

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
MAY 22 2017
S.C. SUPREME COURT

APPEAL FROM BARNWELL COUNTY
Court of General Sessions

Doyet A. Early, III, Circuit Court Judge

Opinion No. 2017-UP-065 (S.C. Ct. App. filed February 1, 2017)
Appellate Case No. 2017-000990

The State, Respondent/Petitioner,

v.

Stephon Robinson, Petitioner/Respondent.

**RESPONDENT/PETITIONER'S RETURN TO PETITIONER/
RESPONDENT'S PETITION FOR A WRIT OF CERTIORARI**

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

ATTORNEYS FOR RESPONDENT/PETITIONER

Other Counsel of Record:

Laura R. Baer, Appellate Defender
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589
(803) 734-1343
Attorney for Respondent

INDEX

	Page
Questions Presented	1
Statement of the Case.....	2
Statement of Facts.....	3
Certiorari	11
Argument:	
I. The Court of Appeals properly limited its erroneous conclusion that “the circuit court erred in applying two of the five <u>Colf</u> factors - the impeachment value of the prior convictions and the centrality of the credibility issue,” without further discussion, where it ultimately found any error in admitting Robinson’s prior convictions for impeachment was harmless in view of the other competent evidence of his guilt.....	13
II. The Court of Appeals properly concluded that any error in admitting Robinson’s prior convictions for impeachment was harmless in view of the other competent evidence of his guilt.	18
Conclusion	22

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly limited its erroneous 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,” without further discussion, where it ultimately found any error in admitting Robinson’s prior convictions for impeachment was harmless in view of the other competent evidence of his guilt.
2. Whether the Court of Appeals properly concluded that any error in admitting Robinson’s prior convictions for impeachment was harmless in view of the other competent evidence of his guilt.

STATEMENT OF THE CASE

Petitioner/Respondent (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 to the Court of Appeals. He was represented in the appeal by Appellate Defenders Dayne C. Phillips and Carmen V. Ganjehsani of the South Carolina Office of Indigent Defense. Respondent/Petitioner (the State) filed a brief in response and in an unpublished opinion dated February 19, 2014, the Court of Appeals 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). The Court of Appeals 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).

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

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, the Court of Appeals issued an unpublished opinion finding the trial court erred, but affirming Robinson’s convictions on harmless error grounds. State v. Robinson, Op. No. 2017-UP-065 (S.C. Ct. App. filed February 1, 2017). (J.App.p.1-p.3). On February 13, 2017, Robinson submitted a Petition for Rehearing asking the Court of Appeals to withdraw its opinion and reverse his conviction. (J.App.p.4-p.20). On February 16, 2016, the State filed a cross-petition for rehearing asking the Court of Appeals to rehear the matter and issue an order affirming Robinson’s convictions and sentence on grounds that there was no error. (J.App.p.21-p.41). In an order filed March 23, 2017, the Court of Appeals denied both petitions for rehearing. (J.App.p.43). On April 21, 2017, Robinson filed a Petition for a Writ of Certiorari in this Court. On April 24, 2017, the State filed a cross-Petition for a Writ of Certiorari. This Return to Robinson’s Petition for Certiorari, submitted 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 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

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).

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.

Robinson 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

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).

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, 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).

Robinson timely filed a notice of intent to appeal and on February 1, 2017, the Court of Appeals issued an unpublished opinion finding the trial court erred in applying two of the five

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

Colf factors and admitting the prior convictions, but still affirming Robinson's convictions on harmless error grounds. State v. Robinson, Op. No. 2017-UP-065 (S.C. Ct. App. filed February 1, 2017). (J.App.p.1-p.3). Both parties submitted petitions for rehearing and in an order filed March 23, 2017, the Court of Appeals denied the petitions. (J.App.p.43). On April 21, 2017, Robinson submitted a petition for a writ of certiorari. This petition for a writ of certiorari on behalf of the State now follows.

CERTIORARI

The State submits that, pursuant to Rule 242(b), SCACR, there are no special and important reasons for this Court to exercise its discretion to grant certiorari and to review the portions of the decision of the Court of Appeals Robinson is now asking it to review. Robinson argues this Court should grant certiorari because of the substantial constitutional issues directly involved. Specifically, he argues that because the admissibility of prior convictions often drives the defendant's decision as to whether to testify at trial, it is exceedingly important that trial judges know how to conduct a proper Colf analysis and that the Court of Appeals understands how to properly review such an analysis on appeal. While the State does not disagree that proper application of the Colf factors, a proper Colf analysis, and proper appellate review are important, and indeed has submitted its own petition for certiorari on what it believes was an error by the Court of Appeals, the specific reasons set forth by Robinson do not support the grant of certiorari on the issues he seeks to raise to this Court.

