

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

RECEIVED

FEB 17 2016

SC Court of Appeals
RESPONDENT,

THE STATE,

V.

STEPHON ROBINSON,

APPELLANT

APPELLATE CASE NO. 2014-002531

FINAL BRIEF OF APPELLANT

LAURA R. BAER
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUE ON APPEAL	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	4
ARGUMENT	11
CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<u>Abney v. State</u> , 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014).....	19
<u>Faretta v. California</u> , 422 U.S. 806, 95 S.Ct. 2525 (1975)	21
<u>Harris v. New York</u> , 401 U.S. 222, 91 S.Ct. 643 (1971).....	21, 22
<u>McKaskle v. Wiggins</u> , 465 U.S. 168, 104 S.Ct. 944 (1984).....	21
<u>Rock v. Arkansas</u> , 483 U.S. 44, 107 S.Ct. 2704 (1987)	21
<u>State v. Black</u> , 400 S.C. 10, 732 S.E.2d 880 (2012).....	9, 14, 15
<u>State v. Broadnax</u> , 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013).....	9, 12, 15
<u>State v. Broadnax</u> , No. 27545, 2015 WL 4099053 (S.C. July 8, 2015).....	12
<u>State v. Bryant</u> , 369 S.C. 511, 633 S.E.2d 152 (2006)	9,15,17,22
<u>State v. Cheeseboro</u> , 346 S.C. 526, 552 S.E.2d 300 (2001)	9,15
<u>State v. Colf</u> , 337 S.C. 622, 525 S.E.2d 246 (2000)	passim
<u>State v. Howard</u> , 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011).....	passim
<u>State v. Morris</u> , 289 S.C. 294, 345 S.E.2d 477 (1986)	23
<u>State v. Rivera</u> , 402 S.C. 225, 741 S.E.2d 694 (2013).....	21
<u>State v. Robinson</u> , 2014-UP-068 (Ct. App. Feb. 19, 2014)	2,11
<u>State v. Rosemond</u> , 356 S.C. 426, 589 S.E.2d 757 (2003)	19
<u>State v. Scriven</u> , 339 S.C. 333, 529 S.E.2d 71 (Ct. App. 2000)	12, 18
<u>United States v. Beahm</u> , 664 F.2d 414 (4 th Cir. 1981).....	17
<u>Washington v. Texas</u> , 388 U.S. 14, 87 S.Ct. 1920 (1967).....	21, 22

Codes

GA. CODE ANN., § 16-8-18 19

S.C. CODE ANN. § 16-11-311(A)(1)(a)..... 18

Rules

Rule 209, SCRE..... 18

Rule 601, SCRE..... 11

Rule 609, SCRE..... passim

STATEMENT OF ISSUE ON APPEAL

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?

STATEMENT OF THE CASE

On October 25, 2011, Appellant Stephon Robinson was indicted by the Barnwell County Grand Jury for first-degree burglary and possession of a weapon during the commission of a violent crime. R. 232.

On November 1–2, 2011, Robinson proceeded to trial before the Honorable Doyet A. Early, III, and a jury. R. 1. Robinson was represented by Glen Walters, and the State was represented by Assistant Solicitors A. Keith McAlister and David Miller. The jury found Robinson guilty. R. 187, ll. 5-21. The trial court sentenced Robinson to twenty years imprisonment on the first-degree burglary conviction and five years imprisonment on the possession of a weapon during the commission of a violent crime conviction. R. 197, ll. 8-11. The sentences were to run concurrently. R. 197, ll. 11-12.

Robinson was represented on direct appeal by Appellate Defenders Dayne C. Phillips and Carmen V. Ganjehsani. The State was represented by Assistant Attorney General J. Benjamin Aplin. On February 19, 2014, the South Carolina Court of Appeals issued an unpublished opinion remanding Appellant’s case to the trial court to “hold a hearing and carefully balance the probative value of his [Robinson’s] prior convictions for impeachment purposes against their prejudicial effect.” R. 199 (State v. Robinson, 2014-UP-068 (Ct. App. Feb. 19, 2014)).¹

¹ It appears that the Order remanding the case may have only been for consideration of Robinson’s 2009 conviction for attempted robbery and the two 2007 Georgia convictions for breaking into an automobile with intent commit a theft or felony. R. 199 (State v. Robinson, 2014-UP-068 (Ct. App. Feb. 19, 2014)). However, the remand court also addressed the admissibility of Robinson’s 2009 second degree burglary conviction in its Order. R. 224 (Nov. 11, 2014 Order, p. 4-6). Out of an abundance of caution, Appellant addresses all four prior convictions in this brief.

