

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County

Honorable Doyet A. Early, Circuit Court Judge

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SC Court of Appeals

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

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

LAURA R. BAER
Appellate Defender

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

ATTORNEY FOR PETITIONER/RESPONDENT

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 23, 2017. App. 43.

QUESTIONS PRESENTED

I.

Whether the Court of Appeals 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?

II.

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

STATEMENT OF THE CASE

On October 25, 2011, Petitioner/Respondent 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.

Following a timely notice of appeal, Robinson’s direct appeal was perfected by the filing of the brief of appellant by appellate defenders Dayne C. Phillips and Carmen V. Ganjehsani. On February 19, 2014, the South Carolina Court of Appeals issued an unpublished opinion remanding Robinson’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)).

The remand hearing was held before the Honorable Doyet A. Early, III, in Aiken County on June 9, 2014.¹ 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

¹ Robinson agreed to waive venue only for purposes of the remand hearing. He did not waive venue for any further proceedings.

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).

Robinson filed and served a timely notice of appeal from the remand court's order. Undersigned counsel perfected his appeal. On February 1, 2017, a three-judge panel of the Court of Appeals affirmed Robinson's convictions and sentences in an unpublished, *per curiam* opinion. App. 1 – 3 (State v. Stephon Robinson, Op. No. 2017-UP-065 (S.C. Ct. App. filed Feb. 1, 2017)). On February 13, 2017, Glover filed a petition for rehearing. App. 4-20. The state filed a cross-petition for rehearing on February 16, 2017. App. 21-42. By order filed March 23, 2017, the Court denied the petition for rehearing. App. 43.

This petition for writ of certiorari to the Court of Appeals follows.

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. Williams grabbed his own gun, started to shoot, and the intruders ran. Williams claimed that Robinson was one of the intruders, who turned and fired one shot back. R. 99-107. The initial call was dispatched to law enforcement around 2:17 or 2:20 that afternoon. R. 50. Williams told police that the men were driving a "white, four-door vehicle" he thought to be a Pontiac. R. 61, ll. 6-11.

Following the incident, Williams was not completely truthful with law enforcement. Williams initially did not tell the officer investigating the incident that Williams himself had shot his gun at the intruders. He claimed to be afraid to tell the truth because his gun was not registered and had been stolen out of Beaufort County. R. 60; R. 111. Instead, Williams told the officers that the bullet holes in his home were already there when he purchased it. R. 112-113. Williams also did not mention to police the fact that he sold marijuana out of his home. See R. 138, l. 17 – 139, l. 25.

At trial, Robinson testified that he was at home with his brother and cousin at the time that the incident occurred at Williams' house. Robinson woke up late that 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 solicitor 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:

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).

First Direct Appeal

On direct appeal, Robinson argued that the trial court erred in admitting his 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 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. On February 19, 2014, the Court of Appeals filed an unpublished opinion remanding the case back to the trial court.²

R. 199 – 200. The Court concluded that “the trial court did not conduct a meaningful analysis balancing the impeachment value of Robinson's prior convictions against their prejudicial effect.” R. 200. Thus, the Court remanded the case with the following instructions:

² Petitioner/Respondent notes that the state raised the same “harmless error” argument in its Brief filed in petitioner's initial direct appeal as it did in its brief following the remand order. See Appellate Case No. 2011-202987, Final Brief of Respondent, pp. 19-21. If the Court of Appeals 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, the Court remanded Robinson's case for a meaningful analysis of the impeachment value of his prior convictions versus their prejudicial effect. See R. 199 – 200.

On remand, the trial court should hold a hearing and carefully balance the probative value of his prior convictions for impeachment purposes against their prejudicial effect. 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.

R. 200.

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 Colf factors should have been applied to make this determination. These included the impeachment value of the crime, the point and time of 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. 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. l. 5 – 221, l. 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. 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 all of the prior convictions together in addressing each of the Colf factors, purportedly “because the analysis remains the same for each conviction.” R. 228. 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, he found that Robinson’s testimony was not important to advance the alibi defense and that 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, the judge determined that the jury properly considered the prior

convictions of Robinson within the confines of the court's limiting instruction and that Robinson was not entitled to a new trial. R. 230 – 231.

Court of Appeals Opinion

In its unpublished opinion affirming Robinson's convictions, the Court of Appeals found that remand court "erred in applying two of the five Colf factors – the impeachment value of the prior convictions and the centrality of the credibility issue." App. 2. The Court ruled that the remand court's finding that Robinson's prior convictions had impeachment value was inconsistent with the case law establishing that prior convictions for robbery, burglary, and theft are not probative of truthfulness. App. 2. The Court further found: "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." App. 3.

Nonetheless, the Court found that "the circuit court's error was harmless in view of the other competent evidence of Robinson's guilt." App. 3. Specifically, the Court cited Williams' "consistent" identification of Robinson as one of the perpetrators, noting Williams' claims that Robinson had been to his house on multiple occasions and his provision of Robinson's name to the investigating officer. The Court wrote that Williams identified Robinson in two different photo lineups and identified Robinson in court. The Court also cited the circumstantial evidence that Williams claimed the intruders drove a white Pontiac, which the Court was "the car" owned by Robinson's girlfriend and borrowed by him the night prior to the incident. The Court wrote found that "Robinson likely had access to the car during the incident." App. 3. Thus, the Court ruled: "With this evidence in mind, any error in the admission of Robinson's prior convictions was harmless." App. 3.

