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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY  
The Honorable Maite Murphy, Circuit Court Judge

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Appellate Case No. 2020-001397

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THE STATE,

Respondent,

v.

JAMES WINSTON ALMOND,

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Appellant.

**FINAL BRIEF OF RESPONDENT**

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## STATEMENT OF ISSUE ON APPEAL

The trial court properly found Appellant's prior convictions for armed robbery and possession of methamphetamine were properly admitted for impeachment purposes pursuant to Rule 609, SCRE, where those convictions fell under the ten-year time limit in Rule 609(b) and where the trial court conducted a careful balancing of the Colf factors before concluding the probative value of the convictions outweighed their prejudicial impact.

## **STATEMENT OF THE CASE**

Appellant was indicted for one count of burglary first degree by the Dorchester County grand jury. Appellant proceeded to trial on September 29, 2020 before the Honorable Maite Murphy. The State was represented by Assistant Solicitors Don Sorenson and Mike Spears. Appellant was represented by Ash Chisholm, Esquire and John Loy, Esquire. Appellant was found guilty as charged. Appellant was sentenced to life imprisonment without the possibility of parole pursuant to S.C. Code Ann §17-25-45. This appeal follows.

## STATEMENT OF FACTS

In the early morning hours of May 25, 2019, Dwight Maxwell was returning home from a night out when he received a call from his ex-girlfriend Amber Brooke Crissman. (R. 6). Crissman asked Maxwell to meet her and a friend at Walmart. (R. 6) Maxwell agreed and spent approximately two hours at Walmart with Crissman and her friend before heading home. (R. 7). When Maxwell returned home, he observed his back door had been smashed and there was glass everywhere. (R. 7). Maxwell testified that his television, PlayStation, Blu-ray player, electronics, laptop, iPad and cigarettes had all been taken. (R. 7.)

Maxwell had Amazon Blink cameras around his residence that captured the incident. (R. 11). Maxwell reviewed the camera footage and provided the clips to law enforcement. (R. 13). James Almond (Appellant) was ultimately identified as the man who threw a paint can through the door. (R. 15). A second individual was also seen on camera and was later identified as Appellant's first cousin and co-defendant, Danny Ford (Ford). (R. 17).

Both Ford and Appellant testified during Appellant's trial, providing different accounts of the incident. Ford testified he was told by Appellant they were going to pick up some of Crissman's belongings from Maxwell's house. He believed he dropped his girlfriend, Nikki Lewis, and Appellant's girlfriend, Crissman, at Walmart because Crissman was uncomfortable around Maxwell. (R. 40). Ford stated he sat in the car while Appellant made trips to the house. (R. 31). Ford stated Appellant asked for his help to speed up the process. (R. 32). Ford testified when he got to the back porch, he observed that the glass to the door had been broken and Appellant was carrying firearms. At this point Ford realized that Appellant was likely not carrying Crissman's belongings and returned to the vehicle. (R. 32). Ford testified that when everyone returned to Ford's house, Ford told Appellant and Crissman to take the stuff and leave the house. (R. 33).

Appellant testified he offered to go to Maxwell's house and get Crissman's belongings for her. (R. 50). He stated that he grabbed Crissman's clothing, make up, her mail, her child's gaming system and her television. (R. 58). Ford testified that he only removed Crissman's belongings and none of Maxwell's and did not smash the door. (R. 60). Appellant was found guilty as charged. (R. 101).

## STANDARD OF REVIEW

“In criminal cases, the appellate court sits to review errors of law only.” State v. Wilson, 345 S.C. 1, 5, 545 S.E.2d 827, 829 (2001). The admission or exclusion of evidence is left to the sound discretion of the trial court, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008); State v. Howard, 396 S.C. 173, 177, 720 S.E.2d 511, 514 (Ct. App. 2011); State v. Swafford, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct. App. 2007). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012); Howard at 178, 720 S.E.2d at 514. To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); Howard at 178, 720 S.E.2d at 514. “The admission of evidence concerning past convictions for impeachment purposes remains within the trial [court’s] discretion provided the [trial court] conducts the analysis mandated by the evidence rules and case law.” State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001).

