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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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DEC 29 2015

Appeal from Barnwell County

SC Court of Appeals

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

STEPHON ROBINSON,

APPELLANT

APPELLATE CASE NO. 2014-002531

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES.....2

ARGUMENT IN REPLY

The trial court’s error in admitting Petitioner’s prior convictions did not constitute harmless error where there was not overwhelming evidence of Robinson’s guilt, the jury instructions did not remedy the unfair prejudice, and the admission of one other prior conviction did not obviate the need to exclude three other prior convictions 3

CONCLUSION.....9

TABLE OF AUTHORITIES

Cases

State v. Bostick, 392 S.C. 134, 708 S.E.2d 774 (2011)..... 5

State v. Brooks, 341 S.C. 57, 533 S.E.2d 325 (2000)..... 4

State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) 4

State v. Byers, 392 S.C. 438, 710 S.E.2d 55 (2011)..... 5

State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) 7

State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (2012) 3, 8

State v. Henson, 407 S.C. 154, 754 S.E.2d 508 (2014)..... 4

State v. Parker, 315 S.C. 230, 433 S.E.2d 831 (1993))..... 4

State v. Robinson, 2014-UP-068 (Ct. App. Feb. 19, 2014). 4

United States v. Beahm, 664 F.2d 414 (4th Cir. 1981)..... 7

Rules

Rule 609, SCRE..... 3

ARGUMENT IN REPLY

The trial court's error in admitting Petitioner's prior convictions did not constitute harmless error where there was not overwhelming evidence of Robinson's guilt, the jury instructions did not remedy the unfair prejudice, and the admission of one other prior conviction did not obviate the need to exclude three other prior convictions.

Introduction

In the Brief of Appellant, Appellant Stephon Robinson raised the following issue:

Whether the remand court erred in finding that the probative value of the admission of Appellant's prior convictions for second degree burglary, strong arm robbery, and breaking and entering into a motor vehicle with intent to commit a felony or theft, outweighed the prejudice to him under Rule 609(a)(1), SCRE?

Appellant's Brief, p. 1. Respondent contends that even if the trial court did error in admitting Robinson's prior convictions, that his convictions 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 charge on consideration of prior convictions, and (3) the cumulative nature of the evidence." Respondent's Brief, p. 23-24. As will be more fully discussed below, the evidence against Respondent was far from "overwhelming" and Respondent's credibility was essential to his defense.

Initially, Appellant notes that Respondent raised this same "harmless error" argument in its Brief filed in petitioner's direct appeal. See Appellate Case No. 2011-202987, Respondent's Brief, p. 19-21. If this Court were persuaded by Respondent's argument, it could have found the error harmless and affirmed Robinson's conviction. See, e.g. State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (2012) (finding trial court "simply denied Heller's motion to exclude the prior convictions without performing an on-the-record Colf analysis" but determining any error in that failure harmless). Instead, this

Court remanded Petitioner's case for a meaningful analysis of the impeachment value of Petitioner's prior convictions versus their prejudicial effect. See State v. Robinson, 2014-UP-068 (Ct. App. Feb. 19, 2014). It is unlikely that this Court would have wasted limited judicial resources on a remand hearing if it viewed the error as harmless.

Harmless Error Standard

“Before an error can be held harmless, a court must find the error harmless beyond a reasonable doubt. That requires a court to determine whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.” State v. Henson, 407 S.C. 154, 166-67, 754 S.E.2d 508, 515 (2014) (internal citations and quotations omitted). In determining whether an error is harmless, the circumstances of each individual case are to be considered. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (finding improper admission of Petitioner's prior firearms conviction was erroneous and did not qualify as harmless error where the Petitioner's credibility was essential to his defense). Thus, “[w]hether the improper introduction of [the] evidence is harmless requires [the appellate court] to look at the other evidence admitted at trial to determine whether the defendant's guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached.” State v. Brooks, 341 S.C. 57, 62–63, 533 S.E.2d 325, 328 (2000) (quoting State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993)).

The Evidence Against Robinson Was Not Overwhelming

The sole evidence against Robinson was the alleged victim's uncorroborated testimony and unreliable identification. Despite that, the Respondent argues that the State presented overwhelming evidence of Robinson's guilt. Respondent's Brief, p. 24-25. The

Respondent treats harmless error like a directed verdict issue by mentioning only the evidence favorable to the State. Compare State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 777 (2011) (“On appeal of the denial of a directed verdict of acquittal, [the appellate] Court must look at the evidence in the light most favorable to the State.”), with State v. Byers, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) (“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.” (internal citations and quotations omitted)). He failed to mention the testimony of Robinson and his two alibi witnesses. Trial Tr. 130, l. 12 – 154, l. 16. Additionally, the police failed to collect the bullet allegedly shot by the intruders. They also failed to collect any fingerprints and did not perform any gunshot residue test on Robinson or his co-defendants. Trial Tr. 57, l. 21 – 59, l. 10; Trial Tr. 73, ll. 10-16; Tr. 74, l. 5 – 78, l. 17. Thus, there was no physical evidence connecting Robinson to the crime scene or having fired a weapon on the date of the incident.

Regarding alleged victim Williams’ testimony, he said had seen Robinson before when he came over to play videogames with Williams’ nephew. Trial Tr. 102, l. 10 – 103 l. 2. Williams knew Robinson’s parent’s more so than he knew Robinson himself, stating:

Well, I really know his parents. I knowed [sic] his father and his mother. I knowed [sic] his grandmother also. **You know the kids, they get bigger and, you know, you don’t recognize them.** You know their parents and then you’ll know them. But I know him. Not personally, but I know him.

