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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

On Petition for Writ of Certiorari to Spartanburg County
Court of Common Pleas

The Honorable J. Derham Cole, Trial Judge
The Honorable Roger L. Couch, PCR Judge

Appellate Case No. 2019-000334

CARNIE NORRIS. .....Respondent.

v.

STATE OF SOUTH CAROLINA. .....Petitioner.

BRIEF OF PETITIONER

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Petitioner's Statement of Issue

Did the PCR court err in granting post-conviction relief due to the unobjected introduction of Norris' prior convictions for burglary and robbery in a trial for armed robbery where the law at the time of trial established the prior convictions were crimes of dishonesty, where Norris was caught in possession of the victims' property and the knife they described mere yards away from the scene of the crime, and where the Norris' testimony was an inconsistent, self-serving fabrication?

STATEMENT OF THE CASE

Carnie Norris (hereafter "Norris") is presently confined in the South Carolina Department of Corrections. During its September 2008 term, the Spartanburg County Grand Jury indicted Norris for armed robbery (2008-GS-42-05631). Norris was represented by Beverly D. Jones, Esquire (hereafter "Counsel"). Solicitor Barry J. Barnette, Esquire, from the Seventh Circuit Solicitor's Office, represented the State. On July 6-7, 2009, the case proceeded to trial before the Honorable J. Derham Cole, circuit court judge. On July 7, 2009, the jury found Norris guilty of the crimes charged. Judge Cole sentenced Norris to twenty-eight years' imprisonment.

Norris filed a notice of appeal, which was perfected by Katherine H. Hudgins, Esquire, by filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). Norris subsequently made a *pro se Anders* response. The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Norris*, 2012-UP-226 (S.C. Ct. App. filed Apr. 18, 2012). The remittitur was issued on June 19, 2012.

Norris timely filed a PCR application on November 7, 2012. The State made its return on February 28, 2014. The evidentiary hearing occurred on September 15, 2014, before the Honorable Roger L. Couch, circuit court judge. J. Brandt Rucker, Esquire was Norris' attorney. Suzanne H. White, Esquire of the South Carolina Attorney General's Office represented the State. Both parties submitted written memoranda/briefs in lieu of closing arguments. By written order dated September 6, 2017, and filed September 6, 2017, Judge Couch granted the application for post-conviction relief, finding "Trial counsel's consent to the introduction of the prior convictions, and her introduction of the prior convictions during her direct examination of the Applicant was error." (App. 505). The State filed a motion to alter or amend the order on September 25, 2017. Judge Couch denied the State's motion by order filed February 15, 2019.

The State filed a notice of appeal on March 1, 2019. The State filed the petition for writ of certiorari and appendix on September 20, 2019. Williams' filed their return on February 3, 2020. The South Carolina Supreme Court transferred this matter to the South Carolina Court of Appeals on February 18, 2020. The Court of Appeals granted certiorari on August 19, 2022. This Brief of Petitioner follows.

STATEMENT OF FACTS

I. The victims and witnesses consistently testified that they were out playing Frisbee-golf when Norris approached, forced Bond to the ground, identified himself as a security guard, rifled through Bond's wallet, and held Bond at knifepoint when there was no report of a burglary.

At trial, victim Andrew Bond testified that on July 16, 2008, he and several friends were playing Frisbee-golf when he was pushed to the ground by a man from behind who demanded his ID and told him he was under arrest. (App. 113-15). The man took Bond's wallet and start looking through it. (App. 115). Bond identified him as Carnie Norris. (App. 115). When Bond asked to see Norris' badge, Norris pulled a knife out and held it to his throat. (App. 116). Law enforcement later found a knife on Norris' person, which Bond identified as the knife used in the assault. (App. 116, 123, l 90). Once the co-defendant arrived on scene and began rifling through Bond's wallet, Norris directed Bond to stay down and not move or Norris would kill him. (App. 117-19). Once Bond's friends pulled up in their cars and the officers arrived, Norris and his co-defendant handed Bond his empty wallet and cell phone before leaving. (App. 119-20).

