

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHON ROBINSON,

APPELLANT

APPELLATE CASE NO. 2014-002531

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the remand court erred in finding that the probative value of the admission of Appellant's prior convictions for second degree burglary, strong arm robbery, and breaking and entering into a motor vehicle with intent to commit a felony or theft, outweighed the prejudice to him under Rule 609(a)(1), SCRE?

STATEMENT OF THE CASE

On October 25, 2011, Appellant Stephon Robinson was indicted by the Barnwell County Grand Jury for first-degree burglary and possession of a weapon during the commission of a violent crime. R. 232.

On November 1–2, 2011, Robinson proceeded to trial before the Honorable Doyet A. Early, III, and a jury. R. 1. Robinson was represented by Glen Walters, and the State was represented by Assistant Solicitors A. Keith McAlister and David Miller. The jury found Robinson guilty. R. 187, ll. 5-21. The trial court sentenced Robinson to twenty years imprisonment on the first-degree burglary conviction and five years imprisonment on the possession of a weapon during the commission of a violent crime conviction. R. 197, ll. 8-11. The sentences were to run concurrently. R. 197, ll. 11-12.

Robinson was represented on direct appeal by Appellate Defenders Dayne C. Phillips and Carmen V. Ganjehsani. The State was represented by Assistant Attorney General J. Benjamin Aplin. On February 19, 2014, the South Carolina Court of Appeals issued an unpublished opinion remanding Appellant's case to the trial court to "hold a hearing and carefully balance the probative value of his [Robinson's] prior convictions for impeachment purposes against their prejudicial effect." R. 199 (State v. Robinson, 2014-UP-068 (Ct. App. Feb. 19, 2014)).¹

¹ It appears that the Order remanding the case may have only been for consideration of Robinson's 2009 conviction for attempted robbery and the two 2007 Georgia convictions for breaking into an automobile with intent commit a theft or felony. R. 199 (State v. Robinson, 2014-UP-068 (Ct. App. Feb. 19, 2014)). However, the remand court also addressed the admissibility of Robinson's 2009 second degree burglary conviction in its Order. R. 224 (Nov. 11, 2014 Order, p. 4-6). Out of an abundance of caution, Appellant addresses all four prior convictions in this brief.

The remand hearing was held before the Honorable Doyet A. Early, III, in Aiken County on June 9, 2014.² Robinson was represented by Appellate Defender Carmen V. Ganjehsani and the State was represented by Assistant Solicitor David W. Miller. R. 202. On November 11, 2014, the remand court issued its Order finding that the probative value of the introduction of Robinson's prior record outweighed any prejudice to him under Rule 609(a)(1) and denying Robinson a new trial. R. 224 (Nov. 11, 2014 Order).

This appeal follows.³

² Robinson agreed to waive venue only for purposes of the remand hearing. He did not waive venue for any further proceedings.

³ Appellant has an obligation to provide a record sufficient for this Court's review. If this Court finds that the remand court erred in finding that Robinson's prior convictions were properly admitted at his trial, then this Court will also conduct a harmless error analysis. To that end, the trial transcript is included in the Designation of the Record on Appeal. The remand court also considered the trial transcript in its decision. R. 224 (Nov. 11, 2014 Order, p. 2).

STATEMENT OF FACTS

Robinson's Trial

The basic facts presented at the trial were that Eddie Williams claimed that Robinson, Robinson's brother, and an unidentified third man entered his home on the afternoon of Sunday, February 20, 2011 and that Robinson had a weapon on his person. Williams grabbed his own gun, started to shoot, and the intruders ran. Robinson allegedly turned and fired one shot. Williams claimed that Robinson was one of the intruders. R. 99-107. The initial call was dispatched to law enforcement around 2:17 or 2:20 that afternoon. R. 50.

Following the incident, Williams was not completely truthful to law enforcement. Williams initially did not tell the officer investigating the incident that Williams himself had shot his gun at the intruders. He was allegedly afraid to tell the truth to law enforcement because the gun in his possession had not been registered and had been stolen out of Beaufort County. R. 60; 111. Williams also told law enforcement on the date of the incident that the bullet holes in his home were already there when he purchased the home. R. 112-113.

At trial, Robinson testified that he was at his home with his brother and cousin at the time that the incident occurred at Williams' home. He woke up late morning, took a shower, and returned the car that he had borrowed from Shelly Leanna Gunnels back to her house between noon and one o'clock. He then returned to his home, where he remained for the rest of the day. R. 130-132.

Gunnels testified that Robinson did borrow her car on February 19th and then returned it on February 20th "around that afternoon." R. 96-97.

When Robinson informed the trial court of his decision to testify, the State requested to impeach him using prior convictions from 2009 for second-degree burglary and strong arm robbery and from 2007 for breaking into an automobile. Defense counsel argued that the prejudicial value of the convictions outweighed any probative value and that, with respect to the burglary offense, that “jurors may conclude that once a burglar, always a burglar.” R. 126, l. 16 – 129, l. 5.

