

STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BARNWELL COUNTY
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2014-002531

THE STATE,RESPONDENT

v.

STEPHON ROBINSON,APPELLANT.

INITIAL BRIEF OF RESPONDENT

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¹ Although the trial court addressed the second degree burglary conviction in the order after remand, this Court only remanded for consideration of the other prior convictions.

² State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether, on remand from this Court, the trial court properly found Appellant's prior convictions for second degree burglary, strong-arm robbery, and breaking into automobiles were properly admitted for impeachment purposes pursuant to Rule 609, SCRE, where those convictions fell under the ten-year time limit in Rule 609(b) and where the trial court conducted a careful on-the-record balancing of the Colf factors before concluding the probative value of the convictions outweighed their prejudicial impact under Rule 609(a)(1).

STATEMENT OF THE CASE

Appellant (Robinson) was indicted at the October 2011 term of the grand jury for Barnwell County for first-degree burglary (2011-GS-06-245) and possession of a weapon during a violent crime (PWDVC) (2011-GS-06-246). He was represented by Glen Walters, Esquire. On November 1-2, 2011, Robinson proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Doyet A. Early, III, to twenty (20) years' imprisonment for first-degree burglary and five (5) years' concurrent imprisonment for PWDVC. Robinson timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a brief in support of his appeal. He was represented in the appeal by Appellate Defenders Dayne C. Phillips and Carmen V. Ganjehsani of the South Carolina Office of Indigent Defense. The State filed a brief in response and in an unpublished opinion dated February 19, 2014, this court remanded Robinson's case to the trial court to "hold a hearing and carefully balance the probative value of his prior convictions for impeachments purposes against their prejudicial effect." State v. Robinson, Op. No. 2014-UP-068 (S.C. Ct. App. filed Feb. 19, 2014). This Court held: "If the trial court finds the prejudicial impact of the prior convictions outweighs their impeachment value, the trail court shall order a new trial. Otherwise, subject to further appellate review, the convictions and sentences are affirmed."

On June 9, 2014, a remand hearing was convened in Aiken County³ before Judge Early. Robinson was present and was represented by Ms. Ganjehsani, and the State was represented by Assistant Solicitor David W. Miller of the Second Circuit Solicitor's Office. (June 9, 2014, Tr.p.1). After hearing arguments from both parties, the trial court

³ For purposes of the hearing, the parties agreed to waive venue and have the matter heard in Aiken County. (November 10, 2014, Order, p.1).

took the matter under advisement. (June 9, 2014, Tr.p.20). In an order dated November 10, 2014, the trial court found “that the probative value of the introduction of [Robinson’s] prior record outweighed any prejudice to him under Rule 609(a)(1), SCRE” and therefore concluded he was not entitled to a new trial. (November 10, 2014, Order, p.8). Robinson timely filed a notice of intent to appeal the order and subsequently submitted a brief in support of his appeal. This Brief of Respondent now follows.

STATEMENT OF FACTS

Trial: November 1-2, 2011

On Sunday, February 20, 2011, Eddie Williams was home lying in bed, getting ready to watch a NASCAR race on television. He thought he heard a car outside so he got up and looked out. Williams saw a familiar white car and recognized Robinson as he got out and knocked on the door. Williams explained that Robinson had been to his house before to play video games with Williams' nephew and at least one or two times had been in the same white car when he visited. Williams said he knows Robinson's parents and his grandmother and had known Robinson when Robinson was a kid. Williams did not answer the door because he knew these were friends of his nephew, and were probably not there to see him. Upon getting no response at the door, Robinson returned to the car and drove away. After the car left, Williams fixed a drink and a sandwich and returned to his bedroom to watch the race. About ten minutes later, Williams again heard a car but did not get up to look outside. Suddenly he heard his front door being kicked in. (Tr.p.98, line 5-p.103, line 11).

Williams grabbed a .357 revolver from his nightstand and got up to confront the intruder, but he slipped and fell briefly as he was making his way down the hall. When Williams looked up, he was face-to-face with Robinson and started to shoot because he was scared. As Robinson turned to run, Williams saw a gun in Robinson's hand and saw Robinson fire a shot into the ceiling. Williams then saw Robinson's brother, Reginald Felder, and a third man who had also entered the house as the three intruders turned and ran outside. Williams grabbed a shotgun and followed the three men out to his front porch to make sure they were not going to come back. He fired the shotgun into the air as the car drove away, and then called the police. (Tr.p.103, line 12-p.107, line 5).

Williams was able to positively identify Robinson and Felder as two of the three intruders in two separate photo line-ups prepared by the police. (Tr.p.107, line 6-p.109, line 22).