Herbert Blankenship, a fellow Frisbee-golf player, saw Norris grab Bond, put him on the ground, announce he was a security officer, and pull a knife. (App. 144-45). As Blankenship and company approached Norris and Bond, Norris pulled the knife, pointed it at the others, and told them to get on the ground. (App. 145-47). Blankenship identified Norris as the perpetrator. (App. 146-47, 160-61). Blankenship and company retreated and contacted security, who called the police. (App. 147-48). The group drove back to the scene and Blankenship directed his headlights at the area where Norris had Bond on the ground until officers arrived. (App. 148-49). Blankenship identified the knife found on Norris as the knife used in the attack. (App. 149, 161).

Daniel Mayfield, another Frisbee-golfer, saw Norris approach Bond, put him on the

ground, and remove his wallet. (App. 169-70). As Mayfield and the others approached them, Norris pointed a knife towards the group and told them to get on the ground. (App. 170). Mayfield identified the knife found on Norris as the knife used in the attack. (App. 170). Mayfield identified Norris as the attacker in court and identified co-defendant Kenneth Chiles. (App. 170-72). Mayfield and company fled and agreed to call the police. (App. 172). Blankenship, who left to retrieve his car, returned "a minute or two later" and the group left to alert a security guard. (App. 172-73). Mayfield testified that Norris identified himself as a security guard before taking Bond's wallet. (App. 175-76, 183-84).

Officer Brad James, of the Spartanburg Public Safety Department, responded to a call about a disturbance involving "a friend being held at knifepoint," and found Norris standing over Bond with "a black object in his hand." (App. 186-87, 192-93, 209). As James approached, the suspect "handed the black object back to the white male that was one the ground[,]" and then crossed the street. (App. 187-88). The man on the ground told James the men robbed him after one identified himself as a security guard. (App. 188-89). James, after receiving backup from Officer John Guest, walked across the street to the still visible Norris and Chiles, and informed them that Bond and his friends accused them of robbing him. (App. 189). Both men initially denied possessing anything belonging to Bond, but Chiles surrendered a few cards from his pocket. (App. 189-91). After receiving consent from Norris, James searched him and found a black-handled kitchen knife. (App. 190, 206). James took the knife and presented it to Bond, who identified it as the weapon used in the robbery. (App. 190-91).

Officer Guest testified law enforcement received two calls regarding a disturbance with weapons, which they found out were from the Hangar security guard and one of Bond's friends. (App. 210). Guest testified that he arrived on scene and saw Norris and Chiles sitting on the

porch across the street. (App. 210-11). Guest spoke with James and both officers crossed over to interview Norris and Chiles. (App. 211). Guest explained that the men mentioned, after prodding, that Frisbee golfers were on the roof. (App. 211). Guest asked for consent to search Chiles, who consented and handed over several of Bond's business and credit cards. (App. 211-12, 214). Guest saw James recover the knife from Norris. (App. 212-13). Guest testified Bond identified the knife as the one used in the robbery. (App. 213). The officers then detained Norris and Chiles. (App. 213). Guest confirmed he never received a call-in regard to a break-in in that area and did not search the premises consistent with any such call. (App. 213, 217).

II. Norris and Chiles claimed they performed a "citizen's arrest," but were inconsistent with one another at trial, and inconsistent with Norris' testimony at the evidentiary hearing.

Both Chiles and Norris testified in their defense. Chiles testified that he fell asleep while watching television and having a beer when Norris knocked on his door. (App. 240, 247-49). Chiles testified Norris told him somebody was trying to break into a building and asked to use his phone. (App. 240-41). Chiles retrieved his phone and went outside to see a tree shaking with two to three people on top of the building. (App. 241, 247-48, 252, 255-56). Chiles recalled that by the time he had put pants on and come back outside, Norris had Bond on the ground, with his hand on the man's shoulder. (App. 241-42, 248, 256-58).

