IN THE SUPREME COURT OF THE STATE OF DELAWARE

WALTER HINES,	§	
	§	
	§	
Defendant Below,	§	
Appellant,	§	No. 562, 2019
	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
	§	
STATE OF DELAWARE	§	
	§	
	§	I.D. No. 1809015360 (N)
Plaintiff Below,	§	
Appellee.	§	
	§	

Submitted: December 9, 2020
Decided: February 17, 2021

Before **VALIHURA**, **VAUGHN**, and **TRAYNOR**, Justices.

Upon appeal from the Superior Court. **AFFIRMED**.

Santino Ceccotti, Esquire, Office of the Public Defender, Wilmington, Delaware.

Andrew J. Vella, Esquire, Department of Justice, Wilmington, Delaware.

VALIHURA, Justice:

Walter Hines appeals his conviction and sentence for Assault in the Second Degree, Possession of a Deadly Weapon During the Commission of a Felony ("PDWDCF"), and two counts of Endangering the Welfare of a Child ("EWC").[1] Hines raises a single issue on appeal. He argues that the Superior Court committed plain error by permitting the State to cross-examine him as to his prior convictions.

After a review of the record, we hold that the Superior Court properly permitted introduction of those convictions under Delaware Rule of Evidence ("D.R.E.") 609. The trial judge weighed the risk of prejudice against the probative value of Hines's felony convictions. Based on that analysis, when Hines testified, the Court received into evidence two felony convictions from 2008 for which Hines was discharged in 2014. The trial court did not admit Hines's misdemeanors or his older felony convictions.

Hines asserts that the Superior Court committed plain error by disregarding two limiting instructions relating to his prior convictions and by not applying D.R.E. 404. Because the State sought, and the Court properly granted admission of the convictions solely for impeachment purposes against Hines as a testifying witness pursuant to D.R.E. 609, we AFFIRM the Superior Court's conviction and judgment of sentence.

[1] App. to Op. Br. at A185–88 (Sentencing Order).

I. Relevant Facts and Background

Hines's issue on appeal relates to an incident that occurred on September 27, 2018.[2] At that time, Hines lived with Valeah Lewis, her mother Juliann Congo, and Lewis's children D.L. and T.L.[3] Michael Gibbs is Lewis's ex-boyfriend and is D.L.'s father. On September 27, as Lewis and Hines were leaving for work, Gibbs and his girlfriend, Putrice Barnes, arrived at the Lewis residence to pick up D.L. After a verbal exchange, Hines and Lewis drove a short way down the street then stopped. Barnes testified that she "flipped the bird" as Lewis drove past.[4]

Hines, Lewis, Barnes, and Gibbs all agree that an altercation ensued shortly thereafter, but their accounts differ regarding the key details.

Lewis and Hines testified that as they left, Barnes followed them, tailgating. According to their testimony, Hines stopped the car at Lewis's instruction,[5] and Gibbs charged them while Barnes retrieved a tire iron from the trunk of her vehicle.[6] Lewis asserts that Gibbs swung the tire iron at Hines,[7] while Hines asserts that Gibbs did not take

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[2] *See id.* at A007–10 (Indictment).

[3] *Id.* at A106 (Direct Examination of Valeah Lewis).

[4] *Id*. at A083 (Direct Examination of Putrice Barnes); *see also id*. at A068 (Direct Examination of D.L.) (corroborating that Barnes "stuck up the middle finger" as Lewis drove past); *id*. at A077 (Direct Examination of I.B.) (same).

[5] *Id.* at A109 (Direct Examination of Valeah Lewis); *id.* at A139 (Direct Examination of Walter Hines).

[6] *Id.* at A109 (Direct Examination of Valeah Lewis); *id.* at A140 (Direct Examination of Walter Hines).