Trial Tr. 103, ll. 3-11 (emphasis added). When Williams viewed the line-ups, he mixed up the names of Robinson and his brother, Felder, casting serious doubt on how well he knew them and whether their selection from the photo array was based upon Williams' recollection of the actual incident or other prior interactions with them. Trial Tr. 69, ll. 11-16. Williams' ability to pick Stephon Robinson and Reginald Felder out of the photo array was hardly remarkable either since he gave the officers their names prior to the identification procedure. Trial Tr. 107, l. 6 – 109, l. 22; Tr. 120, ll. 13-20. Likewise, his in-court identification of Robinson added nothing to his ability to perceive Robinson as the alleged burglar at the time of the incident. Trial Tr. 109, l. 23 – 110, l. 9.

Shelly Gunnels, Robinson's girlfriend, testified consistent with Robinson's testimony. She said that Robinson borrowed her car the night before the alleged robbery and returned it to her on the afternoon of February 20, 2011. Trial Tr. 94, l. 7 – 97, l. 23. As such, Gunnels' identification of a picture of her own vehicle as the one borrowed by Robinson was also unremarkable. Notably, the solicitor did not ask Williams to identify the photograph of the vehicle as the one that he saw driven by the intruders. Trial Tr. 98, l. 5 – 110, l. 9; Trial Tr. 121, l. 3 – 122, l. 2. Thus, while there was sufficient evidence to overcome the motion for directed verdict, the evidence against Robinson was not overwhelming such that "no other rational conclusion could be reached."

**The Trial Court's Limiting Instruction Did Not
Remedy the Unfair Prejudice**

The trial court's limiting instruction to the jury did not render the trial court's error in improperly admitting Robinson's prior convictions harmless. The trial judge 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." Trial Tr. 180, ll. 17-24. In State v. Colf, 337 S.C. 622, 628, 525 S.E.2d 246, 249 (2000), our Supreme Court explained that "evidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions." (citing United States v. Beahm, 664 F.2d 414, 418-19 (4th Cir. 1981) ("The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged.")). Furthermore, the trial court's instruction did not prevent the jury from considering the prior convictions in determining Robinson's credibility, which was the purported purpose of their admission. As discussed more fully in Appellant's Brief, Robinson's credibility was essential to his defense. With no physical evidence connecting Robinson to the crime scene, the jury's decision was based solely on which witnesses they believed. Therefore, the trial court's limiting instruction did not render the error in admitting Robinson's prior convictions harmless.

**Admission of One Prior Conviction Did Not Render
Improper Admission of Other Prior Convictions Harmless**

At trial, the court allowed the solicitor to ask Robinson about his prior second degree burglary conviction but limited its reference to "a felony conviction in 2009 that carried more than one year." Trial Tr. 129, ll. 6-11; Trial Tr. 136, l. 24 – 137, l. 2. The State's contention that the failure to challenge the admission of that reference to one other prior conviction in Robinson's direct appeal renders the improper admission of his other convictions harmless is without merit.

Respondent cites State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012), in support of its position. In Heller, the appellant complained of the admission of his five prior drug convictions where no balancing of the probative value versus prejudicial effect was conducted. 399 S.C. at 168-70, 731 S.E.2d at 318-20. The Heller Court first discussed the defendant's identification by both the victim and multiple witnesses and his confession to the crimes. Id. at 171-72, 731 S.E.2d at 320. The Court then stated: "Further, an abundance of evidence was presented concerning Heller's participation in illegal drug activity such that the admission of Heller's prior drug convictions was cumulative to the other evidence." Id. at 172, 731 S.E.2d at 320. It accordingly found that any error in the admission of the drug convictions was "insubstantial and could not reasonably have affected the result of the trial." Id.

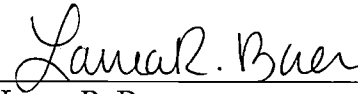
Here, the "other evidence" that Respondent attempts to analogize was another prior conviction for a felony. If this Court accepted Respondent's position, then the trial court could improperly admit all of a defendant's prior convictions so long as admission of one was proper and such error would always be found harmless.¹ That would be an absurd result and ignore the obvious increased prejudice that resulted from mentioning four of Robinson's prior convictions rather than one.

¹ Petitioner does not concede that admission of his prior second degree burglary conviction was proper, even when its reference was limited to "a prior felony conviction within one year." See Brief of Appellant, p. 17-19 and 23.

CONCLUSION

For the reasons set forth herein and in Appellant's Brief, Appellant Stephon Robinson respectfully requests that this Court reverse his convictions and sentences and grant him a new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

This 29th day of December, 2015.

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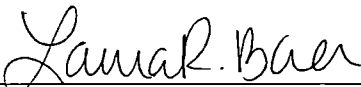
V.

STEPHON ROBINSON,

APPELLANT

CERTIFICATE OF SERVICE

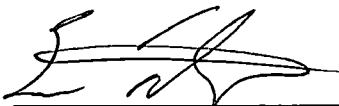
The undersigned attorney hereby certifies that a true copy of the Initial Reply Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Stephon Robinson, #334700, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 29th day of December, 2015.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 29th day of December, 2015.



(L.S.)

Notary Public for South Carolina
My Commission Expires: October 30, 2022.