

South Carolina Law Review

Volume 49
Issue 5 *ANNUAL SURVEY OF SOUTH CAROLINA
LAW*

Article 10

Summer 1998

Evidence Law

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Recommended Citation

(1998) "Evidence Law," *South Carolina Law Review*. Vol. 49 : Iss. 5 , Article 10.
Available at: <https://scholarcommons.sc.edu/sclr/vol49/iss5/10>

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EVIDENCE LAW

IMPEACHMENT OF WITNESSES: APPLICATION OF SOUTH CAROLINA RULES OF EVIDENCE 608(b) AND 609(a)(2)

I. INTRODUCTION

In 1997 the South Carolina Court of Appeals examined two cases involving the use of prior convictions in the impeachment of witnesses. In *State v. Shaw*¹ the court held that a prior conviction of shoplifting fell within the meaning of “dishonesty or false statement” under Rule 609(a)(2) of the South Carolina Rules of Evidence.² In *State v. Joseph*,³ a case that the trial court decided in 1995 before the adoption of the South Carolina Rules of Evidence, the appellate court ruled that the State could not impeach the defendant’s witness with information about an earlier charge of possession of cocaine because the witness successfully completed the Pretrial Intervention Program (PTI) for that offense.⁴ However, the court did not resolve the more difficult question of “whether successful completion of the PTI program prohibits impeachment of the witness with the *conduct* giving rise to the PTI involvement.”⁵

This Note examines the practice of impeaching witnesses with prior convictions after the adoption of the South Carolina Rules of Evidence. Part II discusses prior convictions, comparing Rule 609(a)(2) to the common law. Part III analyzes whether the completion of a PTI program constitutes a conviction under Rule 609(a). Part IV then explains the limitations and advantages of using Rule 608(b), rather than Rule 609(a), and what conduct falls under Rule 608(b). In conclusion, this Note summarizes the effect the South Carolina Rules of Evidence have on the impeachment of witnesses either by prior conviction or by prior bad conduct.

1. 328 S.C. 454, 492 S.E.2d 402 (Ct. App. 1997).

2. *Id.* at 456-57, 492 S.E.2d at 403-04. Rule 609(a)(2) states that “evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.” S.C. R. EVID. 609(a)(2).

3. 328 S.C. 352, 491 S.E.2d 275 (Ct. App. 1997).

4. *Id.* at 359, 491 S.E.2d at 278; S.C. CODE ANN. §§ 17-22-10 to -170 (Law. Co-op. 1976 & Supp. 1997). The PTI program is an alternative, noncriminal disposition of certain criminal charges. To participate in PTI, the offender must satisfy statutory requirements and must agree to the terms and conditions of the intervention program. Upon the successful completion of the program, the solicitor may dispose of the pending criminal charges. *Id.*

5. *Joseph*, 328 S.C. at 358, 491 S.E.2d at 278.

II. IMPEACHMENT BY PRIOR CONVICTION

In *State v. Shaw* the court of appeals ruled that the State could cross-examine a defendant about an earlier shoplifting conviction.⁶ Concluding that shoplifting was a crime involving dishonesty per se, the court of appeals held that the conviction was admissible under Rule 609(a)(2).⁷ While recognizing “that some federal courts have held [that] a defendant may not be impeached on a prior shoplifting conviction,”⁸ the court refused to align itself with those courts.⁹ According to the court, common sense reveals that shoplifters act dishonestly when they take merchandise with no intent to pay.¹⁰ Thus, the court broadly interpreted the term “dishonesty.”