[7] *Id*. at A110 (Direct Examination of Valeah Lewis).

the tire iron from Barnes but instead tried to punch him.[8] Both Hines and Lewis agree that Hines retrieved a baseball bat from the back seat and used it defensively against Gibbs in response to Barnes's and Gibbs's aggression.[9]

Barnes agrees that she followed Hines and Lewis in her vehicle while two of her other children, I.B. and E.G., were in the back seat.[10] Barnes testified that Hines stopped his vehicle and retrieved the baseball bat from his trunk unprompted.[11] She asserts that he then rushed to attack Gibbs, who had been standing in the driveway speaking to another of Lewis's children, T.L., but had started to come toward Lewis in response to Hines's actions.[12] According to Barnes, she only retrieved the tire iron after Hines began hitting Gibbs with the bat, intending to give it to Gibbs to defend himself.[13] Gibbs's account tracks with Barnes's as he agreed that Hines retrieved the bat from his trunk (not back seat) and that Hines attacked him immediately.[14]

The accounts from D.L., T.L., and I.B. largely align with those of Barnes and Gibbs. D.L. and I.B. thought that the bat was in Hines's trunk,[15] while T.L. thought it was the back

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[8] *Id*. at A142 (Direct Examination of Walter Hines).

[9] *Id.* at A110 (Direct Examination of Valeah Lewis); *id.* at A141 (Direct Examination of Walter Hines).

[10] *Id.* at A084 (Direct Examination of Putrice Barnes).

[11] *Id*. at A084–85.

[12] *Id*.

[13] *Id*. at A085–86.

[14] *Id.* at A047–48 (Direct Examination of Michael Gibbs).

[15] *Id.* at A068–69 (Direct Examination of D.L.); *id.* at A077–78 (Direct Examination of I.B.).

seat,[16] but all three testified that Hines was swinging the bat before Barnes took out the tire iron.[17]

Officer Marcos Reviera of the New Castle County Police responded to the scene.[18] By the time he arrived, Hines had left, but Lewis, Barnes, and Gibbs were still present. All three adults spoke to Officer Reviera, as did the four children present: T.L., D.L., E.G., and I.B. Gibbs had a bleeding, swollen left index finger, which Officer Reviera photographed.[19] Officer Reviera also observed and photographed an injury to Gibbs's left elbow and knee.[20]

Although the witnesses agreed on many of the facts, they differed critically on whether Hines retrieved the bat before Barnes retrieved the tire iron, and whether Hines attacked Gibbs or vice versa. Hines's affirmative self-defense claim rose and fell based upon the jury's assessment of whether to credit his and Lewis's account or that of the other witnesses on those key points of difference. Hines's credibility as a testifying witness was thus critical to his case.

Anticipating the possibility that Hines would testify, after the close of the State's case in chief, the parties presented arguments as to the admissibility of Hines's prior

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[16] *Id.* at A062–63 (Direct Examination of T.L.).

[17] *Id.* at A069 (Direct Examination of D.L.); *id.* at A062–63 (Direct Examination of T.L.); *id.* at A077–78 (Direct Examination of I.B.).

[18] *Id.* at A091–92 (Direct Examination of Marcos Reviera).

[19] *Id*. at A093.

[20] *Id*. at A094–95.

convictions under D.R.E. 609.[21] The State represented, and Hines does not dispute, that Hines had prior convictions for Possession with Intent to Deliver a Controlled Substance ("PWID") and Possession of a Firearm by a Person Prohibited ("PFBPP") from June 11, 2008, as well as older felony convictions for PWID and Assault Second Degree, and for several misdemeanors including two counts of Resisting Arrest from 2018 and 2006.[22]

The State sought admission of only "the felonies" and the two Resisting Arrest misdemeanors.[23] When pressed by the trial court, the State acknowledged that D.R.E. 609

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[21] *See id.* at A098 (D.R.E. 609 Motion):

> THE COURT: The State has rested. [Defense Counsel], you indicated that the defense intends to call at least a couple of witnesses, and that Mr. Hines may wish to testify. Do you want to discuss that further with Mr. Hines or is he ready for a colloquy at this point?
>
> DEFENSE COUNSEL: I think perhaps we could hold off on the colloquy until the other defense witnesses have testified, if that's okay.
>
> THE COURT: That's fine. Are there any 609 issues we need to address?
>
> THE STATE: Yes, there are.

[22] *Id.* The State, after it rested its case, advised the Court that it wished to seek to admit for "purposes of attacking [Hines's] credibility" Hines's felony convictions "as well as the recent crimes of resisting arrest, specifically the July 13, 2018 and the December 15th of 2006" convictions. *Id.* The state advised the Court that:

> Your Honor, the defendant's criminal history is as follows: Possession with intent to deliver a controlled substance, conviction June 11, 2008; possession with intent to deliver a controlled substance on December 15th of 2006; assault second degree, convicted on July 8th of 2004; possession of a firearm by a person prohibited, convicted on June 11th of 2008; and receiving stolen property under a thousand dollars, convicted on March 8, 2004, as well as misdemeanors of resisting arrest, convicted on July 13, 2018; and resisting arrest, convicted on December 15, 2006; as well as criminal mischief under a thousand dollars, convicted on August 14, 2003. Those are the defendant's adult convictions.

