STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KRISTOPHER WILMONT BERRY,

APPELLANT

APPELLATE CASE # 2011-198246

FINAL BRIEF OF APPELLANT

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II. Did the trial court err in finding the acts which led to Appellant's other than honorable discharge from the military admissible under Rule 609(a)(2), SCRE, when: Appellant's actions were not prosecuted criminally; Appellant's military discharge constituted as an administrative separation and not as a conviction under Rule 609; and the trial court failed to conduct any Rule 404(b), SCRE, analysis?

STATEMENT OF THE CASE

On September 20, 2010, Appellant Kristopher Berry was indicted by the Darlington County Grand Jury for committing a lewd act upon a minor under the age of sixteen and criminal solicitation of a minor. R. 353 - 354.

On July 18, 2011, Appellant proceeded to trial before the Honorable J. Michael Baxley and a jury. R. 1. Appellant was represented by Paul Cannarella, and the State was represented by Assistant Solicitors Kendall Burch, Patti McKenzie-Parker, and John Holt.

On July 19, 2011, the jury found Appellant not guilty of committing a lewd act upon a minor, but guilty of criminal solicitation of a minor. R. 289, ll. 1-23. The trial court sentenced Appellant to ten years imprisonment suspended upon the service of five years, followed by five years probation. R. 298, ll. 6-17. The trial court also ordered that Appellant register as a sex offender, be on the child abuse registry, and be subject to a sexual violent predator hearing. R. 298, ll. 17-25.

This appeal follows.

STATEMENT OF FACTS

Relevant Facts

Appellant, a gymnastics coach, was charged with criminal solicitation and committing a lewd act upon one of his gymnasts, Minor Child, who was fourteen-years-old. At trial, the State sought to prove that Appellant gave Minor Child a pre-paid cell phone and a camera, so Appellant and Minor Child could communicate via text messages and Minor Child could take "inappropriate" pictures of herself. R. 2, l. 2 – 3, l. 5. The State also sought to prove Appellant sent text messages to Minor Child that were "inappropriate and of a sexual nature," and that Appellant kissed Minor Child using his tongue. R. 3, II. 6-25, and Supp. R. 2, II. l.-12.

Minor Child

At trial, Minor Child maintained that Appellant gave her the cell phone and camera approximately one month before her father found the phone and notified law enforcement. R. 63, l. 19 – 66, l. 7. Minor Child also claimed that, although Appellant wanted her to take nude pictures of herself, she never complied with Appellant's request. R. 65, ll. 16-23. Minor Child further asserted that Appellant "French-kissed" her in the gym's office during one of the team practices. R. 69, l. 1 – 70, l. 25.

The State then questioned Minor Child about the text messages recovered from the cell phone Appellant had given to her. R. 71, ll. 5-9. Using photographic copies of the text messages, Minor Child specifically identified the messages that Appellant sent to her. R. 71, l. 10 – 79, l. 10. Minor Child also identified the text messages sent to her by Joey, her boyfriend, and Jerry Hall, a nineteen-year-old whom she had also allegedly kissed. R. 71, l. 10 – 143, l. 9.

Notably, Minor Child admitted on cross-examination that she had ***never*** used the camera Appellant gave to her, and that she did ***not*** see any pictures on the camera. R. 99, ll. 15-24.

Bart Cave (SLED Agent)

Agent Bart Cave testified that he works for SLED's computer crime and cell phone forensics departments and that he examined the cell phone given to him by Officer Todd Mozingo of the Darlington County Sheriff's Office. R. 145, l. 8 – 146, l. 24. Assistant Solicitor Holt then informed the trial court, "I believe this has been stipulated to as being the defendant's cell phone. This is State's Exhibit 25[9]." R. 147, ll. 4-5. Appellant audibly indicated that it was not his cell phone and defense counsel objected to the admissibility of the cell phone. R. 147, ll. 8-13.