The remand hearing was held before the Honorable Doyet A. Early, III, in Aiken County on June 9, 2014.² Robinson was represented by Appellate Defender Carmen V. Ganjehsani and the State was represented by Assistant Solicitor David W. Miller. R. 202. On November 11, 2014, the remand court issued its Order finding that the probative value of the introduction of Robinson's prior record outweighed any prejudice to him under Rule 609(a)(1) and denying Robinson a new trial. R. 224 (Nov. 11, 2014 Order).

This appeal follows.³

² Robinson agreed to waive venue only for purposes of the remand hearing. He did not waive venue for any further proceedings.

³ Appellant has an obligation to provide a record sufficient for this Court's review. If this Court finds that the remand court erred in finding that Robinson's prior convictions were properly admitted at his trial, then this Court will also conduct a harmless error analysis. To that end, the trial transcript is included in the Designation of the Record on Appeal. The remand court also considered the trial transcript in its decision. R. 224 (Nov. 11, 2014 Order, p. 2).

STATEMENT OF FACTS

Robinson's Trial

The basic facts presented at the trial were that Eddie Williams claimed that Robinson, Robinson's brother, and an unidentified third man entered his home on the afternoon of Sunday, February 20, 2011 and that Robinson had a weapon on his person. Williams grabbed his own gun, started to shoot, and the intruders ran. Robinson allegedly turned and fired one shot. Williams claimed that Robinson was one of the intruders. R. 99-107. The initial call was dispatched to law enforcement around 2:17 or 2:20 that afternoon. R. 50.

Following the incident, Williams was not completely truthful to law enforcement. Williams initially did not tell the officer investigating the incident that Williams himself had shot his gun at the intruders. He was allegedly afraid to tell the truth to law enforcement because the gun in his possession had not been registered and had been stolen out of Beaufort County. R. 60; 111. Williams also told law enforcement on the date of the incident that the bullet holes in his home were already there when he purchased the home. R. 112-113.

At trial, Robinson testified that he was at his home with his brother and cousin at the time that the incident occurred at Williams' home. He woke up late morning, took a shower, and returned the car that he had borrowed from Shelly Leanna Gunnels back to her house between noon and one o'clock. He then returned to his home, where he remained for the rest of the day. R. 130-132.

Gunnels testified that Robinson did borrow her car on February 19th and then returned it on February 20th "around that afternoon." R. 96-97.

When Robinson informed the trial court of his decision to testify, the State requested to impeach him using prior convictions from 2009 for second-degree burglary and strong arm robbery and from 2007 for breaking into an automobile. Defense counsel argued that the prejudicial value of the convictions outweighed any probative value and that, with respect to the burglary offense, that “jurors may conclude that once a burglar, always a burglar.” R. 126, l. 16 – 129, l. 5.

Without providing any analysis, the trial court found: (1) “that [the prior convictions] come within the statute [;]” (2) that the burglary conviction would be referred to as a felony conviction “in order to preclude any prejudicial value [;]” and (3) that “[the State] will be allowed to use the other [prior convictions] for impeachment purposes.” R. 129, ll. 6-11.

Based on the trial court’s ruling, Assistant Solicitor Miller elicited the following testimony during cross-examination of Robinson:

Q: Are you the same Stephon Robinson that was convicted of *strong-arm 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: 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-arm robbery*, was your brother with you then?

A: Yes, sir.

...

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

A: No, sir.

R. 136, l. 21 – 138, l. 8 (emphasis added).

Without providing any prior notice, Assistant Solicitor Miller also impeached Robinson's brother, Reginald Felder, using the same convictions:

Q: Were you convicted in 2007 of *breaking into motor vehicles* to commit a felony or a theft in Georgia?

