

THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB 05 2018

CERTIORARI TO THE COURT OF APPEALS

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 BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

J. BENJAMIN APLIN
Senior Assistant Deputy Attorney General

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

ATTORNEYS FOR RESPONDENT/PETITIONER

TABLE OF CONTENTS

	Page
Table of Contents.....	i
Table of Authorities.....	ii
Respondent/Petitioner’s Statement of Issues on Certiorari	1
Statement of the Case.....	2
Statement of Facts.....	4
 Argument:	
I. The Court of Appeals properly limited its erroneous conclusion that “the circuit court erred in applying two of the five <i>Colf</i> factors—the impeachment value of the prior convictions and the centrality of the credibility issue—without further analysis of the three remaining <i>Colf</i> factors, where it ultimately found the error in that application, and necessarily any possible error in admitting Robinson’s prior convictions for impeachment as a result of that application, was harmless.	12
II. The Court of Appeals properly concluded that any error in applying the <i>Colf</i> factors and admitting Robinson’s prior convictions for impeachment was harmless in view of the other competent evidence of his guilt.....	24
Conclusion	28

TABLE OF AUTHORITIES

Federal Cases:

United States v. Browne, 829 F.2d 760 (9th Cir. 1987)..... 22

United States v. Caldwell, 760 F.3d 267 (3rd Cir. 2014)..... 22

United States v. Jackson, 627 F.2d 1198 (D.C. Cir. 1980)..... 22

State Cases:

Dukes v. State, 248 S.C. 227, 149 S.E.2d 598 (1966)..... 17

Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000)..... 14, 21

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

State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015)..... 15

State v. Brown, 274 S.C. 48, 260 S.E.2d 719 (1979)..... 17

State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006)..... 10, 21, 25

State v. Cheeks, 400 S.C. 329, 733 S.E.2d 611 (2012)..... 26

State v. Clamp, 225 S.C. 89, 80 S.E.2d 918 (1954)..... 19

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

State v. Elmore, 368 S.C. 230, 628 S.E.2d 271 (2006)..... 19

State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012)..... 25, 26

State v. Howard, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011)..... 10, 13

State v. Meggett, 398 S.C. 516, 728 S.E.2d 492 (Ct. App. 2012)..... 13

State v. Morris, 376 S.C. 189, 656 S.E.2d 359 (2008) 13

State v. Rosemond, 356 S.C. 426, 589 S.E.2d 757 (2003)..... 5

State v. Scriven, 339 S.C. 333, 529 S.E.2d 71 (Ct. App. 2000)..... 19

State v. Swafford, 375 S.C. 637, 654 S.E.2d 297 (Ct. App. 2007) 13

Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 623 S.E.2d 373 (2005)..... 13

State Statutes:

Ga. Code Ann. § 16-8-18..... 18, 19

S.C. Code Ann. § 16-11-311..... 19

S.C. Code Ann. § 16-11-311(A)..... 17

S.C. Code Ann. § 16-11-325..... 5

S.C. Code Ann. § 16-13-160..... 19

RESPONDENT/PETITIONER'S STATEMENT OF ISSUES ON CERTIORARI

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 analysis of the three remaining *Colf* factors, where it ultimately found the error in that application, and necessarily any possible error in admitting Robinson’s prior convictions for impeachment as a result of that application, was harmless.
2. Whether the Court of Appeals properly concluded that any error in applying the *Colf* factors and 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. Respondent/Petitioner (the State) was represented by assistant solicitors A. Keith McAlister and David W. Miller of the Second Circuit Solicitor's Office. 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

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

Assistant Solicitor David W. Miller of the Second Circuit Solicitor's Office. (R.p.202). After hearing arguments from both parties, the trial court took the matter under advisement. (R.p.221). In an order dated November 10, 2014, the trial court found "that the probative value of the introduction of [Robinson's] prior record outweighed any prejudice to him under Rule 609(a)(1), SCRE" and therefore concluded he was not entitled to a new trial. (R.p.231).

Robinson timely filed a notice of intent to appeal his convictions and sentences and the parties submitted briefs addressing the issue raised by Robinson on appeal. On February 1, 2017, 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 submitted a Petition for a Writ of Certiorari to the Court of Appeals. On April 24, 2017, the State filed a cross Petition for a Writ of Certiorari. By Order dated December 13, 2017, this Court granted both petitions for writs of certiorari and directed the parties to serve and file the appendix and briefs as provided by Rule 242(i), SCACR. On January 12, 2018, Robinson submitted a Petitioner/Respondent's Brief of Petitioner. This Respondent/Petitioner's Brief of Respondent filed 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 Robinson 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. 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

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.

perhaps the armed robbery coming in as part of a prior record for impeachment purposes, in order to attack your credibility? You understand that?” Robinson replied: “Yes, sir.” Robinson subsequently decided he would take the stand and testify. (R.p.125, line 24-p.126, line 25).