First, Robinson complains that although the Court of Appeals concluded the circuit court erred in applying two of the Colf factors, it failed to rule on the ultimate issue of whether the circuit court erred in finding the probative value of his prior convictions outweighed their prejudicial effect under Rule 609, SCRE. However, the Court of Appeals properly limited its

ruling on error to the conclusions reached on the relevant Colf factors without further discussion, because it ultimately found any error in admitting Robinson's prior convictions for impeachment was harmless. If this Court grants certiorari on Robinson's second issue and elects to address the Court of Appeals' conclusion that the error was harmless, it can at that time also address the reach and import of the Court of Appeals' conclusion that the circuit court erred in applying the Colf factors in the first place. Thus, the alleged error by the Court of Appeals in this regard does not provide a separate or stand-alone basis for granting certiorari.

Second, Robinson complains the Court of Appeals erred in ruling any error was harmless because such a ruling is inconsistent with the Court of Appeals' own finding that "credibility was central to the case." However, the Court of Appeals harmless error analysis was a straightforward exercise of reviewing the competent evidence that was admitted at trial as well as the particular facts and circumstances of Robinson's case. It likewise does not provide a basis for granting certiorari.

For these reasons, the State respectfully asks this Court to: (1) deny Robinson's petition for a writ of certiorari, (2) grant the State's petition for a writ of certiorari on the limited issue raised, (3) affirm the Court of Appeals opinion as modified, and (4) 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.

ARGUMENT

I.

The Court of Appeals properly limited its erroneous 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,” without further discussion, where it ultimately found any error in admitting Robinson’s prior convictions for impeachment was harmless in view of the other competent evidence of his guilt.

Robinson complains that although the Court of Appeals concluded the circuit court erred in applying two of the Colf factors, it failed to address the circuit court’s analysis of the other three Colf factors and failed to rule on the circuit court’s ultimate ruling on whether the prejudice from admitting the prior convictions outweighed their probative value under Rule 609(a)(1), SCRE. However, the Court of Appeals properly limited its ruling on error to the conclusions it reached on the relevant Colf factors without further discussion, because it ultimately found any error in applying the Colf factors was harmless. If this Court grants certiorari on Robinson’s second issue and elects to address the Court of Appeals’ conclusion that the error was harmless, it can at that time also address the reach and import of the Court of Appeals’ conclusion that the circuit court erred in first place. Thus, the alleged error by the Court of Appeals in this regard does not provide a separate or stand-alone basis for granting certiorari.

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.” This 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. 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.

Colf Factors

The record before this Court 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. The Court of Appeals 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,

as set forth in detail in its petition for certiorari, the State submits Robinson and the Court of Appeals both misapprehend and misconstrue the reach of the cases upon which they rely.

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. The Court of Appeals erred in concluding otherwise.

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 trial 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, the Court of Appeals 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, as set forth in its petition for certiorari, the State respectfully submits the Court of Appeals 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. 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 typically charge juries on this precise point when prior crimes are admitted. Here, for example, 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, this 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 the Court of Appeals concluded, 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 have been affirmed by the Court of Appeals.

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 have been upheld.

Although the Court of Appeals disagreed and concluded the trial court erred in applying two of the Colf factors, its failure to address the circuit court's analysis of the other three Colf factors and failure to explicitly rule on the circuit court's ultimate ruling to admit the prior convictions under Rule 609(a)(1), SCRE, does not warrant granting certiorari. The Court of Appeals properly limited its ruling on error to the conclusions it reached on the relevant Colf factors without further discussion, because it ultimately found any error in applying the Colf factors was harmless. The reach and import of the Court of Appeals' conclusion can be addressed if and when this Court grants certiorari on Robinson's harmless error question. It does not alone warrant a grant of certiorari.

II.

The Court of Appeals properly concluded that any error in admitting Robinson's prior convictions for impeachment was harmless in view of the other competent evidence of his guilt.

In his appeal to the Court of Appeals, 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, the Court of Appeals found that in admitting some of Robinson's convictions for impeachment purposes, the trial court 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; however, it also submits that even if the Court of Appeals correctly found error, it properly affirmed Robinson's conviction and sentence because any such error was harmless beyond a reasonable doubt. This Court should deny Robinson's petition for a writ of certiorari.

Harmless Error

To the extent the Court of Appeals properly found the trial court erred in applying two of the five Colf factors on remand, the State submits the conviction were nevertheless properly affirmed because any such error was harmless in light of: (1) the overwhelming evidence presented at trial, (2) the court's jury charge on consideration of prior convictions, and (3) the cumulative nature of the evidence.

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

omitted). Further, it is well settled that the admission of improper evidence is harmless where it is merely cumulative to other evidence. Id.

The State presented overwhelming evidence of Robinson's guilt. Williams testified he knows Robinson's parents and his grandmother, and had known Robinson when Robinson was a kid. He explained that Robinson had been to his house before to play video games with Williams' nephew and at least one or two times had been in the same white car Williams saw leaving his house after the burglary. Williams was face-to-face with Robinson in the house and saw a gun in Robinson's hand when Robinson fled from the house. (R.p.98, line 5-p.107, line 5). Williams subsequently made an in-court identification of Robinson as the man who entered his home on February 20, 2011, and fired a shot. (R.p.109, line 23-p.110, line 9). He testified there was no doubt that Robinson was the man who came into his house that day. (R.p.121, line 24-p.122, line 1). Shelly Leanna Gunnels testified that during her relationship with Robinson, he sometimes used her car and he was allowed to use it whenever he wanted. Gunnels identified her car as the one in a photo taken by Investigator Croft and said Robinson was in possession of her car on the day of the burglary. (R.p.94, line 7-p.97, line 7).

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

Additionally, in the initial direct appeal Robinson did not challenge the trial court's admission of another prior conviction for impeachment purposes; therefore, admission of the challenged convictions is merely cumulative, and could not have prejudiced Robinson. Heller,

supra. Specifically, Robinson’s prior conviction for second-degree burglary, which the trial court ruled could only be referred to as a felony which carries a punishment in excess of a year, was admitted pursuant to Rule 609(a)(1), SCRE. (R.p.129, lines 6-11). Robinson did not challenge admission of this conviction on his initial appeal; therefore, as noted by the Court of Appeals, its admissibility is now the law of the case. State v. Cheeks, 400 S.C. 329, 338, 733 S.E.2d 611, 616 (2012). For these reasons, the State submits the Court of Appeals properly concluded that any error by the trial court in failing to properly apply the Colf factors was harmless, and certiorari should be denied.

Conclusion

For all of these reasons, the State submits the Court of Appeals properly limited its erroneous 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,” without further discussion, where it ultimately found any error in admitting Robinson’s prior convictions for impeachment was harmless and properly concluded that any error in admitting Robinson’s prior convictions for impeachment was harmless in view of the other competent evidence of his guilt. This Court should deny Robinson’s petition for a writ of certiorari.

CONCLUSION

For all of the foregoing reasons, Respondent/Petitioner respectfully requests that this Court: (1) deny Robinson’s petition for a writ of certiorari, (2) grant the State’s petition for a writ of certiorari on the limited issue raised, (3) affirm the Court of Appeals opinion as modified, and (4) 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. If the Court grants the Robinson’s petition for a writ of certiorari, Respondent/Petitioner would request permission under the rules to fully brief the issues contained herein.

Respectfully submitted,

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

J. STROM THURMOND, JR.
Solicitor, Second Judicial Circuit

BY: 
J. Benjamin Aplin
S.C. Bar No. 8729

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727

ATTORNEYS FOR RESPONDENT/PETITIONER

Columbia, South Carolina
May 22, 2017

RECEIVED
MAY 22 2017
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BARNWELL COUNTY
Court of General Sessions

Doyet A. Early, III, Circuit Court Judge

Opinion No. 2017-UP-065 (S.C. Ct. App. filed February 1, 2017)
Appellate Case No. 2017-000990

The State, Respondent/Petitioner,

v.

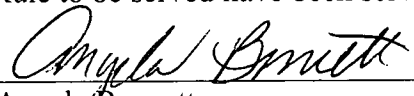
Stephon Robinson, Petitioner/Respondent.

PROOF OF SERVICE

I, Angela Bennett, Executive Legal Assistant, hereby certify that I have served the within *Respondent/Petitioner's Return to Petitioner/Respondent's Petition for a Writ of Certiorari*, dated May 22, 2017, on Petitioner/Respondent by depositing two copies of the Petition in the United States mail, postage prepaid, addressed to his attorney of record:

Laura R. Baer, Appellate Defender
South Carolina Commission on Indigent Defense
Post Office Box 11589
Columbia, SC 29211-1589

I further certified that all parties required by Rule to be served have been served. This 22nd day of May, 2017.



Angela Bennett
Executive Legal Assistant

Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
(803) 734-3727