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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2019-001920

THE STATE, ...RESPONDENT,

v.

RODNEY JEROME FURTICK, ...APPELLANT.

FINAL BRIEF OF RESPONDENT

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The trial judge properly admitted Appellant's sanitized convictions into evidence. While the trial judge applied the incorrect balancing test—in Appellant's favor—the prior convictions were still admissible pursuant to Colf and Rule 609, SCRE. Further, even if the prior convictions were improperly admitted, any error in their admission is harmless given the overwhelming evidence of guilt which also illustrated Appellant's testimony—the only evidence supporting his innocence—was completely incredible.

a. The trial judge incorrectly weighed the prior convictions under Rule 609, SCRE, which benefitted Appellant.

b. Sanitization is a proper process under both South Carolina and federal law.

c. Appellant's prior convictions were properly admitted pursuant to Rule 609 and Colf.

STATEMENT OF THE CASE

Appellant was indicted by the Lexington County Grand Jury for first-degree criminal sexual conduct and first-degree burglary. On November 4–6, 2019, Appellant proceeded to a jury trial before the Honorable Frank R. Addy, Jr. Assistant Solicitors L. Suzanne Mayes, Esquire, and Rhonda Patterson, Esquire, represented the State; Elizabeth Fullwood, Esquire, and Robert Madsen, Esquire, represented Appellant. The jury found Appellant guilty of the lesser-included offense of second-degree criminal sexual conduct and acquitted of his burglary charge. The trial judge sentenced Appellant to twenty years' incarceration.

Appellant timely filed a notice of appeal and brief. This brief of Respondent now follows.

STATEMENT OF FACTS

Julie Hall, the Victim, moved to Cayce, South Carolina in August of 2015 along with her then-husband Brian Dean and eleven-month-old daughter (Daughter). Over the next several months, Dean befriended Appellant and invited him to their home on several occasions, usually once or twice a week after Dean befriended him. From the beginning, Victim felt uncomfortable around Appellant and informed both Dean and her friend (and neighbor) April Carter about her concerns. Victim and Dean agreed Appellant could only visit their home when Dean was around. Appellant was informed of this restriction on multiple occasions. (R.p.166, line 17–R.p.171, line 10)

On the evening of November 18, 2015, Dean left the home to go to a local hobby shop, taking with him the family's sole cellular phone. Victim spent her time preparing dinner for Daughter and performing household chores. As she was preparing Daughter for bed, she heard a knock at back door, followed by it opening. Without seeing the face of the person, Victim attempted to close the door while stating she did not want any visitors in the home while she readied Daughter for bed. However, the intruder was able to enter the home and was immediately recognized as Appellant by Victim. Appellant, appearing angry, was holding a container of food. Concerned, Victim again asked Appellant to leave, but he ignored the request and set the food down in the kitchen of the home. Appellant starting approaching Victim. (R.p.170, lines 2–4; R.p.171, line 11–R.p.178, line 24)

Daughter, who had walked into the situation, did not go into Hall's bedroom like the latter had requested but instead stood in front of Victim. Appellant pushed Daughter against a nearby corner, leaving markings on her back. Daughter began crying so Victim picked her up and tried to calm her down. Appellant then told Victim that if she did not obey his commands, he would hurt Daughter, a threat which Victim believed serious. Appellant started pushing

Victim towards Daughter's room. Daughter's crying escalated into screaming, at which point Appellant shoved Victim onto the floor of Daughter's room and ordered her to lay down. Appellant began assaulting Victim by kissing her and tearing off her tights and underwear. The assault escalated into oral sex, the groping of Victim's breasts, and eventually vaginal intercourse. Appellant also grabbed Victim's hands and forced her to touch him. Throughout the process, Appellant would turn to glare menacingly at the hysterical Daughter, terrifying Victim into submission. After completing his attack, Victim used Daughter's nearby baby wipes to clean himself up. As he left, Appellant threatened victim that if she told anyone about the assault, she would tell his friends "[her] house was free game." After Appellant left, Victim redressed and ran over to Carter's house for help. Carter immediately called 9-1-1 while Victim called Dean. When the police arrived, Victim described to them the night's events. When the officers searched her house, they found Victim's ripped tights in Daughter's room. After, she was taken to the hospital for treatment and a medical examination. She was photographed, with those pictures capturing her visible distress. (R.p.178, line 25–R.p.195, line 12; R.p.203, line 13–R.p.206, line 1)