A: I was, but I didn't do it.

...

Q: Okay. Well, when you weren't *breaking into these motor vehicles* that you were later convicted of breaking into, were you with your brother?

...

A: My brother was doing community service at the time, but the guy that really did it said that me and my brother did it, which we didn't do it.

Q: [W]ere you convicted in 2007 of *breaking into motor vehicles*?

A: Yes, sir.

Q: Okay. And in 2009, were you convicted in July of a *strong-armed robbery*?

A: Yes, sir.

R. 148, l. 7 – 149, l. 7 (emphasis added). The State further questioned Robinson's brother regarding the prior convictions later on cross-examination. R. 153, l. 18 – 154, l. 7.

During the State's closing argument, Assistant Solicitor McAlister argued to the jury:

We talked about burglary in the first-degree before the trial. Burglary in the first-degree is entering a dwelling, a home without consent with intent to commit a crime. And in this case, while carrying a firearm.

Now, all the testimony you've heard today, it's every element: His door was kicked in; the defendant entered the home without consent; he obviously came in to commit a crime. I don't know if he's coming in there to steal a TV -- I don't know what he's doing. We don't have to prove that. He's coming in to commit a crime because he's got a gun in his hand.

R. 172, ll. 4-14; and,

Now, let's talk about the defendant. . . . [sic] 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. . . . And then Mr. Felder gets on 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. . . . He was convicted of crimes that he says he was wrongfully convicted of. He's facing these same charges. Obviously, he has a motivation to lie.*

R. 173, l. 16 – 174, l. 6 (emphasis added).

Remand Hearing

At the remand hearing both defense counsel and the solicitor presented argument regarding the probative value and prejudicial effect of Robinson's prior convictions. Defense counsel argued that the five Colf⁴ factors should have been applied to make this determination. These included the impeachment value of the crime, the point and time of

⁴ State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

the conviction and the witness' subsequent history, the similarity of the prior crimes and the charged crime, the importance of the defendant's testimony, and [the] centrality of the credibility issue. R. 206, l. 4 – 207, l. 12. Defense counsel argued that neither attempted robbery nor breaking and entering of an automobile are probative of truthfulness, such that they had no probative value. R. 207, l. 13 – 208, l. 7. Additionally, though the prior convictions were not for the identical crimes, they were very similar, having a common thread of theft. R. 208, l. 8 – 209, l. 16.

The solicitor averred that there is “nothing similar” between a burglary and a robbery and that there is a “large difference” between breaking into someone's car and breaking into someone's home. With respect to the second degree burglary conviction, he seemed to allege that any prejudice was removed by it being referred to as a felony that carried more than one year. R. 213, l. 10 – 215, l. 8. He further pointed to the fact that the prior convictions occurred within five years of the alleged offense. R. 215, l. 9 – 216, l. 2. The solicitor also said that their admission was “exceedingly important” because the defendant was proclaiming his innocence and there was no physical evidence, just the testimony of Robinson and the alleged victim. He argued that the only prejudice from the other convictions was their effect on his credibility, but that the jury would not assume that “he was a bad guy who did bad things and therefore, he must have done this thing.” R. 216, l. 3 – 219, l. 2.

Defense counsel responded that the solicitor failed to articulate any probative value for the prior convictions other than truthfulness, which is contradicted by case law. She also reemphasized that the similarity between the alleged crimes and the prejudice in

admitting crimes that have no purpose other than showing propensity. R. 219.1.5 – 221, 1.14.

Order Denying Relief

Judge Early issued a written Order denying Robinson any relief and, not surprisingly, finding a sufficient basis for admitting the prior convictions that he originally admitted at trial. R. 224 (Nov. 11, 2014 Order). With the exception of a passing reference to State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012), the remand court did not cite any of the cases referenced by defense counsel during the remand hearing, which included State v. Howard, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011); State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006); State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); and State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013).