Id.

[23] *Id.*

addresses only felonies and crimes of dishonesty, eliminating the misdemeanor Resisting Arrest convictions from consideration.[24] The State also requested that regardless of how the court rules, the State should at least be permitted to confront Hines with the prior Assault Second Degree conviction should he testify as to his own peacefulness in a manner contradicted by that conviction.[25]

The trial court deferred giving a complete ruling because the parties had not identified Hines's release from confinement dates for his felony convictions.[26] The Superior Court ruled from the bench as follows:

> THE COURT: All right, I'm not going to give you my ruling because I do need to know the date of release from confinement which includes, as I understand the rule, at least, not just Level V confinement but any level of probation that was being served.
>
> So, whenever probation was discharged, essentially would be the release date from confinement, I do need to know that because it's particularly relevant to the weighing that the Court must do.
>
> I'll tell that you my inclination is for things that are older than ten years, I'm not going to let in, but if it's within the ten years it's a different weighing analysis and I would consider that for any crimes that fall within the ten years of the date of testimony. So let me know what, if any, convictions fall within that category, [the Prosecutor], and we can address on that.
>
> With respect to convictions where the release date from confinement is more than ten years, as a I read the rule, the Court has to determine that the

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[24] *Id.*

[25] *Id.* at A099.

[26] *Id.* at A100 (D.R.E. 609 Bench Ruling); *see also* D.R.E. 609(b) ("Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the 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.").

> probative value of that conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect and I haven't heard anything about these, with one caveat, I haven't heard anything about these convictions and the specific facts and circumstances with them that makes the probative value of them substantially outweigh their prejudicial effect.
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> However, [Prosecutor], I agree with respect to the assault second conviction, were the defendant to take the stand, say I'm a peaceful person, I would never be violent toward anyone, separate and apart from the 609 analysis, I think that is fair game and I'm sure you can speak with your client about that, [Defense Counsel].
>
> So, let me know on the dates and then I'll get to the rest of my 609 ruling. We'll do a colloquy with the defendant later on, after the other witnesses have testified.[27]

Thus, because the release from confinement date for the 2008 convictions was initially unclear, the trial court deferred ruling on them. It provisionally ruled to exclude felony convictions older than ten years.[28] However, the trial judge put the parties on notice of her intent to permit the State to confront Hines with his prior 2004 Assault Second Degree conviction should Hines open the door by testifying as to his own peaceful nature.[29]

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[27] App. to Op. Br. at A100 (D.R.E. 609 Bench Ruling). This Court previously analyzed how to calculate the age of a conviction under D.R.E. 609(b) in *Wilson v. Sico*, 713 A.2d 923 (Del. 1998). In that case, we held that counting unsupervised probation as 'confinement' was inconsistent with both the plain language and history of D.R.E. 609(b). *Id.* at 925; *see also* 11 *Del. C.* § 4204(c) (describing the ascending levels of accountability sanction available to Delaware courts in sentencing offenders for violations of the Criminal Code other than class A felonies, up to Level IV "partial confinement" and Level V "incarceration"). Because Hines does not raise the Superior Court's use of his parole discharge date for D.R.E. 609(b) purposes in the present appeal, we do not address the correctness of the Superior Court's calculation. *See* Del. Sup. Ct. R. 14(b)(vi)(A)(3) ("The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.").

[28] App. to Op. Br. at A100 (D.R.E. 609 Bench Ruling).

[29] *Id*.

Following a lunch recess, the State subsequently identified Hines's discharge dates, and the Superior Court identified the PWID and PFBPP offenses from 2008, discharged in 2014, as the only ones falling within D.R.E. 609's ten-year period.[30] The Superior Court then ruled from the bench as follows:

> THE COURT: But to me, only the possession with intent to deliver with sentencing date on June 11, 2008, and a discharge from probation on November 14, 2014, and the possession of a firearm by a person prohibited with the same relevant sentencing and release dates fall within the ten years of 609(b). That doesn't mean those convictions automatically are admissible, but rather, they are admissible if the Court finds that their probative value outweighs the prejudicial effect.
>
> There is, of course, always some prejudicial effect in the jury hearing that a defendant was convicted of a felony offense, but there's nothing about these particular felonies that makes them unduly prejudicial in my view, and there's certainly, particularly in a case such as this where we're talking about eyewitness accounts and what I assume, the defense case will have different accounts as to what transpired that day.
>
> Where credibility really is an issue I think it is, there is probative value to the jury hearing about the defendant's felony convictions, should he choose to testify, and that that probative value outweighs any prejudicial effects about the jury hearing about these convictions. Of course, all the jury will hear is what the convictions were and the relevant dates, nothing relating to the underlying offense.
>
> Do the parties have any questions with respect to the 609 ruling.[31]

To the court's question at the end, the State responded, "[n]o, Your Honor."[32]

Hines's counsel then confirmed the parameters of the trial judge's ruling on the record:

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[30] *Id.* at A101.

[31] *Id.*

[32] *Id.*

> DEFENSE COUNSEL: Your Honor, so I just want to make sure I'm a hundred percent clear. The convictions, if Mr. Hines chooses to testify, the Court is allowing the State to cross-examine him regarding the 2008 sentence with possession with intent to deliver conviction and the same sentence, June 2008, possession of a firearm by a person prohibited conviction.
>
> THE COURT: Correct.[33]

Hines did testify, and on direct examination by his counsel, Hines introduced his PWID and PFBPP convictions from 2008:

> DEFENSE COUNSEL: Walter, before we get into what happened that day, you've had some legal troubles in the past, right?
>
> HINES: Yeah, yes.
>
> DEFENSE COUNSEL: You've been convicted of a couple of crimes before, is that right?
>
> HINES: What you mean, a couple?
>
> DEFENSE COUNSEL: I mean, you've been convicted of possession of a firearm by a person prohibited and drug dealing before, right?
>
> HINES: Yeah.
>
> DEFENSE COUNSEL: That was back in 2008, is that right?
>
> HINES: Yeah.[34]

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[33] *Id.*

[34] *Id.* at A138 (Direct Examination of Walter Hines). Later in his testimony, in a non-responsive answer to a question by the State, Hines volunteered that he "just got done doing from the charges that you actually know about of me, I did time for them." *Id.* at A156. His counsel asked the Court to instruct the jury to disregard that remark since, "[t]he jury now knows he's been in prison." *Id.* The Court declined, but did instruct the jury that they should make no inferences and give no weight to Hines's statement. *Id.* at A156–157 (instructing the jury that "[e]vidence of someone previously convicted of a crime may be considered by you in evaluating their credibility but you should not consider it in reaching a decision as to whether the defendant might have some propensity to commit a crime. That is only to be considered by you for purposes of judging his credibility in this case and testifying.").

At the outset of its cross-examination of Hines, the State requested a sidebar and alerted the trial court that it intended to cross-examine Hines as to parts of his testimony that may provoke him to make a statement as to his own peacefulness that might open the door to the Assault Second Degree conviction. The trial court instructed the State to "ask for a sidebar first" if it believed Hines had opened the door.[35]

During the cross-examination, following questioning of Hines about how the confrontation between Hines and Gibbs ended, Hines's counsel requested a sidebar.[36] The trial judge and the State agreed that Hines's responses to that point had not asserted a peaceable character, and that the Assault Second Degree conviction would remain off-limits unless Hines's responses suggested a peaceable character.[37] After the sidebar, Hines testified further, and at no point did he assert that he had a peaceable character. The State did not thereafter attempt to introduce the Assault Second Degree conviction. The State then concluded the cross examination of Hines with the following exchange:

> THE STATE: As [Defense Counsel] had asked you, as you had mentioned, you were convicted on June 11, 2008, of possession with intent to deliver, known as drug dealing, and possession of a firearm by a person prohibited?
>
> HINES: Yes.
>
> THE STATE: I have no further questions, Your Honor. [38]

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[35] *Id.* at A144 (Cross-Examination of Walter Hines).

[36] *Id.* at A157.

[37] *Id.* at A157–58.

[38] *Id.* at A161.

On September 6, 2019, the jury convicted Hines of Assault in the Second Degree, PDWDCF, and two counts of EWC,[39] and sentenced him on December 6, 2019.[40] Hines was sentenced to three years of unsuspended Level V incarceration, followed by periods of declining supervision, as well as fines and collateral requirements such as no-contact orders, anger management classes and a mental health evaluation.[41] Hines timely appealed.

