STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Frank R. Addy, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

v.

JOSEPH RANDOLPH HENRY,

APPELLANT.

Appellate Case No. 2020-001404

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

APPELLANT'S STATEMENT OF THE ISSUES ON APPEAL v

RESPONDENT'S COUNTERSTATEMENT OF THE ISSUES ON APPEAL v

STATEMENT OF THE CASE 1

RESPONDENT'S STATEMENT OF FACTS 2

- **The Crime** 2
- **What Led to Victim's Murder** 2
- **The Aftermath** 5

ARGUMENT

Judge Addy did not abuse his discretion in declining to admit a 14 year old conviction to impeach a witness on this record; regardless, the ruling was harmless beyond a reasonable doubt 11

- **What Occurred Below** 11
- **Standard of Review** 13
- **The Law and Analysis** 14
- **Harmless Error** 24

CONCLUSION 28

DESIGNATION OF MATTER

PROOF OF SERVICE

TABLE OF AUTHORITIES

Cases

Commonwealth v. Browdie,
671 A.2d 668 (Pa. 1996) 28
Commonwealth v. Jones,
319 A.2d 142 (Pa. 1974) 27, 28
Hunter v. Staples,
335 S.C. 93, 515 S.E.2d 261 (Ct. App. 1999) 23, 24
Prejean v. Satellite Company Inc.,
2020 W.L. 2516369(La. 2020) 17, 21
Ray v. State,
310 S.C. 431, 427 S.E.2d 171 (1993) 20
State v. Adams,
354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003) 14, 24
State v. Babb,
299 S.C. 451, 385 S.E.2d, 827 (1989) 20
State v. Baccus,
367 S.C. 41, 625 S.E.2d 216 (2006) 13
State v. Beckham,
334 S.C. 302 513 S.E.2d 606 (1999) 26, 27
State v. Black,
400 S.C. 10, 732 S.E.2d 880 (2012) 14, 20
State v. Brayboy,
401 S.C. 207, 736 S.E.2d 679 (Ct. App. 2012) 24
State v. Broadnax,
414 S.C. 468, 779 S.E.2d 789 (2015) 24
State v. Brown,
528 A.2d 1098 (R.I.1987) 27
State v. Bryant,
369 S.C. 511, 633 S.E.2d 152 (2006) 15
State v. Cheeseboro,
346 S.C. 526, 552 S.E.2d 300 (2001) 23
State v. Colf,
337 S.C. 622, 525 S.E.2d 246 (2000) 14
State v. Commander,
396 S.C. 254, 721 S.E.2d 413 (2011) 14
State v. Cooper,
386 S.C. 210, 687 S.E.2d 62 (Ct. App. 2009) 15
State v. Dunbar,
356 S.C. 138, 587 S.E.2d 691 (2003) 21
State v. Dunlap,
346 S.C. 312, 550 S.E.2d 889 (Ct. App. 2001) 14
State v. Epes,
209 S.C. 246, 39 S.E.2d 769 (1946) 26

State v. Johnson,
363 S.C. 53, 609 S.E.2d 520 (2005) 15
State v. Mizzell,
341 S.C. 529, 535 S.E.2d 134 (Ct. App. 2000) 16, 17, 21
State v. Pagan,
369 S.C. 201, 631 S.E.2d 262 (2006) 13
State v. Robinson,
426 S.C. 579, 828 S.E.2d 203 (2019) 14
State v. Stone,
376 S.C. 32, 655 S.E.2d 487 (2007) 21
State v. Thompson,
278 S.C. 1, 292 S.E.2d 581 (1982) 27
State v. Torrence,
305 S.C. 45, 406 S.E.2d 315 (1991) 27
State v. Turnage,
107 S.C. 478, 93 S.E. 182 (1917) 28
State v. Vang,
353 S.C. 78, 577 S.E.2d 225, 228 (Ct. App. 2003) 21
State v. Wise,
359 S.C. 14, 596 S.E.2d 475 (2004) 13
State v. Wright,
391 S.C. 436, 706 S.E.2d 324 (2011) 26
Teamer v. State,
416 S.C. 171, 786 S.E.2d (2016) 28
United States v. Beahm,
664 F.2d 414 (4th Cir. 1981) 16
United States v. Beechum,
582 F.2d 898 (5th Cir. 1978)(*en banc*) 17, 18, 21
United States v. Bibbs,
564 F.2d 1165 (5th Cir. 1977) 16, 17, 21
United States v. Cathey,
591 F.2d 268 (5th Cir. 1979) 16, 17, 21
United States v. Cavender,
578 F.2d 528 F.2d 528, 531-34, & n. 15, 3 Fed. R. Evid. Serv. 431 (4th Cir. 1978)15, 16, 17, 21
United States v. Lipscomb,
702 F.2d 1049 (D.C. Cir. 1983) 21

Rules

Fed. R. Evid. 609(b) ..... passim
Rule 403, SCRE 16, 19, 23
Rule 609(a)(1) 15, 16, 21, 22, 23
Rule 609(a)(2) 14
Rule 609(b) ..... passim
Rule 609(b)(2) 19

Rule 609, SCRE ..... passim

Other Authorities

Cabera v. Marti,
2011 W.L. 13663168 (S.D.N.Y 2011) 22

APPELLANT'S STATEMENT OF ISSUE ON APPEAL

In this murder case where the State's key witnesses who blamed appellant for the crime were caught on video hiding evidence after the victim's death, did the trial court err in refusing to allow appellant to cross-examine one of those witnesses about his prior conviction for giving false information to the police?

RESPONDENT'S COUNTER-STATEMENT OF ISSUE ON APPEAL

Did Judge Addy abuse his discretion in declining to admit a presumptively inadmissible prior conviction of a witness for impeachment purposes where appellant failed to show by *specific facts and circumstances* that *the probative value* of the 14 year old misdemeanor conviction, involving the witness using his cousin's birth certificate in an attempt to obtain a fake i.d., *substantially outweighed the prejudicial effect* of its admission under Rule 609(b), SCRE, and where appellant did not provide sufficient advance notice of his intent to use the conviction under Rule 609(b) so the State could adequately investigate the conviction and contest its's use; and, regardless, does it matter where there was other overwhelming evidence of appellant's guilt?

STATEMENT OF THE CASE

On February 21, 2019, appellant Joseph Randolph Henry, Jr. shot Alexis Azarigian with a handgun in Lexington County. Henry was arrested shortly thereafter in Lexington County and charged with attempted murder. The next day, the victim died from the gunshot wound inflicted by Henry. The attempted murder charge was upgraded and Henry was formally arrested for murder and possession of a weapon during the commission of a violent crime on February 27, 2019. On March 9, 2020, Henry was indicted by the Lexington County grand jury for Azarigian's murder and the weapon charge. David M. Mauldin and Robert M. Madsen represented Henry. Deputy Solicitor Suzanne Mayes and Assistant Solicitor Angela Martin represented the State. On September 28, 2020, Henry proceeded to a jury trial before Circuit Court Judge Frank R. Addy, Jr. At the trial's conclusion, the jury found Henry guilty of murder and the gun charge. Judge Addy sentenced Henry to 35 years for murder and 5 years consecutive for the gun charge for an aggregate sentence of 40 years.[1] This appeal followed raising 1 issue. This is the Initial Brief of Respondent. (Tr. pp. 1; 709; 753-54; Arrest Warrants, Indictment #s 2020-GS-32-606 & 607).