The solicitor told the trial court he specifically intended to use four convictions to impeach Robinson: a 2009 second-degree burglary, a 2009 attempted armed robbery, and two 2007 Georgia convictions for breaking into an automobile. Robinson objected to all four arguing, “I believe the prejudicial value of allowing that outweighs the probative value.” Specifically in regard to the prior burglary conviction he added: “[U]nder the circumstances, he’s currently charged with a burglary offense and the jurors may conclude that once a burglar, always a burglar.” (R.p.127, line 7-p.128, line 14). The solicitor noted that the court would be giving a limiting instruction as to the impeachment use of the prior convictions, and offered to refer to the prior burglary conviction merely as a felony conviction that carried more than a year. (R.p.128, line 16-p.129, line 5). Ultimately, the trial court ruled:

I find that they come within the statute and I will - - *in order to preclude any prejudicial value*, I will make you refer to the burglary as you just stated, a felony, which carries a penalty in excess of one year and *you will be allowed to use the others for impeachment purposes*.

(R.p.129, lines 6-11) (emphasis added).

Robinson then testified in his own defense. He claimed he was home the day of the burglary and only left once to return the car he had borrowed from Gunnels. Robinson admitted he had been to Williams’ house many times in the past but denied having anything to do with kicking in the door, brandishing a weapon, or attempting to take anything from the home. (R.p.130, line 12-p.132, line 5). On cross-examination, the solicitor challenged Robinson’s claims that he was not involved in the burglary. He also sought to impeach Robinson with his prior record as follows:

Q: Are you the same Stephon Robinson that was convicted of strong armed robbery in 2009?

A: Yes, sir.

Q: And you're the same Stephon Robinson that had another felony conviction in 2009 that carried more than a year, aren't you?

A: Yes, sir.

Q: And you're the same Stephon Robinson that in 2007 had two convictions for breaking and entering automobiles with the intent to commit a felony or theft?

A: Yes, sir.

Q: But you want this jury to believe that you don't know anything about this?

A: Yes, sir, because for one, I plead guilty to all of my charges and take my responsibility because I know I was guilty of those charges. And two, that was back in my past when I did stupid things to get a little money to do things because I didn't have. But my parents recently passed away and we got insurance money and all kind of money back off that and I have no reason to kick in this man's door. Nothing.

Q: Let me ask you this, in 2007, was your brother with you whenever you broke into the cars?

A: Yes, sir.

Q: Did he plead guilty to his charges?

A: Yes, sir.

Q: And in 2009, with the strong armed robbery, was your brother with you then?

A: Yes, sir.

Q: Who else was with you?

A: No one.

Q: You and your brother?

A: Yes, sir.

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

A: No, sir.

Q: He wasn't?

A: No, sir. You talking about the burglary, right?

Q: The charge that you pled guilty to in 2009, the felony charge that carried more than a year.

A: Yes, sir, yes, sir.

Q: Was your brother with you on that?

A: No, sir.

Q: Okay. So in three out of the four times when you committed a crime, your brother was with you?

A: Yes, sir.

(R.p.136, line 22-p.138, line 17). Robison did not make any objections during the solicitor's cross-examination.

Robison also called his cousin, Jamal Wallace, and his brother, Felder, to testify on his behalf. On cross-examination, Felder acknowledged a 2007 Georgia conviction for breaking into motor vehicles but claimed he did not actually do it. He testified Robison 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 Robison was with him when the robbery happened. (R.p.146, line 11-p.149, line 7). Robison did not object during the solicitor's cross-examination of Felder.

During his closing argument, the solicitor commented in part: "Credibility. It all comes down to credibility," and proceeded to address the credibility of each defense witness in order. Specifically, the Solicitor said:

Now, *let's talk about the defendant*. He got on the stand. He admits to having the vehicle. Just a coincidence though that he has a vehicle, the same vehicle that's named by Mr. Williams. Just a coincidence that he's with his brother, Reginald Felder, and his cousin Jamal Wallace. What motive do they have to lie? Every motive. *Jamal Wallace takes the stand*. Obviously, he wasn't there because if he's going to tell you the truth, he'd be facing charges as well. *And then Mr. Felder gets up here, his brother*. He admits, maybe the only thing he told the truth on, I don't know, about the crimes he committed in the past. I got some mixed testimony. He went back and forth on what he did do and what he didn't do. He was convicted of crimes that he says he was wrongfully convicted of. He's facing these same charges. Obviously, he has motivation to lie.

