of Rule 609 and *Colf*. As was the case in *Estrada*, the trial court's "approach implicitly determined that it would not exclude evidence of prior felony convictions under Rule 609(a)(1)," since it ruled that although the potential for prejudice was great, any similarity problem under Rule 609 and *Colf* could be obviated by a generic substitution.

III. *Reversible error*

The erroneous admission of Appellant's prior convictions was not harmless, since the critical issue for the jury to decide was whether Appellant's entry into the home and sex with Complainant were consensual.

"Whether the improper introduction of this evidence is harmless requires us to look at the other evidence admitted at trial to determine whether the defendant's guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached." *State v. Broadnax*, 414 S.C. at 479, 779 S.E.2d at 794 (2015) (internal alterations and quotations

omitted)). "Error is harmless where it could not reasonably have affected the result of the trial." *State v. Bryant*, 369 S.C. at 518, 633 S.E.2d at 156.

In *Bryant*, the Supreme Court found that the erroneous admission of prior convictions to impeach the accused was not harmless where the defense was self-defense and "hinged entirely" on the accused's own testimony, where "the only witnesses to the shooting were [the defendant] and the victim." *Id.* The Supreme Court concluded, "the State should not be allowed to attack the defendant's credibility with inadmissible prior convictions; especially where the [defendant's] credibility was essential to his defense. Accordingly, we hold the improper admission of [the defendant's] prior firearms convictions was not harmless." *Id*. at 518–19, 633 S.E.2d at 156.

Here, the defense was consent and hinged entirely on Appellant's testimony, and the only witnesses to the alleged criminal sexual conduct and burglary were Appellant and Complainant. Although Appellant was additionally impeached with two petit larcenies, those convictions were both minor and specified.

As the trial judge observed, the case boiled down to "a swearing contest." R. 380, ll. 6-7. The jury deliberated for three and a half hours and acquitted Appellant of the crimes for which he was indicted. Under these circumstances, the erroneous admission of impeachment evidence was not harmless.

Also, the court's limiting instruction was insufficient to overcome the harm here, where the convictions were stripped of their essential facts, since the sanitization invited prejudicial jury speculation about the nature of the crimes. "Limiting instructions alone do not make an erroneous admission of prior conviction evidence harmless." *Green v. State*, 338 S.C. at 434, 527 S.E.2d at 101.

"The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged." *United States v. Beahm*, 664 F.2d at 418–19. "[C]oncealment by 'sanitizing' is blatant and visible to the jury . . . It may cause jurors to wonder what else is being concealed, and to base decisions on speculation about what is being kept from them." ROGER PARK & TOM LININGER, THE NEW WIGMORE. A TREATISE ON EVIDENCE: IMPEACHMENT AND REHABILITATION § 3.4 (1st ed. Cum. Supp. 2020).

Here, blatant sanitization was an improper substitute for a full consideration of the *Colf* factors and meaningful balancing of probative value and prejudicial effect under Rule 609, SCRE. This Court should reverse.

CONCLUSION

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

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This 11th day of January, 2021.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

January 11, 2021.

s/ *Joanna K. Delany*

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