Williams subsequently made an in-court identification of Robinson as the man who entered his home on February 20, 2011, and fired a shot. (Tr.p.109, line 23-p.110, line 9). He testified there was no doubt that Robinson is the man who came into his house that day. (Tr.p.121, line 24-p.122, line 1).

Shelly Leanna Gunnels testified she had an on-and-off relationship with Robinson for almost seven years. She said that during their relationship Robinson sometimes used her car, and he was allowed to use it whenever he wanted. Gunnels identified her car as the one in a photo taken by Investigator Jeff Croft. (State's Exhibit #11). She said Robinson borrowed her car on February 19, 2011, and returned it the next afternoon, on February 20, 2011. (Tr.p.94, line 7-p.97, line 7).

After the State rested, the trial court questioned Robinson in regard to his right to testify. The solicitor told the court that Robinson had a prior record, including convictions for "strong armed robbery"⁴ and burglary. The trial court advised Robinson as follows:

You've gotten convictions in the past for burglary and strong armed robbery. If I determine that these prior crimes can be testified or introduced to attack your credibility or believability, if I decide that the probative value outweighs the prejudicial effect of it, I will tell the jury if I do allow that in that they can only consider those as dealing with your credibility and it can't be used in determining whether or not you're guilty in this case.

⁴ Common law or "strong-arm" robbery was codified as "common law robbery" in Section 16-11-325 of the South Carolina Code with an effective date of January 1, 1994. This offense is sometimes referred to as "strong armed robbery" despite the fact that the absence of being "armed" is what typically distinguishes it from "armed robbery." See e.g., *State v. Rosemond*, 356 S.C. 426, 589 S.E.2d 757 (2003). It appears the parties and the trial judge refer to Robinson's prior conviction as one for "strong armed robbery;" however, there is no dispute that Robinson was in fact convicted of "strong-arm" or common law robbery in 2009. (See Brief of Appellant).

So if you testify, perhaps those prior record [sic] can come in and you will be subjected to cross-examination.

(Tr.p.124, line 16-p.125, line 7) (emphasis added). The trial court went on to tell Robinson: “You understand that if you do testify, that you will be subjected to cross-examination and perhaps the armed robbery coming in as part of a prior record for impeachment purposes, in order to attack your credibility? You understand that?” Robinson replied: “Yes, sir.” Robinson subsequently decided he would take the stand and testify. (Tr.p.125, line 24-p.126, line 25).

The solicitor told the trial court he specifically intended to use four convictions to impeach Robinson: a 2009 second-degree burglary, a 2009 attempted armed robbery, and two 2007 Georgia convictions for breaking into an automobile. Robinson objected to all four arguing, “I believe the prejudicial value of allowing that outweighs the probative value.” Specifically in regard to the prior burglary conviction he added: “[U]nder the circumstances, he’s currently charged with a burglary offense and the jurors may conclude that once a burglar, always a burglar.” (Tr.p.127, line 7-p.128, line 14). The solicitor noted that the court would be giving a limiting instruction as to the impeachment use of the prior convictions, and offered to refer to the prior burglary conviction merely as a felony conviction that carried more than a year. (Tr.p.128, line 16-p.129, line 5). Ultimately, the trial court ruled:

I find that they come within the statute and I will - - in order to preclude any prejudicial value, I will make you refer to the burglary as you just stated, a felony, which carries a penalty in excess of one year and you will be allowed to use the others for impeachment purposes.

(Tr.p.129, lines 6-11) (emphasis added).

Robinson then testified in his own defense. He claimed he was home the day of the burglary and only left once to return the car he had borrowed from Gunnels. Robinson admitted he had been to Williams' house many times in the past, but denied having anything to do with kicking in the door, brandishing a weapon, or attempting to take anything from the home. (Tr.p.130, line 12-p.132, line 5). On cross-examination, the solicitor challenged Robinson's claims that he was not involved in the burglary. He also sought to impeach Robinson with his prior record as follows:

Q: Are you the same Stephon Robinson that was convicted of strong armed robbery in 2009?

A: Yes, sir.

Q: And you're the same Stephon Robinson that had another felony conviction in 2009 that carried more than a year, aren't you?

A: Yes, sir.

Q: And you're the same Stephon Robinson that in 2007 had two convictions for breaking and entering automobiles with the intent to commit a felony or theft?

A: Yes, sir.

Q: But you want this jury to believe that you don't know anything about this?

A: Yes, sir, because for one, I plead guilty to all of my charges and take my responsibility because I know I was guilty of those charges. And two, that was back in my past when I did stupid things to get a little money to do things because I didn't have. But my parents recently passed away and we got insurance money and all kind of money back off that and I have no reason to kick in this man's door. Nothing.

Q: Let me ask you this, in 2007, was your brother with you whenever you broke into the cars?

A: Yes, sir.

