

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Barnwell County

Honorable Doyet A. Early, Circuit Court Judge

THE STATE,

RESPONDENT/PETITIONER

V.

STEPHON ROBINSON,

PETITIONER/RESPONDENT

APPELLATE CASE NO 2017-000990

PETITIONER/RESPONSEN'T'S RETURN
TO RESPONDENT/PETITIONER'S
PETITION FOR WRIT OF CERTIORARI

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 RESPONDENT

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STATEMENT OF QUESTION PRESENTED

Although the Court of Appeals properly affirmed Appellant's convictions after finding any error in admitting his prior convictions for impeachment was harmless, it nevertheless erred in first concluding that "the circuit court erred in applying two of the five Colf¹ factors - the impeachment value of the prior convictions and the centrality of the credibility issue," because the trial court properly admitted Appellant's prior convictions after properly applying all five of the Colf factors in weighing the probative value against the prejudicial effect of admission.

COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Court of Appeals properly ruled 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 – in conducting its analysis pursuant to Rule 609(a)(1), SCRE?

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

STATEMENT OF THE CASE

Petitioner/Respondent Robinson incorporates by reference the Statement of the Case included in Robinson's petition for writ of certiorari, which was filed with this Court on April 21, 2017. Therein, Robinson argued that this Court should grant certiorari to review two questions:

- 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?

On April 24, 2017, Respondent/Petitioner ("the State") filed its cross-petition for writ of certiorari.

This Return follows.

ARGUMENT

The Court of Appeals properly ruled 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 – in conducting its analysis pursuant to Rule 609(a)(1), SCRE.

Over defense counsel's objection, the trial judge admitted Petitioner/Respondent Robinson's prior convictions, which included a 2009 conviction for strong-arm robbery and two 2007 convictions for breaking into an automobile. R. 126, l. 16 – 129, l. 11; R. 136, l. 21 – 138, l. 8. Following his initial direct appeal, the Court of Appeals remanded Robinson's case back to the trial judge 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)). On remand, the circuit court ruled that Robinson's prior convictions were properly admitted at trial. R. 224 – 231. With respect to impeachment value, the court noted that "no specific details of the prior convictions were provided" but found that "the mere fact that the Defendant had twice been convicted of serious crimes within a few years of the alleged offenses would tend to impact the Defendant's credibility" because they "imply that the accused is not someone to be trusted – that he might not be credible." R. 228. Regarding the centrality of the credibility issue, the judge found that the credibility of all of the witnesses was "central to the case" and "was an essential element of this trial, as it is with every trial." R. 230 – 231.

On direct appeal from the remand court's order, the Court of Appeals found that the circuit court erred in finding that the prior convictions had impeachment value and in weighing the centrality of credibility in favor of admission of the prior convictions rather than against admission. App. 2 – 3. The State nonetheless prevailed because of the Court of Appeals' erroneous harmless error analysis, which Robinson challenges in his petition for writ of

certiorari.² The State argues that this Court should also review the Court of Appeals' findings of error with respect to how the circuit court weighed the impeachment value of the prior convictions and the centrality of the credibility issue. Specifically, the State avers that the Court of Appeals erred in ruling: (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." State's Cross-Petition, p. 11. On the contrary, the Court of Appeals recognized the circuit court's erroneous application of the law in Robinson's case. Certiorari is not warranted to review the Court of Appeals' findings of error.

A. Robinson's prior convictions for strong-arm robbery and breaking into automobiles lacked impeachment value because they are not probative of truthfulness and the state failed to present any details of the offenses to show otherwise.

The Court of Appeals found that the circuit erred in its application of the Colf factors in finding that Robinson's prior convictions had impeachment value. App. 2. The Court cited

² Robinson also had a prior conviction for second-degree burglary, which the circuit court admitted with the caveat that it be referenced as a "felony conviction in 2009 that carried more than one year," as suggested by the prosecutor. R. 128, l. 24 – 129, l. 11; R. 136, l. 24 – 137, l. 2. Robinson's trial counsel did not object to the attempt to "sanitize" the conviction, and thus it was not raised in Robinson's direct appeal or the subject of the remand hearing. R. 199 – 200. Nonetheless, the circuit judge included findings related to the burglary conviction in his remand order. R. 227 – 231. In its most recent opinion, the Court of Appeals ruled that the admission of Robinson's 2009 burglary conviction was the law of the case. App. 2.

The State argues in its return to Robinson's petition for writ of certiorari, that the admission of the 2009 conviction rendered admission of Robinson's other prior convictions "cumulative" for purposes of a harmless error analysis. State's Return, pp. 20-21. As was more fully discussed in Robinson's Reply Brief at the Court of Appeals, the state's argument would lead to an absurd result, allowing a trial court to improperly admit numerous prior convictions against a defendant, so long as admission of one was proper.