A. *South Carolina Evidence Law Prior to the 1995 Adoption of the Rules of Evidence*

To more fully understand the significance of *Shaw* and the court’s reasoning, it is helpful to briefly examine South Carolina evidence law prior to the 1995 adoption of the South Carolina Rules of Evidence. South Carolina evidence law developed from English and early American common-law decisions.¹¹ Traditionally, only crimes involving dishonesty could be used to impeach witnesses.¹² “[T]o be competent in evidence the former crime of the witness must have involved moral delinquency and tended to show that his character is such as to render his testimony unworthy of belief.”¹³ In *Gantt v. Columbia Coca-Cola Bottling Co.*¹⁴ the court added a new twist, holding that illicit liquor distribution embodied the “moral delinquency” that “would affect a witness’[s] believability if it were not ‘too remote in time.’”¹⁵ More recent cases have concluded that previous crimes are not admissible for impeachment purposes unless they involve moral turpitude.¹⁶ However, the determination of what constituted a crime of moral turpitude often

6. *Shaw*, 328 S.C. at 457, 492 S.E.2d at 404.

7. *Id.* at 456-57, 492 S.E.2d at 403-04.

8. *Id.* at 456, 492 S.E.2d at 403.

9. *Id.* (citing *United States v. Amaechi*, 991 F.2d 374 (7th Cir. 1993); *McHenry v. Chadwick*, 896 F.2d 184 (6th Cir. 1990); *United States v. Scisney*, 885 F.2d 325 (6th Cir. 1989); *United States v. Ashley*, 569 F.2d 975 (5th Cir. 1978); *United States v. Dorsey*, 591 F.2d 922 (D.C. Cir. 1978)).

10. *Id.* at 457, 492 S.E.2d at 404.

11. E. WARREN MOISE, *IMPEACHMENT EVIDENCE* 4 (1996).

12. JAMES F. DREHER & JON P. THAMES, *A GUIDE TO EVIDENCE LAW IN SOUTH CAROLINA* 30 (1979).

13. *State v. Chasteen*, 231 S.C. 141, 145, 97 S.E.2d 517, 519 (1957).

14. 204 S.C. 374, 29 S.E.2d 488 (1944).

15. DREHER & THAMES, *supra* note 12, at 30 (quoting *Gantt*, 231 S.C. at 379, 29 S.E.2d at 489-90).

16. *See, e.g., State v. Millings*, 247 S.C. 52, 53, 145 S.E.2d 422, 423 (1965) (holding auto theft to be a crime of moral turpitude); *State v. Savage*, 306 S.C. 5, 8, 409 S.E.2d 809, 811 (Cl. App. 1991) (holding possession of marijuana with intent to distribute to be a crime of moral turpitude).

perplexed the courts.¹⁷ The South Carolina Supreme Court defines “[a] crime involving moral turpitude [as] an act of baseness, vileness, or depravity in the private and social duties which man owes to his fellow man or to society in general, contrary to the customary and accepted rule of right and duty between man and man.”¹⁸ South Carolina courts have concluded that various types of crimes fall within this definition,¹⁹ while others do not.²⁰ As the supreme court noted in *State v. LaBarge*,²¹ “all crimes involve some degree of social irresponsibility, [but] all crimes do not involve moral turpitude.”²² “Most offenses found to involve moral turpitude . . . seem to include some type of dishonest behavior,”²³ although courts have found crimes that do not necessarily involve dishonesty to be crimes of moral turpitude.²⁴ Conviction of a crime involving moral turpitude was not necessarily admissible as evidence;²⁵ instead, the trial judge had discretion to decide if the prejudicial effect of admitting a witness’s prior conviction outweighed the probative value of such evidence.²⁶

B. Impeachment Under Rule 609(a)(2)

The adoption of Rule 609 of the South Carolina Rules of Evidence altered the admissibility of some types of convictions previously used to impeach witnesses.²⁷

17. DREHER & THAMES, *supra* note 12, at 30.

18. *State v. Perry*, 294 S.C. 311, 312, 364 S.E.2d 201, 202 (1988).