(R.p.173, line 16-p.174, line 6) (emphasis added).

The trial judge then charged the jury on the law, including standard charges on the presumption of innocence, the State's burden of proof, reasonable doubt, the roles of the judge and jury, the duty to assess the credibility of witnesses, and the crimes and the elements of those crimes. The judge gave the following charge on prior convictions:

You also heard in this case evidence that the defendant had been, in the past, convicted of crimes other than the one for which he is now on trial. This evidence may be considered by you if you conclude it's true only in deciding whether the defendant's testimony is believable or credible and for no other purpose. You must not consider the defendant's prior record as any evidence of the defendant's guilt of the charge we are trying here today.

(R.p.180, lines 17-24). The jury found Robinson guilty of both charges. After hearing from Robinson in mitigation, the trial court sentenced him to twenty (20) years' imprisonment for first-degree burglary and five (5) years' concurrent imprisonment for PWDVC.

Hearing on Remand: June 9, 2014

The trial court convened a remand hearing on June 9, 2014. It did not involve the presentation of testimony or other evidence and instead was limited to the trial judge hearing arguments from the parties regarding the admissibility of Robinson's prior convictions for impeachment pursuant to Rule 609(a), SCRE. First, Robinson addressed the five factors set forth in *Colf* and argued those factors went against admission because they showed the probative value of Robinson's prior convictions were outweighed by their prejudicial effect. Relying on *Howard*,³ *Black*,⁴ and *Bryant*,⁵ he contended the prior convictions did not have any impeachment value whatsoever because the crimes are not probative of truthfulness. Robinson then argued admission was inescapably prejudicial because, although not identical, the crimes were very similar where they shared a "common thread" of "theft" or "taking of property." He noted credibility was very important to the case because there was no physical evidence linking him to the crime and argued that under these circumstances it was particularly prejudicial to admit prior convictions that have nothing to do with credibility. (R.p.207-p.211; p.219-p.221).

In response, the solicitor agreed credibility was important to the case but noted the distinction between the automatic admission of prior convictions as crimes involving dishonesty or false statement under Rule 609(a)(2), and the discretionary admission of all other prior convictions under Rule 609(a)(1). He argued the cases relied upon by Robinson dealt with Rule 609(a)(2) and therefore were not directly applicable. The solicitor further noted that *Colf* dealt with crimes that were more than ten years old which, pursuant to Rule 609(b), SCRE, involved a different standard for admission than at issue here. He then addressed each of the *Colf* factors,

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

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

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

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

At the conclusion of the hearing Judge Early took the matter under advisement and on November 10, 2014, he issued an eight-page written order making detailed findings in regard to each of the five *Colf* factors. (R.p.224-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 *Colf* factors, the impeachment value of the prior convictions and the centrality of the credibility issue, but nevertheless affirming Robinson’s convictions because “any error in the admission of Robinson’s conviction was harmless.” *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). Both parties submitted petitions for writs of certiorari to the court of appeals and in an order dated December 13, 2017, this Court granted those petitions and directed the parties to serve and file the appendix and briefs as provided by Rule 242(i), SCACR. On January 12, 2018, Petitioner/Respondent submitted a Brief of Petitioner. This Respondent/Petitioner’s Brief of Respondent filed on behalf of the State now follows.

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 analysis of the three remaining *Colf* factors, where it ultimately found the error in that application, and necessarily any possible error in admitting Robinson’s prior convictions for impeachment as a result of that application, was harmless.

Robinson complains that although the Court of Appeals properly concluded the circuit court erred in applying two of the *Colf* factors, it erred in failing to address the circuit court’s analysis of the other three *Colf* factors and in failing to review 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. He then goes on to make substantive arguments in regard to why he believes the trial court’s analysis of the other three *Colf* factors was erroneous and why the prior convictions should not have been admitted. 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 analyzing and applying the *Colf* factors was harmless. If this Court agrees with the State and the Court of Appeals that any error was ultimately harmless, there is no reason for this Court to reverse based on the absence of analysis by the Court of Appeals on what would be necessarily be inconsequential errors. If instead, this Court agrees with Robinson in regard to his second issue and finds the Court of Appeals erred in concluding any erroneous *Colf* analysis was harmless, the only appropriate remedy would be a remand to the Court of Appeals for a determination of whether, under the standard of review, the trial court abused its discretion in admitting the prior convictions for

impeachment under its entire Rule 609(a)(1) analysis, including consideration of all five of the *Colf* factors.