[1] At sentencing, Henry's father claimed the police investigation was a rush to judgment and Henry's mother claimed his conviction was based, in part, on racial discrimination. In response, Judge Addy stated on the record that he had no doubt that Henry committed the murder of Alexis Azaragian, and he murdered her in a moment of obscene rage. (Tr. pp. 733-54).

RESPONDENT'S STATEMENT OF FACTS

The Crime

On the morning of February 21, 2019, at approximately 7:40 a.m., appellant Joseph Randolph Henry, Jr. ("Henry") [*aka* "Pluto"] murdered Alexis Azarigian ("Victim") by intentionally shooting her in the back of the head with Henry's own 9mm handgun. The murder occurred in Victim's car while the car was proceeding down U.S. Hwy. 1 [Augusta Road] in Lexington County in heavy rush hour traffic. Victim was seated in the front passenger seat when shot, and Henry was in the back seat directly behind the driver when he shot Victim. The driver of the car was a friend of Henry, Joshua Murray ("Joshua") who witnessed the murder. Seated in the back seat directly behind Victim was Kaitlyn Skryme ("Kaitlyn") a friend of Henry's "cousin" Mark Anthony Hardaway, Jr. ("M.J.") who also witnessed the murder.[2] (Tr. pp.140-55; 161-202; 205-24; 226-34; 236-48; 250-72; 274-305; 311-59; 362-413; 432-50; 460-515; 523-86; 591-651; 707-12).[3]

What led to Victim's murder

The day prior to the murder, February 20th, Henry, his friend Joshua, Kaitlyn, and M.J. had spent the day partying [doing drugs] at different locations. The group drove to each location in Henry's blue car. One of the locations was an automotive garage ("the shop") where Henry worked, which was also known as a drug den. The shop was located on Cardinal Drive, a dead

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[2] Kaitlyn was from Kershaw County and had just met appellant Henry and the driver Joshua for the first time the previous day, February 20, 2019. Kaitlyn was friends with an older lady in Lexington County and with Henry's so-called "cousin" known by everyone as "M.J." When Kaitlyn was introduced to Henry by M.J., Kaitlyn was told Henry's name was "Pluto." (Tr. pp. 604-607). Henry is referred to in the transcript by his real name Joseph Henry, "Joe," and "Pluto"

[3] It is unclear from the record whether Henry and M.J. were actually blood relatives or just called each other *cousins* because they had been friends for so long.

end road, directly off U.S. Hwy. 1 [Augusta Rd.] in Lexington County. The same day, some of the group had also rented a motel room and partied there. That afternoon, Kaitlyn saw Henry sitting in the motel room on the bed cleaning a pistol. Henry allowed Kaitlyn to hold the weapon briefly, and he took it back. He then wiped the pistol down, and wrapped it in a black shiny cloth or shirt and put it in a zip-up leather pouch or bag, which Kaitlyn described as a "man-purse" or "murse" [sic]. According to both Kaitlyn and M.J., Henry carried the gun around with him in this leather bag when the group went from place to place. (Tr. pp. 604-51; 388-413; 539-81).

Later that same day, the group returned to the shop, and at some point Henry's friend Joshua left and came back with Victim in Victim's white car, a 4 door Ford Focus. Kaitlyn had never met Victim before and was introduced to her as "Lexi." Later that night, the group all decided to go to Lake Murray. At this time, the group included Henry, M.J., Joshua, Kaitlyn, and Victim. They all rode together in Victim's car to a marina on Lake Murray near where Victim's parents lived in Chapin. Once there, the group spent the night hanging out and partying [doing drugs]. When the sun came up, the group took M.J. back to the shop and dropped him off. The remaining members of the group then decided to go to the residence of Chad Andrews, in Victim's car, because Victim wanted to get $80.00 Andrews owed her. After obtaining the money from Andrews, the group planned to go "boosting" [shoplifting] at different stores. Andrews was a known informant for the Lexington County Sheriff's Office. (Tr. pp. 604-51; 388-413; 539-81).[4]

When the group, minus M.J., arrived at Andrews' residence, Joshua was driving Victim's car; Victim was in the front passenger seat; Kaitlyn was seated directly behind Victim; and, Henry was seated in the backseat directly behind the driver. Victim got out of the car and approached

[4] A Lexington County Deputy Sheriff confirmed at trial that Andrews was an informant for the Sheriff's Office. He also testified Victim was not an informant for the Sheriff's Office.

Andrews in his front yard. They walked away and talked for a few minutes privately. Victim and Andrews then came back to Victim's car, and Andrews tried to get in the car and go with the group. Henry and Joshua both stated out loud Andrews was not getting in the car with them because he was a known informant. Henry made clear, under no circumstances was Andrews going anywhere with them because Henry could not be seen with a known informant or snitch; it would ruin his reputation in the drug culture. Victim got back in the front passenger seat and the group left Andrews' residence in Victim's car, leaving Andrews at his home. The group was still seated in Victim's car as they had arrived at Andrews' residence. (Tr. pp. 604-51; 388-413; 539-81).

The argument that started with Andrews continued in Victim's car between Henry, in the back seat behind the driver, and Victim, in the front passenger seat. The argument escalated as the car was proceeding down the road headed back to the shop. Joshua, from the driver's seat, attempted to quell the argument between Henry and Victim, but he was unable to do so. As the argument continued, Joshua turned onto Hwy. 1 [Augusta Rd] headed toward the shop. During the argument, Henry asked Victim why she would want to bring a known informant with them "boosting." Henry accused Victim of being a snitch because she was hanging around with a snitch. Victim responded by stating Andrews was just her friend; she wanted to spend time with him; and, stated to Henry if Henry thought she was a snitch then he should just kill her. Henry stated to Victim: "..that is what happens to snitches." Henry then called Victim a "bitch" or a "CUNT." Victim in turn then called Henry an "M.F." or a "bitch" and threw a paper napkin at him. (Tr. pp. 604-51; 539-81).[5]

[5] As one would expect, Joshua and Kaitlyn remembered the words exchanged between Henry and Victim slightly differently. (Tr. pp. 604-51; 539-81).

At this point, Henry took his leather bag [man purse] from the back floor board and placed it on his lap. Kaitlyn said out loud: "Don't." Henry cut his eyes at Kaitlyn "to shut her up" and threatened her. Henry then took his 9mm pistol out of his leather bag. Kaitlyn turned and closed her eyes because she knew what Henry was about to do. Out of the corner of his right eye, and with the rear view mirror, Joshua, who was still driving, saw Henry raising his hand with the gun. Henry then shot Victim in the back of the head behind her left ear. When the fatal shot was fired, Joshua saw the flash from Henry's gun. Victim slumped forward and toward the passenger door. Kaitlyn screamed: "You shot her." Henry stated in an emotionless voice, "You know who I am, and you know I do what I say I am going to do." A few seconds later, when Joshua could regain his composure, he pulled into the parking lot of Fellowship Baptist Church ("the church") on Hwy. 1 [Augusta Rd.]. As he did, Victim's body slumped over onto the console and partially on Joshua. Henry told Joshua to pull around the back of the church, but both Joshua and Kaitlyn said no. Victim's car, filled with gun smoke, came to a stop in the parking lot of the church. (Tr. pp. 604-51; 539-81; 330-59; State's Ex. 42 & 52; 432-50; 388-413).