Q: Did he plead guilty to his charges?

A: Yes, sir.

Q: And in 2009, with the strong armed robbery, was your brother with you then?

A: Yes, sir.

Q: Who else was with you?

A: No one.

Q: You and your brother?

A: Yes, sir.

Q: And that other felony charge from 2009, was your brother with you then?

A: No, sir.

Q: He wasn't?

A: No, sir. You talking about the burglary, right?

Q: The charge that you pled guilty to in 2009, the felony charge that carried more than a year.

A: Yes, sir, yes, sir.

Q: Was your brother with you on that?

A: No, sir.

Q: Okay. So in three out of the four times when you committed a crime, your brother was with you?

A: Yes, sir.

(Tr.p.136, line 22-p.138, line 17). Robinson did not make any objections during the solicitor's cross-examination.

Robison also called his cousin, Jamal Wallace, and his brother, Felder, to testify on his behalf. On cross-examination, Felder acknowledged a 2007 Georgia conviction

for breaking into motor vehicles but claimed he did not actually do it. He testified Robinson was doing community service at the time of the Georgia crimes and also did not actually break into any motor vehicles. Felder, however, confirmed a 2009 conviction for strong-arm robbery and said Robinson was with him when the robbery happened. (Tr.p.146, line 11-p.149, line 7). Robinson did not object during the solicitor's cross-examination of Felder.

During his closing argument, the solicitor commented in part: "Credibility. It all comes down to credibility," and proceeded to address the credibility of each defense witness in order. Specifically, the Solicitor said:

Now, let's talk about the defendant. He got on the stand. He admits to having the vehicle. Just a coincidence though that he has a vehicle, the same vehicle that's named by Mr. Williams. Just a coincidence that he's with his brother, Reginald Felder, and his cousin Jamal Wallace. What motive do they have to lie? Every motive. Jamal Wallace takes the stand. Obviously, he wasn't there because if he's going to tell you the truth, he'd be facing charges as well. And then Mr. Felder gets up here, his brother. He admits, maybe the only thing he told the truth on, I don't know, about the crimes he committed in the past. I got some mixed testimony. He went back and forth on what he did do and what he didn't do. He was convicted of crimes that he says he was wrongfully convicted of. He's facing these same charges. Obviously, he has motivation to lie.

(Tr.p.173, line 16-p.174, line 6) (emphasis added).

The trial judge then charged the jury on the law, including standard charges on the presumption of innocence, the State's burden of proof, reasonable doubt, the roles of the judge and jury, the duty to assess the credibility of witnesses, and the crimes and the elements of those crimes. The judge gave the following charge on prior convictions:

You also heard in this case evidence that the defendant had been, in the past, convicted of crimes other than the one for which he is now on trial. This evidence may be considered by you if you conclude it's true only in deciding whether the defendant's testimony is believable or

credible and for no other purpose. You must not consider the defendant's prior record as any evidence of the defendant's guilt of the charge we are trying here today.

(Tr.p.180, lines 17-24). The jury found Robinson guilty of both charges. After hearing from Robinson in mitigation, the trial court sentenced him to twenty (20) years' imprisonment for first-degree burglary and five (5) years' concurrent imprisonment for PWDVC.

Hearing on Remand: June 9, 2014

The trial court convened a remand hearing on June 9, 2014. It did not involve the presentation of testimony or other evidence and instead was limited to the trial judge hearing arguments from the parties regarding the admissibility of Robinson's prior convictions for impeachment pursuant to Rule 609(a), SCRE. First, Robinson addressed the five factors set forth in Colf and argued those factors went against admission because they showed the probative value of Robinson's prior convictions were outweighed by their prejudicial effect. Relying on Howard,⁵ Black,⁶ and Bryant,⁷ he contended the prior convictions did not have any impeachment value whatsoever because the crimes are not probative of truthfulness. Robinson then argued admission was inescapably prejudicial because, although not identical, the crimes were very similar where they shared a "common thread" of "theft" or "taking of property." He noted credibility was very important to the case because there was no physical evidence linking him to the crime and argued that under these circumstances it was particularly prejudicial to admit prior

⁵ State v. Howard, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011).

⁶ State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012).

⁷ State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006).

convictions that have nothing to do with credibility. (June 9, 2014, Tr.p.6-p.10; p.18-p.20).

In response, the solicitor agreed credibility was important to the case but noted the distinction between the automatic admission of prior convictions as crimes involving dishonesty or false statement under Rule 609(a)(2), and the discretionary admission of all other prior convictions under Rule 609(a)(1). He argued the cases relied upon by Robinson dealt with Rule 609(a)(2) and therefore were not directly applicable. The solicitor further noted that Colf dealt with crimes that were more than ten years old which, pursuant to Rule 609(b), SCRE, involved a different standard for admission than at issue here. He then addressed each of the Colf factors, arguing the prior convictions were significantly different from the ones for which Robinson was being tried, and that they were highly probative of veracity. (June 9, 2014, Tr.p.10-p.18).

