IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Petitioner,

v.

HON. LAURA CARDINAL, JUDGE OF THE SUPERIOR COURT
OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF COCHISE,
Respondent,

and

LONNEY MCCOY,
Real Party in Interest.

No. 2 CA-SA 2020-0040
Filed September 15, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Spec. Act. 7(g), (i).

Special Action Proceeding
Cochise County Cause Nos. CR201800156,
CR201800462, and CR201900763

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Brian M. McIntyre, Cochise County Attorney
By Michael A. Powell, Deputy County Attorney, Bisbee
Counsel for Petitioner

Peter A. Kelly, Palominas
Counsel for Real Party in Interest

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 In this special action, the state seeks relief from the respondent judge's order granting the motion in limine filed by the real party in interest, Lonney McCoy, in his criminal proceeding. Because the state has no remedy by appeal, we accept jurisdiction. *See* Ariz. R. P. Spec. Act. 1(a); *State v. Bejarano*, 219 Ariz. 518, ¶¶ 3-4 (App. 2008) (grant of motion in limine not "[a]n order granting a motion to suppress the use of evidence" allowing appeal under A.R.S. § 13-4032(6)). And because the respondent appears to have applied the wrong legal standard, we grant relief. *See* Ariz. R. P. Spec. Act. 3(c); *Gila River Indian Cmty. v. Dep't of Child Safety*, 238 Ariz. 531, ¶ 19 (App. 2015) (remand appropriate when "it is unclear what standard of proof the [trial] court applied"); *State v. Mohajerin*, 226 Ariz. 103, ¶ 18 (App. 2010) ("When a trial court predicates its decision on an incorrect legal standard, . . . it commits an error of law and thereby abuses its discretion.").

¶2 Under three cause numbers, McCoy has been charged with theft from a vulnerable adult, unlawful use of power of attorney, aggravated identity theft, criminal trespass, third-degree burglary, fraudulent schemes and artifices, disorderly conduct, three counts of forgery, and four counts of first-degree money laundering. In a motion in limine, McCoy sought to preclude evidence of his previous conviction for domestic violence assault, a class six felony. He committed the offense in 2014 and was placed on probation. In 2019, his probation was revoked and he was sentenced to time served.

¶3 McCoy argued the respondent judge was required to preclude evidence of his conviction under Rule 609(a)(2), Ariz. R. Evid., because the conviction did not involve dishonesty or a false statement. Although he cited Rule 609(a)(1)(B), he did not expressly argue that the probative value of the conviction was outweighed by its prejudicial effect. The state responded that admission was properly analyzed under Rule 609(a)(1)(B) and argued the chance of prejudice was slight because the offense was not similar to the charged offenses. The state listed other factors as favoring admission, including that McCoy was likely to testify, the "[c]entrality" of his credibility to the case, the recentness of his

conviction, and his conduct since committing the prior offense. The state also noted "the conviction should be sanitized."

¶4 At oral argument, McCoy again asserted preclusion was appropriate because his prior offense did not involve dishonesty. He also argued that sanitizing the conviction was ineffective because it left the jury to "speculat[e]" about the severity of the offense.[1] The state reviewed the factors identified in its response and argued it was improper to evaluate whether the offense involved dishonesty because the conviction was admissible under Rule 609(a)(1)(B).

¶5 The respondent judge granted McCoy's motion. She cited Rule 403, Ariz. R. Evid., and stated that admitting the prior felony "would be more prejudicial than probative. The probative value of the conviction does not substantially out-weigh the prejudicial impact." The state filed a motion for reconsideration, which the respondent denied. This special action followed.

¶6 Rule 609 governs the admission of evidence of previous convictions to impeach a witness. We review the respondent's determination for an abuse of discretion. *See State v. Duarte*, 246 Ariz. 338, ¶ 20 (App. 2018).

¶7 McCoy's previous conviction is for a class six felony with an aggravated prison term of two years. *See* A.R.S. § 13-702(D). Its admission, therefore, is controlled by Rule 609(a)(1)(B), which states that any crime punishable "by imprisonment for more than one year" "must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant." *See also State ex rel. Horne v. Campos*, 226 Ariz. 424, ¶ 38 (App. 2011) (noting class six felony is act "punishable by imprisonment for more than one year" under A.R.S. § 13-2301(D)(4) based on maximum and aggravated sentences). Thus, McCoy's reliance on Rule 609(a)(2) below was incorrect. That section addresses less serious crimes, allowing admission of evidence of "any crime regardless of punishment," only when "the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement."

[1]McCoy again asserts on review that sanitizing the conviction "may be even more damaging to a defendant" because jurors might speculate "concerning the nature of the felony." In light of our resolution of this case, we need not address this question.

¶8 It is difficult to tell, however, which subsection the respondent judge applied. Despite citing Rule 403, she referred to the standard in Rule 609(a)(1)(B), concluding the prejudice stemming from admitting the prior conviction exceeded its probative value. But Rule 403 provides that relevant evidence is inadmissible only when the prejudicial effect of that evidence "substantially outweigh[s]" its probative value. The respondent also recited the standard from Rule 609(b)(1) that evidence of a prior conviction more than ten years old is admissible only when its probative value "substantially outweighs its prejudicial effect." That subsection is not applicable to whether McCoy's 2014 felony conviction is admissible.

¶9 Moreover, the sole basis for prejudice McCoy identified below is that the conviction does not reflect on his honesty. But our supreme court has emphasized that "Rule 609(a)(1) recognizes that all felonies have some probative value in determining a witness' credibility upon the theory that a major crime entails such an injury to and disregard of the rights of other persons that it can reasonably be expected the witness will be untruthful if it is to his advantage." *State v. Malloy*, 131 Ariz. 125, 127 (1981). In sum, "[t]he perpetrator of a major criminal act has demonstrated such a lack of scruples as to show a willingness to give false testimony." *Id.* Thus, although a trial court could consider the nature of the underlying offense in evaluating its probative value, our supreme court has made clear that the fact the defendant committed a serious offense is admissible and probative of that defendant's honesty. Absent an additional basis to find prejudice, the evidence should be admitted. And, it is the defendant's burden to "counter[] the probativeness of veracity inherent in any prior felony conviction" by identifying unfair prejudice. *State v. Williams*, 144 Ariz. 433, 438 (1985).

¶10 Our supreme court has identified a non-exclusive list of factors a court may consider when evaluating the potential for unfair prejudice, including the "impeachment value of the prior, [the] length of time since the prior conviction, the witness' history since the prior conviction, the similarity between the past and present crimes, the importance of defendant's testimony, and the 'centrality of the credibility issue.'" *Id.* (quoting *State v. Mahone*, 537 F.2d 922, 929 (7th Cir. 1976)). McCoy cited none of these factors below, and neither did the respondent judge. Nor is there anything in the record suggesting those factors would weigh against admission here—as the state pointed out, the few relevant factors appear to favor admission. *See id.* ("Failure to enumerate the specific facts and circumstances upon which the ruling is based is not reversible error *if such information appears in the record*." (Emphasis added.))

¶11 Because it is unclear whether the respondent judge applied the correct standard, and application of the incorrect standard is an abuse of discretion, we vacate the respondent's order granting McCoy's motion in limine. *See Gila River Indian Cmty.*, 238 Ariz. 531, ¶ 19; *Mohajerin*, 226 Ariz. 103, ¶ 18.