Chiles testified Norris asked him to hold the man's I.D., among a stack of other cards, so Chiles pocketed them. (App. 242-43, 257). Chiles denied going through Bond's wallet, or that he ever saw the wallet, despite his reported statement of having seen the cards fall out of Bond's wallet. (App. 243, 246, 257, 259). The cards were on the ground before Norris picked them up and handed them to Chiles. (App. 259).

Chiles testified that law enforcement arrived before he could call them. (App. 242, 254,

256-57, 260-61). Chiles claimed that they spoke to two or three officers before crossing the street to the porch, and that he ultimately surrendered the cards upon police inquiry. (App. 244-45, 260, 262-63). Chiles described it as a "citizen's arrest," and that if he thought it was "just kids playing" he would have stayed in bed. (App. 242-43, 246-47). Chiles denied knowledge about the knife or personally possessing a weapon. (App. 249, 258-59, 263). Chiles did not know why Norris was out after midnight. (App. 254-55). Chiles denied hearing Norris identify himself as a security guard. (App. 261-62).

Chiles' friend, A.C. Worthy also testified, recalling that he and Chiles drank multiple beers while watching wrestling. (App. 229-30). After wrestling, Worthy changed the channel to the news, and heard Norris call for Chiles from the window. (App. 231). After repeated calls from Norris, Chiles got up and asked Norris what he wanted, and thereafter got dressed over the course of five to ten minutes. (App. 232-34). Worthy testified Chiles left, then came back to get his cell phone. (App. 234-35). Worthy did not know what happened after Chiles retrieved his cell phone but recalled he "was sitting looking at the wrestling when the officers come back, and they had Mr. Chiles with them in handcuffs." (App. 235). Worthy testified he never heard sirens from patrol cruisers, only "some guys on the porch talking." (App. 236).

Norris testified he was walking up the street when he heard leaves rustle, prompting him to look up and see two people on top of the clinic. (App. 265-66). Norris summoned Chiles and explained something was occurring at the clinic. (App. 266-68). Chiles retrieved his cell phone and the two went over to the people near the clinic and asked what was happening. (App. 268-69). Norris testified that when he asked Bond who he was, Bond became afraid, pulled out his wallet and cell phone, produced cards from the wallet, and showed it to Norris, but that he never possessed Bond's wallet. (App. 270-71, 276). Norris denied preventing Bond from leaving but

testified that he initially prevented Bond from fleeing by holding his arms out, and testified he instructed Bond to wait until police arrived. (App. 269, 271). Norris also denied using a knife during the altercation but admitted to possessing a knife, which he claimed he alerted the police to prior to the search. (App. 279-80). Norris asserted Bond handed the cards over when requested to and dropped some others which Norris instructed Chiles to hold. (App. 259, 275-76). Norris and Chiles provided inconsistent testimony as to whether Bond had an identification card on his person. (App. 258, 276).

At the PCR hearing, Norris attempted to present a claim of prosecutorial misconduct and, in the process, presented new facts. Norris testified he had two knives on his person that evening: a pocketknife and a fish paring knife. (App. 436). Norris testified that they were taken across the street to the porch by law enforcement, and that law enforcement approached again with guns drawn. (App. 436). Norris accused the officers of perjuring themselves for (1) stating the search was consensual and (2) mentioning only the one knife. (App. 436-37).

III. The prior convictions were admitted solely for impeachment, argued solely for impeachment, and comprised a very small part of the trial.

Prior to the testimony of either defendant, the trial court took up the matter of impeachable prior convictions. (App. 225-28). The State asserted Norris had two timely prior convictions: an October 12, 1995, conviction for second-degree burglary, non-violent; and a January 17, 1996, conviction for common law robbery. (App. 226). Counsel did not object to the use of the convictions for impeachment purposes but asked the prosecutor to confirm that those were the only two convictions that would come up. (App. 227-28).

Near the outset of Norris' testimony, Counsel asked about the prior convictions. (App. 267). Counsel asked Norris if he had suffered from a drug problem during that period of his life, which Norris admitted, and explained "[t]hat was over 15 years ago," and that he had pled guilty.