At the conclusion of the hearing Judge Early took the matter under advisement and on November 10, 2014, he issue an eight-page written order making detailed findings in regard to each of the five Colf factors. (November 10, 2014, Order, p.4-p.8). Based on those findings, the trial court concluded: “that the probative value of the introduction of the Defendant’s prior record outweighed any prejudice to him under Rule 609(a)(1), SCRE, in this matter.” The trial court ordered that Robinson’s motion for a new trial be denied. (November 10, 2014, Order, p.8).

ARGUMENT

I.

On remand from this Court, the trial court properly found Appellant's prior convictions for second degree burglary, strong-arm robbery, and breaking and entering into automobiles were properly admitted for impeachment purposes pursuant to Rule 609, SCRE, where those convictions fell under the ten-year time limit in Rule 609(b) and where the trial court conducted a careful balancing of the Colf factors before concluding the probative value of the convictions outweighed their prejudicial impact under Rule 609(a)(1).

Appellant contends the trial court erred in finding that the probative value of the admission of his prior convictions for strong arm robbery and breaking and entering into automobiles outweighed the prejudice to him under Rule 609(a)(1), SCRE. The State disagrees and submits Robinson's arguments are without merit. The trial court acted well within its broad discretion in admitting the convictions after conducting a careful balancing of the factors set forth in Colf, as directed by this Court.

Standard of Review

The admission or exclusion of evidence is left to the sound discretion of the trial court, whose decision will not be reversed on appeal absent an abuse of discretion. State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008); State v. Howard, 396 S.C. 173, 177, 720 S.E.2d 511, 514 (Ct. App. 2011); State v. Swafford, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct. App. 2007). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. State v. Meggett, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012); Howard at 178, 720 S.E.2d at 514. To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice.

Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005);
Howard at 178, 720 S.E.2d at 514.

Rule 609, SCRE

Pursuant to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year's imprisonment "shall be admitted" for impeaching the credibility of a defendant who testifies if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." The South Carolina Supreme Court has approved the five-factor analysis generally employed by the federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused. Colf at 627, 525 S.E.2d at 248. Prior convictions similar to the one for which the defendant is being tried are not automatically inadmissible; instead, "[t]rial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence." Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000). The following factors, along with any other relevant factors, should be considered by the trial court: (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; and (5) the centrality of the credibility issue. Colf at 627, 525 S.E.2d at 248.

The parties agree that Robinson's prior convictions for strong-arm robbery and breaking and entering motor vehicles fit squarely within the time limits for admission of impeachment evidence under the Rules of Evidence. Rule 609 provides:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of 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. Here, Robinson's trial took place on November 1-2, 2011. His prior convictions for strong-arm robbery and for breaking and entering automobiles were in 2009 and 2007, respectively. Because these convictions were within five years of trial, they fall within the ten-year time limit provided by Rule 609(b), SCRE, and therefore were properly admitted to impeach Robinson if the court determined the probative value outweighed the prejudicial effect.

Here, even before the appeal and subsequent remand to the lower court, the trial judge was cognizant of the requirement that he balance the probative value of admitting the prior convictions against the prejudicial effect to Robinson. Indeed, when addressing Robinson's right to testify and the possible impact of the prior convictions the judge specifically advised Robinson that the court would have to decide whether "the probative value outweighs the prejudicial effect of it." (Tr.p.124, line 16-p.125, line 7). The judge then listened to Robinson's claim that, "I believe the prejudicial value of allowing that outweighs the probative value," (Tr.p.128, lines 4-9), before ruling:

I find that they come within the statute and I will - - in order to preclude any prejudicial value, I will make you refer to the burglary as you just stated, a felony, which carries a penalty in excess of one year and you will be allowed to use the others for impeachment purposes.

(Tr.p.129, lines 6-11) (emphasis added). Although the trial judge apparently believed he had sufficiently made the determination required by Rule 609(a)(1) for admission of the prior convictions, this Court disagreed and remanded for the trial court to conduct a more

“meaningful analysis.” That meaningful analysis was then conducted by the trial court in conjunction with the June 9, 2014, remand hearing.

Colf Factors

The record before this Court now includes the trial court’s specific consideration of each of the Colf factors in making its decision under Rule 609(a)(1), SCRE. The State initially notes that by choosing to prohibit any specific reference to Robinson’s prior burglary conviction and simply calling it a felony, the trial judge eliminated any possible prejudice from admission of that particular conviction. Indeed, this Court appears to have limited consideration on remand to only the prior convictions for attempted robbery and breaking into automobiles, which renders any further discussion of the prior burglary conviction by the trial judge mere surplusage. In regard to the other prior convictions, the trial court acted well within its discretion in concluding they were properly admitted after conducting a careful balancing of the factors set forth in Colf.