For all of these reasons, the alleged error by the Court of Appeals in not addressing inconsequential alleged errors does not provide a separate or stand-alone basis for reversing Robinson's convictions. At most, it would require remand to the Court of Appeals for further consideration.

Discussion / Analysis

The admission or exclusion of evidence is left to the sound discretion of the trial court, whose decision will not be reversed on appeal absent an abuse of discretion. *State v. Morris*, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008); *State v. Howard*, 396 S.C. 173, 177, 720 S.E.2d 511, 514 (Ct. App. 2011); *State v. Swafford*, 375 S.C. 637, 640, 654 S.E.2d 297, 299 (Ct. App. 2007). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. *State v. Meggett*, 398 S.C. 516, 523, 728 S.E.2d 492, 496 (Ct. App. 2012); *Howard* at 178, 720 S.E.2d at 514. To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. *Vaught v. A.O. Hardee & Sons, Inc.*, 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005); *Howard* at 178, 720 S.E.2d at 514.

Rule 609, SCRE

Pursuant to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year's imprisonment "shall be admitted" for impeaching the credibility of a defendant who testifies if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." 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 the Court of Appeals and 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 argued 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 Brief of Petitioner, 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.

Point in Time of Prior Convictions and Subsequent History

At trial, by noting that the prior crimes “come within the statute” the trial judge considered the second *Colf* factor, “the point in time of the conviction and the witness’s subsequent history.” Indeed, during sentencing the trial judge mentioned how he had heard about Robinson’s prior convictions during trial but asked they be repeated again for the record. (R.p.191, lines 9-12). Then, specifically in regard to Robinson’s prior convictions and his “subsequent history” the trial judge said:

Young man, I’m not sure what’s going on with you, but you’re on a pattern to be a menace to society. You start off by a simple shoplifting in 2005; you escalated to stealing financial transaction cards, breaking into motor vehicles in ’07. The same year you burglarized another house. You get out on bond and while out on bond, you get involved in an attempted armed robbery two years later. . . . You were released on parole, being supervised by our agents and within thirteen months, you’re kicking in the door of a home with a weapon, shooting at someone.

(R.p.196, lines 1-18). In the November 10, 2014, Order, the trial court simply added more specificity about Robinson’s “subsequent history” by describing the particular sentences which had been given on the prior convictions and how close in time the current crime was to his release from confinement. The trial court emphasized the fact that the prior convictions were within only five years of the trial. Thus, they were close in time in the context of a continuing pattern of Robinson’s criminally non-credible behavior, and were properly admitted. The Court

of Appeals likely did not address this *Colf* factor because it so clearly weighed in favor of admitting the prior convictions.

Similarity between Past Crimes and the Charged Crime

At trial, by choosing to prohibit any specific reference to Robinson's prior burglary conviction, the trial judge considered the third *Colf* factor, "the similarity between the past crime and the charged crime," in deciding which of the convictions were admissible, and to what extent each could be referenced by the State. On remand, the trial court conducted a more details analysis and specifically found "there is very little similarity between [Robinson's] prior convictions and the charge in this matter." (R.p.229). This finding is supported by the record.

Despite Robinson's assertion to the contrary, the prior convictions are not sufficiently similar to the offenses at trial to merit exclusion. Robinson was on trial for first-degree burglary and PWDVC. First-degree burglary is a crime against property. In Robinson's case, it involved the statutory elements of the crime: entry of a dwelling without consent and with intent to commit a crime therein, and when, in effecting entry or when in the dwelling or in immediate flight therefrom, being armed with a deadly weapon. S.C. Code Ann. § 16-11-311(A) (Supp. 2012). By comparison, strong-arm robbery is a crime against the person. It has been defined as "larceny from the person or in immediate presence of another by violence or intimidation." *Dukes v. State*, 248 S.C. 227, 231, 149 S.E.2d 598, 599 (1966). Larceny involves the felonious taking and carrying away of the goods of another, which must be accomplished against the will or without consent of the owners. *State v. Brown*, 274 S.C. 48, 49, 260 S.E.2d 719, 720 (1979). Being armed with a deadly weapon is not an element of strong-arm robbery. It is however, an element of PWDVC and was the aggravating factor in Robinson's first-degree burglary. Thus,

the elements of Robinson's first-degree burglary are not same as the elements of his prior strong-arm robbery, and there is little similarity between these crimes.