Without providing any analysis, the trial court found: (1) “that [the prior convictions] come within the statute [;]” (2) that the burglary conviction would be referred to as a felony conviction “in order to preclude any prejudicial value [;]” and (3) that “[the State] will be allowed to use the other [prior convictions] for impeachment purposes.” R. 129, ll. 6-11.

Based on the trial court’s ruling, Assistant Solicitor Miller elicited the following testimony during cross-examination of Robinson:

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

A: Yes, sir.

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

A: Yes, sir.

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

A: Yes, sir.

...

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

A: Yes, sir.

Q: Did he plead guilty to his charges?

A: Yes, sir.

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

A: Yes, sir.

...

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

A: No, sir.

R. 136, l. 21 – 138, l. 8 (emphasis added).

Without providing any prior notice, Assistant Solicitor Miller also impeached Robinson's brother, Reginald Felder, using the same convictions:

Q: Were you convicted in 2007 of *breaking into motor vehicles* to commit a felony or a theft in Georgia?

A: I was, but I didn't do it.

...

Q: Okay. Well, when you weren't *breaking into these motor vehicles* that you were later convicted of breaking into, were you with your brother?

...

A: My brother was doing community service at the time, but the guy that really did it said that me and my brother did it, which we didn't do it.

Q: [W]ere you convicted in 2007 of *breaking into motor vehicles*?

A: Yes, sir.

Q: Okay. And in 2009, were you convicted in July of a *strong-armed robbery*?

A: Yes, sir.

R. 148, l. 7 – 149, l. 7 (emphasis added). The State further questioned Robinson's brother regarding the prior convictions later on cross-examination. R. 153, l. 18 – 154, l. 7.

During the State's closing argument, Assistant Solicitor McAlister argued to the jury:

We talked about burglary in the first-degree before the trial. Burglary in the first-degree is entering a dwelling, a home without consent with intent to commit a crime. And in this case, while carrying a firearm.

Now, all the testimony you've heard today, it's every element: His door was kicked in; the defendant entered the home without consent; he obviously came in to commit a crime. I don't know if he's coming in there to steal a TV -- I don't know what he's doing. We don't have to prove that. He's coming in to commit a crime because he's got a gun in his hand.

R. 172, ll. 4-14; and,

Now, let's talk about the defendant. . . . [sic] Just a coincidence that he's with his brother, Reginald Felder, and his cousin Jamal Wallace. What motive do they have to lie? Every motive. . . . And then Mr. Felder gets on up here, his brother. *He admits, maybe the only thing he told the truth on, I don't know, about the crimes he committed in the past. . . . He was convicted of crimes that he says he was wrongfully convicted of. He's facing these same charges. Obviously, he has a motivation to lie.*

R. 173, l. 16 – 174, l. 6 (emphasis added).

Remand Hearing

At the remand hearing both defense counsel and the solicitor presented argument regarding the probative value and prejudicial effect of Robinson's prior convictions. Defense counsel argued that the five Colf⁴ factors should have been applied to make this determination. These included the impeachment value of the crime, the point and time of

⁴ State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

the conviction and the witness' subsequent history, the similarity of the prior crimes and the charged crime, the importance of the defendant's testimony, and [the] centrality of the credibility issue. R. 206, l. 4 – 207, l. 12. Defense counsel argued that neither attempted robbery nor breaking and entering of an automobile are probative of truthfulness, such that they had no probative value. R. 207, l. 13 – 208, l. 7. Additionally, though the prior convictions were not for the identical crimes, they were very similar, having a common thread of theft. R. 208, l. 8 – 209, l. 16.

The solicitor averred that there is “nothing similar” between a burglary and a robbery and that there is a “large difference” between breaking into someone's car and breaking into someone's home. With respect to the second degree burglary conviction, he seemed to allege that any prejudice was removed by it being referred to as a felony that carried more than one year. R. 213, l. 10 – 215, l. 8. He further pointed to the fact that the prior convictions occurred within five years of the alleged offense. R. 215, l. 9 – 216, l. 2. The solicitor also said that their admission was “exceedingly important” because the defendant was proclaiming his innocence and there was no physical evidence, just the testimony of Robinson and the alleged victim. He argued that the only prejudice from the other convictions was their effect on his credibility, but that the jury would not assume that “he was a bad guy who did bad things and therefore, he must have done this thing.” R. 216, l. 3 – 219, l. 2.

Defense counsel responded that the solicitor failed to articulate any probative value for the prior convictions other than truthfulness, which is contradicted by case law. She also reemphasized that the similarity between the alleged crimes and the prejudice in

admitting crimes that have no purpose other than showing propensity. R. 219.1.5 – 221, i. 14.

Order Denying Relief

Judge Early issued a written Order denying Robinson any relief and, not surprisingly, finding a sufficient basis for admitting the prior convictions that he originally admitted at trial. R. 224 (Nov. 11, 2014 Order). With the exception of a passing reference to State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012), the remand court did not cite any of the cases referenced by defense counsel during the remand hearing, which included State v. Howard, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011); State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006); State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001); and State v. Broadnax, 401 S.C. 238, 736 S.E.2d 688 (Ct. App. 2013).