(1) Impeachment Value of Prior Convictions

Even before remand, the focus of the trial court’s original inquiry involved the first Colf factor, “the impeachment value of the prior crime.” By: (1) finding the crimes “come within the statute,” (2) limiting the State’s reference to the prior burglary conviction, and (3) finding the solicitor would be “allowed to use the others for impeachment purposes” (Tr.p.129, lines 6-11) (emphasis added), the trial court necessarily concluded that the convictions had impeachment value before they were admitted. That conclusion was more fully vetted on remand and was subsequently explained in the November 10, 2014, Order.

Relying on Howard, Black, Bryant, and the recently issued opinion from our Supreme Court in State v. Broadnax, Op. No. 27545 (S.C. Sup. Ct. refiled July 29, 2015) (Shearouse Adv. Sh. No. 29 at 12) (order granting remand in petition for rehearing issued November 5, 2015), Robinson now argues the remand court's "impeachment value analysis" is "lacking and unsupported." He contends "the remand court failed to connect what about his prior convictions were probative of his credibility" and argues the trial judge improperly generalized its analysis in concluding the mere fact of having prior convictions would impact his credibility. Robinson argues that as in Howard, the trial court improperly focused on his character rather than the impeachment value of his prior crimes. (Brief of Appellant, p.13-p.16). The State disagrees and submits it is precisely the generalized impact on credibility which is contemplated by Rule 609(a)(1), SCRE. Robinson seems to suggest that because his prior convictions are not crimes of "dishonesty or false statement" under Rule 609(a)(2), they cannot be probative of truthfulness. He argues they should not have been admitted and implies that any balancing test attempted by the trial court would have been futile. However, Robinson misconstrues the reach of the cases upon which he relies.

Here, the trial court found: "Simply put, convictions for breaking into motor vehicles and strong-arm robbery don't imply that the accused was an armed burglar, as was alleged in this case, but they do imply that the accused is not someone to be trusted – that he might not be credible." (November 10, 2014, Order, p.5). Thus, unlike in Howard, the trial court's focus was on Robinson's credibility rather than his character. Also unlike in Howard, the trial court in this case was comparing prior crimes that were

not identical to the crime for which Robinson was on trial, rendering their relative impeachment value higher.

In Black, the Supreme Court's analysis centered on the higher standard in Rule 609(b) pertaining to admission of remote convictions rather than the standard in Rule 609(a)(1) pertaining to convictions within ten years. Black, 400 S.C. at 18, 732 S.E.2d at 885. Although there was an extensive discussion regarding the impeachment value of prior convictions, that discussion must be taken in the context of the statutory presumption against the admission of remote convictions unless the trial court finds the probative value "substantially outweighs" its prejudicial effect. Indeed, in Black the Supreme Court noted that even though a conviction for a crime of violence is not particularly probative of the specific trait of truthfulness, its impeachment value is merely "limited." Id. at 23, 732 S.E.2d at 887. The Court did not hold the impeachment value was nonexistent.

In Broadnax the Supreme Court's holding was focused on Rule 609(a)(2) and how it functioned to preclude the trial court from exercising discretion over the admission of prior crimes of dishonesty or false statement for impeachment. The Court held: "We take this opportunity to overrule Al-Amin, and reaffirm the rule as formulated in Bryant that armed robbery is not a crime of dishonesty or false statement for purposes of impeachment under Rule 609(a)(2)." Broadnax at 18 (emphasis added). The Court took issue with the alternative view noting that: "Under Al-Amin's and the concurrence's rationale, the exception contained in Rule 609(a)(2), which permits the automatic admission of certain prior convictions, swallows the rule contained in Rule 609(a)(1), in which discretion regarding the admission of prior convictions rests with the trial judge."

Id. at 18-19. The Court concluded that “a rule that places discretion with the trial judge is even more desirable” because “we think the trial judge is the best arbiter of whether a very prejudicial piece of evidence should be admitted in this situation – unless of course the prior crime specifically relates to a defendant’s penchant to tell the truth on the witness stand.” Id. at 20. The Court emphasized: “Importantly, our holding today does not preclude the admission of prior convictions for armed robbery; rather, it merely enables a trial judge to conduct a balancing test pursuant to Rule 609(a)(1) when the State seeks prior convictions for armed robbery to impeach a criminal defendant’s testimony.” Broadnax at 20.