The Aftermath

A surveillance camera across the street from the church captured Victim's car coming to rest in the church parking lot and Henry getting out of the back rear door of the car on the driver's side. On camera, Henry then reached back into the back of the car, bending at his waist, and did something, possibly removing evidence, such as the fired shell casing, or removing the firearm or leather bag. Kaitlyn testified she saw Henry wrap the gun back up in the black silky cloth and put it back in the leather pouch. While this was occurring, Joshua got out of the front driver's door of the car. After Henry finished what he was doing in the back seat, Joshua spoke to Henry telling him that he, Joshua, was going to have to call for help. Joshua, who had known Henry 2 to 3 years,

hugged his friend Henry, and Henry stated: "do what you have to do, man." Henry then walked away down Hwy. 1 [Augusta Rd.] headed to the shop where he worked; where his car was parked, and where M.J. was. As he walked away, Henry was carrying his 9mm pistol in the leather bag. (Tr. pp. 604-51; 539-81; 330-59; State's Ex. 42 & 52; Tr. pp. 432-50; 388-413).

By this time, Kaitlyn was out of the car and standing at the trunk. Joshua gave Kaitlyn some drugs he had on him and told her to get rid of them and anything she had on her. Kaitlyn walked away and hid Joshua's drugs and drug paraphernalia she had on her in some nearby bushes. While Kaitlyn was doing this, Joshua immediately flagged down a passing motorist, because neither he nor Kaitlyn had a functioning cell phone, and told the motorist that Victim had been shot and needed medical attention. The passing motorist pulled into the church parking lot and called 911, and police, who were nearby, responded within seconds or minutes. When police arrived, both Joshua and the first responding officer tried to assist Victim. Victim was still breathing but unconscious. She was transported by EMS, but never recovered consciousness and died the next day from the gunshot wound to the back of her head. (Tr. pp. 604-51; 539-81; 330-59; State's Ex. 42 & 52 [surveillance videos]; pp. 432-50; 140-202; State's Ex. 1 [911 call]; pp. 205-10).

Joshua and Kaitlyn stayed on the scene and immediately identified Henry as the shooter to first responders. Kaitlyn only knew Henry as "Pluto." Kaitlyn, worried for the safety of others, informed police the murder weapon still had 1 bullet in the chamber, because she had noticed the previous day when Henry showed her the gun that the gun contained only 2 bullets. Both Joshua and Kaitlyn gave police a description of Henry, including his pants, his jacket, his distinctive beanie hat (skull cap), and that he was wearing glasses. They also informed police where he worked, where he lived, and gave a description of his car, a blue RAV 4 type vehicle. A BOLO

was put out for Henry's arrest. (Tr. pp. 604-51; 539-81; 330-59; State's Ex. 42 & 52 [surveillance videos]; pp. 432-50; 140-202; State's Ex. 1 [911 call]; pp. 205-24; 226-33; 236-61).

Several surveillance cameras in the area captured Henry walking away from the crime scene down Hwy 1 [Augusta Rd.] in the direction of the shop. Another surveillance camera near the shop captured Henry arriving at the shop several minutes later wearing the same clothing including the distinctive beanie cap. This camera also captured Henry carrying the leather pouch or bag, containing the murder weapon, over his shoulder. (State's Ex. 42 & 52 [surveillance videos]; Tr. pp. 330-59; State's Ex. 43-50; 65; 106-112 [Still shots of crime scene and Henry leaving scene on foot]; State's Ex. 53-56; 131 [Still shots of Henry approaching the shop]).

Police began a manhunt for Henry immediately including using tracking dogs. As police were arriving at the shop, Henry was apprehended in his blue car, actually a Toyota Matrix, trying to leave the area of the shop where he worked, which was roughly 300-400 yards from the church.[6] Henry was driving his car when stopped He was stopped as he tried to turn onto Hwy. 1 [Augusta Rd.] from Cardinal Drive. (Tr. pp. 226-33; 236-61; 262-72; 524-27).

In Henry's car with Henry was his *cousin* M.J. M.J. told police at the scene that Henry was acting weird ever since he arrived on foot at the shop that morning. M.J. told police that Henry told him, while he was in the car trying to leave the shop parking lot, that there was a gun under

[6] Video surveillance of the shop revealed Henry arrived on foot at the shop several minutes before police arrived. Henry went inside the shop where M.J. was and the two (2) remained inside for several minutes, with others, before they attempted to leave in Henry's car. When police arrived at the shop, occupants would not respond to police at the door and several minutes passed before police were able to gain entry and several individuals inside were arrested. Police were never able to recover the fired 9mm shell casing ejected during the murder or the gray jacket Henry was wearing, and seen on video, when he walked away from the crime scene. (Tr. pp. 220; 242-43; 250-54; 259; 261; 330-69; State's Ex. 42 & 52 [surveillance videos]; State's 43-50, 53-56; 106-112, 131 & 65 [still photos from surveillance videos); State's Ex. 58, 63-65; 67 [photos of shop and interior].

the front seat. Police recovered the murder weapon in the leather pouch under the front driver's seat of Henry's car. It was wrapped in a silky black "hoodie." It still had 1 bullet in the chamber, but contained no other bullets in the clip. M.J. also testified that since Henry arrived at the shop that morning, Henry was wanting M.J. to go to Hilton Head, but M.J. was not ready to go to Hilton Head because he had not received his tax refund check.[7] M.J. also testified he had seen Henry carrying the leather case or pouch the night before at the marina, and Henry used the case to carry Henry's gun in. (Tr. pp. 226-33; 236-72; 274-306; 388-413; 524-27).

Henry's cell phone was also confiscated from his car upon his arrest. A download of his cell phone showed Henry called M.J. two (2) times as he walked from the church to the shop after shooting Victim. The first call lasted approximately 36 seconds. The second call to M.J. lasted over 5 minutes. M.J. called Henry back 2 times during this time period, with 1 call not being answered and the 2nd call lasting 31 seconds. M.J., who had known Henry for 10 years, claimed at trial the only thing that was discussed in the phone calls was Henry stated he was on his way to pick up M.J. at the shop. Appellant Henry's cell phone also revealed Henry never called 911 for assistance for Victim between when he shot Victim and when he was arrested. (Tr. pp. 274-306; 370-87; State's Ex. 123 [Henry's phone]).

Upon Henry's arrest trying to leave the shop with M.J., police found Henry wearing the distinctive beanie hat described by witnesses and seen on surveillance videos; and, his glasses were missing 1 lens. Back at the church parking lot, police found the missing lens to Henry's glasses in the back passenger compartment of Victim's car in the rear driver's side door flap. Also found in Victim's trunk was a book bag containing DMV paperwork of Henry. (Tr. pp. 226-33; 236-61;

[7] Kaitlyn testified M.J. told her the previous day, the 20th, he had already received his tax check and he had plenty of money if she needed any. (Tr. pp. 606, ll. 7-18).

262-72; 274-306; 524-29; State's Ex. 24; 25; 27 [Photos of Henry upon arrest]; State's Ex. 124 [lens] & 138 [glasses]; State's Ex. 115-16 [photos of book-bag and DMV paperwork of Henry]).

