

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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Certiorari to Barnwell County

S.C. SUPREME COURT

Honorable Doyet A. Early, Circuit Court Judge

Opinion No. 2017-UP-065 (S.C. Ct. App. Filed Feb. 1, 2017)

Indictment Nos. 11-GS-06-245, 246

THE STATE,

RESPONDENT/PETITIONER,

V.

STEPHON ROBINSON,

PETITIONER/RESPONDENT.

APPELLATE CASE NO. 2014-002531

JOINT APPENDIX

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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Stephon Robinson, Appellant.

Appellate Case No. 2014-002531

Appeal From Barnwell County
Doyet A. Early, III, Circuit Court Judge

Unpublished Opinion No. 2017-UP-065
Submitted December 1, 2016 – Filed February 1, 2017

AFFIRMED

Appellate Defender Laura Ruth Baer, of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson and Senior
Assistant Deputy Attorney General John Benjamin Aplin,
both of Columbia; and Solicitor James Strom Thurmond,
Jr., of Aiken, for Respondent.

PER CURIAM: Stephon Robinson appeals his convictions of first-degree
burglary and possession of a weapon during the commission of a violent crime.

Robinson argues the circuit court misapplied the *Colf*¹ factors when weighing the probative value against the prejudicial effect of admitting his prior convictions for second-degree burglary, strong-arm robbery, and breaking and entering a motor vehicle with intent to commit a felony or theft. We affirm.

We find the admission of Robinson's 2009 second-degree burglary conviction is the law of the case because Robinson did not object to its admission in his initial appeal. See *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) ("Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court."); *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 572, 776 S.E.2d 397, 403 (Ct. App. 2015) ("[A] decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation." (quoting *In re Grossinger's Assocs.*, 184 B.R. 429, 434 (Bankr. S.D.N.Y. 1995))); see, e.g., *State v. Black*, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012) (finding the circuit court's ruling permitting admission of a defense witness's prior conviction was the law of the case when the defendant did not challenge the use of the conviction to impeach the witness's testimony).

As to the admission of Robinson's remaining prior convictions, we find the circuit court erred in applying two of the five *Colf* factors—the impeachment value of the prior convictions and the centrality of the credibility issue. See *Colf*, 337 S.C. at 626–27, 525 S.E.2d at 248 (approving the following five factors for courts to use when weighing the probative value and prejudice under Rule 609(b), SCRE: "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"); *State v. Howard*, 396 S.C. 173, 178, 720 S.E.2d 511, 514 (Ct. App. 2011) (employing the five-factor analysis to weigh the probative value and prejudice under Rule 609(a)(1), SCRE).

The circuit court erred in finding Robinson's prior convictions had impeachment value because our courts have found prior convictions for robbery, burglary, and theft are not probative of truthfulness. See *Black*, 400 S.C. at 21–22, 732 S.E.2d at 887 ("The tendency to impact credibility, in turn, determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness."); *State v.*

¹ *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000).

Bryant, 369 S.C. 511, 517, 633 S.E.2d 152, 155 (2006) ("[A] conviction for robbery, burglary, theft, [or] drug possession . . . is not probative of truthfulness.").

Despite correctly recognizing that credibility was central to the case, the circuit court erred in finding this factor weighed in favor of admitting Robinson's prior convictions because our courts are hesitant to admit evidence of prior convictions when credibility is central to the case. *See Green v. State*, 338 S.C. 428, 433–34, 527 S.E.2d 98, 101 (2000) (listing the *Colf* factors, noting the importance of credibility because the jury had to choose between the defendant's version of events and that of the law enforcement agents, and finding the defendant was prejudiced by his counsel's failure to argue the prejudicial effect of the defendant's two prior convictions outweighed their probative value).