In Bryant, the Supreme Court stated in dicta that “a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness.” Bryant at 517, 633 S.E.2d at 156. Yet, under the parameter set forth in Black and Broadnax, the conclusion that a particular crime is not one that “involved dishonesty” for purposes of Rule 609(a)(2) analysis, cannot possibly equate to that crime being “not probative of truthfulness” for purposes of Rule 609(a)(1) analysis. Indeed, such an interpretation is belied by the existence of the very rule under interpretation and by the detailed analysis in Broadnax itself. The Rule is titled “Impeachment by Evidence of Conviction of a Crime” and is generally described as being, “for the purpose of attacking the credibility of a witness.” Rule 609(a), SCRE. It provides separate rules for the admissibility of crimes that “involve dishonesty,” Rule 609(a)(2), and all other crimes, Rule 609(a)(1). Thus, the Rule itself stands for the proposition that a criminal conviction, standing alone, has some probative value in regard to credibility. If, as Robinson argues, a crime is only probative of truthfulness if it is a crime that “involves

dishonesty,” then when a crime is not a crime of dishonesty, it could NEVER be admitted under Rule 609(a)(1). This is because, if the crime is “not probative of truthfulness,” its probative value would NEVER outweigh its prejudicial effect. Such a ruling would eviscerate the Rule and only allow impeachment with crimes of dishonesty or false statement. As a result, the judicial limitations on the exception contained in Rule 609(a)(2) would swallow the rule contained in Rule 609(a)(1) in its entirety. This was clearly not the result contemplated by the Supreme Court in Bryant, where, after finding Bryant’s prior firearms convictions “do not involve dishonesty,” the Court nevertheless stated “their probative value should have been weighed against their prejudicial effect.” Bryant at 517, 633 S.E.2d at 156. In Broadnax, the Supreme Court further clarified this interpretation. In other words, a balancing test pursuant to Rule 609(a)(1), SCRE, is always proper, even where the prior conviction and the current charge are identical. Here, the crimes were not identical. The trial court conducted a balancing test by weighing probative value against prejudicial effect and properly admitted the prior convictions.

(2) Point in Time of Prior Convictions and Subsequent History

At trial, by noting that the prior crimes “come within the statute” the trial judge considered the second Colf factor, “the point in time of the conviction and the witness’s subsequent history.” Indeed, during sentencing the trial judge mentioned how he had heard about Robinson’s prior convictions during trial but asked they be repeated again for the record. (Tr.p.191, lines 9-12). Then, specifically in regard to Robinson’s prior convictions and his “subsequent history” the trial judge said:

Young man, I’m not sure what’s going on with you, but you’re on a pattern to be a menace to society. You start off by a simple shoplifting in

2005; you escalated to stealing financial transaction cards, breaking into motor vehicles in '07. The same year you burglarized another house. You get out on bond and while out on bond, you get involved in an attempted armed robbery two years later. . . . You were released on parole, being supervised by our agents and within thirteen months, you're kicking in the door of a home with a weapon, shooting at someone.

(Tr.p.196, lines 1-18). In the November 10, 2014, Order, the trial court simply added more specificity about Robinson's "subsequent history" by describing the particular sentences which had been given on the prior convictions and how close in time the current crime was to his release from confinement. The trial court emphasized the fact that the prior convictions were within only five years of the trial. Thus, they were close in time in the context of a continuing pattern of Robinson's criminally non-credible behavior, and were properly admitted.

(3) Similarity between Past Crimes and the Charged Crime

At trial, by choosing to prohibit any specific reference to Robinson's prior burglary conviction, the trial judge considered the third Colf factor, "the similarity between the past crime and the charged crime," in deciding which of the convictions were admissible, and to what extent each could be referenced by the State. On remand, the trial court conducted a more details analysis and specifically found "there is very little similarity between [Robinson's] prior convictions and the charge in this matter." (November 10, 2014, Order, p.6). This finding is supported by the record.

Despite Robinson's assertion to the contrary, the prior convictions are not sufficiently similar to the offenses at trial to merit exclusion. Robinson was on trial for first-degree burglary and PWDVC. First-degree burglary is a crime against property. In Robinson's case, it involved the statutory elements of the crime: entry of a dwelling without consent and with intent to commit a crime therein, and when, in effecting entry

or when in the dwelling or in immediate flight therefrom, being armed with a deadly weapon. S.C. Code Ann. § 16-11-311(A) (Supp. 2012). By comparison, strong-arm robbery is a crime against the person. It has been defined as “larceny from the person or in immediate presence of another by violence or intimidation.” Dukes v. State, 248 S.C. 227, 231, 149 S.E.2d 598, 599 (1966). Larceny involves the felonious taking and carrying away of the goods of another, which must be accomplished against the will or without consent of the owners. State v. Brown, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979). Being armed with a deadly weapon is not an element of strong-arm robbery. It is however, an element of PWDVC and was the aggravating factor in Robinson’s first-degree burglary. Thus, the elements of Robinson’s first-degree burglary are not same as the elements of his prior strong-arm robbery, and there is little similarity between these crimes.