19. *See, e.g.*, *State v. Major*, 301 S.C. 181, 184, 391 S.E.2d 235, 237 (1990) (possession of cocaine); *State v. Harrison*, 298 S.C. 333, 336, 380 S.E.2d 818, 819 (1989) (fraudulent checks); *Perry*, 294 S.C. at 312, 364 S.E.2d at 202 (malicious destruction of personal property); *State v. Harris*, 293 S.C. 75, 76, 358 S.E.2d 713, 714 (1987) (“Peeping Tom” offenses); *Rouse v. McCrory*, 291 S.C. 218, 220, 353 S.E.2d 130, 131 (1986) (breaking into motor vehicle); *State v. Yates*, 280 S.C. 29, 36-37, 310 S.E.2d 805, 809-10 (1982) (arson and larceny); *Millings*, 247 S.C. at 53, 145 S.E.2d at 423 (auto theft); *State v. Van Williams*, 212 S.C. 110, 114, 46 S.E.2d 665, 667 (1948) (housebreaking, larceny, and grand larceny); *Savage*, 306 S.C. at 8, 409 S.E.2d at 811 (possession of marijuana with intent to distribute).

20. *See, e.g.*, *Mitchell v. State*, 298 S.C. 186, 189, 379 S.E.2d 123, 125 (1989) (manslaughter); *State v. Morris*, 289 S.C. 294, 297, 345 S.E.2d 477, 478 (1986) (bookmaking); *State v. Bailey*, 275 S.C. 444, 446, 272 S.E.2d 439, 440 (1980) (assault and battery of a high and aggravated nature); *State v. Harvey*, 275 S.C. 225, 227, 268 S.E.2d 587, 588 (1980) (simple possession of marijuana).

21. 275 S.C. 168, 268 S.E.2d 278 (1980).

22. *Id.* at 172, 268 S.E.2d at 280.

23. WILLIAM SHEPARD MCANINCH & W. GASTON FAIREY, *THE CRIMINAL LAW OF SOUTH CAROLINA* 45 (3d ed. 1996).

24. *See, e.g.*, *Major*, 301 S.C. at 184, 391 S.E.2d at 237 (possession of cocaine); *State v. Horton*, 271 S.C. 413, 415, 248 S.E.2d 263, 264 (1978) (hit-and-run offense).

25. *See Merritt v. Grant*, 285 S.C. 150, 156-57, 328 S.E.2d 346, 350 (Ct. App. 1985).

26. *Id.*; *see* S.C. R. EVID. 403.

27. Rule 609(a) of the South Carolina Rules of Evidence provides as follows:

For the purpose of attacking the credibility of a witness,

(1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was

Since the adoption of Rule 609, courts no longer need to decide whether a crime is one of moral turpitude. Instead, courts must determine whether a conviction falls within one of the two categories of Rule 609(a). Under Rule 609(a)(1), crimes punishable by imprisonment in excess of one year or by death can be admitted for impeachment purposes if the judge determines that its probative value substantially outweighs its danger of unfair prejudice to the accused.²⁸ Under Rule 609(a)(2), crimes involving dishonesty or false statements shall be admitted regardless of the danger of unfair prejudice.²⁹ Because of Rule 609(a), some crimes historically admissible to impeach a witness will now be inadmissible, and some which were inadmissible are now admissible.

Whether or not a crime is one of dishonesty or false statement under Rule 609(a)(2) is, like the older moral turpitude standard, open to varying interpretations. A "crime involving dishonesty" may be broadly interpreted to mean a crime involving "breach of honesty or trust, [such] as lying, deceiving, cheating, stealing, or defrauding,"³⁰ or the term can be narrowly interpreted to mean a crime involving fraud or deceit.³¹ Thus, whether a prior conviction will be admissible under Rule 609(a)(2) depends upon which interpretation the court adopts. If a crime is viewed as one involving dishonesty, then the court must admit the prior conviction because, under subsection (a)(2), prior convictions involving dishonesty or false statement must be admitted regardless of their probative value or prejudicial effect.³² Prior to the adoption of the rules, the court had discretion over the admissibility of all prior convictions.³³ Now the court's discretion is limited to crimes falling under Rule 609(a)(1).³⁴

C. *Statutory History and Interpretation of Federal Rule of Evidence 609(a)(2)*

Because Rule 609 of the South Carolina and Federal Rules of Evidence are

convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

For the purposes of this rule, a conviction includes a conviction resulting from a trial or any type of plea, including a plea of *nolo contendere* or a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).