However, we find the circuit court's error was harmless in view of the other competent evidence of Robinson's guilt. *See State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the [c]ourt should not set aside a conviction because of insubstantial errors not affecting the result."). Williams, the victim, consistently identified Robinson as the perpetrator. Williams testified he knew Robinson because Robinson had been to his house on multiple occasions. *See State v. Liverman*, 398 S.C. 130, 141, 727 S.E.2d 422, 427 (2012) (recognizing a witness's prior knowledge of the accused as a significant factor in determining the reliability of that witness's identification of the accused). Williams also identified Robinson by name when the investigating officer asked Williams who broke into his house, identified Robinson in two different photo lineups; and identified Robinson in court. Furthermore, the investigating officer testified Williams told him Robinson came to Williams' house in a white Pontiac. The investigating officer was able to identify Robinson's girlfriend as the owner of the car. Robinson's girlfriend testified at trial that Robinson had her car the night before the incident and returned the car sometime during the afternoon of the incident, meaning Robinson likely had access to the car during the incident. With this evidence in mind, any error in the admission of Robinson's prior convictions was harmless.

AFFIRMED.²

WILLIAMS, THOMAS, and GEATHERS, JJ., concur.

² We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

THE STATE,

RESPONDENT,

v.

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STEPHON ROBINSON,

FEB 13 2017

APPELLANT SC Court of Appeals

APPELLATE CASE NO. 2014-002531

Appeal from Barnwell County

Honorable Doyet A. Early, Circuit Court Judge

Opinion No. 2017-UP-065

PETITION FOR REHEARING

On February 1, 2017, this Court affirmed Appellant Stephon Robinson's convictions for first-degree burglary and possession of a weapon during the commission of a violent crime. Robinson respectfully petitions this Court for a rehearing of its Opinion No. 2017-UP-065. This Court properly ruled that the trial court erred in its application of two of the Colf¹ factors in

¹ State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) (holding that in determining whether the probative value of a prior conviction outweighs its prejudicial effect, trial courts should consider: (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, along with the facts and circumstances of each particular case).

conducting its analysis on the admission of Robinson's prior convictions for strong-arm robbery and breaking and entering into a motor vehicle. However, pursuant to Rule 221(a), SCACR, Robinson respectfully that the following points were overlooked or misapprehended by the Court: This Court erred in failing to address the remand court's analysis of the other three Colf factors and failing to address the remand court's ultimate ruling on whether the prejudice from admitting the prior convictions outweighed their probative value. Additionally, this Court erred in finding that the error was "harmless in view of the other competent evidence of Robinson's guilt."

BRIEF PROCEDURAL HISTORY

As this Court will recall, Robinson's initial appeal in this case raised the following issue:

Did the trial court err in admitting Appellant's prior convictions for strong-arm robbery and breaking and entering into a motor vehicle under Rule 609(a)(1), SCRE, when the trial court failed to conduct the required on-the-record balancing test set forth by *State v. Colf*, 337 S.C. 622, 525 S.E.2d 246 (2000), and Appellant was prejudiced by the admission of his prior convictions given the similarity of his prior convictions to his charges for first-degree burglary and possession of a weapon during the commission of a violent crime?

Appellate Case No. 2011-202987, Final Brief of Appellant. In an unpublished opinion, this Court ruled that the trial court failed to conduct a meaningful analysis balancing the impeachment value of Robinson's prior convictions against their prejudicial effect and remanded the case back to the trial court to hold a hearing and to conduct the proper balancing test.² R. 119 – 200; State v. Robinson, Opinion No. 2014-UP-068 (Ct. App. filed Feb. 19, 2014).

² Appellant notes that Respondent raised the same "harmless error" argument in its Brief filed in petitioner's initial direct appeal. See Appellate Case No. 2011-202987, Final Brief of Respondent, p. 19-21. If this Court had been persuaded by Respondent's argument, it could have found the error harmless and affirmed Robinson's conviction at that time. 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).

The remand hearing was held before the Honorable Doyet A. Early, III, on June 9, 2014. On November 11, 2014, Judge Early filed an 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. Robinson appealed, arguing that the remand court erred in finding that the probative value of the admission of Appellant's prior convictions outweighed the prejudice to him under Rule 609(a)(1), SCRE, resulting from its misapplication of the Colf factors. Appellate Case No. 2014-00253, Final Brief of Appellant.