State v. Black, 400 S.C. 10, 28, 732 S.E.2d 880, 890 (2012), and State v. Bryant, 369 S.C. 511,517,633 S.E.2d 152, 155 (2006), in support of its finding that “our courts have found prior convictions for robbery, burglary, and theft are not probative of truthfulness.” App. 2. In Black, this Court explained that “[t]he 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.” 400 S.C. at 21-22, 732 S.E.2d at 887. In Bryant, this Court found that “a conviction for robbery, burglary, theft, [or] drug possession . . . is not probative of truthfulness.” 369 S.C. at 517,633 S.E.2d at 155.

Following the logic set forth in Black, because robbery, burglary, and theft offenses are not probative of truthfulness, the circuit court should have found that the impeachment value of Robinson’s prior convictions for strong-arm robbery and breaking into a motor vehicle were limited and weighed that factor against admission. Instead, the circuit court found that the mere fact that Robinson had “twice been convicted of serious crimes within a few a years of the alleged offense” implied “that the accused is not someone to be trusted – that he might not be credible.” R. 228. The circuit court erred in its assessment of the impeachment value of Robinson’s prior convictions. Consequently, the court’s overall determination that their probative value outweighed the prejudicial effect to the accused was improper, as it should have weighed impeachment value against probative value rather than in favor of it. State v. Bryant, 369 S.C. 511, 516–17, 633 S.E.2d 152, 155 (2006) (“After the trial court conducts the balancing test, the judge must make a determination and articulate, on the record, the specific reasons for his ruling. Specifically, the trial judge must articulate why the probative value of the prior conviction outweighs its prejudicial effect.”). The Court of Appeals made no error in its statement of the law or its application to the facts of Robinson’s case.

In its attempt to find some error in the Court of Appeal's analysis, the State points to the varying sections of Rule 609, SCRE, and argues:

[T]he 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 the Court of Appeals 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, the Court of Appeals' ruling eviscerates the Rule and only allows impeachment with crimes of dishonesty or false statement.

State's Cross-Petition, p. 18. That is not an accurate reflection of Robinson's argument on appeal or the ruling made by the Court of Appeals. Rather, Rule 609(a)(2), SCRE, provides for the automatic admission of prior convictions for crimes involving dishonesty or false statement, subject to the time limits imposed under subsection (b). If the crime does not fall into that narrow category, then its admission requires a balancing test under Rule 609(a)(1) or Rule 609(b), SCRE. State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) (employing the five-factor analysis to weigh the probative value and prejudice under Rule 609(b), SCRE); Green v. State, 338 S.C. 428, 433-34, 527 S.E.2d 98, 101 (2000) (holding Colf factors relevant to probative versus prejudice analysis under Rule 609(a)(1)). If a conviction falls outside of the ten-year window provided for in Rule 609(b), SCRE, there is an presumption against admissibility, which can only be overcome if "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." If a conviction is within the ten years, it is admissible against an accused only if it was punishable by death or imprisonment in excess of one year and "if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." Rule 609(a)(1), SCRE.

The State agrees that the analysis under Rule 609(a)(1), SCRE, for admitting a prior conviction to impeach the credibility of the defendant, requires the circuit court to determine if “the probative value of admitting this evidence outweighs its prejudicial effect to the accused.” State’s Cross-Petition, p. 13. The State also agrees that in conducting that analysis, the court must consider the 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.” Colf, 337 S.C. at 627, 525 S.E.2d at 248 ; see also Green, 338 S.C. at 433-34, 527 S.E.2d at 101 (employing the five-factor analysis under Rule 609(a)(1), SCRE); State v. Bryant, 369 S.C. 511, 516-17, 633 S.E.2d 152, 155-56 (2006) (same); State v. Howard, 396 S.C. 173, 178, 720 S.E.2d 511, 514 (Ct. App. 2011) (same); State v. Scriven, 339 S.C. 333, 341-42, 529 S.E.2d 71, 75-76 (Ct. App. 2000) (remanding case for five-factor analysis under Rule 609(a)(1), SCRE). Thus, a weighing of the Colf factors is the means by which a trial judge conducts the balancing test of probative value versus prejudicial effect. “Impeachment value” is but one of many factors to be considered in that broader determination.

Here, the circuit court’s analysis of “impeachment value” was perhaps the most lacking and unsupported among the five Colf factors. The court acknowledged that no specific details of Robinson’s convictions were provided, but found that “the mere fact that the Defendant had twice been convicted of serious crimes within a few a years of the alleged offense would tend to impact the Defendant’s credibility.” R. 228. The court found that the convictions did not imply that Robinson was “an armed burglar” but rather that he “is not someone to be trusted” and “might not be credible.” R. 228. Then, prior to discussion of the other four Colf factors, the

court ruled: “After carefully weighing the prejudicial effect of these prior convictions with their probative value, I find that the probative value outweighs any prejudicial effect.” R. 228.

Though some overlap in discussion was inevitable, the remand court made the same error made in State v. Howard, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011), of conflating impeachment value with credibility and character. In Howard, the judge’s findings regarding impeachment related to (1) Howard and the victim being the only witnesses to the assault and (2) Howard’s attacks on the victim’s character during trial. 396 S.C. 173, 180, 720 S.E.2d 511, 515 (Ct. App. 2011). The Howard court found:

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

Id. Similarly, in the present case, the remand court failed to connect what about Robinson’s prior convictions were probative of his credibility. Instead, the circuit court generalized that “the mere fact that the Defendant had *twice been convicted of serious crimes within a few a years of the alleged offense* would tend to impact the Defendant’s credibility.” R. 228 (emphasis added).

The applicable case law paints a far different picture of the impeachment value of prior convictions for strong-arm robbery and breaking into an automobile. In State v. Black, this Court noted that “[t]he starting point in the [*Colf*] analysis is the degree to which the prior convictions have probative value, meaning the tendency to prove the issue at hand—the witness’s propensity for truthfulness, or credibility.” 400 S.C. 10, 21, 732 S.E.2d 880, 886 (2012). It is this impact on credibility that, in turn, determines the impeachment value of the prior conviction, i.e. “how strongly the nature of the conviction bears on the veracity, or credibility, of the witness.” Id. at 21-22; 732 S.E.2d at 887. This is important because the purpose of impeachment is not to show

that the testifying individual is a “bad person” but rather to show “background facts which bear directly on whether jurors ought to believe him.” Id. at 22, 732 S.E.2d at 887. The Black Court provided a “rule of thumb” that “convictions that rest on dishonest conduct relate to credibility, whereas crimes of violence, which may result from a myriad of causes, generally do not.” Id.

The Black Court found that the witnesses’ manslaughter conviction was not particularly probative of truthfulness; thus, its impeachment value was **limited**. Id. at 23, 732 S.E.2d at 887 (emphasis added). In State v. Dunlap, 353 S.C. 539, 542, 579 S.E.2d 318, 319-20 (2003), this Court similarly explained that “violations of narcotics laws are generally not probative of truthfulness.” As a result, the Court cautioned that “[t]his **relative lack of probative value should figure prominently in the weighing of prejudice**, pursuant to Rule 609(a)(1), when determining whether to permit a criminal defendant’s impeachment by such conduct.” 353 S.C. at 542, 579 S.E.2d at 320 (emphasis added).

In a footnote, the Black Court went on to describe the dichotomy between serious crimes, which have a greater potential for prejudice, and those that actually impact a witness’s veracity. Id. at 24, n.6, 732 S.E.2d at 888, n.6. The Black Court cited its prior decision in State v. Bryant, 369 S.C. 511, 517-18, 633 S.E.2d 152, 155-56 (2006), in which is observed that “a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness.” Id. The State avers that this statement in Bryant was “dicta.” State’s Cross-Petition, p. 18. However, in State v. Broadnax, 414 S.C. 468, 475-76, 779 S.E.2d 789, 792-93 (2015), this Court “reaffirm[ed] 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).”

In Broadnax, this Court held that “for impeachment purposes [under Rule 609(a)(2), SCRE], crimes of “dishonesty or false statement” are crimes in the nature of *crimen falsi* “that

bear upon a witness's propensity to testify truthfully.” 414 S.C. at 476-77, 779 S.E.2d at 793. This Court found that because armed robbery was not *per se* probative of truthfulness, Broadnax's prior convictions were not automatically admissible pursuant to Rule 609(a)(2). Id. at 476-78, 779 S.E.2d at 793-94. Instead, the trial judge should have subjected them to a Rule 609(a)(1) balancing test. Id. at 478, 779 S.E.2d at 794. This Court seemed to acknowledge that the prosecution can attempt to show that an underlying offense that does not fall under Rule 609(a)(2), SCRE, is nonetheless probative of truthfulness because it “involved false statements or acts of deceit beyond the basic crime itself.” Id. at 475 n. 5, 779 S.E.2d at 792, n. 5. However, as the circuit court acknowledged in its remand order, the prosecution made no such effort in the present case. R. 228.

In sum, contrary to the State's assertion, Robinson did not advocate for and the Court of Appeals did not hold that a conviction that did not involve dishonesty or false statement, so as to be automatically admissible under Rule 609(a)(2), SCRE, can *never* be admissible under Rule 609(a)(1), SCRE. See State's Cross-Petition, p. 18-19. Rather, the impeachment value of such convictions is one of several factors that must be considered in weighing probative value versus prejudicial effect. Here, the prosecution failed to provide any evidence beyond the mere fact of the convictions in order to establish that Robinson's prior convictions were probative of truthfulness. Thus, the Court of Appeals properly determined that the circuit court erred in finding that Robinson's prior convictions had impeachment value and weighing that factor in favor of admission of the prior convictions. Certiorari is not warranted to review this portion of the Court of Appeals' opinion.

B. The centrality of credibility in Robinson's case weighed against admission of his prior convictions.

The Court of Appeals found that the circuit court further erred in its application of the Colf factors, where the circuit court recognized that credibility was central to the case but improperly weighed the factor in favor of admission rather than against it. App. 3. The Court of Appeals ruled that "our courts are hesitant to admit evidence of prior convictions when credibility is central to the case." App. 3. In support of its ruling, the Court cited Green v. State, 338 S.C. 428, 433-34, 527 S.E.2d 98, 101 (2000). App. 3. The State attempts to complicate Green's analysis and avers, without support, that "the more 'central' credibility is to a particular case, the more probative a piece of impeachment evidence becomes." State's Cross-Petition, p. 20. The Court of Appeals made no error in its statement of the law or its application to the facts of Robinson's case.

It is undisputed that credibility was important in Robinson's case, which was based purely upon witness testimony. This heightened the court's need to carefully consider the potential prejudice to Robinson from admission of the prior convictions. In Green, this Court held that the Colf factors, previously applied to the balancing test under Rule 609(b), SCRE, were likewise applicable under Rule 609(a)(1), SCRE. 338 S.C. at 433-34, 527 S.E.2d at 101. In the very next paragraph, applying the Colf factors to the facts of Green's case, the Court wrote:

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.

Id. at 434, 527 S.E.2d at 101. While the Green Court did not explicitly state the centrality of credibility weighed in favor of exclusion of the prior convictions, that is certainly a reasonable inference.

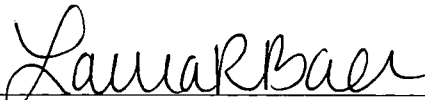
Further, though the Court of Appeals' opinion cited only Green, this Court's decision in State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006) is also instructive. In Bryant, this Court recognized that the case hinged on the defendant's testimony regarding self-defense and found that "the State should not be allowed to attack the defendant's credibility with inadmissible prior convictions; especially where the Petitioner's credibility was essential to his defense." 369 S.C. at 518-19, 633 S.E.2d at 156. Similarly, Robinson's trial was entirely based on the contradicting testimony of the alleged victim and testimony of Robinson and his two alibi witnesses. There was no physical evidence. Thus, Robinson's credibility, vis-a-vis the other witnesses, was paramount to his defense. The admission of his prior convictions, which lacked any impeachment value and were similar to the charged offense, was an improper attack on his credibility.

The State points out that "the entire point of admitting prior convictions [pursuant to Rule 609, SCRE] is for impeachment." State's Cross-Petition, p. 20. Indeed, in State v. Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015), this Court wrote: "Ultimately, 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." To that end, the only automatically admissible convictions are for crimes that involve dishonesty and false statement that fall within the ten year time limit. Rule 609(a)(2), SCRE. The purpose of the balancing test required under Rule 609(a)(1), SCRE, is to ensure that prior to admitting a prior conviction against the accused, the trial judge considers the prior

conviction's impeachment value, remoteness in time, and similarity to the charged crime, along with the importance of the defendant's testimony and the centrality of credibility. Unfortunately, too often prosecutors handling cases like Robinson's seek to admit improper prior convictions, knowing that "[t]he jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged." Green, 338 S.C. at 434, 527 S.E.2d at 101 (quoting United States v. Beahm, 664 F.2d 414, 418–19 (4th Cir.1981)). The Court of Appeals properly ruled that the circuit court erred in weighing the centrality of credibility in favor of admission of Robinson's prior convictions. Certiorari is not warranted to review this portion of the Court of Appeals' opinion.

CONCLUSION

Based on the foregoing, Petitioner/Respondent Stephon Robinson respectfully requests that this Court deny Respondent/Petitioner's cross-petition for writ of certiorari.



Laura R. Baer
Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of May, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Barnwell County

Honorable Doyet A. Early, Circuit Court Judge

THE STATE,

RESPONDENT/PETITIONER


V.

STEPHON ROBINSON,

PETITIONER/RESPONDENT

CERTIFICATE OF SERVICE

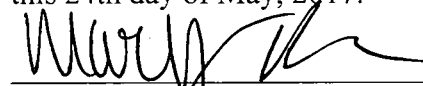
The undersigned hereby certifies that a true copy of the Return to Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Stephon Robinson, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 24th day of May, 2017.



Laura R. Baer
Appellate Defender

ATTORNEY FOR RESPONDENT

SUBSCRIBED AND SWORN TO before me
this 24th day of May, 2017.

 (L.S)

Notary Public for South Carolina

My Commission Expires: May 12, 2027 .