The remand court then considered the four convictions together in addressing each of the Colf factors, purportedly “because the analysis remains the same for each conviction.” R. 228 (Nov. 11, 2014 Order, p. 5). Judge Early found that the the prior convictions all had impeachment value. He also found that the convicitons were sufficiently close in time to the trial and were not substanitally similar to the alleged crime with the exception of the redacted prior burglary charge. Further, Robinson’s testimony was not important to advance the alibi defense and the “credibility of all witnesses, for the State and the Defense, was an essential element of this trial, as it is with every trial.” Thus, he determined that the jury properly considered the prior convictions of Robinson within the confines of the court’s limiting intstruction and that Robinson was not entitled to a new trial. R. 230-231 (Nov. 11, 2014 Order, p. 7-8). With respect to the

2009 second degree burglary conviction, the court additionally found that it was “probative as to the believability of the Defendant and that any undue prejudice from introduction of the conviction [was] diminished by this Court’s limiting instruction as well as the requirement that the State refer to the conviction only as a ‘conviction for a felony offense that carried more than a year.’” R. 227 (Nov. 11, 2014 Order, p. 4).

ARGUMENT

The remand court erred in finding that the probative value of the admission of Appellant's prior convictions for strong arm robbery and breaking and entering into a motor vehicle with intent to commit a felony or theft, outweighed the prejudice to him under Rule 609(a)(1), SCRE.

This Court remanded Robinson's case for a hearing on the admissibility of his prior convictions, instructing the remand court to "carefully balance the probative value of the prior convictions for impeachment purposes against their prejudicial effect." R. 199 (State v. Robinson, 2014-UP-068 (Ct. App. Feb. 19, 2014)). The remand court conducted a perfunctory "analysis" and found that it properly admitted Robinson's prior convictions. The court's findings miss mark the mark in many respects, resulting in the deficiency of its entire assessment of probative value versus prejudicial effect. Had the remand court looked to any of the relevant case law in reaching its findings and conclusions, there would have been no rational or fair decision other than to grant Robinson a new trial. This is especially so when Robinson was alleged to have committed the burglary with his brother and the solicitor elicited testimony that the prior strong arm robbery conviction and the two breaking and entering a motor vehicle convictions arose from incidents involving him and his brother.

Rule 601(a), SCRE, and the Colf Factors

"According to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year imprisonment are admissible for impeaching the credibility of a defendant who testifies when the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." State v. Howard, 396 S.C. 173, 178, 720 S.E.2d 511, 514 (Ct. App. 2011) (quotation marks omitted). "Our Supreme Court has

approved the five-factor analysis generally employed by the federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused.” Id. (citing State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000)).

The defendant’s prior convictions in State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000), all occurred over ten years prior to the alleged offenses such that Rule 609(b), SCRE, applied. The trial court was thus required to find that the probative value of the prior convictions *substantially* outweighed the prejudicial impact in order to allow for their admission. See Rule 609, SCRE. In the present case, there is no dispute that the convictions fell within the ten-year time limit such that Rule 609(a)(1) applied. Thus, the threshold for admissibility is lower, requiring only a determination “that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.”

Howard makes clear that even in a Rule 609(a) analysis, the Colf factors are applicable, stating: “The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness’s subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant’s testimony; and (5) the centrality of the credibility issue.” 396 S.C. at 178, 720 S.E.2d at 514; see also State v. Scriven, 339 S.C. 333, 341-42, 529 S.E.2d 71, 75-76 (Ct. App. 2000) (citing differences in Rule 609(a)(1) and 609(b), SCRE, but recognizing that regardless the trial judge should engage in a meaningful analysis of the relevant factors and balance the probative value against the prejudicial effect to the accused). In our Supreme Courts recent decision in State v. Broadnax, No. 27545, 2015 WL 4099053, *5 (S.C. July 8, 2015), the court wrote:

Ultimately, the Rule [609] is designed to help the jury discern the truth. It is not a tool for the State to bolster its case against the criminal defendant for the mere fact that the defendant has engaged in prior criminal activity. The balance we strike today cuts to the heart of our system's conceptions of fair trial and fair play.

In the present case, the prior convictions included a 2009 conviction for second degree burglary, a 2009 conviction for strong arm robbery, and two 2007 Georgia convictions for breaking and entering a motor vehicle with intent to commit a felony or theft. The State presented no additional facts in an attempt to admit these convictions as crimes involving dishonesty or false statement pursuant to Rule 609(b), likely knowing that such would be unsuccessful. Thus, their admission pursuant to Rule 609(a) required application of the Colf factors to find whether their probative value outweighed the prejudicial effect.

Lack of Impeachment Value

The remand court's impeachment value analysis is perhaps the most lacking and unsupported. 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." He said that they do not imply that Robinson was "an armed burglar" but rather that he is someone that cannot be trusted and might not be credible. Thus, Judge Early found that each of the prior convictions had impeachment value, which was not outweighed by any prejudice. R. 228 (Nov. 11, 2014 Order, p. 5).