S.C. R. EVID. 609(a). South Carolina's Rule 609(a) "is identical to the federal rule except for the addition of the last sentence." S.C. R. EVID. 609 Note.

28. S.C. R. EVID. 609(a)(1).

29. S.C. R. EVID. 609(a)(2).

30. See *United States v. Brackeen*, 969 F.2d 827, 829 (9th Cir. 1992) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 650 (unabridged ed. 1986)).

31. *Id.*

32. S.C. R. EVID. 609(a)(2).

33. See *supra* Part II.A.

34. S.C. R. EVID. 609(a)(1).

almost identical,³⁵ it may be helpful to consider the statutory history of the federal rule. The floor debate in the U.S. House of Representatives over Rule 609(a) far exceeded the debate of “any other provision of the Evidence Rules.”³⁶ The Senate Judiciary Committee Report explained that the phrase “dishonesty and false statement” was to mean “crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of *crimen falsi* the commission of which involves some element of untruthfulness, deceit or falsification bearing on the accused’s propensity to testify truthfully.”³⁷ The House Conference Committee Report basically adopted the Senate’s terminology.³⁸ Since the 1975 adoption of the Federal Rules, the overwhelming majority of federal court cases decided have adopted this narrow definition of dishonesty and have not held crimes such as shoplifting and larceny to be crimes of dishonesty.³⁹

D. State Courts’ Interpretation of Rule 609(a)(2)

States that have adopted some form of the federal rules have also struggled with defining the crimes that fall within Rule 609(a)(2). For example, the Washington Supreme Court in *State v. Burton*⁴⁰ accepted the narrow definition espoused by the congressional conference committees and found that crimes of “‘dishonesty’ include only those crimes which contain elements in the nature of *crimen falsi* and which bear *directly* on a defendant’s propensity for truthfulness.”⁴¹ However, many other state courts have ruled that crimes involving theft and shoplifting may be admissible as crimes involving dishonesty or false statement.⁴²

E. South Carolina’s Interpretation of Rule 609(a)(2)

In *State v. Shaw* the court of appeals aligned itself with those jurisdictions that have taken a broad view of dishonesty and held that shoplifting involved dishonesty

35. See *supra* note 29.

36. 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6131, at 154 (1993).

37. S. REP. NO. 93-1277 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7061.

38. H.R. CONF. REP. NO. 93-1597 (1974), reprinted in 1974 U.S.C.C.A.N. 7098, 7103.

39. See, e.g., *United States v. Grandmont*, 680 F.2d 867, 871 (1st Cir. 1982) (robberies inadmissible); *United States v. Cunningham*, 638 F.2d 696, 699 (4th Cir. 1981) (passing worthless checks inadmissible); *United States v. Ashley*, 569 F.2d 975, 979 (5th Cir. 1978) (shoplifting inadmissible); *United States v. Seamster*, 568 F.2d 188, 191 (10th Cir. 1978) (burglary inadmissible); *United States v. Smith*, 551 F.2d 348, 362 (D.C. Cir. 1976) (attempted robbery inadmissible).

40. 676 P.2d 975 (Wash. 1984).

41. *Id.* at 980.

42. See, e.g., *People v. Collins*, 592 N.E.2d 217, 221 (Ill. App. Ct. 1992) (holding that misdemeanor theft is a crime of dishonesty); *People v. Courtney*, 542 N.E.2d 116, 118 (Ill. App. Ct. 1989) (ruling convictions for robbery and Credit Card Act violations involved dishonesty); *State v. Grover*, 518 A.2d 1039, 1040 (Me. 1986) (finding prior conviction of theft admissible).

per se.⁴³ In so holding, the court relied on *Webster's* definition of "dishonesty" to mean deceiving or stealing.⁴⁴ The court's broad interpretation will increase the number of witnesses impeached by their prior convictions because any crime that is determined to involve dishonesty can automatically be used for impeachment purposes regardless of prejudicial effect.⁴⁵ As a result, South Carolina courts may admit evidence of criminal convictions for crimes tangentially related to dishonesty. Such a result appears contrary to Congress's intent when it adopted Rule 609⁴⁶ and could prove to negatively impact the rights of the accused.