On cross-examination, trial counsel's entire strategy was to discredit Victim by attacking various aspects of her social life. Trial counsel questioned Victim regarding depression medication she was on at the time of the rape, the financial issues Victim and Dean experienced as a couple including a rule to vacate based on missed rent payments, the theft of an EBT card in October 2015 which Victim had reported to police and suggested Appellant was the culprit. Trial counsel also questioned her about the events of the attack, including her inability to remember how long it lasted, that she waited a few minutes after Appellant left before going to

Carter's home, and her report to police that Appellant had visited her home several times on the day of the attack. (R.p.195, line 16–R.p.203, line 8)

Carter testified to having a friendship with Victim and interacting with her on a daily basis. On November 18, 2015, she was sitting on her porch at home when Victim ran over to her house, crying and hysterical, and claiming she had been raped by Appellant after he entered through the rear of her home. Carter also noted she had observed Appellant lurking around the neighborhood that night. (R.p.207, line 10–R.p.218, line 18)

Sergeant John Reese was the first officer to respond to the 9-1-1 call and arrived at Carter's residence at 9:00 p.m. He immediately noticed Victim appeared disheveled and upset. She reported Appellant had entered through the backdoor of the residence, forced her onto the floor in her daughter's room, before beginning his assault with oral sex and progressing to vaginal intercourse. Following the attack, Appellant threatened Victim that if she told anyone about the assault, her daughter would be harmed. Later, Appellant obtained a search warrant and obtained a DNA sample from Appellant. Sergeant Jason Merrill also responded to the call, and was the officer who ultimately brought Victim and Daughter home from the hospital. At their home, he investigated the scene and found several items of note located in Daughter's room: (1) crumpled baby wipes in the arm of the chair, (2) a clump of wipes removed from the package, but which appeared to be unused; and (3) a pair of tights, torn and found on the floor. (R.p.220, line 7–R.p.236, line 4; R.p.289, line 21–R.p.300, line 17)

Based on the information collected from Victim, Sergeant Merrill contacted Appellant for additional information. After providing Appellant with his Miranda rights, Sergeant Merrill pointedly questioned him about the attack. He showed Appellant pictures of both Dean and Victim, and also revealed their names. Appellant denied knowing both individuals and claimed

he did not even recognize their names. Appellant further asseverated that there was no reason his DNA would be found in their home. Sergeant Caleb Thomas was also present for the interview with Appellant, and confirmed Sergeant Merrill's testimony that Appellant denied knowing Victim and Dean, and that Appellant claimed his DNA would not have been found in their home. (R.p.300, line 18–R.p.314, line 19; R.p.329, line 8–R.p.336, line 12)

Marilyn Sanchez, a paramedic, arrived to treat Victim and observed she was "very nervous, kind of scared, frantic, . . . very worried about her toddler that was with her." Victim claimed she was concerned Appellant would return. Victim also told Sanchez about the beginning of the attack, specifically how Appellant entered the back door of the home before she could lock it, and told her that Appellant had performed sexual acts in her vaginal area. Jennifer Nguyen, a forensic nurse examiner, treated Victim after she arrived at the hospital. She used a sexual assault kit to collect evidence from Victim, which including vaginal swabs, swabs for "touch" DNA on her body, saliva swabs, and even took the underwear she was wearing. She also heard Victim state that there had been verbal threats of harm to herself and Daughter following the attack. (R.p.241, line 21–R.p.254, line 23; R.p.258, line 21–R.p.281, line 2; R.p.286, line 1–R.p.287, line 10)

Jaclyn McKay, a SLED agent and expert in forensic serology, found semen on the vaginal swabs, rectal swabs, and the underwear recovered by officers. She also found saliva on the swabs taken from parts of the Victim's body. Those samples were forwarded for DNA testing. SLED agent Samuel Stewart, an expert in DNA analysis, analyzed the samples gathered. DNA from the vaginal swabs, rectal swabs, and the bodily fluid swabs all matched Appellant, with "the probability of randomly selecting an unrelated individual matching the semen on th[o]se items [being] approximately 1 in 17 quintillion. Appellant could not be excluded as the

minor contributor from the sperm sample collected from the underwear, with the probability off an unrelated individual contributing to that mixture being 1 in 110 million. (R.p.345, line 1–R.p.357, line 14; R.p.359, line 10–R.p.370, line 23)