## ARGUMENT

**The trial court properly found Appellant’s prior convictions for armed robbery and possession of methamphetamine were properly admitted for impeachment purposes pursuant to Rule 609, SCRE, where those convictions fell under the ten-year time limit in Rule 609(b) and where the trial court conducted a careful balancing of the Colf factors before concluding the probative value of the convictions outweighed their prejudicial impact.**

Appellant contends the trial court erred in admitting Appellant’s prior convictions for armed robbery and possession of methamphetamine pursuant to Rule 609, SCRE. Specifically, Appellant argues that the trial court admitted the prior convictions without conducting the required, meaningful analysis of the five factors set forth in State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000). Appellant’s argument is without merit. The trial court acted well within its broad discretion in admitting the convictions after a balancing of the factors set forth in Colf.

### **Rule 609, SCRE**

Pursuant to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year’s imprisonment “shall be admitted” for impeaching the credibility of a defendant who testifies if “the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” The South Carolina Supreme Court has approved the five-factor analysis generally employed by the federal courts for weighing the probative value of impeachment of prior convictions against the prejudice to the accused. Colf at 627, 525 S.E.2d at 248. Rule 609(b) provides: “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 since release of the witness from the 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 supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Here, Appellant's trial took place in 2019. His prior conviction for armed robbery occurred in 2007 for which he received a ten year sentence. (R. 44). If at minimum Appellant served two years of his ten year sentence, his release would fall into the ten year time limit. His convictions for possession of methamphetamine were in 2018 and 2019 also falling within the ten year limit. (R. 43). These convictions or release from conviction fell within the ten year time limit provided by Rule 609(b), SCRE, and therefore were properly admitted to impeach Appellant after the court determined the probative value outweighed the prejudicial effect.

### **Colf Factors**

The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248. In regard to the prior convictions, the trial court acted within its discretion in concluding that they were properly admitted after conducting a careful balancing of the factors set forth in Colf.<sup>1</sup>

#### **(1) Impeachment Value of Prior Convictions**

“The starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand- the witness's propensity for truthfulness, or credibility.” State v. Black, 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012). “The tendency to impact credibility ... determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of

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<sup>1</sup> The parties agreed that the fifth Colf factor regarding the centrality of credibility to the case was not in dispute and will not be discussed. (R. 48, Brief of Appellant pg. 12).

the witness.” *Id.* at 21-22, 732 S.E.2d at 887. The purpose of the impeachment is not to show the witness is a bad person, but rather to show background facts which impact the witness's credibility. *Id.* at 22, 732 S.E.2d at 887. Our Supreme Court held in State v. Robinson, that the trial court did not abuse its discretion in finding that Robinson’s convictions of strong arm robbery and breaking and entering automobiles had impeachment value. State v. Robinson, 426 S.C. 579, 600, 828 S.E.2d 203, 214 (2019). “Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1). If the Court of Appeals' conclusion regarding this factor is carried to its logical extreme, no convictions would ever have impeachment value under Rule 609 unless they were crimes of dishonesty or false statement admitted under Rule 609(a)(2). Rule 609(a)(2) would inevitably swallow Rule 609(a)(1).” *Id.* at 599, 828 S.E.2d at 213. “It was within the trial court’s discretion to conclude that because Robinson has prior convictions for such offenses, he legitimately might not be considered credible. *Id.* at 600, 828 S.E.2d at 214. “Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility of the witness.” State v. Black, 400 S.C. 21, 22, 732 S.E.2d 880, 887 (2012).

Here the trial judge stated:

And I agree as far as the credibility issue. The jury must choose between the Defendant’s credibility and another witness, certainly credibility is a central issue for the court to consider. And I think I touched on the other factors that were in the case as far as impeachment value of prior crimes, again goes to credibility.

(R. 46). The trial judge conducted an analysis properly concluding that Appellant’s prior convictions went to the credibility of the witness and had impeachment value therefore weighing in favor of admissibility.