While admittedly some overlap in discussion is inevitable, the remand court made the same error made in Howard, of conflating impeachment value with credibility and character. There, the remand 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. at 180, 720 S.E.2d at 515. 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 trial judge 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 (Nov. 11, 2014 Order, p. 5) (emphasis added). The applicable case law paints a far different picture of the impeachment value of the prior convictions. In State v. Black, our Supreme Court noted that "[t]he starting point in the 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. In a footnote, the 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 (citing State v. Bryant, 369 S.C. 511, 517-18, 633 S.E.2d 152, 155-56 (2006) (observing “a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness”) and State v. Cheeseboro, 346 S.C. 526, 552 S.E.2d 300 (2001) (noting convictions for housebreaking and grand larceny were not generally considered probative of truthfulness)).

In Broadnax, our Supreme 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.” Opinion No. 27545 (S.C. filed July 8, 2015). The court went on to say that “armed robbery, therefore, is not per se probative of truthfulness.” Id. Thus, following the logic set forth in Black, since armed robbery is not probative of truthfulness, its impeachment value is limited. 400 S.C. at 23, 732 S.E.2d at 887. Nonetheless, the remand court found that all of Robinson’s prior convictions, which would include the strong arm robbery, “imply that the accused is not someone to be trusted – that he might not be credible.” R. 228 (Nov. 11, 2014 Order, p. 5).

Had the remand court properly looked at the nature of the prior convictions in determining their impeachment value, he would have had no choice but to conclude that neither of the prior convictions was probative of truthfulness. Thus, this factor should have weighed against admission of Robinson's prior convictions.

Point in Time of Prior Convictions and Subsequent History

The remand court found that the prior convictions all occurred within five years of the trial and "were therefore well within the time frame provided for by the Rule. R. 229 (Nov. 11, 2014 Order, p. 6). However, there was no dispute that the prior convictions occurred within the ten-year timeframe such that the presumption against admission of Rule 609(b), SCRE, was not applicable. The alleged offense was committed on February 20, 2011, and Robinson was tried on November 1-2, 2011. The prior offenses were from two and four years prior, in 2007 and 2009. Even so, the court was required to consider how the timing of the prior convictions affected their probative value versus prejudicial effect. Instead, the remand court focused on the ten-year timeframe and pointed to the fact "[a]t the time of this offense, and at the time of trial in November 2011, the Defendant was ostensibly still being supervised by Georgia and South Carolina authorities for these prior convictions." R. 229 (Nov. 11, 2014 Order, p. 6). While that have been the case, the jury did not and should not have known what the sentences were for each of Robinson's prior convictions. Thus, it is difficult to fathom how Robinson's probationary status at the time of the alleged offense was a legitimate factor for consideration.

Similarity Between Prior Convictions and Charged Offense

The remand court also misapplied the third Colf factor regarding similarity between the prior convictions and the charged offense. Judge Early found that the second degree burglary conviction, though identical, was saved by his limitation that the State refer to it as “a felony conviction that carries more than a year.” Regarding the strong arm robbery and breaking and entering into a motor vehicle with intent to commit a felony or theft, he found that they did not involve elements “crucial to the charge of burglary.” He specifically pointed to first degree burglary’s requirements of the use of a deadly weapon and entering someone’s home. Thus, he found no similarity between those prior convictions and the charged offenses. R. 229 (Nov. 11, 2014 Order, p. 6). If the remand court’s reasoning were affirmed, then the similarity factor would be rendered meaningless. If a simple difference in the elements were the standard, a prior conviction for anything other than the identical offense would never be found similar. Further, where the prior conviction and alleged offense were identical, the trial court could just order that the State use some vague reference to the class and potential punishment of the offense. This would destroy any impeachment value since the jury would know nothing of the nature of the crime and be left to speculate as to what offense the defendant committed. Thus, the flaw in the remand court’s logic is apparent.

In Colf, our Supreme Court explained that “evidence of similar offenses inevitably suggests to the jury the defendant’s propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions.” 337 S.C. at 628, 525 S.E.2d at 249 (citing United States v. Beahm, 664 F.2d 414 (4th Cir. 1981)). In Bryant, the Court again noted “when the prior offense is similar to the offense for which the

defendant is on trial, the danger of unfair prejudice to the defendant from impeachment by that prior offense weighs against its admission.” 369 S.C. at 517-18, 633 S.E.2d at 156; see also State v. Scriven, 339 S.C. 333, 343, 529 S.E.2d 71, 76 (Ct. App. 2000) (holding that when prior convictions are “similar or identical to charged offenses . . . the likelihood of a high degree of prejudice to the accused is inescapable”).

In the present case, Robinson was charged with first degree burglary and possession of a weapon during a crime of violence. R.232 (Indictment). A defendant is guilty of burglary in the first degree if the defendant “enters a dwelling without consent and with intent to commit a crime in the dwelling” and “when, in effecting entry or while in the dwelling or in immediate flight, he or another participant in the crime... is armed with a deadly weapon or explosive.” S.C. CODE ANN. § 16-11-311(A)(1)(a).