Prior to Appellant's testimony and outside the presence of the jury, the State proffered the convictions with which it sought to impeach Appellant: (1) third-degree burglary from 2010; (2) petit larceny from 2010; (3) two second-degree assault and batteries from 2012; and (5) property offense, third or greater from 2015. The admissibility of the petit larceny and property offense convictions was not challenged by trial counsel or the trial judge, but trial counsel requested the property offense be referred to as "larceny" to avoid mention of the fact that it was a third offense. However, trial counsel objected to the admission of the burglary and assault and battery convictions pursuant to Rules 403 and 609(a)(1), SCRE, arguing they were "very similar in nature" to the crimes for which Appellant was on trial . Further, trial counsel claimed assault and battery "has absolutely nothing to do with truthfulness whatsoever." In response, the State argued that the defense's constant assault on Victim's credibility made the challenged convictions relevant to the case.[1] The trial judge expressed concern over the similarity of the

[1] In his brief, Appellant repeatedly claims the State's sole justification for admission of the challenged convictions was that they carried a punishment of more than a year in prison. (Br. of Appellant, p.18). Appellant's claim is a gross mischaracterization of the State's argument. Notably, the State did make reference to the fact that Appellant's convictions carried sentences of greater than a year of incarceration because such is a requirement for admission pursuant to Rule 609, SCRE. See Rule 609(a)(1), SCRE ("evidence that a witness other than an accused has been convicted of a crime shall be admitted . . . if the crime was punishable by death or imprisonment in excess of one year . . . , and **evidence than an accused has been convicted of such a crime** shall be admitted if the court determines . . . .) (emphasis added). The State's primary reason for admitting these prior convictions was to challenge Appellant's credibility after the defense made the credibility of Victim its central strategy at trial. See (R.p.377, line 22–R.p.378, line 6). Further, it should be noted this statement by the State was made in rebuttal to trial counsel's assertion that assault and battery offenses are never related to "truthfulness whatsoever." See (R.p.380, line 22–R.p.381, line 23). In context, the State was reference the

challenged convictions to the charged crimes, and specifically referenced State v. Howard. However, the trial judge also noted the importance of credibility to the case. Therefore, the trial judge decided he would allow the State to refer to the burglary conviction simply as a felony punishable by more than a year of incarceration. Trial counsel raised a similar argument to the admissibility of the second-degree assault and battery convictions. The trial judge noted those convictions "[were]n't so similar" to the CSC charge, and that he would consider the question overnight. (R.p.375, line 20–R.p.384, line 24)

The following day, the trial judge noted that he would "have to conclude that the probative value of the impeachment **substantially** outweigh[ed] any undue prejudice," and found the probative value of the convictions "mostly outweigh[ed]," but did not substantially outweigh the danger of suggesting to the jury that Appellant had a propensity towards violence/attacking people. Accordingly, the trial judge decided to allow the State to "sanitize" the convictions and refer to the assault and battery convictions as "two misdemeanors carrying more than a year" incarceration. Trial counsel objected to this attempt to sanitize the convictions, arguing there was no legal support for the practice of sanitizing convictions under South Carolina law and claiming that prior cases, including State v. Bryant, stated burglary, theft, drugs, and other crimes "are just not probative of truthfulness." The trial judge stated he believed other courts "routinely" sanitized convictions to minimize prejudice, and such practice was an acceptable way to "substantially lessen[]" the prejudice of allowing the introduction of prior convictions similar to crimes with which a defendant is charged. (R.p.384, line 25–R.p.389, line 11)

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fact that Rule 609(a)(1) does not require an offense based on inherent dishonesty or false statements, as such convictions are discussed under Rule 609(a)(2).

Appellant elected to testify at trial. Appellant immediately acknowledged he had been convicted of "a felony that carried a possible punishment of more than a year" in 2010, petit larceny in 2012, "two misdemeanors that carried a possible punishment of more than a year" in 2012, and larceny in 2015. (R.p.390, line 17–R.p.391, line 10)

At trial, Appellant's testimony contradicted the statements he provided police: notably, he admitted to knowing and regularly interacting with Victim and Dean beginning in October 2015. He encountered Dean while walking, asked him for cigarette, and then accompanied him to a nearby convenience store. After returning with Dean to his house, he met Victim and remained at the home with her after Dean left for work. In the following hours, Victim and Appellant began flirting and began a sexual relationship. His interactions with Dean and Victim, and his sexual relationship with the latter, continued until November 18, 2015. Appellant claimed he did, in fact, have possession of one of the family's EBT cards at one point, but that Dean had given it to him and he eventually returned it and paid the money back later. (R.p.391, line 11–R.p.402, line 10)

Appellant claimed he initiated contact with Dean and Victim on November 18, 2015, in an attempt to obtain baby food which he would then sell to a local convenience story to obtain some pocket money. He returned to the home in the late afternoon/early evening with the baby food after the attempt to sell the baby food failed. Finding that Victim had not yet eaten, he left to obtain food and later returned with a meal. Before long, Appellant propositioned Victim for intercourse, which Victim accepted. For an unexplained reason, the two had intercourse in Daughter's room. Afterwards, Appellant left. Appellant stated that Victim at no time appeared agitated or upset throughout this encounter. (R.p.402, line 11–R.p.416, line 20)