In response, the trial court informed Assistant Solicitor Holt that he needed to lay a foundation before attempting to enter the phone into evidence. R. 147, ll. 14-16. Cave subsequently testified that, although he was unable to recover any text messages from the cell phone, he was able to retrieve the contact list from the phone's sim-card. R. 150, ll. 7-17. Cave also maintained that the cell phone's micro-SD-card contained several pictures. R. 151, ll. 7-14. Yet, the State did not attempt to enter the cell phone or the pictures into evidence.

Officer David Young

Officer David Young of the Darlington County Sheriff's Department recovered the cell phone that Appellant had given to Minor Child, as well as Appellant's personal cell phone during the execution of a search warrant. R. 159, l. 3 – 166, l. 18. The State then entered defendant's alleged personal cell phone into evidence. State's Exhibit # 259.

Hearing on Admissibility of Appellant's Military Discharge

Prior to Appellant's testimony, a hearing was held to determine whether the facts surrounding Appellant's "other than honorable discharge" from the marines was admissible as impeachment evidence. R. 181, l. 19 – 186, l. 9. Defense counsel listed Appellant's prior bad acts: (1) Appellant had used a military computer for personal use without permission; (2) Appellant falsified documents; (3) Appellant trespassed on private property; and (4) Appellant committed adultery. R. 182, ll. 1-18. Defense counsel further noted, "[This] *was a separation in lieu of court-martial, which may be some type of plea bargaining process.*" R. 182, ll. 10-11 (emphasis added).

In response, Assistant Solicitor Holt argued:

> These [are] military convictions really, are what they are. It took place before a tribunal, where I am sure he had an attorney, a JAG attorney. He did this. He was convicted of this. He was found guilty of less than honorable things. I think - - - How can it not go to the truth and veracity of what he was saying. It fit regularly under Rule - - Just like a regular conviction.

R. 183, ll. 9-17. The trial court inquired, "I am asking you under Rule 609[, SCRE], upon what do you base that entitlement?" Assistant Solicitor Holt replied:

> I was looking at Rule 608[,SCRE]. If you want to talk strictly about [Rule] 609[, SCRE], I think it fits within the time limit. I think just generally it fits the exact rule. Subject to Rule 403[, SCRE], I don't see a problem with that. Rule 609(a)(2)[, SCRE], [states] that if [a defendant] be *convicted of a crime*, shall be admitted if it involves dishonesty or false statement regardless of the punishment.

R. 184, ll. 9-15 (emphasis added). Assistant Solicitor Holt then admitted to the trial court, "I'm not an expert at reading these documents." R. 185, ll. 9-11. Defense counsel informed the trial court, "I don't think that the local Sheriff's Office charged [Appellant] with

anything." R. 185, ll. 1-2.

The trial court ultimately held, "Rule 609[, SCRE,] says that the witness has been convicted of a crime shall be admitted if it involves dishonesty, or false statement regardless of the punishment. *I find that each of these specifications involve dishonesty and will therefore permit them in. . . . The Court finds that all of that complies with Rule 609(a)(2).*" R. 185, l. 4 – 186, l. 9 (emphasis added). Assistant Solicitor Holt stated that he would not discuss Appellant's adultery, and the trial court noted, "The Court would almost likely exclude it, because of the similar nature[.]" R. 186, ll. 1-7.

Furthermore, the trial court subsequently marked Appellant's military records as Court's Exhibit # 2, "so that any review of this will have the benefit of seeing what was contained in the record, within the Military records." R. 271, ll. 11-15.

Kristopher Berry (Appellant)

Appellant recalled that Minor Child's mother informed him that she was concerned about her daughter's relationship with her boyfriend, Joey, and that she was possibly going to remove Minor Child from gymnastics because of the relationship. R. 203, l. 15 – 204, l. 16. Appellant testified, "[W]e wanted to keep [Minor Child] as a gymnast, so we talked to her." R. 204, ll. 15-16. Appellant further noted,

> [Minor Child] called me and said that Joey had called her and really upset her and she didn't know what to do . . . And [Minor Child] said she needed a way to talk to me whenever she wanted . . . So, it was discussed after Thanksgiving about a phone so that she could talk with me in times of hard times, and whenever she needed to talk to me . . . I ended up giving her a phone . . . I told her, alright, I will get you a way that we can communicate back and forth.