The remand court then considered the four convictions together in addressing each of the Colf factors, purportedly “because the analysis remains the same for each conviction.” R. 228 (Nov. 11, 2014 Order, p. 5). Judge Early found that the the prior convictions all had impeachment value. He also found that the convicitons were sufficiently close in time to the trial and were not substanitally similar to the alleged crime with the exception of the redacted prior burglary charge. Further, Robinson’s testimony was not important to advance the alibi defense and the “credibility of all witnesses, for the State and the Defense, was an essential element of this trial, as it is with every trial.” Thus, he determined that the jury properly considered the prior convictions of Robinson within the confines of the court’s limiting intstruction and that Robinson was not entitled to a new trial. R. 230-231 (Nov. 11, 2014 Order, p. 7-8). With respect to the

2009 second degree burglary conviction, the court additionally found that it was “probative as to the believability of the Defendant and that any undue prejudice from introduction of the conviction [was] diminished by this Court’s limiting instruction as well as the requirement that the State refer to the conviction only as a ‘conviction for a felony offense that carried more than a year.’” R. 227 (Nov. 11, 2014 Order, p. 4).

ARGUMENT

The remand court erred in finding that the probative value of the admission of Appellant's prior convictions for 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.

This Court remanded Robinson's case for a hearing on the admissibility of his prior convictions, instructing the remand court to "carefully balance the probative value of the prior convictions for impeachment purposes against their prejudicial effect." R. 199 (State v. Robinson, 2014-UP-068 (Ct. App. Feb. 19, 2014)). The remand court conducted a perfunctory "analysis" and found that it properly admitted Robinson's prior convictions. The court's findings miss mark the mark in many respects, resulting in the deficiency of its entire assessment of probative value versus prejudicial effect. Had the remand court looked to any of the relevant case law in reaching its findings and conclusions, there would have been no rational or fair decision other than to grant Robinson a new trial. This is especially so when Robinson was alleged to have committed the burglary with his brother and the solicitor elicited testimony that the prior strong arm robbery conviction and the two breaking and entering a motor vehicle convictions arose from incidents involving him and his brother.

Rule 601(a), SCRE, and the Colf Factors

"According to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year imprisonment are admissible for impeaching the credibility of a defendant who testifies when the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." State v. Howard, 396 S.C. 173, 178, 720 S.E.2d 511, 514 (Ct. App. 2011) (quotation marks omitted). "Our 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.” Id. (citing State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000)).

The defendant’s prior convictions in State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000), all occurred over ten years prior to the alleged offenses such that Rule 609(b), SCRE, applied. The trial court was thus required to find that the probative value of the prior convictions *substantially* outweighed the prejudicial impact in order to allow for their admission. See Rule 609, SCRE. In the present case, there is no dispute that the convictions fell within the ten-year time limit such that Rule 609(a)(1) applied. Thus, the threshold for admissibility is lower, requiring only a determination “that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.”

Howard makes clear that even in a Rule 609(a) analysis, the Colf factors are applicable, stating: “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.” 396 S.C. at 178, 720 S.E.2d at 514; see also State v. Scriven, 339 S.C. 333, 341-42, 529 S.E.2d 71, 75-76 (Ct. App. 2000) (citing differences in Rule 609(a)(1) and 609(b), SCRE, but recognizing that regardless the trial judge should engage in a meaningful analysis of the relevant factors and balance the probative value against the prejudicial effect to the accused). In our Supreme Courts recent decision in State v. Broadnax, No. 27545, 2015 WL 4099053, *5 (S.C. July 8, 2015), the court wrote:

Ultimately, the Rule [609] is designed to help the jury discern the truth. It is not a tool for the State to bolster its case against the criminal defendant for the mere fact that the defendant has engaged in prior criminal activity. The balance we strike today cuts to the heart of our system's conceptions of fair trial and fair play.

In the present case, the prior convictions included a 2009 conviction for second degree burglary, a 2009 conviction for strong arm robbery, and two 2007 Georgia convictions for breaking and entering a motor vehicle with intent to commit a felony or theft. The State presented no additional facts in an attempt to admit these convictions as crimes involving dishonesty or false statement pursuant to Rule 609(b), likely knowing that such would be unsuccessful. Thus, their admission pursuant to Rule 609(a) required application of the Colf factors to find whether their probative value outweighed the prejudicial effect.

Lack of Impeachment Value

The remand court's impeachment value analysis is perhaps the most lacking and unsupported. The court acknowledged that no specific details of Robinson's convictions were provided, but found that "the mere fact that the Defendant had twice been convicted of serious crimes within a few a years of the alleged offense would tend to impact the Defendant's credibility." He said that they do not imply that Robinson was "an armed burlgar" but rather that he is someone that cannot be trusted and might not be credible. Thus, Judge Early found that each of the prior convictions had impeachment value, which was not outweighed by any prejudice. R. 228 (Nov. 11, 2014 Order, p. 5).

While admittedly some overlap in discussion is inevitable, the remand court made the same error made in Howard, of conflating impeachment value with credibility and character. There, the remand judge's findings regarding impeachment related to (1)

Howard and the victim being the only witnesses to the assault and (2) Howard's attacks on the victim's character during trial. 396 S.C. at 180, 720 S.E.2d at 515. The Howard court found:

[T]he trial court failed to properly address the impeachment value of Howard's prior ABHAN convictions as required by *Colf*. While the trial court discussed the importance of credibility in this case, the court failed to state how Howard's prior ABHANS were probative of his credibility. The trial court instead focused on Howard's character, which does not affect the impeachment value of his prior crimes.

Id.

Similarly, in the present case, the remand court failed to connect what about Robinson's prior convictions were probative of his credibility. Instead, the trial judge generalized that "the mere fact that the Defendant had *twice been convicted of serious crimes within a few a years of the alleged offense* would tend to impact the Defendant's credibility." R. 228 (Nov. 11, 2014 Order, p. 5) (emphasis added). The applicable case law paints a far different picture of the impeachment value of the prior convictions. In State v. Black, our Supreme Court noted that "[t]he starting point in the analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand—the witness's propensity for truthfulness, or credibility." 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012). It is this impact on credibility that, in turn, determines the impeachment value of the prior conviction, i.e. "how strongly the nature of the conviction bears on the veracity, or credibility, of the witness." Id. at 21-22; 732 S.E.2d at 887. This is important because the purpose of impeachment is not to show that the testifying individual is a "bad person" but rather to show "background facts which bear directly on whether jurors ought to believe him." Id. at 22, 732 S.E.2d at 887. The Black court provided a "rule of thumb" that "convictions that rest on dishonest conduct relate to

credibility, whereas crimes of violence, which may result from a myriad of causes, generally do not.” Id.

The Black court found that the witnesses’ manslaughter conviction was not particularly probative of truthfulness; thus, its impeachment value was limited. Id. at 23, 732 S.E.2d at 887. In a footnote, the court went on to describe the dichotomy between serious crimes, which have a greater potential for prejudice, and those that actually impact a witness’s veracity. Id. at 24, n.6, 732 S.E.2d at 888, n.6 (citing State v. Bryant, 369 S.C. 511, 517-18, 633 S.E.2d 152, 155-56 (2006) (observing “a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness”) and State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) (noting convictions for housebreaking and grand larceny were not generally considered probative of truthfulness)).

In Broadnax, our Supreme Court held that “for impeachment purposes [under Rule 609(a)(2), SCRE], crimes of “dishonesty or false statement” are crimes in the nature of *crimen falsi* “that bear upon a witness’s propensity to testify truthfully.” Opinion No. 27545 (S.C. filed July 8, 2015). The court went on to say that “armed robbery, therefore, is not per se probative of truthfulness.” Id. Thus, following the logic set forth in Black, since armed robbery is not probative of truthfulness, its impeachment value is limited. 400 S.C. at 23, 732 S.E.2d at 887. Nonetheless, the remand court found that all of Robinson’s prior convictions, which would include the strong arm robbery, “imply that the accused is not someone to be trusted – that he might not be credible.” R. 228 (Nov. 11, 2014 Order, p. 5).

Had the remand court properly looked at the nature of the prior convictions in determining their impeachment value, he would have had no choice but to conclude that neither of the prior convictions was probative of truthfulness. Thus, this factor should have weighed against admission of Robinson's prior convictions.

Point in Time of Prior Convictions and Subsequent History

The remand court found that the prior convictions all occurred within five years of the trial and "were therefore well within the time frame provided for by the Rule. R. 229 (Nov. 11, 2014 Order, p. 6). However, there was no dispute that the prior convictions occurred within the ten-year timeframe such that the presumption against admission of Rule 609(b), SCRE, was not applicable. The alleged offense was committed on February 20, 2011, and Robinson was tried on November 1-2, 2011. The prior offenses were from two and four years prior, in 2007 and 2009. Even so, the court was required to consider how the timing of the prior convictions affected their probative value versus prejudicial effect. Instead, the remand court focused on the ten-year timeframe and pointed to the fact "[a]t the time of this offense, and at the time of trial in November 2011, the Defendant was ostensibly still being supervised by Georgia and South Carolina authorities for these prior convictions." R. 229 (Nov. 11, 2014 Order, p. 6). While that have been the case, the jury did not and should not have known what the sentences were for each of Robinson's prior convictions. Thus, it is difficult to fathom how Robinson's probationary status at the time of the alleged offense was a legitimate factor for consideration.

Similarity Between Prior Convictions and Charged Offense

The remand court also misapplied the third Colf factor regarding similarity between the prior convictions and the charged offense. Judge Early found that the second degree burglary conviction, though identical, was saved by his limitation that the State refer to it as “a felony conviction that carries more than a year.” Regarding the strong arm robbery and breaking and entering into a motor vehicle with intent to commit a felony or theft, he found that they did not involve elements “crucial to the charge of burglary.” He specifically pointed to first degree burglary’s requirements of the use of a deadly weapon and entering someone’s home. Thus, he found **no** similarity between those prior convictions and the charged offenses. R. 229 (Nov. 11, 2014 Order, p. 6). If the remand court’s reasoning were affirmed, then the similarity factor would be rendered meaningless. If a simple difference in the elements were the standard, a prior conviction for anything other than the identical offense would never be found similar. Further, where the prior conviction and alleged offense were identical, the trial court could just order that the State use some vague reference to the class and potential punishment of the offense. This would destroy any impeachment value since the jury would know nothing of the nature of the crime and be left to speculate as to what offense the defendant committed. Thus, the flaw in the remand court’s logic is apparent.

In Colf, 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.” 337 S.C. at 628, 525 S.E.2d at 249 (citing United States v. Beahm, 664 F.2d 414 (4th Cir. 1981)). In Bryant, the Court again noted “when the prior offense is similar to the offense for which the

defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission.” 369 S.C. at 517-18, 633 S.E.2d at 156; see also State v. Scriven, 339 S.C. 333, 343, 529 S.E.2d 71, 76 (Ct. App. 2000) (holding that when prior convictions are “similar or identical to charged offenses . . . the likelihood of a high degree of prejudice to the accused is inescapable”).

In the present case, Robinson was charged with first degree burglary and possession of a weapon during a crime of violence. R.232 (Indictment). A defendant is guilty of burglary in the first degree if the defendant “enters a dwelling without consent and with intent to commit a crime in the dwelling” and “when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime... is armed with a deadly weapon or explosive.” S.C. CODE ANN. § 16–11–311(A)(1)(a).

Addressing Robinson’s prior second degree burglary charge first, the court appeared to recognize the similarity between that and the first degree burglary charge. However, rather than prohibiting its admission, the court allowed the State to refer to it as “a felony conviction that carries more than a year.” According to the remand court, “there is nothing about that characterization of the prior conviction to make it similar to the offense that the Defendant faced.” R.224 (Nov. 11, 2014 Order). The problem with this resolution is that Rule 209(a), SCRE, governs the admission of prior convictions “for the purpose of attacking the credibility of a witness.” When you omit the nature of the crime charged, you take away any probative value that it may have had for truthfulness. The jury is left to speculate whether the prior felony was for burglary, murder, or some other offense. Because there is no basis for the jury to reason that the prior conviction

reflects on truthfulness, its admission becomes propensity evidence. Instead, the prior conviction for second degree burglary should not have been admitted at all.

The court then turned to Robinson's prior convictions for strong arm robbery and two counts of breaking and entering into a motor vehicle with intent to commit a felony or theft. "Strong arm robbery is defined under common law 'as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.'" Abney v. State, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014) (quoting State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003)). Though the specific statute related to the Georgia convictions was not referenced in the record, it appears to be a theft related offense of "entering automobile." GA. CODE ANN., § 16-8-18 ("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.").

While they vary in degree, the common thread amongst the charged offense and the prior convictions is the taking of the property of another. The solicitor implied in his cross-examination of Robinson that he committed the alleged burglary in order steal marijuana from the residence. R. 139, ll. 6-9. Then, in his closing argument, the solicitor admitted that he did not know what crime Robinson allegedly intended to commit once inside the home, but implied that it was a theft by saying "I don't know if he's coming in there to steal a TV." R. 172, ll. 8-14. However, even without the solicitor's attempts to

draw further similarity between Robinson's prior convictions and the alleged offense, the similarities are plain.

The only real difference in the breaking and entering of a motor vehicle with intent to commit a felony or theft and a first degree burglary is the location of the crime and that the burglary required some additional aggravator. Likewise, a first degree burglary can be essentially a strong arm robbery that occurs within the home and with some additional aggravator. In this case, the additional aggravator was the use of a deadly weapon, but that does not mean that a weapon may not have been used in the prior crimes. By admitting these prior convictions, the jury knew that Robinson had stolen before and seemingly had a pattern of escalating conduct. First, he broke into two vehicles with the intent to commit a felony or theft. Then, he took money, goods, or property from a person through the use of violence or fear. It would likely not surprise them that now he entered a house, thinking that the owner was not there, either to steal drugs or other property.

Moreover, there was an overarching factual similarity between the charged offense and the strong armed robbery and breaking and entering a motor vehicle convictions. Robinson was accused of committing the charged offense with his brother and a third party. The solicitor elicited testimony that Robinson committed the offenses underlying those prior convictions with his brother. R. 136, l. 21 – 138, l. 8; R. 148, l. 7 – 149, l. 7.

Despite all of this, the remand court incomprehensibly found that there was no similarity between the crimes. Thus, he failed to weigh their similarity in his assessment of prejudice to Robinson.

Importance of Robinson's Testimony

The remand court's evaluation of the importance of Robinson's testimony completely ignored the constitutional significance of Robinson's right to testify in his own defense. See State v. Rivera, 402 S.C. 225, 249, 741 S.E.2d 694, 707 (2013) (“[T]he right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify ‘is either respected or denied; its deprivation cannot be harmless.’” (quoting McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944 (1984))). Judge Early found that Robinson's testimony was cumulative to the alibi testimony of his two other defense witnesses such that it was not necessary for him to take the stand in his own defense. R. 230 (Nov. 11, 2014 Order, p. 7).

The right of a criminally accused to testify or not to testify is fundamental. Rock v. Arkansas, 483 U.S. 44, 52, 107 S.Ct. 2704 (1987) (“[F]undamental to a personal defense ... is an accused's right to present his own version of the events *in his own words*.” (emphasis added)). “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.” Id. at 53, 107 S.Ct. at 2704 (quoting Harris v. New York, 401 U.S. 222, 230, 91 S.Ct. 643 (1971)). “The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution.” Id. at 51, 107 S.Ct. 2704. “It is one of the rights that ‘are essential to due process of law in a fair adversary process.’” Id. (quoting Faretta v. California, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525 (1975)). “The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call ‘witnesses in his favor,’ a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment.” Id. at 52, 107 S.Ct. 2704 (citing Washington v. Texas, 388 U.S. 14, 87

S.Ct. 1920 (1967)). “The opportunity to testify is also a necessary corollary to the Fifth Amendment’s guarantee against compelled testimony.” Id. “The choice of whether to testify in one’s own defense ... is an exercise of [that] constitutional privilege.” Id. at 53, 107 S.Ct. 2704 (quoting Harris, 401 U.S. at 230, 91 S.Ct. 643) (omission in original).

To characterize Robinson’s testimony as cumulative because he presented other alibi witnesses is far too simplistic. The State went to great lengths to undermine the testimony of Robinson’s alibi witnesses. R. 143, l. 21 – 146, l. 1; R. 147, l. 25 – 154, l. 10. While a defendant is equally entitled to take the stand or remain silent at his trial, there is often no more powerful witness for the defense than the defendant himself. It allows the jury an opportunity to view the defendant’s demeanor, judge his credibility, and assess how he handles himself during cross-examination. Thus, there is a constitutional dimension to a defendant’s testimony that the trial court should have considered in evaluating the importance of Robinson’s testimony and which weighs in favor of exclusion of the prior convictions.

Centrality of Credibility

Lastly, it is undisputed that credibility was important in Robinson’s case, which was based purely on witness testimony. This heightened the court’s need to carefully consider the potential prejudice to Robinson from admission of the prior convictions. See Bryant, 369 S.C. at 518-19, 633 S.E.2d at 156 (recognizing that the case hinged on the defendant’s testimony regarding self-defense and finding that “the State should not be allowed to attack the defendant’s credibility with inadmissible prior convictions; especially where the Petitioner’s credibility was essential to his defense”).

In State v. Morris, 289 S.C. 294, 345 S.E.2d 477 (1986), the solicitor was improperly permitted to cross-examine the defendant regarding his prior conviction for bookmaking. Morris was decided when the standard for impeachment of a witness' credibility required that the conviction relate to a crime involving moral turpitude. 289 S.C. at 296, 345 S.E.2d at 478. The Morris court's finding of error was thus based upon its holding that bookmaking was not a crime of moral turpitude. Id. Despite the different standard for admission, the court's reasoning for rejecting the State's harmless error argument remains instructive. The Morris court found that "the credibility of Morris was of paramount importance in his defense." Id. at 297-98, 345 S.E.2d at 479. It cited the sharp conflict in the evidence, which "was essentially limited to the testimony of the two girls and Morris." Id. Consequently, the court said that it "[could not] hold beyond a reasonable doubt that the affirmative answer to the solicitor's impermissible question did not irreparably damage Morris' credibility in each juror's mind." Id.

Similarly, Robinson's trial was entirely based on the contradicting testimony of the alleged victim and testimony of Robinson and his two alibi witnesses. There was no physical evidence. Thus, Robinson's credibility was paramount to his defense. Thus, the admission of his prior convictions, which lacked any impeachment value and were so similar to the charged offense, was improper to attack his credibility.

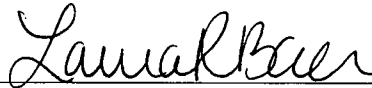
In summary, the remand court erred its analysis of the Colf factors and how they weighed against admission of the prior convictions. With respect to the second degree burglary conviction, the vague characterization substituted by the solicitor only lessened its impeachment value and caused the jury to speculate as to what prior felony Robinson committed. Regarding the other convictions, the prejudice to Robinson was compounded

by the fact that the solicitor elicited testimony that they arose from offenses committed by Robinson with his brother. Robinson was similarly accused of committing the charged offense with his brother and an unknown third party. Thus, not only were the prior convictions utilized as evidence of Robinson's propensity to steal, they were used as evidence of his propensity to steal with his brother. This is not the basis upon which the jury should have been called upon to reach its verdict. The probative value, if any, of Robinson's prior convictions was outweighed by the prejudicial effect of their admission. Robinson is accordingly entitled to a new trial.

CONCLUSION

For the foregoing reasons, Appellant Stephon Robinson respectfully requests that this Court reverse his convictions and sentences and grant him a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "Laura R. Baer", is written over a horizontal line.

Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of February, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Briefs comply with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

RECEIVED

February 17th, 2016

FEB 17 2016

Laura R. Baer SC Court of Appeals

Laura R. Baer
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1330

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

RECEIVED

FEB 17 2016

SC Court of Appeals

THE STATE,

RESPONDENT,

V.

STEPHON ROBINSON,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final 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, this 17th day of February, 2016.

Laura R. Baer

Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of February, 2016.

Marie M. ...

(L.S.)

Notary Public for South Carolina
My Commission Expires: July 3, 2023.