When questioned about his interview with police in which he denied knowing Victim and Dean, he claimed he was not wearing glasses and could not see the pictures shown to him or read any forms listing his rights. He claimed that although officers did provide glasses, he still did not identify either Victim or Dean because "he wanted to keep the glasses" but the detective said the glasses needed returned following the interview. (R.p.416, line 21–R.p.419, line 18)

On cross-examination, Appellant admitted that the details of his first sexual encounter with Victim which he testified to differed from those he provided in a hearing earlier that week. As to his meeting with police, Appellant conceded he knew his rights about communicating with police due to his prior experience with the criminal justice system. Further, he acknowledged that his lack of glasses did not prevent him from recognizing Victim's name or telling officers as much. As they State continued to press Appellant on his testimony, he walked back man of his statements, claiming he could not remember his police interview very well and that he only had intercourse with Victim on two occasions. (R.p.419, line 22–R.p.437, line 9).

STANDARD OF REVIEW

"In criminal cases, an appellate court reviews errors of law only and is bound by the factual findings of the trial court unless clearly erroneous." State v. Bryant, 372 S.C. 305, 312, 642 S.E.2d 582, 586 (2007). "The conduct of a criminal trial is left largely to the sound discretion of the trial judge, who will not be reversed in the absence of a prejudicial abuse of discretion. Id. "An abuse of discretion occurs when a trial court's decision is unsupported by the evidence or controlled by an error of law." Id.

ARGUMENT

The trial judge properly admitted Appellant's sanitized convictions into evidence. While the trial judge applied the incorrect balancing test—in Appellant's favor—the prior convictions were still admissible pursuant to Colf and Rule 609, SCRE. Further, even if the prior convictions were improperly admitted, any error in their admission is harmless given the overwhelming evidence of guilt which also illustrated Appellant's testimony—the only evidence supporting his innocence—was completely incredible.

a) The Trial Judge Incorrectly Weighed the Prior Convictions Under Rule 609, SCRE, Which Benefitted Appellant

Initially, the State would note that, if anything, Appellant benefitted from the trial judge's balancing test and sanitization of the challenged prior convictions: the trial judge applied the incorrect balancing standard to his ruling, one which restricted the admission of the prior convictions more than what was required under Rule 609(a)(1). Pursuant to Rule 609(a)(1), prior crimes "shall be admitted in the court determines that the probative value of admitting [such] evidence outweighs its prejudicial effect to the accused." After weighing them, the trial judge found admission of all the challenged convictions outweighed their danger of unfair prejudice to the Appellant. However, the trial judge mistakenly believed admission of these convictions had to **substantially** outweigh their potential for unfair prejudice, which is the standard under Rule 609(b), SCRE for admitting prior convictions which occurred **more than ten years** before a criminal defendant's trial. All of Appellant's challenged convictions occurred within ten years of the trial and, pursuant to the trial judge's on-the-record analysis, were admissible without any sanitization pursuant to Rule 609(a)(1). This is particularly true for Appellant's only conviction and the topic of this appeal: second-degree CSC, a crime which without further explanation does not have any obvious connection to the prior convictions for second-degree assault and battery.

b) Sanitization is a proper process under both South Carolina and federal law.

Appellant argues the sanitization of the challenged convictions was improper for two reasons: (1) that sanitization of convictions should not be substituted for performing the balancing tests required by Rule 609 and Colf,; and (2) sanitizing the convictions scrubbed them of information which would be used by the jury to evaluate Appellant's credibility. The State entirely agrees with Appellant's first point and notes that the case law supporting sanitization clearly states this point. In fact, the reason for the sanitization of the challenged convictions is because the trial judge performed the requisite tests and decided to remove the descriptions of the prior convictions in order to properly "balance" the value which could be gained from admitting the convictions against the potential that the jury would use the descriptions of the convictions as improper propensity evidence.

Appellant's second argument is rooted in a misunderstanding of the federal and state case law involving sanitization. For example, Appellant argues a "close reading of Boyce" supports his position because the Fourth Circuit 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." United States v. Boyce, 611 F.2d 530 (4th Cir. 1979) (discussing Rule 609, FRE). The State notes the Fourth Circuit ruled a prosecutor "may" ask about these details, not that it "must." Further, the State interprets Appellant's argument pertaining to Boyce as stating that an exception does not exist because there is a general rule pertaining to the admission of prior convictions: however, Appellant's paradoxical argument would mean that no exception could exist because a general rule exists, despite the former's dependence on the latter's existence.