## **(2) Point in Time of Prior Convictions and Subsequent**

### **History**

Appellant concedes that the narcotics charges were well within the ten-year limit. (Brief of Appellant p. 12). In regard to the armed robbery conviction, Appellant argues there was a legitimate question as to the point in time of the 2007 armed robbery conviction. At trial, the State informed the trial judge that Appellant's conviction for armed robbery was in 2007 and that he was sentenced to 10 year's imprisonment. (R. 44.) The trial judge did not abuse her discretion in assuming that Appellant served only two years of his ten year sentence. Further, by noting that the armed robbery "would fall within the adequate period of time for it to be admissible within 609" and again "the point in time, I think, certainly falls within the parameters of 609 and would be admissible under that" the trial judge considered the second Colf factor. (R. 44-46). This factor weighs in favor of admissibility.

## **(3) Similarity between Past Crimes and the Charged Crime**

Appellant argues that although the trial court expanded on factor three, the court failed to consider trial counsel's argument that Appellant was alleged to have been armed with a similar weapon in both the prior robbery conviction and in the burglary trial. "Evidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions." State v. Colf, 337 S.C 622, 628, 525 S.E.2d 246, 249 (2000). "When the prior offense is similar to the offense for which the defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission." State v. Bryant, 369 S.C. 511, 517-518, 633 S.E.2d 152, 156 (2006).

Here the prior convictions are not similar to the charged crime. The prior narcotics convictions are not at all similar as they are drug charges, whereas the current crime charged is first degree burglary. Appellant argues that the prior armed robbery conviction and the current charge of burglary first degree are similar.

First-degree burglary is defined, as applied to this case, as entering “a dwelling without consent and with the intent to commit a crime in the dwelling” and “when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime... is armed with a deadly weapon.” S.C. Code Ann §16-11-311(A)(1)(a). Armed robbery is defined, as applied to this case, as “A person who commits robbery while armed with... a deadly weapon” where “a person present during the commission of the robbery reasonably believed it to be a deadly weapon...” S.C. Code Ann §16-11-330(A).

Appellant argues that the crimes are similar because Appellant was alleged to have been armed with a similar weapon in both the prior robbery conviction and in the burglary trial. In Robinson, the Supreme Court held the fact that robbery and burglary are overly similar just because, most burglaries are done to steal something was not a determinative factor in determining similarity. State v. Robinson, 426 S.C. 579, 602, 828 S.E.2d 203, 215 (2019). Likewise, the fact that a gun was involved in both crimes is not a determining factor in similarity. Further, Appellant’s argument that the trial judge did not consider this argument in ruling is without merit. At trial, the trial judge stated:

“to address the armed robbery, as far as the similarity because of being armed with a deadly weapon , I think that’s clearly distinguishable in this case because it’s not alleged that he [appellant] entered the home with a deadly weapon, but became armed with a deadly weapon due to having taken firearms from the home or immediately therefrom. So I think that those facts are distinguishable from an armed robbery, and that would be a factor for me to consider as well.”

(R. 48-49). Therefore the trial judge acted properly in her discretion in balancing the similarity of past crimes and the charged crime. This factor rules in favor of admissibility.

#### **(4) Importance of Appellant's Testimony**

Appellant argues that there was no information provided by the trial judge of the importance of Appellant's testimony and how it would mitigate for or against the admission of the prior convictions. At trial the judge stated:

The importance of the defendant's testimony certainly is a central issue in this case. Obviously there's direct and circumstantial evidence from the State with some important testimony. He can certainly testify maybe it wasn't him in the video. I'm not certain what his testimony is going to be or whether, you know, he had a reason to be there, and so the credibility is certainly a central issue in the case. And I find that the probative value does outweigh the prejudicial effect on the defendant, and I believe that it will be admissible.

(R. 44-45). At the time of his ruling to admit Appellant's prior convictions, the trial judge had heard opening statements, seen the State's entire case including video surveillance of Appellant at Maxwell's house and heard testimony for Appellant's cousin and co-defendant. The trial judge was well within her discretion in weighing the importance of Appellant's testimony and properly admitted Appellant's prior convictions.

## CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court should be affirmed.

Respectfully submitted,

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Appellant

**CERTIFICATE OF COUNSEL**

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The undersigned certifies that 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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