(App. 267). The State questioned Norris at the end of cross-examination:

> Q. And you've done robbery before, haven't you, Mr. Norris?
>
> A. Yes, sir.
>
> Q. And you've broke into buildings before, haven't you, sir?
>
> A. Yes, sir. That's my past record. I hope that my past record will not do anything to harm me.

(App. 283). No details of the crimes were ever brought out before the jury. The State primarily focused its closing argument on the inconsistencies in Norris's testimony, and briefly mentioned the priors in closing:

> They want you to believe – these are two gentlemen that's been familiar with the criminal justice system. Both of them has been convicted of different offenses. And you heard what those offenses was. And that's part of what you can weigh with the credibility of their testimony. And the judge will tell you about that. It's called impeachment – impeachment. The defendants can be asked about it.

(App. 304-05). After the verdict, the State explained that for the prior burglary, Norris was sentenced to fifteen years, and for the robbery Norris was sentenced to fifteen years suspended to nine years and five years of probation to run consecutive to any other sentence. (App. 337-38). Records from the South Carolina Department of Corrections indicate Norris was released on parole from the prior convictions on January 29, 2004. (App. 534).

The trial court charged the jury at length regarding the burden of proof, the presumption of innocence, and reasonable doubt. (App. 312-15). The trial court instructed the jury on the proper use of evidence of prior convictions, explaining:

> . . . that evidence may be used for a very and strictly limited purpose by the jury, and that is as it relates to the impeachment of a witness' or a defendant's testimony given during the trial. In other words, you may consider such evidence on the issue of the credibility and/or the believability of a defendant and that defendant's testimony, but you may not consider it for any other purpose. It is not being introduced as evidence of a defendant's guilt for the crime for which he now stands charged, and you are not permitted to consider it on that issue.

> The sole purpose for which it is introduced, the sole reason that it is allowed and the sole purpose for which you may consider it is solely as to the issue of the credibility and the believability of a defendant's testimony in the event you find such evidence to be probative on that particular point or issue.

(App. 318-19). The jury retired to deliberate at 4:04 p.m. and returned with a guilty verdict at 4:25 p.m. (App. 334-35).

IV. Counsel concluded the prior convictions were admissible under the rules, built a strategy that would avoid their use and not require Norris' to testify, and was primarily focused on advising Norris to not testify.

At the PCR hearing, Counsel testified that she understood the convictions were admissible. (App. 465). Speaking to other issues, Counsel testified she believed that a joint trial with co-defendant Chiles was to Norris' benefit and explained "if there was another individual who could provide helpful testimony and thereby eliminate the need [for] Mr. Norris' testimony, that would have been helpful to him." (App. 464-65). Counsel confirmed that Chiles would testify first, due to the alphabetization of the defendants, and requested additional time from the trial court to conference with Norris "in an attempt to prevent him from testifying or at least impose my recommendation that he not testify." (App. 466). Counsel testified she discussed with Norris that he would be tried jointly with Chiles, that Chiles would testify, and what he would testify to. (App. 468-69). Counsel noted that admission of the armed robbery charge would not have made a difference because the burglary conviction would have still come in. (App. 473-74).

STANDARD OF REVIEW

The standard of review in PCR matters depends on the specific issues before the appellate court. *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). Overall, reviewing courts "give[] great deference to the post-conviction relief court's findings of fact and conclusions of law", *Dempsey v. State*, 363 S.C. 365, 368, 610 S.E.2d 812, 814 (2005), with the applicant shouldering the burden of proof. Rule 71.1(e), SCRCP; *Caprood v. State*, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000); *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). A PCR court's findings will be upheld if there is "any evidence of probative value sufficient to support them." *Id.* Reversal of the lower court's findings occurs when there is no probative evidence to support the initial finding. *Pierce v. State*, 338 S.C. 139, 526 S.E.2d 222 (2000). However, courts must conduct a de novo review when evaluating questions of law and are required to reverse the initial holding when the decision is controlled by an error of law. *Smalls*, 422 S.C. at 180-81, 810 S.E.2d at 839-40; *Goins v. State*, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). Because the PCR Court failed to properly apply *Strickland*'s command to eliminate the distorting effects of hindsight and failed to apply the rule that Counsel is not required to anticipate changes in the law, the issue should be reviewed de novo.