The Boyce court explained in its footnote that the prosecution generally has right to question a defendant about the nature and number of a defendant's previous felonies, but that in "special case[s]" involving prior convictions for the **same** offense as that for which the defendant is tried, a trial court will generally not permit the government to prove the nature of that offense because it would cause unfair prejudice to a defendant. Id. at 530, n.1 (emphasis added).

Similarly, Appellant's belief that his argument is supported by U.S. v. Estrada, 430 F.3d 606 (2nd Cir. 2005) demonstrates confusion over the facts of that case. In Estrada, two defendants appealed their various drug convictions for various issue including the district court's policy of not permitting the impeachment of witnesses with the statutory names of their prior convictions. Id. at 608. In that case, the district court ruled, without performing a balancing test, that crimes "not bearing directly on veracity, 'it's the fact and presumably the date, if you want to get it in, that goes to credibility" and the court was not "aware of any judge in th[e] district that lets in the nature of the [Rule 609(a)(1), FRE] convictions rather [than] simply the fact and the date." Id. at 609.

The Second Circuit Court of Appeals found that district court's actions "short-circuited the balancing prescribed by the Rule." Id. at 620. Notably, the Second Circuit did not criticize the use of aseptic convictions themselves, and only stated: "District courts must thus undertake and individualized balancing analysis under Rule 609(a)(1)[,FRE] 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 also acknowledged that even sanitized convictions possesses probative value. See id. at 620 ("By permitting to go before the jury only evidence of an aseptic, unnamed "felony" conviction for Rule 609(a)(1) crimes of which government witnesses had

been convicted, the district court acknowledged the generic probative value of felony convictions.")

Additionally, the Estrada court explained that fairness and the possibility of unfair prejudice to the State should also be considered when performing a Rule 403, FRE balancing test. See id. at 620 ("The Advisory Committee notes make clear that while the prior convictions of a government witness are unlikely to inflame the jury or invite a propensity inference, they may cause unfair prejudice to the government's interest in a fair trial or unnecessary embarrassment to the witness."

Appellant also cites to brief quotations from several cases which, in the abstract, appear to support his argument. However, closer review of these cases indicate they are all distinguishable from the South Carolina and Federal precedent upon which South Carolina's sanitization standard is based. For example, the federal cases cited by Appellant do not involve sanitization issues. United States v. Wolf, 561 F.2d 1376 (10th Cir. 1977) involved the admission of prior conviction involving dishonesty, which that court approved. Id. at 1381. That court did note that questioning the defendant about the details of a prior conviction, however, was usually improper. Id. In United States v. Gordon, 780 F.2d 1165 (5th Cir. 1986), that court rejected the defendant's attempts to cross-examine a prosecution witness on the specifics of his prior convictions, noting the defenses was allowed to question that witness about the existence of those convictions and was even able to question the witness about the "deal" he made with the prosecution. Id. at 1176.

The state court cases cited by Appellant similarly do not support Appellant's argument. People v. Garth, 287 N.W.2d 216 (Mich. Ct. App. 1979), Bells v. State, 759 A.2d 1149 (Md. Ct. Spec. App. 2000), and State v. Taylor, 993 S.W.2d 33 (Tenn. 1999) all involve the admission of

prior convictions based primarily on their respective states' prior case law and rules of evidence. See Garth, 287 N.W.2d at 315–16 (citing M.C.L. s 600.2159); Bells, 759 A.2d at 115255 (analyzing the admission of prior convictions under Michigan law and precedent while acknowledging Maryland is "in the minority of jurisdictions in holding that sanitized prior convictions are improper for impeachment"); Taylor, 993 S.W.2d at 34 (noting Tenn. R. Evid. 609(a) is based upon the Supreme Court of Tennessee's opinion in State v. Morgan, 541 S.W.2d 385 (Tenn. 1976), and takes Morgan "at face value.")

In State v. Hardy, 946 P.2d 1175 (Wash. 1997), the Supreme Court of Washington noted that under its rules of evidence, crimes not involving dishonesty or false statement rarely have probative value which merit their introduction at trial. Id. at 1178–79. Moreover, the quotation Appellant cited from the case is not one which contradicts the State's argument or South Carolina law: unnaming a felony is not a substitute for the balancing process required, and the probative value must still outweigh the prejudicial effect before admitting an unnamed conviction. See Elmore, at 239 n.5, 628 S.E.2d at 275–76 n.5. Interestingly, State v. Crawford, 206 P. 717 (Utah 1922), actually stands for the opposite of Appellant's argument: in it, the Supreme Court of Utah found jurors are entitled to know always know the name of the prior conviction submitted for impeachment, even if the conviction is for the same offense for which the defendant is on trial. Id. at 719–20 (finding the trial court properly allowed of impeachment of a defendant on trial for robbery with prior convictions of robbery and burglary).