Also upon his arrest, police noticed on Henry's shirt a blood stain and photographed the stain while Henry was standing outside the police car. It was also stated there, in Henry's presence, the shirt would be seized at the Sheriff's Office. During his transport to the Sheriff's Office, an interior car camera in the police car captured Henry slipping his handcuffs to the front and chewing off the portion of his shirt containing the blood stain. Once they reached the Sheriff's Office and Henry was removed from the car, officers saw the hole in Henry's shirt and confiscated the same. The shirt was introduced in evidence at trial along with the video of Henry destroying the evidence on his shirt. (Tr. pp. 267-70; 326-28; 524-37; 595-96; State's Ex. 28 [in car video] & 144 [shirt with hole]); State's Ex. 72-75 [Photos of stain on shirt at time of arrest]; State's Ex. 98 [photo of shirt at the jail]).

The autopsy determined Victim was shot behind her left ear. The bullet path was from the back of the head to the front and slightly left to right. This was consistent with Victim having been shot while seated in the front passenger seat and Henry being seated behind the driver when he fired the fatal shot as testified to by both Joshua and Kaitlyn. There was no stippling or powder burns around the victim's wound indicating the gun was at least 18 to 24 inches away from Victim's head when fired. This was also consistent with Henry firing the weapon from the back driver's side passenger seat. The fired bullet fragmented as it traveled through Victim's brain with the fragments coming to rest at the right front of her head or falling to the bottom of her brain. No fragments exited her skull. The bullet was so fragmented that it could not be determined forensically if it was fired by Henry's gun but the State's firearm's expert did determine the

fragmented bullet was a large caliber jacketed bullet consistent with a 9mm and the jacket was consistent with the unfired bullet found in Henry's 9mm. (Tr. pp. 434-50; 495-515).

No gun primer residue tests were performed on any witnesses or the defendant because the shooting took place inside an enclosed vehicle; and, it was misting or raining the morning of the shooting and Henry had touched several objects and persons before his arrest. (Tr. pp. 316-17; 321; 323-24; 329; 591-95; 601). Additionally, as previously discussed, Henry was inside the shop for 5 to 8 minutes before police arrived so he could have easily wiped his hands off or washed his hands. (State's Ex. 52 [Surveillance video of the shop]).

However, police did conduct DNA testing on the 9mm pistol recovered wrapped in the silk cloth inside the zipped leather pouch. The slide, grip, and trigger were swabbed for DNA. Kaitlyn, Joshua, and Victim **were eliminated** as touching the gun's slide, grip, or trigger. Henry was not eliminated. In fact, according to the touch DNA testing, it was more probable that **Henry** and 2 unknown individuals [whose samples were not submitted] **touched** the gun on the **slide, grip,** and **trigger.** M.J.'s DNA was not tested. (Tr. pp. 302-05; 460-95; 594-96).

Appellant Henry did not testify or offer any evidence. He rested at the end of the State's case. (Tr. p. 660). As previously stated, the jury found him guilty of murder and the weapon charge.

ARGUMENT

Judge Addy did not abuse his discretion in declining to admit a 14 year old conviction to impeach a witness on this record; regardless, the ruling was harmless beyond a reasonable doubt.

What Occurred Below

When Joshua was called to the stand before the jury, counsel asked to approach Judge Addy. After an off the record side-bar conference, Judge Addy stated as follows and defense counsel stated:

> COURT: All right, I think we're square on that.
>
> MR. MAULDIN: I take exception to your ruling, and
>
> COURT: We'll put it on the - - We'll put it on the record later.
>
> MS. MAYES: Joshua Murray. (Whereupon Joshua Murray was duly sworn).

(Tr. pp. 538, ln. 22 – 539, ln. 10). Joshua then testified on direct, cross, and re-direct. (Tr. pp. 539-581). Joshua was impeached with several other convictions and arrests and admitted he hid the drugs he had on him at the time Henry murdered the victim, he directed Kaitlyn to hide any paraphernalia she had on her, and that he initially lied to police about hiding the drugs he had on him. (Tr. pp. 539-581). After his testimony and the jury was excused, the Court put on the record what occurred at the bench conference before the witness testified;

> THE COURT: All right. The jury is out.
>
> Let me go ahead and put something on the record.
>
> Prior to Mr. Murray testifying a moment ago, the defense and the State approached me at a sidebar. And the State outlined the convictions that they were going to elicit from Mr. Murray, the assault charges, the drug charges, et. cetera. The defense also sought to impeach Mr. Murray on a - - I think it was a 2014 conviction or - -
>
> MS. MAYES: 2006

THE COURT: 2006, yes. I'm sorry. I meant to say 2004, but it was 2006, a fourteen year old conviction, that's where I'm getting fourteen from, a 2006 conviction for false information to police. It was apparently a magistrate level 30-day misdemeanor conviction and the - - of course, that's outside the - - the ten year rule. I asked for the specifics of that conviction and Ms. Martin represented to me that basically it was a situation where Mr. Murray had borrowed his cousin's birth certificate or something like that for the purpose of going to the DMV and getting a fake ID. I wanted that put on the record. I basically found that based on the specific facts of the false information charge that wasn't a situation in my mind he was giving false information of a substantive or a serious - - of a crime and trying to mislead the police in some substantive way. It sounded like we were talking about a kid trying to get a fake I.D., but I did want to afford Mr. Mauldin a chance to put on the record that objection to my failure to letting him impeach the witness with that conviction and anything else he wanted to detail.

(Tr. pp. 582, ln. 16 – 583, ln. 22). Defense counsel then placed his objection on the record:

MR. MAULDIN: Thank you. Your Honor. I had not been provided with any kind of incident report regarding the incident. I don't know if that's information they got from Mr. Murray himself, which could be very self-serving. Also, I believe because the credibility of Mr. Murray and Ms. Skyrme, the two eyewitnesses here, are basically the only people putting Mr. Henry as the shooter, none of the physical evidence conclusively points to it, as we said, it's been a circumstantial case up to this point, that their credibility is crucial to the State's case and crucial for the defendant to attack and we believe in the interest of justice that the probative value of the conviction should have outweighed its prejudicial effect.

(Tr. pp. 583, ln. 23 – 584, ln. 12).

Judge Addy then allowed the Solicitor to respond to defense counsel's argument:

THE COURT: And, Ms. Martin you wanted to - -

MS. MARTIN: I just wanted the Court to be aware I did get the information strictly from Mr. Murray. We didn't research the conviction. It was a 30 day misdemeanor and I think a fine was just paid, but the information that Mr. Murray gave me was that he had used his cousin's identification to help get a driver's license or something of that nature.

(Tr. pp. 584, ll. 13-20). Judge Addy also noted later in ruling on the motion that the defense had just given notice that morning that it intended to impeach the witness with that conviction. Judge Addy stated as follows:

THE COURT: Okay. We'll I think you indicated at the sidebar, Mr. Mauldin, that you had only given notice under Rule 609 this morning of your desire to use that conviction and - - and obviously that may have limited the State's ability to perform

> a full investigation of what the facts were and maybe their only option was to speak to Mr. Murray, but it is what it is and my ruling stands. If this had been him lying to police about concealing a murder weapon or him lying to police about something more than a fake I.D., I could probably - - would probably have allowed you to have inquired about that, but based on the specific facts of the underlying offense, I don't think it's impeachment value is - - is substantial. In fact, it's very limited and way too remote. So, that's my ruling, but your objection's noted.

(Tr. pp. 584, ln. 21-585, ln. 11). There was no further objection or argument by defense counsel on this issue. (See Tr. pp. 585, ln. 11- 600). Defense counsel offered no evidence during the trial or after that the remote conviction was anything other than what the State represented through its brief investigation.