In its unpublished opinion, **this Court found that the remand court erred in the application of two of the Colf factors – the impeachment value of the prior convictions and the centrality of the credibility issue.** State v. Robinson, Opinion No. 2017-UP-065 (Ct. App. filed Feb. 1, 2017). However, this Court did not discuss the three remaining Colf factors or the remand court's ultimate determination that the prejudicial affect did not outweigh the probative value of the Robinson's prior convictions. Additionally, this Court ruled that "the circuit court's error was harmless in view of the other competent evidence of Robinson's guilt," citing the following the facts:

Williams, the victim, consistently identified Robinson as the perpetrator. Williams testified he knew Robinson because Robinson had been to his house on multiple occasions. Williams also identified Robinson by name when the investigating officer asked Williams who broke into his house, identified Robinson in two different photo lineups; and identified Robinson in court. Furthermore, the investigating officer testified Williams told him Robinson came to Williams' house in a white Pontiac. The investigating officer was able to identify Robinson's girlfriend as the owner of the car. Robinson's girlfriend testified at trial that Robinson had her car the night before the incident and returned the car sometime during the afternoon of the incident, meaning Robinson likely had access to the car during the incident.

Id. Thus, this Court affirmed Robinson's convictions. Id.

ARGUMENT

This Court erred in discussing only two of the *Colf* factors and failing to rule on the ultimate issue of whether the remand court erred in finding that the probative value of Robinson's prior convictions outweighed their prejudicial affect under Rule 609(a), SCRE.

“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)).

Howard made 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). “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.” State v. Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015).

Here, this Court aptly ruled that the remand court erred its application of two of the Colf factors. Specifically, the remand court erred in finding that Robinson’s prior conviction for strong arm robbery and two prior convictions for breaking and entering a motor vehicle with intent to commit a felony or theft had impeachment value. State v. Robinson, Opinion No. 2017-UP-065 (Ct. App. filed Feb. 1, 2017). “[O]ur courts have found prior convictions for robbery, burglary, and theft are not probative of truthfulness.” Id. This court also found that the remand court erred in finding that the centrality of credibility weighed in favor of admission of the prior convictions because “our courts are hesitant to admit evidence of prior convictions when credibility is central to the case.” Id. However, this Court did not discuss the three remaining Colf factors or rule upon whether the trial judge erred in his ultimate determination that the probative value outweighed the prejudicial affect.

Regarding the **similarity between the prior convictions and charged offense of burglary**, Judge Early found that there was “no similarity” because the prior offenses did not require the use of a deadly weapon or entry into someone’s home. R. 229. The standard applied by the remand court was akin to the “elements test” used to determine lesser included offenses. See State v. Watson, 349 S.C. 372, 375, 563 S.E.2d 336; 337 (2002) (“The elements test inquires whether the greater of the two offenses includes all the elements of the lesser offense.”). Such an “analysis” dilutes the purpose behind the consideration of similarity. See Colf, 337 S.C. at 628, 525 S.E.2d at 249 (explaining that “evidence of similar offenses inevitably suggests to the jury the defendant’s propensity to commit the crime with which he is charged” and is not eliminated by limiting instructions); State v. Bryant, 369 S.C. 511, 517-18, 633 S.E.2d 152, 156 (2006)

(“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.”); 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). “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)). The Georgia convictions appear to be for violations of GA. CODE ANN., § 16-8-18, which provides: “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. 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. The jury would not think it unreasonable that Robinson, based on his prior conduct, would have 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's brother**. 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. 16; R. 148, l. 7 – 149, l. 7. At the end of the questioning, he asked: "So in three out of the four times when you committed a crime, your brother was with you?" R. 138, ll. 14-16. Despite all of this, the remand court incomprehensibly found that there was *no similarity* between the crimes. The judge's failure to properly weigh the

similarity of the offenses was just as egregious as the failures with respect to impeachment value and centrality of credibility that were discussed in this Court's opinion.

Additionally, 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. Judge Early improperly 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.

The right of a criminally accused to testify or not to testify is fundamental. State v. Rivera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013); Rock v. Arkansas, 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (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.” Rivera, 402 S.C. at 241, 741 S.E.2d at 702. “The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution,” including the due process clause of the Fifth Amendment and the compulsory process clause of the Sixth Amendment, applicable to the states through the Fourteenth Amendment. Id. at 214-42, 741 S.E.2d at 703. “The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony.” Id. A person's right to be heard in his defense—a right to his day in court—is basic in our system of jurisprudence. Id. (citations omitted).