Addressing Robinson’s prior second degree burglary charge first, the court appeared to recognize the similarity between that and the first degree burglary charge. However, rather than prohibiting its admission, the court allowed the State to refer to it as “a felony conviction that carries more than a year.” According to the remand court, “there is nothing about that characterization of the prior conviction to make it similar to the offense that the Defendant faced.” R.224 (Nov. 11, 2014 Order). The problem with this resolution is that Rule 209(a), SCRE, governs the admission of prior convictions “for the purpose of attacking the credibility of a witness.” When you omit the nature of the crime charged, you take away any probative value that it may have had for truthfulness. The jury is left to speculate whether the prior felony was for burglary, murder, or some other offense. Because there is no basis for the jury to reason that the prior conviction

reflects on truthfulness, its admission becomes propensity evidence. Instead, the prior conviction for second degree burglary should not have been admitted at all.

The court then turned to Robinson's prior convictions for strong arm robbery and two counts of breaking and entering into a motor vehicle with intent to commit a felony or theft. "Strong arm robbery is defined under common law 'as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear.'" Abney v. State, 408 S.C. 41, 757 S.E.2d 544 (Ct. App. 2014) (quoting State v. Rosemond, 356 S.C. 426, 430, 589 S.E.2d 757, 758 (2003)). Though the specific statute related to the Georgia convictions was not referenced in the record, it appears to be a theft related offense of "entering automobile." GA. CODE ANN., § 16-8-18 ("If any person shall enter any automobile or other motor vehicle with the intent to commit a theft or a felony, he shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one nor more than five years, or, in the discretion of the trial judge, as for a misdemeanor.").

While they vary in degree, the common thread amongst the charged offense and the prior convictions is the taking of the property of another. The solicitor implied in his cross-examination of Robinson that he committed the alleged burglary in order steal marijuana from the residence. R. 139, ll. 6-9. Then, in his closing argument, the solicitor admitted that he did not know what crime Robinson allegedly intended to commit once inside the home, but implied that it was a theft by saying "I don't know if he's coming in there to steal a TV." R. 172, ll. 8-14. However, even without the solicitor's attempts to

draw further similarity between Robinson's prior convictions and the alleged offense, the similarities are plain.

The only real difference in the breaking and entering of a motor vehicle with intent to commit a felony or theft and a first degree burglary is the location of the crime and that the burglary required some additional aggravator. Likewise, a first degree burglary can be essentially a strong arm robbery that occurs within the home and with some additional aggravator. In this case, the additional aggravator was the use of a deadly weapon, but that does not mean that a weapon may not have been used in the prior crimes. By admitting these prior convictions, the jury knew that Robinson had stolen before and seemingly had a pattern of escalating conduct. First, he broke into two vehicles with the intent to commit a felony or theft. Then, he took money, goods, or property from a person through the use of violence or fear. It would likely not surprise them that now he entered a house, thinking that the owner was not there, either to steal drugs or other property.

Moreover, there was an overarching factual similarity between the charged offense and the strong armed robbery and breaking and entering a motor vehicle convictions. Robinson was accused of committing the charged offense with his brother and a third party. The solicitor elicited testimony that Robinson committed the offenses underlying those prior convictions with his brother. R. 136, l. 21 – 138, l. 8; R. 148, l. 7 – 149, l. 7.

Despite all of this, the remand court incomprehensibly found that there was no similarity between the crimes. Thus, he failed to weigh their similarity in his assessment of prejudice to Robinson.

Importance of Robinson's Testimony

The remand court's evaluation of the importance of Robinson's testimony completely ignored the constitutional significance of Robinson's right to testify in his own defense. See State v. Rivera, 402 S.C. 225, 249, 741 S.E.2d 694, 707 (2013) (“[T]he right of an accused to testify in his defense is fundamental to the trial process and transcends a mere evidentiary ruling. An accused's right to testify ‘is either respected or denied; its deprivation cannot be harmless.’” (quoting McKaskle v. Wiggins, 465 U.S. 168, 104 S.Ct. 944 (1984))). Judge Early found that Robinson's testimony was cumulative to the alibi testimony of his two other defense witnesses such that it was not necessary for him to take the stand in his own defense. R. 230 (Nov. 11, 2014 Order, p. 7).

The right of a criminally accused to testify or not to testify is fundamental. Rock v. Arkansas, 483 U.S. 44, 52, 107 S.Ct. 2704 (1987) (“[F]undamental to a personal defense ... is an accused's right to present his own version of the events *in his own words*.” (emphasis added)). “Every criminal defendant is privileged to testify in his own defense, or to refuse to do so.” Id. at 53, 107 S.Ct. at 2704 (quoting Harris v. New York, 401 U.S. 222, 230, 91 S.Ct. 643 (1971)). “The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution.” Id. at 51, 107 S.Ct. 2704. “It is one of the rights that ‘are essential to due process of law in a fair adversary process.’” Id. (quoting Faretta v. California, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525 (1975)). “The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call ‘witnesses in his favor,’ a right that is guaranteed in the criminal courts of the States by the Fourteenth Amendment.” Id. at 52, 107 S.Ct. 2704 (citing Washington v. Texas, 388 U.S. 14, 87

S.Ct. 1920 (1967)). “The opportunity to testify is also a necessary corollary to the Fifth Amendment’s guarantee against compelled testimony.” Id. “The choice of whether to testify in one’s own defense ... is an exercise of [that] constitutional privilege.” Id. at 53, 107 S.Ct. 2704 (quoting Harris, 401 U.S. at 230, 91 S.Ct. 643) (omission in original).