On appeal, Henry challenged only Judge Addy's refusal to allow Henry to impeach his friend Joshua with his prior misdemeanor conviction for giving false information to the police, which was approximately 14 years from the date of trial to the prior conviction. It was a 30 day magistrate's level offense. The learned trial judge did not abuse his discretion in declining to allow the admission of this remote conviction under the particular circumstances of this case and the facts. Even assuming arguendo Judge Addy somehow erred, it was harmless on this record.

Standard of Review

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless they are clearly erroneous. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006). "The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Wise, 359 S.C. 14, 21, 596 S.E.2d 475, 478 (2004). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "The admission of evidence concerning past convictions for impeachment purposes remains within the trial judge's discretion, provided the judge conducts the analysis

mandated by the evidence rules and case law." State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001)). To warrant reversal, an error must result in prejudice to the appealing party. State v. Commander, 396 S.C. 254, 721 S.E.2d 413 (2011). And, our Supreme Court has recognized that it is conceivable the discretionary rulings of two different trial judges who reached opposite conclusions from the same set of circumstances will both be affirmed on appeal due to the deferential nature of the abuse of discretion standard. State v. Robinson, 426 S.C. 579, 607, 828 S.E.2d 203, 217 (2019). A trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003).

The Law and Analysis

Appellant's argument begins from a position of weakness. Convictions more than 10 years' old are not generally admitted; and our Supreme Court has cited with favor federal precedent that such convictions should be admitted only in "exceptional circumstances." State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012); State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

Rule 609, SCRE governs the admissibility of prior convictions to impeach a witness. *Rule 609, SCRE.* Rule 609(a)(2) provides that a witness may be impeached with a prior conviction involving dishonesty or false statement regardless of punishment. *Rule 609(a)(2), SCRE.* However, Rule 609(b), provides as follows:

> (b) **Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or the release of the witness from confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction is supported by specific facts and circumstances substantially outweighs its prejudicial effect. However evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

Rule 609(b), SCRE.

Rule 609(b) provides evidence of a conviction under Rule 609(a)(1) or (2) is not admissible if a period of ten (10) years has elapsed since the date of the conviction or the release of the witness from confinement, whichever is later. *Rule 609(b), SCRE*; Black, 400 S.C. at 16–17, 732 S.E.2d at 884. Rule 609(b) provides a caveat that the conviction over ten (10) year old is not admissible to impeach a witness unless the trial court determines, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect. *Rule 609(b), SCRE;* Black, *supra*. The Rule further provides that evidence of a conviction more than ten (10) years old as calculated above, is not admissible unless the proponent gives the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence. *Rule 609(b), SCRE*; Robinson, 426 S.C. 579, 828 S.E.2d 203 (recognizing notice requirement). In summary, our Supreme Court and this Court has recognized that Rule 609(b) establishes **a presumption against the admissibility of remote convictions.** Colf, 337 S.C. at 626–27, 525 S.E.2d at 248; State v. Cooper, 386 S.C. 210, 222, 687 S.E.2d 62, 69 (Ct. App. 2009)

Importantly, the Rule requires *the proponent* of the admission of the more than 10 year old conviction show the probative value of a conviction over 10 years old "substantially outweighs" its prejudicial impact "supported by specific facts and circumstances." *Rule 609(b), SCRE*: State v. Johnson, 363 S.C. 53, 609 S.E.2d 520 (2005); State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006); Colf, 337 S.C. 622, 525 S.E.2d 246; United States v. Cavender, 578 F.2d 528, 531-34, & n. 15, 3 Fed. R. Evid. Serv. 431 (4th Cir. 1978)(trial court must find the conviction over 10 years old *substantially outweighs* not just merely outweighs the prejudicial impact and this must be

supported by specific facts and circumstances; approving a trial court's reviewing the underlying nature of the prior conviction in question when remote).[8]

The Supreme Court has recognized this is a more stringent standard than the standard for admissibility under Rule 609(a)(1). Robinson, 426 S.C. at 598, 828 S.E.2d at 213. Further, Rule 403, SCRE provides the trial court consider confusion of the issues, misleading the jury, etc. Robinson, 426 S.C. 594, 828 S.E.2d at 210.

It should also be noted Rule 609(b) differs from 609(a) in that the requirements are flipped around, under 609(a) *to be excluded* the convictions prejudicial impact must outweigh its probative value. Under 609(b), applicable here, the probative value of the conviction must substantially outweigh the prejudicial impact *to be admissible*. Cavender, 578 F.2d at 531-34, n. 9.

Further, as previously stated, convictions falling under Rule 609(b)'s prohibition are to be admitted **only rarely and only in exceptional circumstances**. Black, 400 S.C. at 18, 732 S.E.2d at 885; United States v. Beahm, 664 F.2d 414, 417-18 (4th Cir. 1981)(the Congressional purpose of enacting Rule 609(b) "...was to prohibit the admission of convictions over ten years old, permitting exceptions to the prohibition 'very rarely.'"), *quoting* Cavender, 578 F.2d at 231; *Fed. R. Evid. 609(b) Advisory Committee Note* (convictions over 10 years old are to only be admitted "very rarely and only in exceptional circumstances."); United States v. Cathey, 591 F.2d 268, 275 (5th Cir. 1979)(Rule 609(b) establishes a presumption convictions over 10 years old are not admissible for impeachment and trial judges should be extremely cautious in admitting evidence of remote convictions); United States v. Bibbs, 564 F.2d 1165 (5th Cir. 1977)("Congress intended

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[8] Cavender, 578 F.2d 528 has been repeatedly cited by South Carolina appellate courts as authoritative. *See* Black, *supra*; State v. Mizzell, 341 S.C. 529, 535 S.E.2d 134 (Ct. App. 2000), *rev'd on other grounds* State v. Mizzell, 349 S.C. 326, 563 S.E.2d 315 (2002)(Confrontation Clause violation for not allowing impeachment of witness about amount of jail time he was facing).

that the trial judges be extremely cautious in admitting evidence of remote convictions."); Prejean v. Satellite Company Inc., 2020 W.L. 2516369(La. 2020)(*Slip Copy*)("The balancing scale Congress has given the courts is weighted against the finding that the probative value of a more than 10-year old conviction substantially outweighs its prejudicial effect.")(quoting Cathey, *supra* and Bibbs, *supra*). These cases establish the probative value of the conviction dissipates with the passage of time. United States v. Beechum, 582 F.2d 898, 915 (5th Cir. 1978)(*en banc*)(temporal remoteness depreciates the probity of the extrinsic offense).

This Court held in State v. Mizzell, 341 S.C. 529, 535 S.E.2d 134 (Ct. App. 2000), *rev'd on other grounds* Mizzell, 349 S.C. 326, 563 S.E.2d 315;

> Based on our reading of the rule, the trial court must make specific findings on the record only when *admitting* evidence of remote convictions. *See* United States v. Cavender, 578 F.2d 528, 532 (4th Cir.1978) ("We conclude that 609(b) requires the District Court, if it concludes to admit thereunder a conviction more than ten years old, to find that the probative value of such conviction 'substantially outweighs' its prejudicial impact and to support that finding with an identification of the 'specific facts and circumstances' which support its decision."); Colf, 337 S.C. at 626, 525 S.E.2d at 248 (appellate court held that since Rule 609(b), SCRE, is identical to Rule 609(b), FRE, federal cases may be persuasive)."