State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012), the only South Carolina case cited by Appellant in support of his argument, does not deal with sanitization, while other South Carolina cases noted by the State supra directly support the recognition of sanitization by our Supreme Court. See, e.g., Green, 338 S.C. at 433 n.5, 527 S.E.2d at 101 n.5.

Notably, all the cases cited by Appellant either ignore of fail to consider an informative aspect of prior convictions highlighted in Robinson: that a history of prior convictions may reveal "a continuing pattern of criminal behavior that could legitimately impact [the defendant's] credibility in the eyes of the jury." See id. at 600 828 S.E.2d at 214. In Robinson, the Supreme Court of South Carolina noted, analyzing that defendant's prior convictions "illustrate[d] closeness in time between the prior offenses and the offense for which Robinson was on trial, revealing a pattern of behavior that legitimately evoked questions of Robinson's credibility." Id. In the instant case, Appellant's sanitized convictions, combined with the prior convictions not disputed on appeal, showed a consistent pattern of criminal behavior: he had five prior convictions in the five years prior to the current offense. Similar to Robinson, Appellant's pattern of disregard for the law directly impacted his credibility and was an important consideration for the jury.

Ultimately, all of the cases cited by Appellant do not contradict the fact that both federal and South Carolina law recognize and approve the use of sanitization of prior convictions, provided the sanitization process is not used without also performing the balancing test required before admitting prior convictions. In the instant case, the trial judge performed the balancing test and concluded the sanitized convictions were admissible. The trial judge did not abuse his discretion in making this ruling.

c) Appellant's prior convictions were properly admitted pursuant to Rule 609 and Colf

Issue Preservation: Appellant's Failure to Argue the Colf Factors at Trial

In South Carolina, issue preservation requirements are a fundamental component of appellate procedure. Gaddy v. Douglass, 359 S.C. 329, 350, 597 S.E.2d 12, 23 (Ct. App. 2004). The key purpose of those requirements is "to give the trial court a fair opportunity to rule on the

issues, and thus provide [the appellate court] with a platform for meaningful appellate review." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). Significantly, the application of issue preservation requirements ensures the trial court has an opportunity "to rule properly after it considered all relevant facts, law, and arguments." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

In order for an issue to be preserved for appellate review, the issue must have been: (1) raised to and ruled upon by the trial court; (2) raised by the appellant; (3) raised in a timely manner; and (4) raised to the trial court with sufficient specificity. State v. Rogers, 361 S.C. 178, 183, 603 S.E.2d 910, 912–13 (Ct. App. 2004); see also JEAN HOEFER TOAL ET AL., APPELLATE PRACTICE IN SOUTH CAROLINA 57 (2nd ed. 2002) (identifying the four requirements that must be met in order for an issue to be properly preserved for appellate review). If an error is not presented to and ruled upon by the trial judge, it cannot be raised for the first time to the appellate court. State v. Freiburger, 366 S.C. 125, 135, 620 S.E.2d 737, 742 (2005). Moreover, a party cannot raise one argument in support of an issue at trial and then raise a different argument in support of that issue to the appellate court. State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989); see State v. Thomason, 355 S.C. 278, 288, 584 S.E.2d 143, 148 (Ct. App. 2003) ("[A] party cannot argue one theory at trial and a different theory on appeal."); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (Ct. App. 2003) ("[A] defendant may not argue one ground below and another on appeal.").

In his brief, Appellant argues the trial judge erred in admitting the contested prior convictions based on his analysis of the five Colf factors. However, Appellant's arguments for three of the five Colf factors are not preserved for review. Despite the trial judge performing an

on-the-record analysis which considered both Rule 609 and the Colf factors, Appellant made arguments which, viewed in the light most favorable to him, only applied to two of the Colf factors: (1) Appellant claimed "assault and battery has absolutely nothing to do with truthfulness whatsoever"; and (2) the challenged convictions should be inadmissible because they were too similar to the crimes for which Appellant was on trial. Appellant did not argue or challenge the trial judge's findings regarding the timeliness of the prior convictions in regards to his trial, the importance of Appellant's testimony, or the centrality of the credibility issue to the trial; in fact, trial counsel's statements indicate, if anything, agreement with the trial judge's findings as to these factors. Accordingly, Appellant's arguments as to three of the five Colf factors are unpreserved for review. See Bailey, 298 S.C. at 5, 377 S.E.2d at 584.