R. 205, ll. 4-22.

Appellant admitted, "[S]ometimes the jokes [he sent to Minor Child] were crude, and the jokes were inappropriate. But, it got through to her to open up and talk to me about Joey." R. 206, ll. 13-15. Appellant also testified that despite the inappropriateness of the text messages he sent to Minor Child, he never touched Minor Child inappropriately or made plans to meet Minor Child alone at the gym to have sex. R. 209, ll. 6-13; 213, ll. 15-23. Appellant further stated that he gave Minor Child the camera because he wanted her to take a picture of her boyfriend, Joey, so he could "put a face with the name." R. 217, l. 22 – 218, l. 18.

Notably, based on the trial court's prior ruling, Appellant addressed the acts that led to his discharge from the military on direct-examination. R. 222, l. 25 – 226, l. 5. Assistant Solicitor Holt also questioned Appellant about his military discharge on cross-examination. R. 229, l. 20 – 230, l. 24.

On cross-examination, Assistant Solicitor Holt showed Appellant the cell phone that was entered into evidence as State's Exhibit # 259, and Appellant responded, "This does not look like my phone." R. 262, l. 24 – 263, l. 9.

On reply, the State re-called SLED Agent Bart Cave and requested to enter into evidence a naked picture of Appellant that was recovered State's Exhibit # 259. R. 265, ll. 13-25.

Hearing on Admissibility of Naked Picture

Defense counsel argued that the ownership of the phone had become a collateral matter because Appellant had admitted to sending the complained of text messages to Minor Child. R. 266, ll. 3-12. Defense counsel also argued, "*And if [the State] want[s] that picture in [evidence], it unduly prejudices the jury and suggests something to them that is*

unfair." R. 266, ll. 14-16 (emphasis added). In response, Assistant Solicitor Parker stated:

> Your Honor, we initially offer in our case in chief, Bart came from SLED to talk about that phone to show ... to show that all text messages had been deleted off of that phone. . . . *So, we were offering that [naked picture of Appellant], I guess to intend to show the guilt of the defendant that night before law enforcement made contact with him to go through that phone*, and delete anything that he believed would be incriminating. . . . But now he has denied it is his phone.

R. 266, l. 19 – 267, l. 5 (emphasis added).

Based on this information, the trial court found:

> [Appellant] left a clear impression with the court that the phone may not be his. . . . *Now, for those reasons, this goes to credibility and believability, not just about the phone, and the ownership of the phone, but the reliability of this witness*, the defendant, as a witness. Now for all of those reasons, the court believes this is directly relevant and probative. It is about more than the text messages. It is about credibility.

R. 268, ll. 5-13 (emphasis added). The trial court then noted, "And now the question is whether or not this photograph, which is of a nude defendant with his hands covering his private parts, but taking a picture of himself in the mirror, retrieved from that phone; whether it is more prejudicial than probative." R. 268, ll. 13-18.

Defense counsel immediately agreed to "stipulate that the SLED agent testified that he pulled a picture of this defendant off of the phone." R. 268, ll. 20-22. Defense counsel reiterated, "*That is too prejudicial, because they are going to get what they want without introducing that prejudicial photograph.*" R. 269, ll. 15-18. Assistant Solicitor Parker responded, "[W]e could I guess cut and paste physically with scissors, and try to cut the picture to show - - or maybe cover up the picture to show you know from here up, instead of all this down here. *You know, it is a full shot, to reduce the prejudicial impact.*" R. 269, l. 22 – 270, l. 1 (emphasis added). Defense counsel stated again, "We will stipulate that there

is a picture [of Appellant] that came out of that phone." R. 270, ll. 2-3.

The trial court ultimately held, "*I am disinclined to allow the State to crop the picture, because it may indicate that some worse activity is occurring*, other than just a covering of the defendant's private part, which is basically what he is doing with his right hand." R. 270, ll. 4-9 (emphasis added). The trial court also found:

> [T]his [picture] is probative, because on the issue that the defendant testified that he believed that the victim liked men that had - - I can't recall the description, but it was good abs. This is a picture of the defendant's abdomen, and the muscles of his abdomen, and it may somehow be related to that testimony. I find that it is further relevant and probative for that reason.