II. Contentions of the Parties

On appeal, Hines asserts that the Superior Court committed plain error in two ways when it permitted the State's final cross-examination question about his prior convictions for PWID and PFBPP. *First*, he argues that his convictions were not properly admissible under D.R.E. 404 and our cases interpreting D.R.E. 404. *Second*, he asserts that the trial court's instruction at the outset of Hines's cross-examination, that the prosecutor should request a sidebar if he believed the defendant had asserted a peaceful nature, applied as a precondition to admitting *any* of Hines's prior convictions, not merely his prior Assault Second Degree conviction. Thus, Hines argues that the State's final question violated the trial court's order.

The State responds that Hines's two 2008 felony convictions were properly admitted under D.R.E. 609 to impeach his credibility. It further contends that D.R.E. 404 does not apply since the convictions were not admitted to prove an element of the offense charged.

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[39] *Id.* at A182–83 (Jury Verdict). The jury acquitted him of an Aggravated Menacing count and two EWC counts. *Id.* Of the four EWC counts, the jury convicted Hines of endangering T.L. and D.L., but acquitted him as to E.G. and I.B.

[40] *Id.* at A185–88 (Sentence Order).

[41] *Id.* at A185–88 (Sentencing Order); *see also id*. at A182–83 (Jury Verdict).

Thus, the State argues that the Superior Court's evidentiary rulings were correct under D.R.E. 609, and that the State's questioning was consistent with the court's instructions.

III. Standard and Scope of Review

"We review a trial court's decision on the admissibility of evidence under an abuse of discretion standard."[42] "We generally decline to review contentions not raised below and not fairly presented to the trial court for decision."[43] Because Hines did not contemporaneously object to the State's last question on cross-examination, we review the decision for plain error.[44] The doctrine of plain error is limited to "material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[45]

IV. Analysis

A. The Prior PWID and PFBPP Convictions Were Properly Admitted Under the Rules of Evidence

In his brief, Hines relies on D.R.E. 404(b) and four cases interpreting it. Three of

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[42] *Rivers v. State*, 183 A.3d 1240, 1243 (Del. 2018) (citing *Forrest v. State*, 721 A.2d 1271, 1275 (Del. 1999)).

[43] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (citing Del. Sup. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986); *and Jenkins v. State*, 305 A.2d 610 (Del. 1973)).

[44] *Id*. (Under our rules, an issue may be raised for the first time on appeal only if we find that the trial court "committed plain error requiring review in the interests of justice.") (citing Del. Sup. Ct. R. 8; and *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995)).

[45] *Wainwright*, 504 A.2d at 1100.

the opinions were issued by this Court -- *Getz v. State*,[46] *Morse v. State*,[47] and *Campbell v. State*.[48] Both *Morse* and *Campbell* apply *Getz* as our governing standard for D.R.E. 404 admissibility.[49] The fourth, *Huddleston v. United States*, is a United States Supreme Court decision addressing the parallel Federal Rule of Evidence 404.[50]

But as the State correctly notes, the basis for admitting Hines's convictions was not D.R.E. 404, but rather, D.R.E. 609. As this Court observed in *Getz*, "[t]he adoption of D.R.E. Rule 404(b), modeled after Federal Rule of Evidence 404(b), formalized the general rule forbidding introduction of character evidence solely to prove that the defendant acted in conformity therewith on the occasion in question."[51] The second sentence of D.R.E. 404(b), however, "permits introduction of such evidence for reasons other than proving propensity, 'such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.'"[52] The *Getz* analysis begins by inquiring whether the other-crimes evidence is "material to an issue or ultimate fact in dispute in the case."[53] By contrast, D.R.E. 609 is a rule of witness impeachment.

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[46] 538 A.2d 726 (Del. 1988).

[47] 120 A.3d 1 (Del. 2015).

[48] 974 A.2d 156 (Del. 2009).

[49] *Morse*, 120 A.3d at 8; *Campbell*, 974 A.2d at 160–61.

[50] 485 U.S. 681, 682 (1988).

[51] *Getz*, 538 A.2d at 730.

[52] *Id*. As this Court stated in *Getz*, "[h]ence, evidence of prior misconduct is admissible when it has 'independent logical relevance' and when its probative value is not substantially outweighed by the danger of unfair prejudice." *Id*.