In regard to Robinson’s prior convictions from Georgia, they appear to be convictions for “unlawfully entering an automobile.” Ga. Code Ann. § 16-8-18 (Supp. 2007) (“If any person shall enter any automobile or other motor vehicle with the intent to commit a theft or a felony, he shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years, or, in the discretion of the trial judge, as for a misdemeanor.”). As such, they also involved different elements from first degree burglary in South Carolina, and did not require proof of being armed with a deadly weapon. Since the prior crimes were not identical to the crimes for which Robinson was on trial, the State submits the trial judge was acting within his discretion in allowing their use for impeachment pursuant to Rule 609(a)(1), SCRE, the court’s balancing of the Colf factors on remand was sufficient.

(4) Importance of Robinson's Testimony and (5) Centrality of Credibility

In a case that hinged almost entirely on the credibility of the victim and the State's burden of proof, both the fourth Colf factor, "the importance of the defendant's testimony," and the fifth Colf factor, "the centrality of the credibility issue," were necessarily implicated in the court's decision to admit Robinson's prior convictions. These factors were in fact highlighted by the parties in arguments throughout the trial. In his opening statement, the solicitor focused on the victim and his expected testimony about the burglary, which included running "into the defendant standing just a few feet away, face to face, no mask, no disguise, with a gun in his hand." (Tr.p.45, lines 1-9). In his own opening statement, Robinson asked the jury to "hold the State to their burden of proving their case beyond a reasonable doubt" and specifically noted they would hear from the victim, and then asked the jurors to "carefully evaluate all that's put before you." He concluded by arguing, "I'm confident after you review the evidence and the testimony that will be given, you can reach your own conclusion as to what happened." There was no mention of Robinson testifying or his credibility. (Tr.p.47, line 15-p.48, line 16).

Robinson began his closing argument by attacking the victim's credibility, claiming Williams' words were "those of a drug dealer" and "rotten to the core." (Tr.p.159, line 9-p.160, line 25). The solicitor then argued, "It all comes down to credibility." He discussed the credibility of each trial witness, ending with the most critical witness, Williams. (Tr.p.172, line 17-p.175, line 4). While Robinson's testimony was certainly important to his case,⁸ the focus at trial for both parties was on the

⁸ Undoubtedly, every defendant who chooses to testify must believe his testimony is important or he would not take the stand. Thus, the State submits the act of testifying alone does not mean the defendant's

credibility of the victim. With or without Robinson's testimony, the jury was considering direct evidence of guilt: Williams' eyewitness identification testimony describing Robinson's participation in the burglary. At the time of his ruling to admit Robinson's prior convictions, the trial judge had heard opening statements as well as Williams' testimony and knew the entire case turned on Williams' credibility, regardless of whether Robinson took the stand. Unlike in Bryant, Robinson did not present a defense that hinged entirely on his own testimony.

Indeed, as noted by the trial court in the order after remand, Robinson's testimony was merely cumulative to the testimony of two other defense witnesses in regard to Robinson's alibi defense. Also as noted by the trial court, the credibility of all witnesses was an essential element of Robinson's trial. (November 10, 2014, Order, p.7-p.8). The trial court clearly weighed both the importance of Robinson's testimony and the centrality of credibility in arriving at the well supported conclusion that Robinson's prior convictions should be admitted for impeachment purposes. That conclusion should be affirmed.

Harmless Error

To the extent this Court finds the trial court erred in admitting Robinson's prior convictions after specifically balancing of the Colf factors on remand, the State submits the conviction should nevertheless be affirmed because any such error was harmless in light of: (1) the eyewitness identification testimony presented at trial, (2) the court's jury

testimony is automatically "important" for purposes of a Colf analysis. Otherwise, the fourth Colf factor would add nothing to the overall analysis. See State v. Bryant, 369 S.C. 511, 518-19, 633 S.E.2d 152, 156 (finding the erroneous admission of Bryant's prior firearms convictions was not harmless where "[Bryant's] defense was that he acted in self-defense, and this hinged entirely on his own testimony.").

charge on consideration of prior convictions, and (3) the cumulative nature of the evidence.

Error is harmless where it could not reasonably have affected the result of the trial. Bryant at 518, 633 S.E.2d at 156. In order for an appellate court to reverse a case based on erroneous admission of prior convictions, prejudice must be shown. State v. Heller, 399 S.C. 157, 171, 731 S.E.2d 312, 320 (Ct. App. 2012). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Bryant at 518, 633 S.E.2d at 156; Heller at 171, 731 S.E.2d at 320. Thus, an insubstantial error not affecting the result of the trial is harmless where a defendant's guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. Bryant at 518, 633 S.E.2d at 156. "A harmless error analysis is contextual and specific to the circumstances of the case: No definite rule of law governs a finding of harmless error; rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial." Heller at 171, 731 S.E.2d at 320 (citations omitted). Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence. Id.