ARGUMENT

- I. **The Court of Appeals 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.**

Introduction

This case involves the improper impeachment of Petitioner/Respondent Robinson with his prior convictions for strong-arm robbery and breaking into an automobile during his trial for first-degree burglary. R. 126, l. 16 – 129, l. 5. The issue raised below was: Whether 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? Final Brief of Appellant, p. 1. In its unpublished opinion, the Court of Appeals properly ruled that the remand court erred in its application of two of the Colf³ factors in conducting its analysis on the admission of Robinson's prior convictions. However, the Court of Appeals 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, the Court of Appeals erred in finding that the error was "harmless in view of the other competent evidence of Robinson's guilt." See App. 1 – 3.

³ 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).

This Court should grant certiorari to review the issues raised herein pursuant to Rule 242(b), SCACR, because of the substantial constitutional issues directly involved and because of the Court of Appeals' misapplication of the harmless error doctrine. The admissibility of a defendant's prior convictions weigh heavy in their determination of whether to exercise their right to testify at trial. However, in order to preserve an objection to such a determination, the defendant must testify in order to preserve the ruling for appellate review. State v. Glenn, 285 S.C. 384, 385, 330 S.E.2d 285, 286 (1985) (“[W]hen the trial judge chooses to make a preliminary ruling on the admissibility of prior convictions to impeach a defendant and the defendant does not testify at trial, the claim of improper impeachment is not preserved for review.”). Thus, it is exceedingly important that trial judges understand how to conduct a proper Colf analysis and weigh the factors in determining whether the probative value of prior convictions outweigh their prejudicial effect to the accused, and that the Court of Appeals understand how to properly review such an analysis.

Discussion

The South Carolina Rules of Evidence provide:

For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted **if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused;** and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Rule 609(a), SCRE. Our Courts have 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 under Rule 609, SCRE. See State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000); State v. Bryant, 369 S.C. 511, 517–18, 633 S.E.2d 152, 156 (2006);

State v. Howard, 396 S.C. 173, 178, 720 S.E.2d 511, 514 (Ct. App. 2011); State v. Scriven, 339 S.C. 333, 341-42, 529 S.E.2d 71, 75-76 (Ct. App. 2000).

Thus, in conducting a Rule 609(a), SCRE, analysis, the trial court should consider the “[t]he following factors, along with any other relevant factors, . . . (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.” Howard, 396 S.C. at 178, 720 S.E.2d at 514. In State v. Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015), this Court cautioned that “[u]ltimately, the Rule [609, SCRE] 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.”

Here, the Court of Appeals 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. App. 1 – 2. However, the 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 to 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: “[H]e 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. 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. 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-arm 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 are both constitutional and practical dimensions 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, such that they 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. Considering all of the Colf factors, the remand court's ruling that the probative value of the admission of the prior convictions outweighed their prejudicial affect was error.

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." To that end, Robinson requested that the Court of Appeals 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)(1), SCRE." R. 231; App. 9. As discussed *supra*, the remand court erred in its analysis of the remaining three Colf factors, none of which were addressed in the Court of Appeals' 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, the Court's opinion stopped short of making that conclusion and, thus, did not rule on the ultimate issue raised in the case. Nonetheless, the petition for rehearing was denied. App. 43. In the interest of judicial economy, Robinson does not request a remand to the Court of Appeals, but rather a ruling that the Court of Appeals' opinion contained an implicit finding that the remand court erred in determining that the probative value of Robinson's convictions outweighed the prejudice to him.

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

The Court of Appeals 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." App. 3. 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. The 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. App. 3. However, the 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 the state. 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 the Court of Appeals' own ruling that remand court "correctly recognize[d] that credibility was central to the case." App. 3.

This Court should grant certiorari because the Court of Appeals improperly evaluated the facts in the light most favorable to the state and ignored its own finding that credibility was essential to the case, which weighs against a finding of harmlessness. See State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986) (holding that where the defendant's credibility was of paramount importance to his defense, the Court could not hold beyond a reasonable doubt that the affirmative answer to the solicitor's impermissible question about his prior conviction for bookmaking did not irreparably damage the defendant's credibility in each juror's mind).

"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).

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, as eluded to in the Court of Appeals’ Opinion. See App. 3.

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), this 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 Bryant 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").

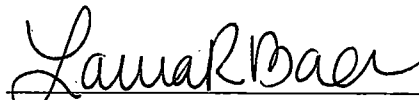
Notably, the Court of Appeals ruled that the remand court "correctly recogniz[ed] that **credibility was central to the case.** App. 3 (emphasis added). The impropriety of the admission of the prior convictions was compounded by the solicitor's improper inquiry into the details of the offense, specifically 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 improper admission of Robinson's prior convictions was not harmless beyond a reasonable doubt.

CONCLUSION

Based on the foregoing, Petitioner/Respondent Stephon Robinson respectfully requests that this Court grant certiorari to review the Court of Appeals' decision in this case.

Respectfully Submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR
PETITIONER/RESPONDENT

This 21st day of April, 2017.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
APR 21 2017
SC Court of Appeals

Certiorari to Barnwell County
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,

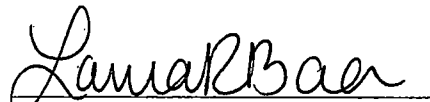
V.

STEPHON ROBINSON,

PETITIONER/RESPONDENT.


CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Stephon Robinson, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210; this 21st day of April, 2017.



Laura R. Baer
Appellate Defender
ATTORNEY FOR
PETITIONER/RESPONDENT

SUBSCRIBED AND SWORN TO BEFORE
ME this 21st day of April, 2017.

 (L.S)

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