[53] *Id.* at 734.

The State did not argue that Hines's prior convictions were admissible as part of its case-in-chief and that they were independently logically relevant to prove some fact supporting the conclusion that Hines committed the offense charged.[54] Rather, the State was explicit that it "would seek to admit [the convictions] *for the purposes of attacking his credibility*."[55] When the trial judge issued her ruling, she expressly based it on D.R.E. 609,[56] and confirmed with the State that the prior convictions' admissibility was limited to cross-examining Hines as a testifying witness.[57]

As this Court has held, where the use of prior convictions is solely for impeachment under D.R.E. 609, reliance on *Getz* is misplaced.[58] Instead, "use of prior convictions solely for impeachment must be determined under D.R.E. 609."[59] Under D.R.E. 609, the trial court determines whether the prior convictions are felonies, and if they involved dishonesty or false statements.[60] If, as here, the crimes are felonies not involving dishonesty or false statements, the trial court must balance the probative value of the convictions against the

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[54] The State argued before the Superior Court that:

> The State would not be submitting the evidence to show that because the defendant has these, convictions, that he committed this crime. The purpose of that would be for the jury to know the defendant's prior felony convictions and to be able to assess his credibility based on his entire history here.

App. to Op. Br. at A099 (D.R.E. 609 Motion).

[55] *Id*. at A098 (emphasis added).

[56] *See id.* at A101 ("So, this is my ruling with respect to the 609 issues.").

[57] *Id.* at A101. Hines's contention in his opening brief that his "credibility was never in question" is not consistent with any reasonable reading of the trial court record. Op. Br. at 10.

[58] *Gregory v. State*, 616 A.2d 1198, 1203 (Del. 1992).

[59] *Id*.

[60] *Morris v. State*, 795 A.2d 653, 665 (Del. 2002).

risk of prejudice.[61] A conviction passing this weighing test "must be admitted,"[62] but only as to "the type of crime and the date and place of the convictions, without releasing the prejudicial details of the events."[63] As this Court stated in *Archie v. State*, "the cross examination should be restricted to the fact of the convictions, and the circumstances and details of prior criminal conduct should not be explored by the prosecutors."[64] Moreover, the rule provides for a time limit, further limiting admissibility if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement, whichever is the later date.[65] To use an older conviction, the trial court must find that its probative value of the conviction "substantially outweighs its prejudicial effect."[66] And for any introduction of a prior conviction for impeachment purposes, the trial court is required to give a cautionary jury instruction.[67]

The trial court engaged in exactly that analysis. The trial judge balanced the prejudicial effect of the relevant felonies against their probative value and found their probative value outweighed any prejudicial effect.[68] As noted above, Hines's counsel then

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[61] *Id.* (stating that D.R.E. 609(a)(2) "permits the admission of prior convictions of crimes involving dishonesty without applying the balancing test of Rule 609.").

[62] D.R.E. 609(a).

[63] *Archie v. State*, 721 A.2d 924, 928 (Del. 1998).

[64] *Id.* (quoting *United States v. Robinson*, 8 F.3d 398, 409 (7th Cir. 1993)).

[65] D.R.E. 609(b).

[66] *Id.* In addition, the proponent must give to the adverse party sufficient advance written notice of its intent to use it so that the party has a fair opportunity to contest its use.

[67] *Massey v. State*, 953 A.2d 210, 218 (Del. 2008).

[68] App. to Op. Br. at A101 (D.R.E. 609 Bench Ruling). Although the trial court's analysis of the balancing test was brief, the court performed it as required under the Rule.

recapped the trial court's ruling stating, "[t]he convictions, if Mr. Hines chooses to testify, the Court is allowing the State to cross-examine him regarding the 2008 sentence possession with intent to deliver conviction and the same sentence, June 2008, possession of a firearm by a person prohibited conviction.[69]

The judge properly excluded the older convictions and the misdemeanors, except as to the felony Assault Second Degree conviction, as failing to substantially outweigh prejudice.[70] Measuring the Assault Second Degree conviction against that standard, the trial court determined that it would substantially outweigh prejudice only if Hines made a statement as to his own peacefulness which the conviction would contradict, as that would increase its probative impeachment value by challenging Hines's honesty.[71] In addition, the Superior Court properly gave a limiting instruction.[72]

The trial court's decisions as to admissibility were made under the relevant rule and in accordance with the proper standards. Hines provides no basis in the record or in

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[69] *Id.*

[70] *Id.*

[71] *Id.* at A100.

[72] *Id.* at A180 (Jury Instructions). Specifically, the Superior Court instructed that:

> Defendant's conviction of a crime. You may consider evidence that the defendant previously was convicted of a felony solely for the purpose of judging the defendant's credibility or believability. Evidence of a prior conviction does not necessarily destroy or damage the defendant's credibility, and it does not mean that the defendant has testified falsely. It is simply one of the circumstances you may consider in weighing the defendant's testimony. You may not consider evidence of the defendant's prior conviction in deciding guilt or innocence. You may only consider such evidence in judging the defendant's credibility.

Id.

Delaware case law from which this Court could find the Superior Court abused its discretion.

B. The State Did Not Violate the Trial Judge's Order.

The second part of Hines's challenge to the admission of the two felonies relates to the trial court's ruling on the Assault Second Degree conviction. The trial court had withheld a final ruling on that conviction's admissibility, contingent on the substance of Hines's testimony. Hines now points to the sidebar at the outset of his cross-examination, where the State and the trial judge discussed that conditional admissibility with respect to "*convictions*."[73] Hines's theory is that that in discussing *convictions* plural, the trial court extended its instruction that the Assault Second Degree conviction was only conditionally admissible based on the content of Hines's testimony to also limit the admissibility of his PWID and PFBPP convictions as well. Because Hines never asserted his own peaceful character, he argues that the State violated this order by inquiring as to his PWID and PFBPP convictions.

Hines's reading of the sidebar is not consistent with the context in which it occurred. The Court's instruction "[i]f you think you are going to go there, ask for a sidebar first" plainly refers to the Assault Second Degree conviction where the probative of that conviction value depended on the content of Hines's testimony. The trial court's instruction to request a sidebar allowed the trial court to assess whether Hines's testimony had sufficiently opened the door for that conviction's probative value to substantially

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[73] *Id.* at A144 (Cross-Examination of Walter Hines).

outweigh any prejudice in accordance with the requirements of D.R.E. 609(b). The parties and the trial court expressly confirmed that understanding at the time as follows:

> DEFENSE COUNSEL: Your Honor, I'm sorry, I'm not trying to bog this down but it sounds like we were getting into the area of the testimony where [the Prosecutor] previously stated she was going to cross-examine my client ***with other convictions that the Court has not yet ruled admissible and the Court indicated we should do a sidebar.***
>
> THE COURT: I don't think she's gotten to the point where she can – I think there's a follow-up question coming.
>
> THE STATE: That's correct, Your Honor.
>
> THE COURT: Only if he were to say that, but I'm not somebody who would assault somebody.
>
> THE STATE: I apologize.
>
> THE COURT: Only if he were to say I'm a peaceable person, I would not assault someone.
>
> THE STATE: Yes, correct.
>
> THE COURT: Then we come to sidebar.[74]

In sum, Hines's testimony did not open the door to the prior Assault Second Degree, and so the State did not confront Hines with it and the Superior Court did not admit it. Hines's felony convictions for PWID and PFBPP were properly introduced as impeachment evidence in accordance with Delaware law and the trial court's instructions. Hines, himself, introduced these convictions in his direct testimony, and the State ended its cross-examination of him asking him to confirm that he had been convicted of these two offenses. The State did not violate the trial court's evidentiary rulings, and the trial court

[74] *Id.* at A157 (Cross-Examination of Walter Hines) (emphasis added).

did not commit plain error by permitting the State to question Hines as to his prior PWID and PFBPP convictions from 2008.[75]

V. Conclusion

For the forgoing reasons, the judgment of the Superior Court is AFFIRMED.

[75] Although Hines has not raised it, in *Martin v. State*, 346 A.2d 158, 160 (Del. 1975), this Court held that when a testifying defendant admits to his prior convictions on direct examination, "given the narrow context in which evidence of prior felony convictions is admissible in Delaware, . . . the State should not be permitted to simply develop a repetition of what came out during direct testimony." We observed that "[t]he tendency to judge on the basis of a bad general record is too strong to encourage repetition of it." *Id.* In *Martin*, because "a single question and answer [was] the extent of the repetition," we held that "the error was harmless beyond a reasonable doubt." *Id.* Likewise, here, the single question and answer was the extent of the repetition and any error arising from it would be harmless beyond a reasonable doubt.