Mizzell, 341 S.C. at 535, 535 S.E.2d at 137. This Court in Mizzell went on to point out there was a discussion on the record by the trial judge and what that discussion was and this Court concluded:

> It is apparent from this discussion that, while the trial court did not expressly compare the probative value and prejudicial effect of the evidence before ruling it was inadmissible, the trial court did analyze these factors. Based on the trial court's analysis, it excluded the presumptively inadmissible evidence. We, therefore, find no abuse of the trial court's discretion.

Mizzell, 349 S.C. at 536-37. There was no abuse of discretion here. Judge Addy did compare the probative value and prejudicial effect of the presumptively inadmissible conviction and found on the record appellant had not shown the probative value of the evidence substantially outweighed its prejudicial effect. Further, Judge Addy *excluded* the evidence, **not** *admitted* it. Mizzell, *supra* at 535, 535 S.E.2d at 137.

Appellant did not give notice this crime was going to be used to impeach the witness until the morning the witness testified.[9] (Tr. pp. 582-85). The State was unable to research the crime, but did interview the witness about the prior conviction and learned the conviction for providing false information to the police was based on him using a cousin's birth certificate to obtain a fake driver's license. In summary, Joshua used his cousin's birth certificate to obtain a fake i.d. Judge Addy, appropriately ruled, under Rule 609(b), SCRE, appellant could have hindered the State's ability to research the conviction because it did not provide notice until that day. (Tr. pp. 582-85). In fact, the issue was not raised to Judge Addy until after the witness was called to the stand before the jury, and a sidebar had to be held on the issue. (See Tr. pp. 538-39).

Judge Addy ruled if the conviction had been for actually providing false information during an actual police investigation of a crime, such as a homicide, he would have admitted it. (Tr. pp. 538-39; 582-85). Though it was a crime of dishonesty it was a misdemeanor, which resulted in a fine. Judge Addy noted, if it had been more like lying to police in an investigation, it may have tilted the scales the other way. (See Tr. p. 584-85). Because of what the prior offense was and its age, Judge Addy found it had "limited value" as impeachment, not the absence of any value. (Tr. p. 585). This is consistent with federal case law finding the probative value of the conviction dissipates with the passage of time. Beechum, 582 F.2d at 915 (*en banc*)(temporal remoteness depreciates the probity of the extrinsic offense). Given its age [remoteness] (14 years) and no proof the conviction was anything other than what the witness stated it was, Judge Addy

[9] As an additional sustaining ground, Rule 609(b), SCRE, provides that evidence **is not admissible** if the party wishing to use the remote conviction does not provide adequate notice of the party's intent to use the conviction. Defense counsel did not argue below that he provided sufficient adequate notice, in fact conceded that he did not provide notice until that morning. Judge Addy also found counsel had not provided notice until that morning. Henry does not argue in his brief that he provided adequate notice under Rule 609(b). He avoids the subject. (See BOA, pp. 4-15).

appropriately ruled he would not allow that conviction to be used as impeachment but other convictions within the 10 year period could be used. *Rule 609(b), SCRE* (prior conviction of more than 10 years is not admissible to impeach a witness unless the trial court finds in the interest of justice supported by specific facts and circumstances the probative value substantially outweighs its prejudicial effect). *See also* Rule 403, SCRE (judge should also consider confusion of the issues, misleading the jury, etc.); Robinson, 426 S.C. 594, 828 S.E.2d at 210. The record shows Judge Addy did exactly what the Rules of Evidence and case law require. He considered the specific facts of the case and the conviction involved, its nature and timing, the importance of the witness' testimony, and other factors including Rule 609(b) itself, and weighed the probative value of admitting the remote conviction against the prejudice in admitting the remote conviction and found appellant Henry had not shown by specific facts and circumstances that the probative value of the remote conviction **substantially outweighed** any prejudice. Rule 609(b), SCRE; Black, *supra*; Rule 403, SCRE.

Henry argued below and on appeal that there was no proof or police report, that the conviction was for Joshua using his cousin's birth certificate to obtain a fake i.d.; however, this was Henry's fault. He could have researched this issue long before trial but did not do so. He could have provided the State with notice long before the morning the State called the witness to the stand, during the middle of the trial. If crucial as appellant asserts (IBOA, p. 11)-why did appellant rely on the absence of evidence-he complains he had not seen a "incident report." It was his obligation under Rule 609(b)(2) to show the specific facts justifying admission. *SCRE, Rule 609(b);* Johnson, 363 S.C. 53, 609 S.E.2d 520 (Under Rule 609(b) the proponent of the use of the conviction must show by specific facts and circumstances that the probative value substantially

outweighs any prejudice). As provided in Rule 609(b), Judge Addy appropriately found the proponent, Henry, did not meet his burden. (Tr. pp. 582-85).

Judge Addy also found appellant Henry's failure to provide sufficient notice, i.e. give the State a fair opportunity to investigate the matter to contest Henry's argument regarding the use of such evidence, probably caused Henry to not receive a police report. *See Rule 609(b)*("However, evidence of a conviction more than 10 years old as calculated herein, **is not admissible** unless the proponent gives the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.")(emphasis added). This finding is completely supported by the record. (Tr. pp. 538-39; 682-85). It was not the State who caused Henry not to have any other evidence about the remote conviction; it was Henry. (Tr. pp. 538-39; 682-85). ("[A] party cannot complain of an error which his own conduct has induced." State v. Babb, 299 S.C. 451, 455, 385 S.E.2d, 827, 829 (1989).

Henry also tries to strictly apply Colf, the factors are modified for a "non-defendant" witness. Colf involved the impeachment of a defendant, so some of these factors must, as a practical matter, be adjusted for this particular case, which involves a lay witness. *See* Id. The factors simply do not fit neatly in regard to a lay witness because he is not on trial for an offense. Further, our Courts have repeatedly recognized: "These factors are not exclusive," and, "trial courts should exercise their discretion in light of the facts and circumstances of each particular case." State v. Black, 400 S.C. 10, **19**, 732 S.E.2d 8809, **885-86** (2012). That is exactly what Judge Addy did. While he did not list out each of the Colf factors in his ruling, Judge Addy, knew the law and conducted the required analysis. The learned trial judge understood the balancing test and what he could and should consider. *See generally* Ray v. State, 310 S.C. 431, 427 S.E.2d 171 (1993) (judges are presumed to know the law). And, as previously stated he did *not admit* the

evidence he *excluded* it. Cavender, *supra*; Mizzell, *supra*. Likewise, our Supreme Court has advised that at a minimum, the trial court must not only state the ruling, but the "why." Black, *supra*. Again, that is exactly what Judge Addy did. (Tr. pp. 538-39; 682-85).[10]

Respondent also disagrees with appellate counsel's argument the factors weigh in favor of admissibility. They do not on this record. While Joshua had a prior conviction for providing false information to police, it was 14 years old. As Judge Addy found, it was way too remote. Appellant's argument the conviction was *only 4 years* past the presumptively inadmissible deadline of 10 years is comical to say the least. The law recognizes the probative value of the conviction for impeachment purposes dissipates with time. Beechum, 582 F.2d at 915 (*en banc*)(temporal remoteness depreciates the probity of the extrinsic offense); Prejean, 2020 W.L. 2516369 (*Slip Copy*)("The balancing scale Congress has given the courts is weighted against the finding that the probative value of a more than 10-year old conviction substantially outweighs its prejudicial effect.")(quoting Cathey, *supra* and Bibbs, *supra*).