In regard to Robinson's prior convictions from Georgia, they appear to be convictions for "unlawfully entering an automobile." Ga. Code Ann. § 16-8-18 (Supp. 2007) ("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."). As such, they also involved different elements from first degree burglary in South Carolina, and did not require proof of being armed with a deadly weapon.

In his Brief, Robinson takes issue with the trial court's consideration of the elements of the crimes when comparing the similarity between his past crimes and the charged crimes, arguing this was somehow not a valid method of comparison. (Petitioner/Respondent's Brief of Petitioner, p.13-p.18). In support of this argument, he examines the circumstance in *Colf* and alleges that under the remand court's analysis, *Colf*'s prior convictions would not have been "similar" because they did not involve the exact same elements as the charge for which *Colf* was convicted. The State submits Robinson has oversimplified the trial court's methods in this regard. Comparisons necessarily fall along a spectrum, with exact matches falling at one end and those with no similarities on the other. Crimes with overlapping or shared elements fall somewhere in between.

As recognized in his Brief, "the trial judge in *Colf* erred by treating the prior crimes as if their similarity heightened their probative value when in actually increased their prejudicial effect." (Petitioner/Respondent's Brief of Petitioner, p.14). Here, the trial court specifically did the opposite, as instructed by *Colf*, and treated the prior crimes as if their similarity increased

their prejudicial effect. Considering the elements of the offenses was a logical and proper way to make the comparison between prior and charged offenses, particularly where the trial court never found or suggested the prior crimes must have the exact same elements to be considered too similar for admission. Indeed, in *Colf*, the prior crimes of attempted breaking and entering and breaking and entering were very similar to burglary for which Colf was charged. *See State v. Clamp*, 225 S.C. 89, 98, 80 S.E.2d 918, 922 (1954) (noting the elements of common law burglary include “the breaking and entering of the dwelling house of another, in the night-time, with the intent to commit a felony therein . . .”). Likewise, in the cases relied upon by Robinson—*State v. Scriven*, 339 S.C. 333, 529 S.E.2d 71 (Ct. App. 2000), and *State v. Elmore*, 368 S.C. 230, 628 S.E.2d 271 (2006)—the prior crimes were similar or identical to one or all of the charged offenses. Here the crimes were not identical, and bore few similarities.

In Robinson’s case, unlike *Colf*, the prior crime of strong arm robbery was simply not as similar to the first-degree burglary for which he was charged, as demonstrated by comparing the elements of the crimes. While the prior Georgia crimes of unlawfully entering an automobile involve more similar behavior to the current crimes because they all involved an unlawful entry, the act of entering a vehicle is nevertheless quite different from the act of entering someone’s dwelling with circumstances of aggravation, hence the greatly disparate sentences for these crimes. *Compare* S.C. Code Ann. § 16-13-160 and Ga. Code Ann. § 16-8-18 (establishing a maximum penalty of five years for “breaking into motor vehicles” and “unlawfully entering an automobile”) *with* S.C. Code Ann. § 16-11-311 (establishing a maximum penalty of life imprisonment for first-degree burglary).

Since Robinson’s prior crimes were not identical to the crimes for which he was on trial, the trial judge was acting within his discretion in allowing their use for impeachment pursuant to

Rule 609(a)(1), SCRE. The trial court's balancing of the *Colf* factors on remand was sufficient. As with factor two above, the Court of Appeals likely did not address this *Colf* factor because it weighed in favor of admitting the prior convictions.

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. In his opening statement, the solicitor focused on the victim and his expected testimony about the burglary, which included running "into the defendant standing just a few feet away, face to face, no mask, no disguise, with a gun in his hand." (R.p.45, lines 1-9). In his own opening statement, Robinson asked the jury to "hold the State to their burden of proving their case beyond a reasonable doubt" and specifically noted they would hear from the victim, and then asked the jurors to "carefully evaluate all that's put before you." He concluded by arguing, "I'm confident after you review the evidence and the testimony that will be given, you can reach your own conclusion as to what happened." There was no mention of Robinson testifying or his credibility. (R.p.47, line 15-p.48, line 16).