Appellant's Rule 609 Analysis Improperly Considers His Burglary Acquittal

The State also notes that Appellant's Rule 609(a)(1) and Colf analysis greatly confuses the facts of this case. First and foremost, Appellant acts as if the unmodified convictions were presented to the jury. See, e.g., (Br. of Appellant p.17). However, the record (and both parties' briefs) demonstrate this was not the case. Any discussion of the challenged prior convictions must weigh their potential prejudice from the sanitized information presented to the jurors. It is also important to note that Appellant, in an apparent effort to bolster his argument, analyzes the potential prejudice the prior convictions had on his burglary charge. However, such analysis is inappropriate, confusing, and pointless because Appellant was acquitted of burglary. This Court should ignore any of Appellant's arguments regarding prejudice as to this acquitted charge.

The Colf Factors as Applied to Appellant's Case

Assuming Appellant's arguments regarding the Colf factors are preserved, the record shows the trial judge did not abuse his discretion in admitting the prior convictions.

1. Impeachment Value of the Prior Convictions

Appellant argues there was "no showing' that Appellant's prior convictions for burglary and second-degree assault and battery reflected dishonesty, meaning this factor weighed in favor of excluding the prior convictions. However, Appellant's argument ignores the guidance provide in Robinson: it is not necessary for crimes to involve dishonesty or a false statement for them to be admissible pursuant to Rule 609. Id. at 599, 828 S.E.2d at 213. As explained by the Robinson court, prior convictions for crimes involving false statement or dishonesty are automatically admissible pursuant to Rule 609(a)(2), and interpreting Rule 609(a)(1) to require some degree of dishonesty in admitted crimes would mean "no convictions would ever have impeachment value under Rule 609 unless they were crimes of dishonesty or false statement . . . . Rule 609(a)(2) would inevitably swallow Rule 609(a)(1)." Id. The court also noted that Rule 609(a)(1) prior convictions do indicate to a jury that the accused is someone who might not be credible, and "[i]t was within the trial court's discretion to conclude that because Robinson ha[d] prior convictions for such offenses, he legitimately might not be considered credible" Id. at 599–600, 828 S.E.2d at 213–14.

In the instant case, the trial judge determined Appellant's frequent criminal history, which included numerous convictions in the years leading up to the crime, was evidence that challenged Appellant's credibility and thus possessed impeachment value. This was of particular importance in this case because the defense focused its effort on discrediting Victim and portraying her as a liar who misrepresented a consensual encounter, which only increased the impeachment value of his prior convictions. Contrary to Appellant's blanket assertion that convictions not involving dishonesty or false statements are inadmissible, both Robinson and Rule 609(a) flatly contradict his claim and allow for the admission of any convictions provided

they comply with Rule 609(a)(1). Accordingly, the trial judge properly exercised his discretion in finding the admission of the challenged prior convictions possessed impeachment value.

2. The Point in Time of the Conviction and Appellant's Subsequent History

Appellant argues his burglary and assault and battery convictions were remote in time because they all occurred between seven and nine years prior to trial. Again, Appellant's argument shows a fundamental misunderstanding of both Rule 609 and Colf. Rule 609(a)(1). Notably, Rule 609(b) allows the use of any conviction for the purposes of Rule 609(a)(1) which occurred within ten years of the conviction or release from said conviction. Rule 609(b) does establish a "presumption against admissibility of remote convictions," only convictions and sentences which occurred greater than ten years prior to trial, and even those convictions may be admitted if their probative value, supported by specific facts and circumstances, substantially outweighs their prejudicial effect. Rule 609(b), SCRE; Colf, 337 S.C. at 626, 525 S.E.2d at 248.

A Colf analysis of the timing of a prior conviction is slightly different: as clarified in Robinson, this factor focuses on the "closeness in time" between the prior offenses and the charge for which the defendant is on trial, not the trial itself. See Robinson, 426 S.C. at 600, 828 S.E.2d at 214. The Robinson court found that the named defendant's criminal history, which included convictions in 2007 and 2009, "reveal[ed] a pattern of behavior that legitimately evoked questions of Robinson's credibility" related to his 2011 offense. Id. In the instant case, the second-degree assault and battery convictions occurred only three years prior to the charged offense and the burglary charge occurred two years before those convictions. Further, these convictions were submitted in conjunction with three others for petit larceny and a property offense which also occurred during the five-year period up to the crime. Similar to Robinson,

Appellant's routine pattern of behavior evoked serious questions of his credibility and weighed in favor of the admission of the challenged offenses.