And, the conviction was for using a relative's birth certificate to obtain a fake i.d. *See* Cavendar, *supra* (approving trial court, not jury, inquiring into the underlying nature of the conviction in conducting a probative prejudice analysis and determining admissibility under 609); United States v. Lipscomb, 702 F.2d 1049, 1064 (D.C. Cir. 1983)("A comparison of Rule 609(a)(1)

[10] It should also be noted, while Henry objected below to Judge Addy's exclusion of the evidence, at no time did he object to the sufficiency of the ruling on the ground Judge Addy did not conduct the appropriate analysis. State v. Stone, 376 S.C. 32, 36, 655 S.E.2d 487, 488-89 (2007)("If a pitch was never thrown at trial, we cannot review whether the trial court made the proper call."); State v. Vang, 353 S.C. 78, 85, 577 S.E.2d 225, 228 (Ct. App. 2003(finding any issue resulting from the trial judge's failure to take a particular action was not preserved for appellate review because appellant did not ask the trial judge during trial to take the action appellant contended on appeal should have been taken.); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693-94 (2003) (providing an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court in order to be preserved for appeal).

with Rule 609(b) strongly suggests that Rule 609(a)(1) does not require the district court always to inquire into the facts and circumstances underlying a prior felony conviction. Under Rule 609(b), a felony conviction more than 10 years old can be admitted only if 'the probative value of the conviction *supported by specific facts and circumstances* substantially outweighs its prejudicial effect.' (Emphasis added.) Rule 609(a)(1), in contrast, does not require that the probative value of the conviction be supported by specific facts and circumstances. We must presume that the omission was intentional.")(emphasis in original); Cabera v. Marti, 2011 W.L. 13663168 (S.D.N.Y 2011)(*not published in F.Supp.2d*)("...the prejudice to plaintiff from the admission of a conviction that is already more than ten years old outweighs any probative value that the conviction has, as the facts underlying the conviction are radically different than those at issue in this case"). Further, the witness did not have another conviction for 6 years and 9 years and they were both for assault and battery, not similar to the remote conviction. He then had an arrest for possession and conspiracy possess drugs in 2017. Joshua admitted he was a drug addict. Again, he had no conviction similar to the presumptively inadmissible conviction.

While Joshua's testimony was important, he was not the only witness. Kaitlyn also witnessed the murder and testified to exactly what occurred. She identified Henry as the shooter. She corroborated Joshua's testimony. Video evidence also identified Henry getting out of the back seat of the car immediately after the shooting, removing evidence, and leaving the scene and arriving at the shop. Both Kaitlyn and M.J. identified Henry as the person carrying the gun the night before. Henry was arrested in possession of the weapon attempting to leave town. Henry destroyed evidence of the crime and was captured on video destroying some of the evidence.

Finally, the witness, Joshua, who was appellant Henry's friend, was impeached with the assault convictions and a drug arrests. The witness also admitted he instructed Kaitlyn to hide the

drugs he had on him at the time of the murder and any paraphernalia Kaitlyn had on her. And, he admitted he went back later and got those drugs so he would not be arrested for them. The witness also admitted he was a drug [meth] user. He also admitted on the stand that he lied to or misled police about hiding the drugs and drug paraphernalia when interviewed at the scene and/or at the police station. The witness was thoroughly impeached. As a result, the jury could judge his credibility appropriately.

Further, as noted, South Carolina recognizes the factors must be modified for a witness **and** the factors are not exclusive but the Court must look at all factors applicable to the specific circumstances of the case. Black, *supra*.

Judge Addy followed the appropriate Rule of Evidence, Rule 609(b), to the letter. There was no abuse of discretion by Judge Addy. Hunter v. Staples, 335 S.C. 93, 102, 515 S.E.2d 261, 266 (Ct. App. 1999) (affirming the trial court's exclusion of a prior conviction based on its finding that the conviction was not relevant and its prejudicial effect outweighed its probative value despite the court's failure to "specifically enunciate the factors involved in reaching his ultimate decision" because it was "evident the judge considered Rule 609(a)(1) in conjunction with the Rule 403 balancing analysis"). Judge Addy specifically found that based on the limited investigation the State was able to conduct, because of appellant Henry's late notice, and the defendant provided Judge Addy no other facts, appellant had not shown by *specific facts and circumstances* that the probative value of the remote conviction *substantially outweighed* the prejudice. Rule 609(b), SCRE; *See* State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001)(trial court did not abuse his discretion in refusing to allow State's witness impeached with prior remote convictions). As a result, Judge Addy did not abuse his discretion in excluding the presumptively inadmissible 14 year old conviction. A trial court's decision regarding the comparative probative value and

prejudicial effect of relevant evidence will be reversed only in exceptional circumstances. State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003)(a trial court's decision regarding the comparative probative value and prejudicial effect of relevant evidence will be reversed only in exceptional circumstances). *See* Hunter v. Staples, 335 S.C. 93, 515 S.E.2d 261 (a trial judge's balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of highly subjective factors of the probative value or the prejudice presented by evidence).

Harmless Error

Regardless, Judge Addy's ruling was harmless beyond a reasonable doubt on this record. State v. Broadnax, 414 S.C. 468, 478-79, 779 S.E.2d 789 (2015)(trial court's determination on whether or not to admit prior conviction for impeachment purposes is subject to harmless error analysis and that is determined by looking at all the evidence in the case and determining whether or not the defendant's guilt was conclusively proven by other competent evidence such that no other rational conclusion could be reached); State v. Brayboy, 401 S.C. 207, 214, 736 S.E.2d 679, 683 (Ct. App. 2012)(finding exclusion of conviction for impeachment purposes of witness was harmless error based on other evidence of defendant's guilt).

Henry appears to argue Joshua was the only witness in this case to his murder of Victim. He was not. Kaitlyn was also in the back seat of the car and witnessed Henry murder Victim. Henry also appears to argue he can impeach Kaitlyn with Joshua's prior conviction. Obviously, the law does not allow him to impeach another witness with Joshua's prior conviction, much less a misdemeanor that is 14 years old. .

Additionally, and importantly, the witness in question, Joshua, was appellant Henry's friend. They had been friends for two (2) to three (3) years. Joshua's testimony is corroborated

by not only the surveillance video of Henry getting out the car at the church immediately after the shooting, but also Henry's fleeing the crime scene on foot with the murder weapon, and Henry being arrested attempting to flee to Hilton Head when arrested by police at the shop. Surveillance videos captured Henry getting out of the back seat directly behind the driver immediately after the shooting, bending over and doing something in the back seat, and then walking away from the crime scene and arriving at the shop after the shooting The video included him removing items from Victim's car immediately after the murder and carrying the leather pouch over his shoulder as he arrived at the shop. As he proceeded down Hwy. 1 from the crime scene headed to the shop, Henry did not attempt to flag down a passing motorist to assist the victim or call 911 for assistance for the victim or call police; instead, he called M.J. and spoke to him for at least 5 minutes. It was Joshua who pulled into the church parking lot immediately after Henry shot Victim, and it was Joshua who flagged down a passing motorist to call for assistance. It was Joshua and Kaitlyn who refused to hide the victim's car or body behind the church.