The State presented overwhelming evidence of Robinson's guilt. Williams testified he knows Robinson's parents and his grandmother, and had known Robinson when Robinson was a kid. He explained that Robinson had been to his house before to play video games with Williams' nephew and at least one or two times had been in the same white car Williams saw leaving his house after the burglary. Williams was face-to-face with Robinson in the house and saw a gun in Robinson's hand when Robinson fled

from the house. (Tr.p.98, line 5-p.107, line 5). Williams subsequently made an in-court identification of Robinson as the man who entered his home on February 20, 2011, and fired a shot. (Tr.p.109, line 23-p.110, line 9). He testified there was no doubt that Robinson was the man who came into his house that day. (Tr.p.121, line 24-p.122, line 1). Shelly Leanna Gunnels testified that during her relationship with Robinson, he sometimes used her car and he was allowed to use it whenever he wanted. Gunnels identified her car as the one in a photo taken by Investigator Croft and said Robinson was in possession of her car on the day of the burglary. (Tr.p.94, line 7-p.97, line 7).

Given this overwhelming evidence of guilt, the State submits the mention of Robinson's prior convictions could not reasonably have affected the result of the trial, and any error was harmless. Heller, supra. This is particularly true where the trial judge clearly instructed the jury: "You must not consider the defendant's prior record as any evidence of the defendant's guilt of the charge we are trying here today." (Tr.p.180, lines 17-24).

Additionally, in the initial direct appeal Robinson did not challenge the trial court's admission of another prior conviction for impeachment purposes; therefore, admission of the challenged convictions is merely cumulative, and could not have prejudiced Robinson. Heller, supra. Specifically, Robinson's prior conviction for second-degree burglary, which the trial court ruled could only be referred to as a felony which carries a punishment in excess of a year, was admitted pursuant to Rule 609(a)(1), SCRE. (Tr.p.129, lines 6-11). Robinson did not challenge admission of this conviction on his initial appeal; therefore, its admissibility is now the law of the case. State v. Cheeks, 400 S.C. 329, 338, 733 S.E.2d 611, 616 (2012). For all of these reasons, the

State submits that any error by the trial court in failing to conduct a thorough on-the-record balancing of the Colf factors was harmless.

Conclusion

In Robinson's case, the trial court considered the appropriate Colf factors on remand and determined that the probative value of the prior convictions for impeachment purposes outweighed the prejudice to the accused. This is all that was required under Rule 609(a)(1), SCRE. Accordingly, where the trial court considered the appropriate factors and ruled that the prior convictions were more probative than prejudicial, the court did not abuse its discretion, and its ruling should be upheld. To the extent the trial court's analysis was somehow deficient, any error was nevertheless harmless in light of: (1) the eyewitness identification testimony presented at trial, (2) the court's charge on the jury's consideration of prior convictions, and (3) the cumulative nature of the evidence.

STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM BARNWELL COUNTY
Doyet A. Early, III, Circuit Court Judge

DEC 01 2015

SC Court of Appeals

Appellate Case No. 2014-002531

THE STATE,RESPONDENT

v.

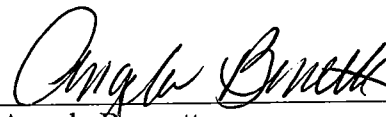
STEPHON ROBINSON,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Initial Brief of Respondent* and *Designation of Matter*, both dated December 1, 2015, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Laura Baer, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
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Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served.
This 1st day of December, 2015.



Angela Bennett
Administrative Assistant

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CONCLUSION

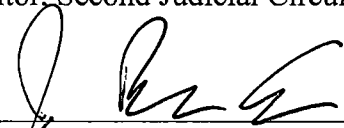
For all of the foregoing reasons, the State respectfully requests that the order on remand, the conviction, and the sentence of the lower court be affirmed.

Respectfully submitted,

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Columbia, South Carolina
December 1, 2015



RECEIVED

DEC 01 2015
SC Court of Appeals

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Re: The State v. Stephon Robinson
Appellate Case No. 2014-002531

Dear Counsel:

I am enclosing two (2) copies of the Initial Brief of Respondent and Designation of Matter in the above-referenced case.

Sincerely,

J. Benjamin Aplin
Assistant Attorney General
S.C. Bar No. 8729

JBA/ab
Enclosures

cc: Honorable Jenny A. Kitchings
(original enclosed)
Victim Services