Robinson began his closing argument by attacking the victim's credibility, claiming Williams' words were "those of a drug dealer" and "rotten to the core." (R.p.159, line 9-p.160, line 25). The solicitor then argued, "It all comes down to credibility." He discussed the credibility of each trial witness, ending with the most critical witness, Williams. (R.p.172, line

17-p.175, line 4). While Robinson's testimony was certainly important to his case,⁶ the focus at trial for both parties was on the credibility of the victim. With or without Robinson's testimony, the jury was considering direct evidence of guilt: Williams' eyewitness identification testimony describing Robinson's participation in the burglary. At the time of his ruling to admit Robinson's prior convictions, the trial judge had heard opening statements as well as Williams' testimony and knew the entire case turned on Williams' credibility, regardless of whether Robinson took the stand. Unlike in Bryant, Robinson did not present a defense that hinged entirely on his own testimony.

Indeed, as noted by the trial court in the order after remand, Robinson's testimony was merely cumulative to the testimony of two other defense witnesses in regard to Robinson's alibi defense. Also as noted by the trial court, the credibility of all witnesses was an essential element of Robinson's trial. (R.p.230-p.231). 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 in regard to the centrality of credibility, 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 Brief of Petitioner, the State respectfully submits the Court of Appeals misapprehended the application of the fifth *Colf* factor based on single line from a post-

⁶ Undoubtedly, every defendant who chooses to testify must believe his testimony is important or he would not take the stand. Thus, the State submits the act of testifying alone does not mean the defendant's testimony is automatically "important" for purposes of a *Colf* analysis. Otherwise, the fourth *Colf* factor would add nothing to the overall analysis. See *State v. Bryant*, 369 S.C. 511, 518-19, 633 S.E.2d 152, 156 (finding the erroneous admission of Bryant's prior firearms convictions was not harmless where "[Bryant's] defense was that he acted in self-defense, and this hinged entirely on his own testimony.>").

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, and thus favors admissibility under Rule 609. *See, e.g., United States v. Caldwell*, 760 F.3d 267, 287-88 (3rd Cir. 2014) (“When the defendant’s credibility is a central issue, this weighs in favor of admitting a prior conviction.”) (quoting WEINSTEIN’S FEDERAL EVIDENCE § 609.05 [3][f]); *United States v. Jackson*, 627 F.2d 1198, 1210 (D.C. Cir. 1980) (finding that the more central credibility was to Jackson’s case, the more it favored admissibility of his prior convictions); *United States v. Browne*, 829 F.2d 760, 764 (9th Cir. 1987) (finding both the importance of the defendant’s testimony and his credibility’s centrality to the case strongly tipped the balance in favor of admissibility).

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.

Conclusion

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 appropriate standard of review, its ruling should simply 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 any remedial action by this Court given the harmless error conclusion reached by the Court of Appeals. 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 this Court determines the harmless error analysis was in error. It does not alone warrant reversal of Robinson's convictions because even if not harmless, it would warrant nothing more than remand.

II.

The Court of Appeals properly concluded that any error in applying the *Colf* factors and 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 affirm the Court of Appeals and affirm Robinson's convictions and sentence.

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

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 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 affirm the Court of Appeals opinion as modified and issue an opinion affirming Robinson’s convictions on the ground that the trial court properly applied the *Colf* factors when weighing the probative value against the prejudicial effect of admitting Robinson’s prior convictions for impeachment purposes pursuant to Rule 609(a)(1), SCRE.

CONCLUSION

For all of the foregoing reasons, Respondent/Petitioner respectfully requests that this Court affirm the Court of Appeals opinion as modified and issue an opinion affirming Petitioner/Respondent's convictions and sentence on grounds 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 pursuant to Rule 609(a)(1), SCRE.

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
February 5, 2018

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIORARI TO THE COURT OF APPEALS

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

RECEIVED

FEB 05 2018

S.C. SUPREME COURT

THE STATE, RESPONDENT/PETITIONER,

v.

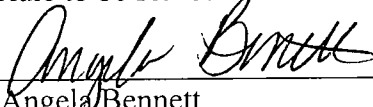
STEPHON ROBINSON, PETITIONER/RESPONDENT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Coordinator, hereby certify that I have served the within *Respondent/Petitioner's Brief of Respondent*, dated February 5, 2018, on Petitioner/Respondent by depositing two copies of the Brief 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 5th day of February, 2018.



Angela Bennett
Administrative Coordinator

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