Additionally, Henry was arrested in possession of the murder weapon under the front seat of his car, and he told M.J. where the gun was as police surrounded them. The gun was in the same leather pouch *M.J.* **and** *Kaitlyn* had seen Henry carrying the gun in the day and night before the murder; the same pouch seen on surveillance video as Henry approaches the shop on foot after the murder. It still contained one (1) bullet consistent with the bullet used to kill Victim. It still contained one (1) bullet as Kaitlyn described it would to police from seeing it the day before in Henry's possession. And, when police recovered the gun it was wrapped in a silky hoody just as Kaitlyn described Henry wrapping it in the previous day in the hotel room and immediately after the shooting. And, Henry was arrested wearing glasses with one (1) lens missing, and the missing lens was found in the rear passenger compartment of Victim's vehicle behind the driver's seat,

along with paperwork of Henry's in Victim's trunk. And, Henry was arrested in possession of the distinctive beanie he was seen wearing on surveillance video as he fled from the crime scene.

Additionally, Henry was captured on video destroying evidence of the murder in the back of the patrol car while being driven to the jail after his arrest. Henry removed the front portion of his T-Shirt that contained a blood stain seen by officers when he was arrested at the shop. Officers stated in Henry's presence at the shop that they were going to seize the shirt once they got to the jail because it had a blood stain on it. Not only was Henry captured on video destroying the evidence in the car, but when they arrived at the police station they seized Henry's shirt where he had left a visible hole in the front of the shirt removing the blood stain. Henry's jacket was also missing at the time of his arrest as was the fired shell casing from Henry's weapon. State v. Beckham, 334 S.C. 302, 314-15 513 S.E.2d 606 (1999)((destruction or attempted destruction of physical evidence is incriminating evidence of guilt), *referencing* State v. Epes, 209 S.C. 246, 39 S.E.2d 769 (1946).[11]

Further, Kaitlyn, who had just met Henry and Joshua the previous day, and was friends with Henry's *cousin* M.J., testified to the same thing that Joshua testified to, i.e. Henry shot Victim in the back of the head with his 9mm hand gun after a heated argument in Victim's car as the group proceeded down Hwy 1 in Lexington County. Kaitlyn's testimony corroborated Joshua's testimony. Kaitlyn was from a neighboring county and had just come to Lexington County the day before. She was visiting M.J. She only knew Henry as "Pluto." She told the police the same at the crime scene. Her testimony corroborates that of Joshua; she independently identified Henry as the killer; and, she had no axe to grind against Henry and no reason to testify falsely for Joshua

[11] Beckham was *abrogated on other grounds by* State v. Wright, 391 S.C. 436, 706 S.E.2d 324 (2011)(plain view).

or anyone else. Henry **cannot impeach Kaitlyn** with a prior conviction of another witness, Joshua.

The forensic evidence also corroborated the testimony of Joshua and Kaitlyn. Victim was shot behind her left ear from a gun at least 18 to 24 inches away because there was no gunpowder burns or stippling on or around the wound site or the back of her left ear. The bullet wound was from left to right and back toward the front coming to rest in the right front of her head. Henry's own "cousin" M.J. testified Henry told him the gun was under the front seat when they were arrested attempting to leave the shop, and M.J. testified the gun was Henry's and he carried it around the night before in the leather pouch.

Further, Henry not only fled the murder scene but was trying to get M.J. to flee to Hilton Head when police arrived and arrested him at the shop attempting to pull onto Hwy. 1 [Augusta Rd.]. State v. Beckham, 334 S.C. 302, 315, 513 S.E.2d 606, 612 (1999)(flight is evidence of guilty knowledge and intent); State v. Thompson, 278 S.C. 1, 292 S.E.2d 581 (1982)(evidence of flight admissible to show guilty knowledge, intent, and that defendant sought to avoid apprehension);[12] State v. Brown, 528 A.2d 1098 (R.I.1987)(The critical factor to the admissibility of evidence of flight is whether the totality of the evidence creates an inference that the defendant had knowledge that he was being sought by the authorities). *See also* Commonwealth v. Jones, 319 A.2d 142, 150 (Pa. 1974)(it is sufficient that circumstances justify inference that accused's actions were motivated as result of his belief that officers were aware of his wrongdoing and were

[12] Thompson was *overruled on other grounds by* State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991)(issue preservation).

seeking him for that purpose);[13] State v. Turnage, 107 S.C. 478, 93 S.E. 182 (1917)(Flight or evasion of arrest is evidence of guilt to go to the jury).

The failure to admit a presumptively inadmissible 14 year old misdemeanor magistrate court conviction as impeachment evidence was harmless beyond a reasonable doubt on this record. Broadnax, *supra*; Brayboy, *supra*. *See* Teamer v. State, 416 S.C. 171, 786 S.E.2d 189 (2016)(finding no Strickland prejudice from counsel's failure to impeach witness with a remote conviction for filing a false police report in a burglary and shooting case because it would not have changed the result at trial because there was other evidence of defendant's guilt and witness was impeached in other ways including other convictions, and other witnesses identified the defendant).

CONCLUSION

Judge Addy did not abuse his discretion in declining to admit a presumptively inadmissible 14 year old magistrate's court conviction pursuant to Rule 609(b) because appellant did not show by specific facts and circumstances the probative value of the remote conviction *substantially outweighed* its prejudice where Henry did not provide sufficient timely written notice he wished to impeach the witness with the remote conviction under Rule 609(b) and the State's resulting brief investigation of the conviction revealed it was based on the witness using a relative's birth certificate to obtain a fake i.d. Regardless, not admitting the 14 year old magistrate court conviction was harmless on this record where the evidence of Henry's guilt was overwhelming. For the above stated reasons, Henry's convictions and sentences for the murder of Alexis Azaragian should be affirmed and this appeal denied and dismissed.

Respectfully submitted,

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[13] Jones was *superseded by statute on other grounds by* Commonwealth v. Browdie, 671 A.2d 668 (Pa. 1996)(manslaughter charge).

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ATTORNEYS FOR RESPONDENT

December 3, 2021.

RECEIVED
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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Lexington County
The Honorable Frank R. Addy, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

v.

JOSEPH RANDOLPH HENRY,

APPELLANT.

Appellate Case No. 2020-001404

PROOF OF SERVICE

I, Donna D'Alessio, am an employee of the Respondent, hereby certify that as per the March 20, 2020 Order of the Chief Justice, the Initial Brief of Respondent, Designation of Matter, and Proof of Service has been forwarded to Appellant's counsel, David Alexander, Esq., via email today, December 3, 2021 to dalexander@sccid.sc.gov., as well as to his assistant, lmatthews@sccid.sc.gov.

I further certify that all parties required by Rule to be served have been served.

This 3rd day of December, 2021.

Donna D'Alessio

Donna D'Alessio,
Legal Assistant to J. Anthony Mabry,
Senior Assistant Attorney General

Donna D'Alessio

From: Donna D'Alessio
Sent: Friday, December 3, 2021 3:06 PM
To: 'dalexander@sccid.sc.gov'
Cc: 'lmatthews@sccid.sc.gov'
Subject: Henry, Joseph Randolph - Appellate Case No. 2020-001404 - Initial Brief of Respondent, Designation of Matter and Designation of Matter
Attachments: Henry, Joseph Randolph - Appellate Case No. 2020-001404 - Initial Brief of Respondent, Designation of Matter, and Proof of Service (02837934xD2C78).pdf

Dear Mr. Alexander:

Attached is a scanned copy of the Respondent's Initial Brief, Designation of Matter and Proof of Service regarding the above matter. The Initial Brief of Respondent, and supporting documents are being submitted to the South Carolina Court of Appeals through e-filing, along with a copy of this email.

Hope you are well and thank you.

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