III. THE PRETRIAL INTERVENTION PROGRAM AND IMPEACHMENT

In 1997 the South Carolina Court of Appeals also considered whether the successful completion of a PTI program should be deemed a conviction for impeachment purposes.⁴⁷ In *State v. Joseph* the court held that a prosecution witness could not be impeached by evidence of a witness's successful completion of a PTI program because participation in the program is not considered a conviction.⁴⁸ The court reasoned that statutory "provisions for expungement and confidentiality of the arrest reflect a legislative policy decision" that an offender who participates in a PTI program should "be given a fresh start, free from the stigma of a criminal conviction."⁴⁹ The court opined that "upon successful completion of the PTI program, it is as if the arrest never occurred—the offender is not required to admit to the arrest and the offender's denial of the arrest is, by statute, deemed to be truthful."⁵⁰ The *Joseph* decision is in accord with Rule 609(c),⁵¹ which states that if a "conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted," evidence of the conviction is not admissible for

43. 328 S.C. 454, 456-57, 492 S.E.2d 402, 403-04 (Ct. App. 1997).

44. *Id.* at 457, 492 S.E.2d at 404.

45. S.C. R. EVID. 609(a)(2).

46. *See supra* notes 37-39 and accompanying text.

47. Two Florida cases have also considered whether evidence of participation in a PTI program can be used to impeach a witness. In *Coolen v. State*, 696 So. 2d 738 (Fla. 1997), the Florida Supreme Court found no error in the trial court's refusal to allow a witness to be cross-examined about a charge of sexual battery when the witness had entered a PTI program. *Id.* at 743. However, the trial court did allow counsel to disclose that the witness "was charged with a felony . . . and that she was currently on PTI, but did not allow counsel to reach the nature of the felony or the facts involved." *Id.*

In *West v. State*, 503 So. 2d 435 (Fla. Dist. Ct. App. 1987), the Florida appellate court upheld the trial court's denial of the cross-examination of a witness concerning his previous participation in a juvenile PTI program. *Id.* at 436.

48. 328 S.C. 352, 358, 491 S.E.2d 275, 278 (Ct. App. 1997). Because this case was decided by the trial court prior to the adoption of the South Carolina Rules of Evidence, the moral turpitude standard was appropriate.

49. *Id.* at 359, 491 S.E.2d at 279.

50. *Id.* at 359, 491 S.E.2d at 278.

51. S.C. R. EVID. 609(c).

impeachment purposes.⁵² Moreover, the court's reasoning is also consistent with a 1988 South Carolina Attorney General opinion which stated that no conviction occurs when an offender successfully completes a pretrial intervention program.⁵³

IV. IMPEACHMENT BY PRIOR BAD ACTS

A. Rule 608(b)

A witness's credibility can be impeached by prior bad acts even if these acts did not result in a conviction.⁵⁴ Rule 608(b)⁵⁵ of the South Carolina Rules of Evidence authorizes the admissibility of a witness's prior conduct in specific instances.⁵⁶ The court in *Joseph* discussed, but did not decide, whether the conduct leading up to the witness's arrest could be introduced to attack the witness's credibility.⁵⁷ Realizing that protecting both the arrest and the conduct from inquiry would be unfair if it prevented a party from using information that could affect the witness's credibility,⁵⁸ the court suggested that "[a]llowing impeachment through a carefully worded question about the underlying conduct, but not the arrest, would ensure that all litigants are able to present all relevant information to the jury."⁵⁹ However, because the issue was not preserved for appeal, the court did not have to resolve the question.⁶⁰