R. 270, ll. 10-17. The trial court further stated:

> The court is going to permit the picture in over objection of Mr. Cannarella [defense counsel], because I believe it is the appropriate thing to do. But, also, *just so the record will be clear, there are consequences when you take the stand. And you take a position. And there is proof to the contrary of that position. You must simply just bear the consequences.*

R. 270, ll. 21-24 (emphasis added). The picture, listed as State's Exhibit # 264, was then entered into evidence over defense counsel's objection. R. 271, ll. 7-10.

Post-Trial Motion for a New Trial

On August 22, 2011, the trial court filed an Order Denying Defendant's Motion for a New Trial. The trial court's Order stated, "Defendant now moves for a new trial under Rule 29[, SCRCrimP] on the basis that the Court erred in admitting State's exhibit number 264, a photograph of Defendant standing nude before a mirror, found on a cell phone. Defense counsel argues that this picture was overwhelmingly prejudicial, not necessary in light of Defense counsel's offer to stipulate certain facts, and of no probative value." The trial court ruled in the Order, "After review, the Court finds that this evidence was properly admitted."

Specifically, the trial court held:

> Defense counsel's offer to stipulate that the phone belonged to Defendant came too late, and the Court cannot require the State to accept an offer of stipulation of a fact in controversy. Defendant himself placed this issue directly in controversy, and *the photograph was the best evidence available on this issue*, and thus highly probative as to phone ownership. . . . It is also highly probative on the issue of Defendant's credibility. While the Court acknowledges that the photograph was prejudicial to the Defendant to some extent, its probative value is much greater than its prejudice. For these reasons, the motion for a new trial is DENIED.

See Judge Baxley's Order Denying Defendant's Motion for a New Trial (filed on August 22, 2011) (emphasis added).

ARGUMENT

I. The trial court abused its discretion in admitting a naked photograph of Appellant with his genitalia partially covered by not allowing the State to crop the photograph above Appellant's waist or defense counsel to stipulate to Appellant's ownership of the cell phone that contained the photograph at Appellant's trial for lewd act upon a minor and criminal solicitation of a minor because the photograph was not sent to the minor child, thereby making the prejudicial photograph inflame the emotions of the jury and establish that Appellant had a general sexually deviant disposition.

At trial, defense counsel objected to a naked photograph of Appellant with his genitalia partially covered under Rule 403, SCRE, arguing that the danger of unfair prejudice substantially outweighed the probative value of the photograph. R. 266, ll. 3-12; State's Exhibit # 264. Notably: (1) Appellant was charged with committing a lewd act upon a minor and criminal solicitation of a minor; (2) the trial court did not allow the State to crop the photograph above Appellant's waist; (3) defense counsel agreed to stipulate to Appellant's ownership of the cell phone that contained the photograph; and (4) the photograph was ***not*** sent to the minor child. R. 262, l. 24 – 271, l. 10. Therefore, the trial court abused its discretion in admitting the prejudicial photograph because the primary purpose of the photograph was to inflame the emotions of the jury and to establish that Appellant had a general sexually deviant disposition in violation of Rule 403, SCRE. *See State v. Lee*, Op. No. 5026 (S.C. Ct. App. filed August 22, 2012) (2012 WL 3590473).

A. Probative Value

Rule 403, SCRE, states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." A trial court has particularly wide discretion in ruling on Rule 403 objections. *See State v. Adams,* 354 S.C. 361, 378, 580

S.E.2d 785, 794 (Ct. App. 2003) ("A trial judge's decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in exceptional circumstances. We ... are obligated to give great deference to the trial court's judgment [regarding Rule 403]." (internal citation omitted)). However, "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are ... not necessary to substantiate material facts or conditions." *State v. Torres,* 390 S.C. 618, 623, 703 S.E.2d 226, 228 (2010). "[A] court analyzing probative value considers the importance of the evidence and the significance of the issues to which the evidence relates." *State v. Collins*, 398 S.C. 197, 203, 727 S.E.2d 751, 754 (Ct. App. 2012).