3. Similarity Between Past Crimes and the Charged Crimes

The third factor, the similarity of the past crimes to the crime(s) for which a defendant stands trial, weighs entirely in the State's favor. In Colf, the South Carolina Supreme Court cautioned that "evidence of similar offenses inevitably suggest to the jury the defendant's propensity to commit the crime with which he is charged." Id. at 628, 525 S.E.2d at 249. By removing the names of these crimes, the trial judge eliminated the possibility that the jury would know that Appellant had prior convictions which were similar to his charges, and that these prior convictions could then be improperly used as propensity evidence. Accordingly, this factor also weighs in favor of admission by the trial judge.

4. Importance of Appellant's Testimony

Appellant argues this factor weighed against admission of the challenged prior convictions simply because "it was important for the jury to hear Appellant's side of the story" and "it was more important that the jury hear Appellant's testimony than it was that the jury hear of his convictions." (Br. of Appellant p.16). In addition to being unpreserved, Appellant's argument demonstrates another fundamental misunderstanding of Colf. As explained in Robinson: "Th[e] right [to testify] does not preclude the State from impeaching a defendant's credibility with prior convictions. If the defendant's right to testify were to trump all other considerations relevant to Colf and Rule 609, then a defendant could never be impeached with prior convictions." Robinson, 426 S.C. at 604, 828 S.E.2d at 216.

Notably, Appellant's briefing of this factor cites to federal cases pre-Colf which do not utilize anything similar to a Colf analysis. In fact, the case Appellant focuses on, U.S. v.

Lipscomb, 702 F.2d 1049 (D.C. Cir. 1983), involved a defendant who, with the knowledge that he would be impeached with prior convictions, elected not to testify. In the instant case, Appellant did elect to testify. In fact, Appellant's decision to testify is a tacit acknowledgement that the admission of the prior convictions did not prevent him from presenting his version of events to the jury. This factor weighs in favor of admission of the challenged prior convictions.

5. The Centrality of the Credibility Issue

The fifth factor, the importance of credibility to the trial, also weighed in favor of admitting all of prior convictions tendered by the State. "[W]hen credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate." Robinson, 426 S.C. at 606, 828 S.E.2d at 217. Further, "[i]f 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.

Appellant's entire defense strategy was to use his testimony to try and contradict and/or reframe the testimony provided by the State's witnesses, especially Victim's. Not only did trial counsel attempt to discredit Victim by questioning her about the details of the attack that she was unable to remember, such as exactly how long it lasted, but trial counsel also went after aspects of Victim's life that appeared entirely unrelated to the attack, such as the financial issues she and Dean experienced and even her past diagnosis of depression and her use of medication for it. Appellant directly assailed Victims' credibility and reputation by claiming she participated in a long-term affair with him and made no efforts to conceal such indiscretion from her young child. Appellant also attempted to discredit the testimonies of the officers who interviewed him after the sexual assault. By directly assaulting the credibility of the witnesses, Appellant only increased the value of introducing the challenged convictions at trial.

Harmless Error

Even if the admission of the prior convictions was improper, their admission was harmless error. The evidence presented at trial, including Appellant's incredible testimony, left no room for doubt as to his guilt.

Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006); State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct. App. 2012). Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence." Heller, 399 S.C. at 171, 731 S.E.2d at 320.

In the instant case, all the evidence at trial confirmed Appellant had sexual relations with Victim on the night in question; even the defense did not dispute that fact. The defense's only strategy was to discredit nearly all of the state's witnesses to make it appear as if, most notably, Victim and the police officers who met with him were all lying. As to Victim, trial counsel tried to signal that she was lying about a consensual sexual encounter, but provided no explanation as to why Victim reported this encounter and appeared visibly distressed to the numerous witnesses who saw her in the hours after the attack. Further, Appellant failed to provide a credible explanation as to why he denied knowing Victim or having sexual contact with her when he was interviewed by police officers. Appellant's implausible, self-serving explanations for the State's

evidence was contradicted by the State's evidence and any reasonable juror, even in the absence of the disputed prior convictions, would have convicted Appellant based on the remainder of the evidence presented by the State. Accordingly, the error alleged by Appellant is harmless. See Bryant at 518, 633 S.E.2d at 156.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgments and convictions of the lower court be affirmed.

Respectfully submitted,

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March 10, 2021

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of General Sessions
The Honorable Frank R. Addy, Circuit Court Judge

Appellate Case No. 2019-001920

THE STATE, ...RESPONDENT,

v.

RODNEY JEROME FURTICK, ...APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondent 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.".

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