ARGUMENT

The PCR court erred in finding Counsel was deficient for declining to challenge the admissibility of Norris' two prior convictions for burglary and common-law robbery and erred in finding Norris was prejudiced by the deficiency. The PCR court erred by applying dicta as though it was the then-prevailing law and professional norm, by misapplying *each* of the five factors for considering the admissibility of prior convictions which would apply today, and by failing to properly acknowledge the palpably false character of the "citizens arrest" story advanced by Norris and the numerous inconsistencies which provided to wholly discredit his trial and PCR hearing testimony. Accordingly, this Court should reverse the order of the lower court and reinstate Norris' conviction and sentence.

Where the application alleges ineffective assistance of counsel as a ground for relief, an applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in *Strickland*. First, an applicant must prove that counsel's performance was deficient. *Strickland*, 466 U.S. at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney's performance by its "reasonableness under prevailing professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (quoting *Strickland*, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional

judgment." *Id.* (citing *Strickland*, 466 U.S. at 690). "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). The Court, in determining deficiency, must affirmatively entertain the range of possible reasons counsel may have had for proceeding as they did. *Cullen v. Pinholster*, 563 U.S. 170, 196 (2011); *Harrington v. Richter*, 562 U.S. 86, 109-10 (2011). "[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." *Yarborough* at 6; *see also Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) ("[C]ounsel's performance need not be optimal to be reasonable."). An applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. "The prejudice analysis requires the court deciding the ineffectiveness claim to consider the totality of the evidence before the judge or jury." *United States v. Basham*, 789 F.3d 358, 371-72 (4th Cir. 2015) (quoting *Elmore v. Ozmint*, 661 F.3d 783, 858 (4th Cir. 2011)).

I. Counsel's concession that the prior convictions could be used to impeach Norris did not constitute deficient performance because the convictions were crimes of dishonesty at the time of trial, and the court's reliance on *State v. Bryant* is misplaced and amounts to an error of law requiring reversal.

"For the purpose of attacking the credibility of a witness, . . . evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." Rule 609(a)(2), SCRE. Evidence of prior convictions are "not admissible if a period of more than ten 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." Rule 609(b), SCRE (emphasis added); *see also State v. Shands*, 424 S.C. 106, 123, 817 S.E.2d 524, 533 (Ct. App. 2018) (parole does not count as confinement for the purposes of Rule 609(b), SCRE).

Both the prior common-law robbery and the burglary would have been considered under Rule 609(a)(2), SCRE, as crimes of dishonesty at the time of trial. *See State v. Al-Amin*, 353 S.C. 405, 425, 578 S.E.2d 32, 43 (Ct. App. 2003) ("It is the larcenous element of taking property of another which makes the action dishonest. . . . To restrict the application of Rule 609(a)(2) only to those offenses which evidence an element of affirmative misstatement or misrepresentation of fact would be to ignore the plain meaning of the word 'dishonesty.'"); *rev'd by State v. Broadnax*, 414 S.C. 468, 475-76, 779 S.E.2d 789, 792-93 (2015) (citing *State v. Bryant*, 369 S.C. 511, 517, 633 S.E.2d 152, 155-56 (2006)). Thus, the prior convictions would have been admitted without a balancing test.

The lower court cites to *State v. Bryant* for the proposition that "a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness. 369 S.C. at 517, 633 S.E.2d at 155-56. However, as the State argued in *Broadnax*, the case in *Bryant* involved convictions for firearms offenses, not any robbery or other larceny, such that the language relied upon by the PCR court was dicta, and not binding law at the time of trial. 414 S.C. at 475, 779 S.E.2d at 792-93. *Al-Amin* remained as good law in 2009, and Counsel was well within the bounds of reasonably effective assistance to rely upon it and concedes the issue. *See e.g. Thornes v. State*, 310 S.C. 306, 309-10, 426 S.E.2d 764, 765-66 (1993) ("[t]his

court has never required an attorney to anticipate or discover changes in the law, or facts which did not exist, at the time of trial."). The PCR court thus erred as a matter of law and Counsel was not deficient.