B. The Relationship Between Rule 608(b) and Rule 609(a)(2)

South Carolina has yet to resolve how Rule 608(b) relates to Rule 609(a) when the prior bad act results in a conviction. Because Rule 608(b) excepts a "conviction of [a] crime as provided in Rule 609,"⁶¹ Rule 608 can be read narrowly, allowing

52. *Id.*

53. See 1988 Op. S.C. Att'y Gen. No. 88-78, at 223.

54. S.C. R. EVID. 608(b).

55. Rule 608(b) of the South Carolina Rules of Evidence provides:

[S]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Id.

56. *Id.*

57. *State v. Joseph*, 328 S.C. 352, 360, 491 S.E.2d 275, 279 (Ct. App. 1997).

58. *Id.*

59. *Id.*

60. *Id.*

61. S.C. R. EVID. 608(b).

only the admission of prior bad acts that do not result in a conviction.⁶² However, a broader reading of this exemption language would exempt only proof of a prior conviction from the ban on extrinsic evidence.⁶³ Although the conviction itself could not be admitted, this broader instruction would allow the cross-examination of a witness about any dishonest conduct, even if that conduct resulted in a conviction.⁶⁴ If South Carolina courts adopt this more liberal interpretation, lawyers could elicit more information regarding prior conduct using Rule 608(b) than is allowed under Rule 609(a)(2). “Rule 609[(a)(2)] provides quite clearly that only the fact of conviction is admissible for impeachment. Rule 608(b), however, provides that specific instances of conduct, probative of ‘truthfulness or untruthfulness’ may be ‘inquired into on cross-examination’ of the impeached witness.”⁶⁵ Can the cross-examiner avoid the limits contained in Rule 609 by invoking Rule 608(b) instead? This strategy would also avoid Rule 609(b)’s ten-year limitation period⁶⁶ and Rule 609(c)’s ban on questions about convictions that have generated pardons or annulments.⁶⁷

V. CONCLUSION

South Carolina courts have not yet decided whether Rule 608(b) can be used to inquire into conduct that results in convictions. Perhaps courts could offer the cross-examiner a choice—either proceed under Rule 608(b) by asking about the underlying acts without mentioning the convictions, or proceed under Rule 609(a) and be limited to the conviction itself. Although Rule 608(b) seems preferable because the question may elicit more information, the judge has the discretion to allow or disallow this evidence. Under Rule 609(a)(2), however, a crime involving dishonesty or false statement will automatically be admissible. South Carolina courts will likely continue to interpret crimes involving dishonesty and false statement broadly so that more crimes are automatically admitted for impeachment purposes. Although the new rules of evidence supersede the moral turpitude standard of the common law, South Carolina courts may continue to look to the

62. See H. Richard Uviller, Essay, *Credence, Character, and the Rules of Evidence: Seeing Through the Liar’s Tale*, 42 DUKE L.J. 776, 804 (1993) (examining the relationship between rules 608 and 609). Although this article discusses the federal rules of evidence, the South Carolina rules are substantively similar.

63. S.C. R. EVID. 608(b).

64. Uviller, *supra* note 64, at 805.

65. *Id.* at 804 (quoting FED. R. EVID. 608(b)).

66. S.C. R. EVID. 609(b). This section provides that evidence of a conviction is not admissible if “more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement, . . . whichever is the later date.” *Id.* However, the court can make an exception if “the probative value of the conviction . . . substantially outweighs its prejudicial effect.” *Id.*

67. S.C. R. EVID. 609(c). This section provides that “[e]vidence of a conviction is not admissible . . . [if] the conviction has been the subject of a pardon, annulment, [or] certificate of rehabilitation.” *Id.*

common law for guidance in their interpretation of the dishonesty and false statement standard of Rule 609(a)(2). As a result, many crimes may be automatically admitted even if only tangentially related to dishonesty.

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