To characterize Robinson’s testimony as cumulative because he presented other alibi witnesses is far too simplistic. The State went to great lengths to undermine the testimony of Robinson’s alibi witnesses. R. 143, l. 21 – 146, l. 1; R. 147, l. 25 – 154, l. 10. While a defendant is equally entitled to take the stand or remain silent at his trial, there is often no more powerful witness for the defense than the defendant himself. It allows the jury an opportunity to view the defendant’s demeanor, judge his credibility, and assess how he handles himself during cross-examination. Thus, there is a constitutional dimension to a defendant’s testimony that the trial court should have considered in evaluating the importance of Robinson’s testimony and which weighs in favor of exclusion of the prior convictions.

Centrality of Credibility

Lastly, it is undisputed that credibility was important in Robinson’s case, which was based purely on witness testimony. This heightened the court’s need to carefully consider the potential prejudice to Robinson from admission of the prior convictions. See Bryant, 369 S.C. at 518-19, 633 S.E.2d at 156 (recognizing that the case hinged on the defendant’s testimony regarding self-defense and finding 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”).

In State v. Morris, 289 S.C. 294, 345 S.E.2d 477 (1986), the solicitor was improperly permitted to cross-examine the defendant regarding his prior conviction for bookmaking. Morris was decided when the standard for impeachment of a witness' credibility required that the conviction relate to a crime involving moral turpitude. 289 S.C. at 296, 345 S.E.2d at 478. The Morris court's finding of error was thus based upon its holding that bookmaking was not a crime of moral turpitude. Id. Despite the different standard for admission, the court's reasoning for rejecting the State's harmless error argument remains instructive. The Morris court found that "the credibility of Morris was of paramount importance in his defense." Id. at 297-98, 345 S.E.2d at 479. It cited the sharp conflict in the evidence, which "was essentially limited to the testimony of the two girls and Morris." Id. Consequently, the court said that it "[could not] hold beyond a reasonable doubt that the affirmative answer to the solicitor's impermissible question did not irreparably damage Morris' credibility in each juror's mind." Id.

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 was paramount to his defense. Thus, the admission of his prior convictions, which lacked any impeachment value and were so similar to the charged offense, was improper to attack his credibility.


In summary, the remand court erred its analysis of the Colf factors and how they weighed against admission of the prior convictions. With respect to the second degree burglary conviction, the vague characterization substituted by the solicitor only lessened its impeachment value and caused the jury to speculate as to what prior felony Robinson committed. Regarding the other convictions, the prejudice to Robinson was compounded

by the fact that the solicitor elicited testimony that they arose from offenses committed by Robinson with his brother. Robinson was similarly accused of committing the charged offense with his brother and an unknown third party. Thus, not only were the prior convictions utilized as evidence of Robinson's propensity to steal, they were used as evidence of his propensity to steal with his brother. This is not the basis upon which the jury should have been called upon to reach its verdict. The probative value, if any, of Robinson's prior convictions was outweighed by the prejudicial effect of their admission. Robinson is accordingly entitled to a new trial.

CONCLUSION

For the foregoing reasons, Appellant Stephon Robinson respectfully requests that this Court reverse his convictions and sentences and grant him a new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

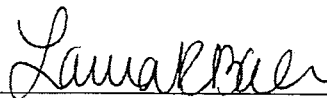
ATTORNEY FOR APPELLANT

This 17th day of February, 2016.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability the Final Briefs comply with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 17th, 2016



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

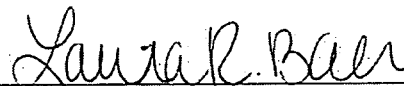
V.

STEPHON ROBINSON,

APPELLANT

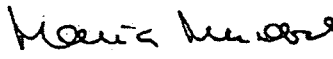
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of February, 2016.



Laura R. Baer
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of February, 2016.

 (L.S.)

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

STATE OF SOUTH CAROLINA
In The Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM BARNWELL COUNTY
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2014-002531

THE STATE,RESPONDENT

v.

STEPHON ROBINSON,APPELLANT.

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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Doyet A. Early, III, Circuit Court Judge

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THE STATE,RESPONDENT

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¹ Although the trial court addressed the second degree burglary conviction in the order after remand, this Court only remanded for consideration of the other prior convictions.