II. The lower court's analysis under Rule 609(a)(1), SCRCP, and the five factors set forth in *State v. Colf* is infected by its misapplication of *State v. Bryant* and is riddled with errors of law.

The PCR court's reliance on *Bryant* and rejection of *Al-Amin* thereafter infects its analysis under the factors set forth in *State v. Colf*, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000). In *Colf*, this Court identified and embraced five non-exclusive factors often considered in federal courts for determining whether the probative value of a prior conviction outweighed the prejudicial effect of its introduction to a jury:

1. The impeachment value of the prior crime;
2. The point in time of the conviction and the witness's subsequent history;
3. The similarity between the past crime and the charged crime;
4. The importance of the defendant's testimony;
5. The centrality of the credibility issue.

Id. Although this Court in *Colf* applied the factors to the admissibility of remote prior convictions, the same factors have been consistently applied for the purpose of Rule 609(a)(1), SCRE, analysis. *State v. Robinson*, 426 S.C. 579, 828 S.E.2d 203, 211 (2019).

First, the lower court improperly relies upon the fact that the State did not set forth additional details about the prior crimes to establish their dishonest character (App. 507). However, the State had no reason to do so because common law robbery was a crime of dishonesty at the time of trial and admissible without further analysis. Furthermore, the analysis under the first *Colf* prong appears to muddy the challenges of weighing the impeachment value

of a prior crime under Rule 609(a)(1), SCRE, and the dishonest character of a prior conviction under Rule 609(a)(2), SCRE. "Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609(a)(2), such convictions may still have impeachment value under Rule 609(a)(1)." *Robinson*, 828 S.E.2d at 213. In *Robinson*, this Court reversed the South Carolina Court of Appeals vacation of a conviction where the Court of Appeals made the same error as made in the lower court in this matter: both courts noted no details as to the convictions were provided and concluded that they had no impeachment value.

Second, the lower court declares the convictions were too remote in time, looking back only to the date of the conviction, rather than the date of release as required by Rule 609(b), SCRE. (App. 507-08). As the trial took place on July 6-7, 2009, *only four years* had passed between Norris' release from confinement on parole in 2004 and the July 2008 robbery. The lower court's analysis that over fifteen years had passed since the prior robbery and burglary ignores that Norris was released from prison and committed new crimes after only a few years. Norris' continuing pattern of criminality legitimately diminishes his credibility in front of a jury. *See Robinson*, 828 S.E.2d at 214 ("An analysis of the sentences illustrates closeness in time between the prior offenses and the offense for which Robinson was on trial, revealing a pattern of behavior that legitimately evoked questions of Robinson's credibility."). Further, as the trial took place in July 2009, only five years passed between Norris' release and trial, easily satisfying the time requirements of Rule 609(b), SCRE.

Third, though there is concededly a fundamental similarity between strong-arm robbery and armed robbery, the lower court failed entirely to note the dissimilarity between the prior burglary and armed robbery. (App. 508, 526). Robbery involves different conduct than burglary,

and the fact that most burglaries are undertaken with an eye toward stealing something does not render it overly similar for impeachment purposes in a trial for robbery or armed robbery. *Robinson*, 828 S.E.2d at 215. The failure to acknowledge the dissimilarity of the prior burglary is particularly notable where, as here, Counsel herself emphasized the point during the PCR evidentiary hearing as part of her explanation as to why expending time and preparatory resources on fighting to exclude the prior convictions was pointless: the burglary was coming in.

