

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL JOHNSON,)
) No. 228, 2003
 Defendant Below,)
 Appellant,) Court Below: Superior Court
) of the State of Delaware in
 v.) and for New Castle County
)
 STATE OF DELAWARE,) Cr. A. Nos. IN02070399, IN01070400
) thru IN02070405, IN02072552
 Plaintiff Below,)
 Appellee.) ID No. 0206016046

Submitted: November 18, 2003

Decided: January 15, 2004

Before **VEASEY**, Chief Justice, **HOLLAND**, and **STEELE**, Justices.

ORDER

This 15th day of January 2004, upon consideration of the briefs of the parties, it appears to the Court as follows:

1. Michael Johnson is the father of two of Tiesha Youngrose's four children. Johnson would occasionally baby-sit the children at Youngrose's home, although he did not have a key to the house. On June 22, 2002, Youngrose and a friend, Ernest Wilson, returned to her house around 10:00 p.m. after attending a wedding and went to bed. Johnson unlawfully entered Youngrose's house that night, opened her bedroom door, and turned on the light. Youngrose was unable to call the police because the phone line had been cut. Johnson struck her several

times when she attempted to leave and seek help. Johnson assaulted Wilson with a knife and fled the house only after Wilson struck Johnson in the head with a glass.

2. On August 12, 2002, a grand jury indicted Johnson on two counts of Possession of a Deadly Weapon during Commission of a Felony, Aggravated Menacing, Assault First Degree, Burglary First Degree, Assault Third Degree, Terroristic Threatening, and Criminal Mischief. A jury trial began on January 30, 2003. Before Johnson testified, his counsel made a motion *in limine* seeking to tailor the wording of any reference to Johnson's earlier convictions. Defense counsel requested that Johnson's earlier convictions be referred to, not as "robberies," but as misdemeanors and/or felonies that "involved theft." Johnson had been previously convicted of Robbery Second, Possession of a Deadly Weapon, Shoplifting, and Criminal Impersonation. The motion was denied. On February 3, 2003, a jury convicted Johnson of all charges.

3. On appeal, Johnson argues that the trial judge erred by denying the motion. Johnson does not contest that the convictions were admissible for impeachment purposes under D.R.E. 609(a)(2). He acknowledges that D.R.E. 609(a)(2) is not subject to the same balancing test required by 609(a)(1).¹ His appeal is based solely on the trial judge's failure to apply the D.R.E. 403 balancing

¹ D.R.E. 609(a): General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted but only if the crime (1) constituted a felony under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect or (2) involved dishonesty or false statement, regardless of its punishment.

test.² Johnson maintains that reference to his earlier convictions as robberies instead of thefts adds no probative value for impeachment purposes and only provides additional information that may be used improperly by the jury.

4. After *de novo* review, we conclude that the trial judge did not err because prior convictions admitted pursuant to D.R.E. 609 (a)(2) are not subject to the D.R.E. 403 balancing test.³ A prior conviction is admissible under D.R.E. 609 (a)(1) to attack the credibility of a witness “*only if*” it is a felony “*and*” the court performs the requisite balancing test. Conversely, the absence of a balancing test in D.R.E. 609(a)(2) precludes judges from weighing the probative value against any potential prejudicial effect. Accordingly, if a prior conviction is admissible for impeachment purposes under 609(a)(2), the trial court has no authority to exclude it, regardless of its prejudicial effect. Further, the prosecution is permitted to make a full inquiry on cross-examination about a prior conviction admissible under 609(a)(2).⁴

5. The trial judge applied settled Delaware law when he admitted Johnson’s prior convictions. He had no discretion to conduct a D.R.E. 403

² D.R.E. 403 states: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury, or considerations of undue delay, waste of time or needless presentation of cumulative evidence.

³ *Gregory v. State*, 616 A.2d 1198, 1204 (Del. 1992).

⁴ *Archie v. State*, 721 A.2d 924 (Del. 1998).

balancing test or to order the modification of any reference to Johnson's prior convictions.

NOW, THEREFORE IT IS ORDERED that the judgment of the Superior Court be, and the same hereby is, AFFIRMED.

/s/ Myron T. Steele
Justice