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

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RESPONDENT'S STATEMENT OF ISSUE ON APPEAL

1. Whether, on remand from this Court, the trial court properly found Appellant's prior convictions for second degree burglary, strong-arm robbery, and breaking into automobiles were properly admitted for impeachment purposes pursuant to Rule 609, SCRE, where those convictions fell under the ten-year time limit in Rule 609(b) and where the trial court conducted a careful on-the-record balancing of the Colf factors before concluding the probative value of the convictions outweighed their prejudicial impact under Rule 609(a)(1).

STATEMENT OF THE CASE

Appellant (Robinson) was indicted at the October 2011 term of the grand jury for Barnwell County for first-degree burglary (2011-GS-06-245) and possession of a weapon during a violent crime (PWDVC) (2011-GS-06-246). He was represented by Glen Walters, Esquire. On November 1-2, 2011, Robinson proceeded to trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable Doyet A. Early, III, to twenty (20) years' imprisonment for first-degree burglary and five (5) years' concurrent imprisonment for PWDVC. Robinson timely filed a notice of intent to appeal his conviction and sentence and subsequently submitted a brief in support of his appeal. He was represented in the appeal by Appellate Defenders Dayne C. Phillips and Carmen V. Ganjehsani of the South Carolina Office of Indigent Defense. The State filed a brief in response and in an unpublished opinion dated February 19, 2014, this court remanded Robinson's case to the trial court to "hold a hearing and carefully balance the probative value of his prior convictions for impeachments purposes against their prejudicial effect." State v. Robinson, Op. No. 2014-UP-068 (S.C. Ct. App. filed Feb. 19, 2014). This Court held: "If the trial court finds the prejudicial impact of the prior convictions outweighs their impeachment value, the trial court shall order a new trial. Otherwise, subject to further appellate review, the convictions and sentences are affirmed."

On June 9, 2014, a remand hearing was convened in Aiken County³ 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

³ For purposes of the hearing, the parties agreed to waive venue and have the matter heard in Aiken County. (R, p.224).

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 the order and subsequently submitted a brief in support of his appeal. This Brief of Respondent 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"⁴ 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.

⁴ 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).

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

(R.p.124, line 16-p.125, line 7) (emphasis added). The trial court went on to tell Robinson: "You understand that if you do testify, that you will be subjected to cross-examination and perhaps the armed robbery coming in as part of a prior record for impeachment purposes, in order to attack your credibility? You understand that?" Robinson replied: "Yes, sir." Robinson subsequently decided he would take the stand and testify. (R.p.125, line 24-p.126, line 25).

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

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

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

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

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

A: Yes, sir.

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

A: Yes, sir.

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

A: Yes, sir.

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

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

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

A: Yes, sir.

Q: Did he plead guilty to his charges?

A: Yes, sir.

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

A: Yes, sir.

Q: Who else was with you?

A: No one.

Q: You and your brother?

A: Yes, sir.

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

A: No, sir.

Q: He wasn't?

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

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

A: Yes, sir, yes, sir.

Q: Was your brother with you on that?

A: No, sir.

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

A: Yes, sir.

(R.p.136, line 22-p.138, line 17). 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 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,⁵ Black,⁶ and Bryant,⁷ 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).

⁵ State v. Howard, 396 S.C. 173, 720 S.E.2d 511 (Ct. App. 2011).

⁶ State v. Black, 400 S.C. 10, 732 S.E.2d 880 (2012).

⁷ State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006).

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 issue an eight-page written order making detailed findings in regard to each of the five Colf factors. (R, p.227-p.231). Based on those findings, the trial court concluded: "that the probative value of the introduction of the Defendant's prior record outweighed any prejudice to him under Rule 609(a)(1), SCRE, in this matter." The trial court ordered that Robinson's motion for a new trial be denied. (R. p.231).

ARGUMENT

I.

On remand from this Court, the trial court properly found Appellant's prior convictions for second degree burglary, strong-arm robbery, and breaking and entering into automobiles were properly admitted for impeachment purposes pursuant to Rule 609, SCRE, where those convictions fell under the ten-year time limit in Rule 609(b) and where the trial court conducted a careful balancing of the Colf factors before concluding the probative value of the convictions outweighed their prejudicial impact under Rule 609(a)(1).

Appellant contends 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 disagrees and submits Robinson's arguments are without merit. 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.

Standard of Review

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

Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 480, 623 S.E.2d 373, 375 (2005);
Howard at 178, 720 S.E.2d at 514.

Rule 609, SCRE

Pursuant to Rule 609(a)(1), SCRE, prior convictions punishable by more than one year's imprisonment "shall be admitted" for impeaching the credibility of a defendant who testifies if "the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused." The South Carolina Supreme Court has approved the five-factor analysis generally employed by the federal courts for weighing the probative value for impeachment of prior convictions against the prejudice to the accused. Colf at 627, 525 S.E.2d at 248. Prior convictions similar to the one for which the defendant is being tried are not automatically inadmissible; instead, "[t]rial courts must weigh the probative value of the prior convictions against their prejudicial effect to the accused and determine, in their discretion, whether to admit the evidence." Green v. State, 338 S.C. 428, 433, 527 S.E.2d 98, 101 (2000). The following factors, along with any other relevant factors, should be considered by the trial court: (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue. Colf at 627, 525 S.E.2d at 248.