In this case, Appellant decided to testify. On cross-examination, Assistant Solicitor Holt showed Appellant the cell phone that was entered into evidence as State's Exhibit # 259, and Appellant responded, "This does not look like my phone." R. 262, l. 24 – 263, l. 9. On reply, the State re-called SLED Agent Bart Cave and requested to enter into evidence a naked picture of Appellant that was recovered State's Exhibit # 259. R. 265, ll. 13-25.

Defense counsel argued that the ownership of the phone had become a collateral matter because Appellant had admitted to sending the complained of text messages to Minor Child. R. 266, ll. 3-12. Defense counsel also argued, "*And if [the State] want[s] that picture in [evidence], it unduly prejudices the jury and suggests something to them that is unfair.*" R. 266, ll. 14-16. In response, Assistant Solicitor Parker stated:

> Your Honor, we initially offer in our case in chief, Bart came from SLED to talk about that phone to show ... to show that all text messages had been deleted off of that phone. . . . *So, we were offering that [naked picture of Appellant], I guess to intend to show the guilt of the defendant that night before law enforcement made contact with him to go through that phone*, and delete anything that he believed would be incriminating ... But now he has denied it is his phone.

R. 266, l. 19 – 267, l. 5 (emphasis added).

Based on this information, the trial court found:

> [Appellant] left a clear impression with the court that the phone may not be his. . . . *Now, for those reasons, this goes to credibility and believability, not just about the phone, and the ownership of the phone, but the reliability of this witness*, the defendant, as a witness. Now for all of those reasons, the court believes this is directly relevant and probative. It is about more than the text messages. It is about credibility.

R. 268, ll. 5-13 (emphasis added).

Furthermore, prior to the introduction of the photograph, the State already presented convincing testimony from Officer Young who recovered the cell phone during the execution of a search warrant that it was Appellant's cell phone, and Appellant had admitted he sent the text messages to Minor Child. R. 159, l. 3 – 166, l. 18; R. 203, l. 15 – 218, l. 18. The State also put the search warrant and Appellant's voluntary statement into evidence. Supp. R. 1; R. 167; State's Exhibits #s 1 and 263. Thus, the probative value of the photograph was minimal at best because it added very little to the jury's ability to determine whether Appellant had previously owned the cell phone, or the jury's ability to determine whether Appellant was guilty of the crimes charged. *See Torres,* 390 S.C. at 623, 703 S.E.2d at 228 (finding "[p]hotographs calculated to arouse the sympathy or prejudice of the jury should be excluded if they are ... not necessary to substantiate material facts or conditions.")

B. Danger of Unfair Prejudice

"The probative value of the photos must be balanced against 'the danger of unfair prejudice.' " *Collins*, 398 S.C. at 207, 727 S.E.2d at 757. "Prejudice that is 'unfair' is distinguished from the legitimate impact all evidence has on the outcome of a case." *Id.*

" 'Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest [a] decision on an improper basis.' " *Id.* (quoting *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)). " 'All evidence is meant to be prejudicial; it is only unfair prejudice which must be [scrutinized under Rule 403].' " *Id.* (quoting *Gilchrist*, 329 S.C. at 630, 496 S.E.2d at 429).

"Photographs pose a danger of unfair prejudice when they have 'an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one.' " *Id.* (quoting *State v. Holder*, 382 S.C. 278, 290, 676 S.E.2d 690, 697 (2009)). "Like probative value, unfair prejudice should be evaluated in the practical context of the issues at stake in the trial of the case." *Id.*; *See State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001) ("The determination of prejudice must be based on the entire record and the result will generally turn on the facts of each case.").

Here, the trial court noted, "[N]ow the question is whether or not this photograph, which is of a nude defendant with his hands covering his private parts, but taking a picture of himself in the mirror, retrieved from that phone; whether it is more prejudicial than probative." R. 268, ll. 13-18. Defense counsel immediately agreed to "stipulate that the SLED agent testified that he pulled a picture of this defendant off of the phone." R. 268, ll. 20-22. Defense counsel also reiterated, "*That is too prejudicial, because they are going to get what they want without introducing that prejudicial photograph.*" R. 269, ll. 15-18.

In response, Assistant Solicitor Parker stated, "[W]e could I guess cut and paste physically with scissors, and try to cut the picture to show - - or maybe cover up the picture to show you know from here up, instead of all this down here. *You know, it is a full shot, to*

reduce the prejudicial impact." R. 269, l. 22 – 270, l. 1 (emphasis added). Defense counsel stated again, "We will stipulate that there is a picture [of Appellant] that came out of that phone." R. 270, ll. 2-3.

As to the danger of unfair prejudice, the naked photograph of Appellant partially covering his genitalia with his right hand would cause a reasonable juror to draw an emotional response such as "an undue tendency to suggest a decision on an improper basis." *See Holder*, 382 S.C. at 290, 676 S.E.2d at 697. Accordingly, the photographs were unduly prejudicial because the primary purpose of the photograph was to inflame the emotions of the jury and to establish that Appellant had a general sexually deviant disposition. *See Lee*, Op. No. 5026 (S.C. Ct. App. filed August 22, 2012) (2012 WL 3590473).

C. Balancing Probative Value and Unfair Prejudice

The trial court ultimately held, "*I am disinclined to allow the State to crop the picture, because it may indicate that some worse activity is occurring*, other than just a covering of the defendant's private part, which is basically what he is doing with his right hand." R. 270, ll. 4-9 (emphasis added). The trial court also found:

> [T]his [picture] is probative, because on the issue that the defendant testified that he believed that the victim liked men that had - - I can't recall the description, but it was good abs. This is a picture of the defendant's abdomen, and the muscles of his abdomen, and it may somehow be related to that testimony. I find that it is further relevant and probative for that reason.

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you take a position. And there is proof to the contrary of that position. You must simply just bear the consequences.

R. 270, ll. 21-24 (emphasis added). The photograph was then entered into evidence over defense counsel's objection. R. 271, ll. 7-10; State's Exhibit # 264.

Clearly, the added visual element provided by the photograph does far more to create a danger of unfair prejudice than it does to add probative value. Thus, the trial court abused its discretion in admitting a naked photograph of Appellant with his genitalia partially covered by not allowing the State to crop the photograph above Appellant's waist or defense counsel to stipulate to Appellant's ownership of the cell phone that contained the photograph at Appellant's trial for lewd act upon a minor and criminal solicitation of a minor because the photograph was not sent to the minor child. *See Collins*, 398 S.C. at 203, 727 S.E.2d at 754.

D. Harmless Error

The trial court's error cannot be harmless for two reasons. First, the prejudicial photograph "lure[s] the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997)). Second, the State's case relied heavily upon the jury's determination of Appellant's credibility. *See Lee*, Op. No. 5026 (S.C. Ct. App. filed August 22, 2012), 2012 WL 3590473.

II. The trial court erred in finding the acts which led to Appellant's other than honorable discharge from the military admissible under Rule 609(a)(2), SCRE, because: Appellant's actions were not prosecuted criminally; Appellant's military discharge constituted as an administrative separation and not as a conviction under Rule 609; and the trial court failed to conduct any Rule 404(b), SCRE, analysis.

"The South Carolina Rules of Evidence provide that if the witness has been convicted of a crime that is punishable by death or imprisonment of more than one year, and the probative value of the conviction outweighs its prejudicial effect, the conviction is admissible to attack the witness's credibility. Rule 609(a)(1), SCRE." *State v. Johnson*, 363 S.C. 53, 609 S.E.2d 520 (2005). Additionally, "if the crime involved dishonesty or a false statement the conviction is admissible to attack the witness's credibility. Rule 609(a)(2), SCRE." *Id.*

In this case, prior to Appellant's testimony, a hearing was held to determine whether the facts surrounding Appellant's "other than honorable discharge" from the marines was admissible as impeachment evidence. R. 181, l. 19 – 186, l. 9. Defense counsel listed Appellant's prior bad acts: (1) Appellant had used a military computer for personal use without permission; (2) Appellant falsified documents; (3) Appellant trespassed on private property; and (4) Appellant committed adultery. R. 182, ll. 1-18. Defense counsel further noted, "[This] *was a separation in lieu of court-martial, which may be some type of plea bargaining process.*" R. 182, ll. 10-11 (emphasis added).

In response, Assistant Solicitor Holt argued:

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R. 183, ll. 9-17. The trial court inquired, "I am asking you under Rule 609[, SCRE], upon what do you base that entitlement?" Assistant Solicitor Holt replied:

> I was looking at Rule 608[,SCRE]. If you want to talk strictly about [Rule] 609[, SCRE], I think it fits within the time limit. I think just generally it fits the exact rule. Subject to Rule 403[, SCRE], I don't see a problem with that. Rule 609(a)(2)[, SCRE], [states] that if [a defendant] be convicted of a crime, shall be admitted if it involves dishonesty or false statement regardless of the punishment.

R. 184, ll. 9-15. Assistant Solicitor Holt then admitted to the trial court, "I'm not an expert at reading these documents." R. 185, ll. 9-11. Defense counsel informed the trial court, "I don't think that the local Sheriff's Office charged [Appellant] with anything." R. 185, ll. 1-2.

The trial court ultimately held, "Rule 609[, SCRE,] says that the witness has been convicted of a crime shall be admitted if it involves dishonesty, or false statement regardless of the punishment. *I find that each of these specifications involve dishonesty and will therefore permit them in. . . . The Court finds that all of that complies with Rule 609(a)(2).*" R. 185, l. 4 – 186, l. 9 (emphasis added); Court's Exhibit # 2.

Notably, Appellant was discharged under "other than honorable conditions," which is an administrative separation, not a criminal conviction, and the State failed to prove that Appellant was prosecuted criminally for the acts which led to his military discharge. Court's Exhibit # 2; *See* Marine Corps Separation and Retirement Manual (MARCORSEPMAN - MCO P1900.16F Ch 2), 1003 – Types of Separation. Specifically, an administrative separation is defined as: "Discharge or release from active duty upon or before expiration of enlistment, period of induction, or other required period of service, in the manner prescribed in this Manual, by law, by the Secretary of Defense or the Secretary

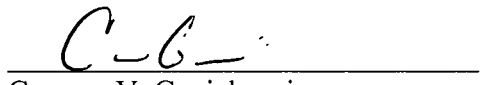
of the Navy, but specifically excluding punitive separation by the sentence of a general or special court-martial." MARCORSEPMAN, 1002 – Definitions.

Accordingly, the trial court erred in finding the acts which led to Appellant's other than honorable discharge from the military admissible under Rule 609(a)(2), SCRE, because: Appellant's actions were not prosecuted criminally; Appellant's military discharge constituted as an administrative separation and not as a conviction under Rule 609; and the trial court failed to conduct any Rule 404(b), SCRE, analysis. *See* MARCORSEPMAN, 6316 ("Rules of Evidence. *An administrative separation board functions as an administrative rather than a judicial body.* . . . There is a sharp and distinct delineation between the administrative process which has as its purpose the administrative elimination of unsuitable, unfit, or unqualified Marines, and the judicial process, the purpose of which is to establish the guilt or innocence of a member accused of a crime and to administer punishment when appropriate.") (emphasis added).

CONCLUSION

For the foregoing reasons, Appellant Kristopher Berry respectfully requests that this Court reverse his conviction and remand this case to the Darlington County Court of General Sessions.

Respectfully submitted,



Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

This 16th day of May, 2013.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 16th, 2013

C_G_

Carmen V, Ganjehsani
Appellate Defender

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Darlington County

J. Michael Baxley, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

KRISTOPHER WILMONT BERRY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina J. Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Columbia, South Carolina, this 16th day of May, 2013.

Carmen V. Ganjehsani
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 16th day of May, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: October 2, 2013.