Fourth and fifth, the PCR court declares Norris' testimony and credibility essential. (App. 508). Accordingly, the lower court again ignores Counsel's advice to her client that he not testify, but instead rely exclusively on the helpful testimony of co-defendant Chiles, whose impeachable record was less severe. (App. 464-65). Norris testimony was not at all essential, nor his credibility of any consequence by Counsel's design. Counsel clearly understood that her client lacked credibility, and would testify poorly, endeavored to compensate for those facts, and then did the best she could, given the circumstances when Norris refused her advice and exercised his right to testify, to his own detriment.

Considering the case under the five factors above, the only reasonable conclusion was that (1) the prior convictions had substantial impeachment value, (2) the moderately close proximity of Applicant's release from custody for the prior convictions to the acts alleged revealed a pattern of criminal conduct to legitimately impeach his credibility, (3) the burglary was sufficiently dissimilar from the new charges as to not raise constitutional concerns, (4) Norris' testimony was not necessary given the co-defendant had already favorably testified, and (5) Norris' credibility was not crucial to the case given his testimony was not necessary. The PCR court's legal conclusions to the contrary are without support in the record and constitute a reversible error of law.

III. Even if Norris' prior convictions should have been excluded, his testimony was already so devoid of credibility that there is no reasonable probability the inclusion of the convictions changed the outcome of trial, such that the PCR court's finding of prejudice is error.

In the present matter, as set forth in detail in the Statement of the Facts: (1) Bond and his friends all testified Bond were robbed by Norris and Chiles at knifepoint; (2) Norris and Chiles were identified yards from the scene; (3) Chiles was found in possession of the victim's possessions; (4) Norris was found in possession of the knife identified by the victims as the one used in the robbery; (5) law enforcement indicated there was no report of any break-in as insisted upon by the defendants, and (6) Norris was seen handing back the wallet and leaving the scene, abandoning the victim, after the so called "citizen's arrest." Considering these facts, the only potential defense available to Norris (and Chiles) was to cook up a story to try and explain away what looks like robbery. They did so through the citizen's arrest theory.

Norris' testimony at trial and the PCR hearing is not credible when set against the testimony of three witnesses who consistently testified they saw the knife and identified it, and the police officers who testified they responded to a report of a disturbance involving someone being held at knifepoint. The witnesses had no way of knowing Norris had a knife on him at the time of the 911 calls if they had not seen the knife held at Bond's neck. Despite both defendants testifying, neither affirmatively sought to return Bond's credit cards to him or law enforcement, and only did so when demanded to do so by the police.[1]

Furthermore, Chiles had no prior robbery or burglary convictions, merely shoplifting and

[1] Here, Norris' new story that the police approached him and Chiles on the porch at gunpoint becomes especially damaging, as it runs contrary to Chiles' trial effort to show that he immediately and freely returned the cards to law enforcement as soon as the police asked. Still further, assuming the police had their guns drawn as Norris now claims, Chiles could not have simultaneously held his hands up and reached into his pocket to produce the cards, and an attempt to suddenly reach into his pocket would have likely ended with tragic consequences.

criminal domestic violence convictions introduced at trial and was similarly convicted. (App. 238-39). Norris' prior convictions did not and could not cast a shadow over Chiles testimony.

Where the trial testimony from a defendant is so facially ludicrous and self-serving as is the case here, an applicant fails to show prejudice from Counsel's concession to and engagement with evidence of prior convictions which tend to only discredit him. Jurors are expected to use common sense for just such testimony as this, and they did for about twenty minutes. Norris' and Chiles' utter lack of credibility was because their story was facially unbelievable and in stark contrast to the victims, bystanders, and law enforcement, not because of Norris' prior criminal history.

The PCR court granted relief upon finding that "[a]bsent the knowledge of these prior convictions, the jury would have been confronted with two competing versions of the event in question." (App. 509). This ignores the impact varying levels of credibility can have upon a jury's verdict alone. Norris' "citizen's arrest" story is simply not plausible facially, nor when compared to the inconsistencies with his co-defendant, other witnesses' testimonies, and by the fact that he was apprehended in possession of both a weapon identified by the victims and the victims' property.

CONCLUSION

For the reasons stated above, this Court reverse the grant of post-conviction relief.

Respectfully submitted,

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