To characterize Robinson's testimony as cumulative because he presented other alibi witnesses is far too simplistic. The solicitor 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 weighed in favor of exclusion of the prior convictions.

Lastly, regarding the **timing of the prior convictions**, 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. Robinsons' prior convictions were from 2007 and 2009 undisputedly fell within the ten year period under subsection (a) of Rule 609, SCRE. However, the remand court further pointed to the fact that "[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. 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.

Rule 220(b), SCACR, provides: "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case." Thus, Appellant must request that this Court rule specifically on whether the remand court erred in its determination that "the probative value of the introduction of the Defendant's prior record outweighed any prejudice to him under Rule 609(a)(I), SCRE." R. 231. As discussed *supra*, the remand court erred in its analysis of the remaining three Colf factors, none of which were

addressed in this Court's opinion. Given the significance of the lack of impeachment value and the centrality of credibility, a discussion of only two of the Colf factors may have been sufficient to support a finding that the remand court erred in determining that the probative value of Robinson's convictions outweighed the prejudice to him under Rule 609(a)(1), SCRE. However, this Court's opinion stopped short of making that conclusion and, thus, did not rule on the ultimate issue raised in the case. Robinson respectfully requests that this Court file an amended opinion.

This Court erred in ruling that any error was harmless, as such a ruling is inconsistent with this Court's finding that "credibility was central to the case" and the solicitor improperly elicited details of the offenses.

This Court ruled that any error, ostensibly in the admission of Robinson's prior convictions, "was harmless in view of the other competent evidence of Robinson's guilt." State v. Robinson, Opinion No. 2017-UP-065 (Ct. App. filed Feb. 1, 2017). The facts listed in support of that ruling noted that the victim identified Robinson, who he "knew" from prior interactions, as one of the perpetrators. This Court also noted that the victim described the perpetrators as driving a white Pontiac and that Robinson "likely" had access to "the car" at the time of the incident. Id. This Court overlooked the contrary evidence presented by the defense and overstated the evidence presented by the state, seemingly applying a directed verdict like standard, encouraged by Respondent. See 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."). Moreover, the finding of harmlessness is inconsistent with this Court's ruling that remand court "correctly recognize[ed] that credibility was central to the case." See State v. Robinson, Opinion No. 2017-UP-065 (Ct. App. filed Feb. 1, 2017).

“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). 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 harmless error doctrine “should be employed guardedly . . . and on a case by case basis.” State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986).

This case involved an alleged home invasion of Eddie Williams on February 19, 2011. According to Williams, Robinson, Robinson’s brother Reginald Felder, and an unidentified third man kicked in his door and entered his home. Williams grabbed his handgun, started to shoot, and the intruders ran. Robinson allegedly turned and fired one shot. R. 99-107. The initial call was dispatched to law enforcement around 2:17 or 2:20 that afternoon. R. 50, ll. 14-21. Williams told police that the men were driving a “white, four-door vehicle” he thought to be a Pontiac. R. 61, ll. 6-11.

Williams was not honest with police about the incident at first, telling them varying stories that his trailer was “shot up” and that the trailer had bullet holes in it when he purchased it. In fact, three of the four bullet holes were from the shots that Williams fired himself.

Williams claimed to be afraid to tell the truth because the gun in his possession had not been registered. R. 110, l. 14 – 114, l. 25. Williams did not mention to police the fact the he sold marijuana out of his home. See R. 138, l. 17 – 139, l. 25.