The parties agree that Robinson's prior convictions for strong-arm robbery and breaking and entering motor vehicles fit squarely within the time limits for admission of impeachment evidence under the Rules of Evidence. Rule 609 provides:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of

the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Rule 609(b), SCRE. Here, Robinson's trial took place on November 1-2, 2011. His prior convictions for strong-arm robbery and for breaking and entering automobiles were in 2009 and 2007, respectively. Because these convictions were within five years of trial, they fall within the ten-year time limit provided by Rule 609(b), SCRE, and therefore were properly admitted to impeach Robinson if the court determined the probative value outweighed the prejudicial effect.

Here, even before the appeal and subsequent remand to the lower court, the trial judge was cognizant of the requirement that he balance the probative value of admitting the prior convictions against the prejudicial effect to Robinson. Indeed, when addressing Robinson's right to testify and the possible impact of the prior convictions the judge specifically advised Robinson that the court would have to decide whether "the probative value outweighs the prejudicial effect of it." (R.p.124, line 16-p.125, line 7). The judge then listened to Robinson's claim that, "I believe the prejudicial value of allowing that outweighs the probative value," (R.p.128, lines 4-9), before ruling:

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

(R.p.129, lines 6-11) (emphasis added). Although the trial judge apparently believed he had sufficiently made the determination required by Rule 609(a)(1) for admission of the prior convictions, this Court disagreed and remanded for the trial court to conduct a more

“meaningful analysis.” That meaningful analysis was then conducted by the trial court in conjunction with the June 9, 2014, remand hearing.

Colf Factors

The record before this Court now includes the trial court’s specific consideration of each of the Colf factors in making its decision under Rule 609(a)(1), SCRE. The State initially notes that by choosing to prohibit any specific reference to Robinson’s prior burglary conviction and simply calling it a felony, the trial judge eliminated any possible prejudice from admission of that particular conviction. Indeed, this Court appears to have limited consideration on remand to only the prior convictions for attempted robbery and breaking into automobiles, which renders any further discussion of the prior burglary conviction by the trial judge mere surplusage. In regard to the other prior convictions, 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.

(1) 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 the recently issued opinion from our Supreme Court in State v. Broadnax, Op. No. 27545 (S.C. Sup. Ct. refiled July 29, 2015) (Shearouse Adv. Sh. No. 29 at 12) (order granting remand in petition for rehearing issued November 5, 2015), Robinson now argues the remand court's "impeachment value analysis" is "lacking and unsupported." He contends "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 disagrees and submits it is precisely the generalized impact on credibility which is contemplated by Rule 609(a)(1), SCRE. Robinson seems 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 argues they should not have been admitted and implies that any balancing test attempted by the trial court would have been futile. However, Robinson misconstrues the reach of the cases upon which he relies.

Here, the trial court found: "Simply put, convictions for breaking into motor vehicles and strong-arm robbery don't imply that the accused was an armed burglar, as was alleged in this case, but they do imply that the accused is not someone to be trusted – that he might not be credible." (R, p.228). Thus, unlike in Howard, the trial court's focus was on Robinson's credibility rather than his character. Also unlike in Howard, the trial court in this case was comparing prior crimes that were not identical to the crime for which Robinson was on trial, rendering their relative impeachment value higher.

In Black, the Supreme Court's analysis centered on the higher standard in Rule 609(b) pertaining to admission of remote convictions rather than the standard in Rule 609(a)(1) pertaining to convictions within ten years. Black, 400 S.C. at 18, 732 S.E.2d at 885. Although there was an extensive discussion regarding the impeachment value of prior convictions, that discussion must be taken in the context of the statutory presumption against the admission of remote convictions unless the trial court finds the probative value "substantially outweighs" its prejudicial effect. Indeed, in Black the Supreme Court noted that even though a conviction for a crime of violence is not particularly probative of the specific trait of truthfulness, its impeachment value is merely "limited." Id. at 23, 732 S.E.2d at 887. The Court did not hold the impeachment value was nonexistent.

In Broadnax the Supreme Court's holding was focused on Rule 609(a)(2) and how it functioned to preclude the trial court from exercising discretion over the admission of prior crimes of dishonesty or false statement for impeachment. The Court held: "We take this opportunity to overrule Al-Amin, and reaffirm the rule as formulated in Bryant that armed robbery is not a crime of dishonesty or false statement for purposes of impeachment under Rule 609(a)(2)." Broadnax at 18 (emphasis added). The Court took issue with the alternative view noting that: "Under Al-Amin's and the concurrence's rationale, the exception contained in Rule 609(a)(2), which permits the automatic admission of certain prior convictions, swallows the rule contained in Rule 609(a)(1), in which discretion regarding the admission of prior convictions rests with the trial judge." Id. at 18-19. The Court concluded that "a rule that places discretion with the trial judge is even more desirable" because "we think the trial judge is the best arbiter of whether a

very prejudicial piece of evidence should be admitted in this situation – unless of course the prior crime specifically relates to a defendant’s penchant to tell the truth on the witness stand.” