

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0106

State of New Hampshire

v.

Charles Paul

Appeal Pursuant to Rule 7 from Judgment
of the Rockingham County Superior Court

REPLY BRIEF FOR THE DEFENDANT

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(15 minutes oral argument)

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New Hampshire Rule of Evidence 609 4, 5, 6

I. THE COURT ERRED BY GRANTING THE STATE'S MOTION IN LIMINE TO ADMIT EVIDENCE OF PAUL'S PRIOR CONVICTIONS UNDER NEW HAMPSHIRE RULE OF EVIDENCE 609.

In his opening brief, Paul argues that the court erred by admitting his prior convictions on the ground that their “probative value . . . outweigh[ed their] prejudicial effect,” the more relaxed of two balancing tests set forth in New Hampshire Rule of Evidence 609. DB* 19–29; N.H. R. Ev. 609(a)(1)(B). Paul argues that, because the convictions were more than ten years old, the court instead should have applied the more demanding balancing test, under which it would have asked whether the convictions’ “probative value, supported by specific facts and circumstances, substantially outweigh[ed] [their] prejudicial effect.” DB 19–29; N.H. R. Ev. 609(b)(1) (emphasis added).

The State argues that the convictions were not more than ten years old and, thus, that the court applied the correct balancing test. SB 27–32. But it also argues that, even if the convictions were more than ten years old and thus, that the court applied the wrong balancing test, “this Court should find that the [] court reached the correct result . . . for the wrong reason.” SB 32. It argues that, even under the more demanding balancing test, the probative

* Citations to the record are as follows:
“DB” refers to Paul’s opening brief;
“SB” refers to the State’s brief.

value of Paul’s prior convictions substantially outweighed their prejudicial effect. SB 33–34.

If an alternative ground for affirmance would have been discretionary, this Court will affirm on that ground “only if there is only one way the trial court could have ruled as a matter of law.” State v. Cavanaugh, 174 N.H. 1 (2020) (quoting State v. Hayward, 166 N.H. 575, 583 (2014)). Had the court here addressed whether the probative value of Paul’s prior convictions substantially outweighed their prejudicial effect, its ruling on that question would have been discretionary. See State v. Jette, 174 N.H. 669, 673 (2021) (reviewing trial court’s balancing of probative value and prejudicial effect with deference); SB 26 (“To admit or exclude evidence is within the discretion of the trial court”).

The State does not argue that the trial court would have been compelled, as a matter of law, to find that the probative value of Paul’s prior convictions substantially outweighed their prejudicial effect. Nor could it. “The ten-year limitation is the result of a considered judgment that the probative value of evidence of convictions more than ten years old is, in most cases, outweighed by its prejudicial effect.” State v. Hickey, 129 N.H. 53, 57 (1986). “Under [Rule 609], . . . it is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances.” Id. (brackets omitted).

Nothing here would have required the court to conclude that this was one of those rare cases that presented exceptional circumstances. The State notes — correctly — that “the jury’s judgment of [Paul’s] credibility was integral to the case,” and that “[Paul’s] credibility was a central issue in the case.” SB 33. Based on this premise alone, however, it asserts that the probative value of his convictions must have “substantially outweighed any prejudicial effect.” SB 33.

Under Rule 609(b), the question would not have been whether Paul’s credibility was central. Rather, the question would have been whether his convictions, which were more than ten years old, were highly probative of his credibility. Those two questions are distinct. Evidence can be highly probative of a tangential issue. Conversely, evidence can be minimally probative of a central issue. Here, Paul’s credibility was certainly central, but the State offers no reason to conclude that his prior convictions were particularly probative of his credibility.

If anything, the centrality of Paul’s credibility would have weighed against any finding that the more demanding balancing test was satisfied. Because Paul’s credibility was central, the prejudicial effect of admitting the convictions was substantial. See DB 29–31 (arguing that, because “Paul’s credibility was crucial,” admission of the convictions was prejudicial).

The State also argues that, even if the court erred by admitting Paul’s convictions, the error was harmless. SB 34–37. After the State filed its brief, this Court clarified that its harmless-error analysis involves a totality-of-the-circumstances test in which “[n]o one factor is dispositive.” State v. Boudreau, ___ N.H. ___ (June 7, 2023). The ultimate question is whether “the State [has] prove[n] beyond a reasonable doubt that the error did not affect the verdicts.” Id. Here, it has not.

As the parties agree, Paul’s credibility was central. SB 33. The erroneous admission of the old convictions distorted the jury’s evaluation of his credibility. As Paul explained in his opening brief, the State maximized the prejudicial effect of the attempted-escape conviction, in particular, by using it to show that Paul would do anything to avoid going to prison. DB 29–30. This made it more likely that the jury would not only reject self-defense, but also find that Paul intended to kill A.Y. DB 30–31.

The State notes that it did not question Paul extensively about his convictions and did not mention them in its closing argument. SB 37. “[W]hen an elephant has passed through the courtroom,” however, “one does not need a forceful reminder.” Mallard v. Warden, ___ N.H. ___ (Jan. 4, 2023).

The State argues that, even without Paul’s convictions, the evidence of his guilt was overwhelming. SB 34–37. The

cases it cites, however, involved disputes about the relevance and sufficiency of evidence. SB 35–36 (citing State v. Bean, 153 N.H. 380, 387 (2006) (addressing sufficiency of the evidence); State v. Thorp, 86 N.H. 501, 507 (1934) (addressing the relevance of the defendant’s statement); In the Matter of Geraghty, 169 N.H. 404, 416 (2016) (addressing sufficiency of the evidence)). It is one thing to say that a jury could have found guilty. It is something else entirely to say, beyond a reasonable doubt, that a jury would have found guilty. See Kotteakos v. United States, 328 U.S. 750, 765 (1946) (“The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error.”).

The State asks this Court to find, based on a cold record, that even if Paul’s convictions had been excluded, the jury still would have found his “testimony . . . both unreliable and incredible.” SB 37. This Court has no way of knowing how a jury would have evaluated Paul’s credibility had the court not erroneously admitted his convictions. It should reject the State’s invitation.

CONCLUSION

WHEREFORE, Charles Paul respectfully requests that this Court reverse.

Undersigned counsel requests 15 minutes oral argument.

This brief complies with the applicable word limitation and contains 1,088 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief is being timely provided to Audriana Mekula-Hanson, counsel for the State, through the electronic filing system's electronic service.

/s/ Thomas Barnard
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DATED: June 16, 2023