Robinson testified on his own behalf and presented two alibi witnesses, Arthur Wallace and Reginald Felder. R. 130, l. 12 – 154, l. 16. All three men testified consistently that they went to a club together on February 19, 2011 in the white Pontic owned by Shelly Leanna Gunnels, who was Robinson's on-again/off-again boyfriend. R. 133, ll. 14-25; R. 142, ll. 11-13; R. 147, ll. 6-8; see R. 95, ll. 12-24. They left the club late, around 3:00 a.m., and Robinson had been drinking, so they drove back to Robinson's home and went to sleep rather than taking the car back to Gunnels then. R. 134, ll. 1-22; R. 142, ll. 11-13; R. 147, ll. 8-12. At approximately 10:00 a.m. on February 20, 2011, Felder drove the car to "Shelton's" to buy cigarettes and food. R. 135, l. 12 – 136, l. 1; R. 142, l. 13-19; R. 147, ll. 12-17. Robinson woke up late morning or early afternoon, took a shower, and drove the car back to Gunnels between noon and 1:00 p.m. Since he went alone, Gunnels drove Robinson back home, where he remained the rest of the afternoon. R. 131, ll. 5-8; R. 135, l. 2-11; R. 141, ll. 1-4; R. 142, l. 19 – 143, l. 11; R. 147, ll. 17-19; R. 149, l. 14 – 150, l. 6.

Gunnels testified that Robinson borrowed her car on February 19th and returned it on the 20th at "I guess around that afternoon." R. 96, l. 22 – 97, l. 7. Gunnels said that she did not remember who was with Robinson when he returned the car. R. 97, ll. 8-10. Gunnels identified a picture of her own vehicle as the one borrowed by Robinson. R. 96, ll. 2-14. However, it is notable that the solicitor never showed the picture to Williams. R. 98, l. 5 – 110, l. 9; R. 121, l. 3 – 122, l. 2. Thus, there was no testimony that Gunnels' specific white Pontiac was the car seen by Williams.

While Robinson admitted that he had purchased marijuana at Williams' house over the past year and a half, Williams claimed that he had seen Robinson when Robinson came over to play videogames with Williams' nephew. R. 102, l. 10 – 103 l. 2; R. 131, ll. 17-25; R. 138, l. 17 – 139, l. 25. Williams also acknowledged that he knew Robinson's parents 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.

R. 103, ll. 3-11 (emphasis added). When Williams viewed the line-ups, he mixed up the names of Robinson and his brother, Reginald Felder, casting serious doubt on how well he knew them. R. 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. R. 107, l. 6 – 109, l. 22; R. 120, ll. 13-20. If Williams misidentified Robinson as one of the perpetrators, his ability to select him from a photo array may well have been based on their prior interactions rather than any reliable memory of the incident itself. 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. R. 109, l. 23 – 110, l. 9.

Additionally, the police failed to collect the bullet allegedly shot by the intruders and never located a weapon belonging to Robinson or the other suspects. They also failed to collect any fingerprints and did not perform any gunshot residue test on Robinson or his brother. R. 57, l. 21 – 59, l. 10; R. 73, ll. 10-16; R. 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. Cf. State v. Broadnax, 414 S.C. 468, 478–79, 779 S.E.2d 789, 794 (2015) (holding admission of defendant's prior convictions harmless where there was overwhelming evidence of guilt,

including that defendant was positively identified by several employees who recalled his *distinctive facial features and clothing*, defendant was stopped in a dented gray truck like that driven by the robber's accomplice *only a short distance away within minutes* after the employees reported the robber, and *defendant was found crouching in the floorboard area of the truck with a gun and bag of money matching the employees' descriptions*).

In State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), our Supreme Court reversed the defendant's murder conviction, finding that the admission of the defendant's prior firearms conviction was improper under Colf and rejecting the state's argument that its admission was harmless error. Bryant's sole defense was self-defense, which hinged entirely on his own testimony. 369 S.C. at 518, 633 S.E.2d at 156. The Bryan Court found that: "Although, the record contains evidence which may undermine Petitioner's self-defense theory, the record also contains evidence which supports Petitioner's self-defense theory." Id. The Court ruled 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."** Id. at 518-19, 633 S.E.2d at 156. Thus, the Court held that the improper admission of Bryant's prior firearms convictions was not harmless. Id. at 519, 633 S.E.2d at 156.

Similar to Bryant, the solicitor should not have been allowed to attack Robinson's credibility with inadmissible prior convictions for strong-arm robberies and two breaking and entering into a motor vehicle. See also State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) ("Error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense." (citing State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986))); Green v. State, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000) (upholding finding of prejudice from failure of trial counsel to argue that the prejudicial effect of

the defendant's prior convictions outweighed their probative value where the defendant's "credibility was critical, as the jury had to choose between his version of events and that of the SLED agents").

Notably, this Court ruled that the remand court "correctly recogniz[ed] that **credibility was central to the case.**" State v. Robinson, Opinion No. 2017-UP-065 (Ct. App. filed Feb. 1, 2017) (emphasis added). The impropriety of the admission of the prior convictions was compounded by the solicitor's improper inquiry into the details of the offense, specifically whether Robinson's prior offenses were committed in concert with his brother, Reginald Felder, who was charged as his co-defendant in the instant case. R. 136, l. 21 – 138, l. 16; see State v. Joseph, 328 S.C. 352, 361, 491 S.E.2d 275, 280 (Ct. App. 1997) ("[T]he details of the crime of which the witness has been convicted, whether the details could be considered mitigating or aggravating, are not admissible."). Thus, the solicitor used the prior convictions not for purposes of credibility, which was itself improper in light of the proper Colf evaluation, but to show that Robinson had a propensity to commit crimes with his brother.

In light of the totality of the evidence and the centrality of Robinson's credibility, the remand court's error in finding that his prior convictions were properly admitted was not harmless beyond a reasonable doubt.

CONCLUSION

For the reasons set forth herein, Appellant Stephon Robinson respectfully requests that the Opinion of the Court of Appeals be withdrawn and that this Court reverse his convictions.

Respectfully Submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT

This 13th day of February, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Honorable Doyet A. Early, Circuit Court Judge

RECEIVED
FEB 13 2017
SC Court of Appeals

THE STATE,

RESPONDENT,

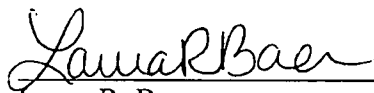
V.

STEPHON ROBINSON,

APPELLANT

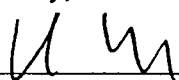
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and upon Stephon Robinson, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 13th day of February, 2017.



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 13th day of February, 2017.



(L.S)
Notary Public for South Carolina
My Commission Expires: May 12, 2025

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

FEB 16 2017

APPEAL FROM BARNWELL COUNTY
Court of General Sessions

SC Court of Appeals

Doyet A. Early, III, Circuit Court Judge

Opinion No. 2017-UP-065 (S.C. Ct. App. filed February 1, 2017)

Appellate Case No. 2014-002531

THE STATE,RESPONDENT,

v.

STEPHON ROBINSON,APPELLANT.

RESPONDENT'S PETITION FOR REHEARING

On February 1, 2017, this Court issued an unpublished opinion that affirmed Appellant Stephon Robinson's convictions for first-degree burglary and possession of a weapon during the commission of a violent crime. State v. Robinson, Op. No. 2017-UP-065 (S.C. Ct. App. filed February 1, 2017). Respondent (the State) respectfully petitions the Court for rehearing pursuant to Rule 221(a), SCACR. Although the State ultimately was the prevailing party when this Court affirmed on the basis of harmless error, the State nevertheless seeks rehearing on the grounds that the Court may have misapprehended or overlooked several crucial point raised by the parties that bear directly upon this Court's conclusion that "the circuit court erred in applying two of

the five Colf factors—the impeachment value of the prior convictions and the centrality of the credibility issue.” Specifically, the State submits this Court may have misapprehended the reach of prior precedent from our Supreme Court in concluding that: (1) “The circuit court erred in finding Robinson’s prior convictions had impeachment value because our courts have found prior convictions for robbery, burglary, and theft are not probative of truthfulness,” and (2) “Despite correctly recognizing that credibility was central to the case, the circuit court erred in finding this factor weighed in favor of admitting Robinson’s prior convictions because our courts are hesitant to admit evidence of prior convictions when credibility is central to the case.”

First, the State submits that while prior convictions for robbery, burglary, and theft are not crimes of dishonesty under Rule 609(a)(2), SCRE, they still can be probative of truthfulness under Rule 609(a)(1) and, therefore, the trial court properly admitted Robinson’s prior convictions after conducting a balancing test by weighing probative value against prejudicial effect. Second, the State submits the trial court properly found the fifth Colf factor did weigh in favor of admitting Robinson’s prior convictions. For these reasons, the State respectfully asks this Court to grant this petition for rehearing and issue an opinion affirming Robinson’s convictions on the ground that the trial court properly applied the Colf factors when weighing the probative value against the prejudicial effect of admitting Robinson’s prior convictions for impeachment purposes pursuant to Rule 609(a)(1), SCRE.

Statement of the Case

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 impeachment 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 trial 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 County¹ 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. (R.p.202). After hearing arguments from both parties, the trial court took the matter under advisement. (R.p.221). 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. (R. p.231).

Robinson timely filed a notice of intent to appeal his convictions and sentences and the parties submitted briefs addressing the issue raised by Robinson on appeal. On February 1, 2017, this Court issued an unpublished opinion finding the trial court erred, but affirming

¹ For purposes of the hearing, the parties agreed to waive venue and have the matter heard in Aiken County. (R.p.224).

Robinson's convictions on harmless error grounds. State v. Robinson, Op. No. 2017-UP-065 (S.C. Ct. App. filed February 1, 2017). On February 13, 2017, Robinson submitted a Petition for Rehearing asking this Court to withdraw its opinion and reverse his conviction. This Petition for rehearing on behalf of the State 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. (R.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. (R.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. (R.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. (R.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. (R.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. (R.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"² 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

² 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).

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.

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

(R.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. (R.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." (R.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. (R.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.

(R.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.

(R.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.

(R.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. (R.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.

(R.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.

(R.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,³ Black,⁴ and Bryant,⁵ 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 convictions that have nothing to do with credibility. (R.p.207-p.211; p.219-p.221).

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,

³ State v. Howard, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011).

⁴ State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012).

⁵ State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006).

arguing the prior convictions were significantly different from the ones for which Robinson was being tried, and that they were highly probative of veracity. (R.p.211-p.219).

At the conclusion of the hearing Judge Early took the matter under advisement and on November 10, 2014, he issued an eight-page written order making detailed findings in regard to each of the five Colf factors. (R. p.227-p.231). 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. (R. p.231).

Argument

In this appeal, Robinson argued 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 disagreed and argued 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. In its unpublished opinion, this Court found that in admitting some of Robinson's convictions for impeachment purposes, the trial erred in applying two of the Colf factors, but ultimately concluded the error was harmless and affirmed Robinson's convictions. The State continues to stand by its argument that the trial court properly admitted Robinson's prior convictions and therefore, this Court should affirm on grounds that there was no error.

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. 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." (R.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," (R.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.

(R.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. In regard to the prior convictions still at issue in this appeal, 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.

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” (R.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 State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015), Robinson argued the remand court’s “impeachment value analysis” is “lacking and unsupported.” He contended “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 disagreed and submitted it is precisely the generalized impact on credibility which is contemplated by Rule 609(a)(1), SCRE. Robinson seemed 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 argued they should not have been admitted and implies that any balancing test attempted by the trial court would have been futile. This Court now seems to have adopted Robinson’s reasoning, also relying on Howard, Black, and Bryant to conclude “prior convictions for robbery, burglary, and theft are not probative of truthfulness.” However, the State submits Robinson and this Court both misapprehend and misconstrue the reach of the cases upon which they rely.

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.” (R, p.228). 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 476, 779 S.E.2d at 793 (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. 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 478, 779 S.E.2d at 794. 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." Id.

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 and this Court concluded, 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. Thus, this Court's ruling eviscerates the Rule and only allows 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. This Court should grant rehearing and affirm on grounds there was no error.

Importance of Robinson’s Testimony and Centrality of Credibility

In a case dependent on the credibility of the victim, the credibility of Appellant, 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. 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.

In determining otherwise, this Court relied on Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), and concluded: “[T]he circuit court erred in finding this factor weighed in favor of admitting Robinson’s prior convictions because our courts are hesitant to admit evidence of prior convictions when credibility is central to the case.” However, the State respectfully submits the Court has misapprehended the application of the fifth Colf factor based on single line from a post-conviction relief case which must be considered in the specific context in which it was stated. In Green, our Supreme Court concluded:

In the instant case, evidence in the record supports the PCR court’s ruling that respondent was prejudiced by defense counsel’s failure to argue the

prejudicial effect of the convictions outweighed their probative value. Respondent was impeached with evidence of two convictions for possession of cocaine that were four and five years old. His credibility was critical, as the jury had to choose between his version of events and that of the SLED agents.

Green at 434, 527 S.E.2d at 101. Yet in making this observation, the Green Court was addressing a novel and very specific set of circumstances. It explained: "We have not previously addressed whether the probative value of a prior conviction, similar to the crime charged, not involving dishonesty or false statement, outweighs its prejudicial effect, where credibility is critical." Green at 432-33, 527 S.E.2d at 100-01. In this context, it is clear the Supreme Court was concerned with the similarity between the past crimes and the charged crimes, and the prejudice that could result. Thus, despite the observation that "credibility is critical" the court concluded Green was prejudiced by counsel's failure to argue the prejudice of the prior crimes outweighed probative value. This, however, was due to the stark similarity between the past crime and the charged crime, not because credibility was a key issue.

Under the South Carolina Rules of Evidence, the entire point of admitting prior convictions is for impeachment. See Rule 609, SCRE ("Impeachment by Evidence of Other Crime"). Thus, the more "central" credibility is to a particular case, the more probative a piece of impeachment evidence becomes. By comparison, the prejudicial effect of admitting a prior conviction stems from the danger the jury will treat it as improper character or propensity evidence rather than as related to credibility. Indeed, the trial courts charge juries on this precise point when prior crimes are admitted. Here, the trial court told the jury:

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.

(R.p.180, lines 17-24). In Green, the Supreme Court's acknowledgement that "credibility was critical, as the jury had to choose between his version of events and that of the SLED agents" does not suggest, as this Court concludes, that "our courts are hesitant to admit evidence of prior convictions when credibility is central to the case." Rather, the State submits it merely stands for the proposition that the prejudice from the similarity between the past crime and the crime charged can be so significant that it may outweigh the countervailing probative impact resulting from credibility being central to the case. Consequently, the trial court properly found the fifth Colf factor weighed in favor of admitting Robinson's prior convictions, and that finding should be affirmed.

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 under the standard of review, its ruling should be upheld.

Conclusion

For all of these reasons, the State submits this Court may have misapprehended or overlooked several crucial points raised by the parties which bear directly upon this Court's conclusion that: "the circuit court erred in applying two of the five Colf factors—the impeachment value of the prior convictions and the centrality of the credibility issue." The State respectfully asks this Court to grant rehearing and issue an opinion affirming Appellant's convictions on grounds that there was no error because the trial court properly considered all five

of the Colf factors in weighing the probative value against the prejudicial effect of admitting Appellant's prior convictions.

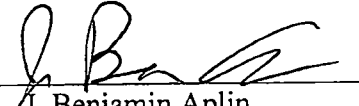
WHEREFORE, based on the foregoing argument and the arguments raised in the Final Brief of Respondent, the State respectfully requests that this Court grant this petition for rehearing, reconsider and rehear this matter, and issue an order affirming Appellant's convictions and sentence on grounds that there was no error.

Respectfully submitted,

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Columbia, South Carolina
February 16, 2017

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of General Sessions

Doyet A. Early, III, Circuit Court Judge

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SC Court of Appeals

Opinion No. 2017-UP-065 (S.C. Ct. App. filed February 1, 2017)

Appellate Case No. 2014-002531

THE STATE,RESPONDENT

v.

STEPHON ROBINSON,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Legal Assistant, hereby certify that I have served the within *Petition for Rehearing*, dated February 16, 2017, on Appellant by depositing a copy of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Laura Ruth Baer, Appellate Defender
S.C. Commission on Indigent Defense
Division of Appellate Defense
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I further certified that all parties required by Rule to be served have been served. This 16th day of February, 2017.



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The South Carolina Court of Appeals

The State, Respondent,

v.

Stephon Robinson, Appellant.

Appellate Case No. 2014-002531

ORDER

After careful consideration of Appellant's and Respondent's petitions for rehearing, the Court is unable to discover any material fact or principle of law that has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, both petitions for rehearing are denied.

H. John Wiley

J.

Paul W. Thomas

J.

John D. Beathem

J.

Columbia, South Carolina

cc:

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FILED

March 23, 2017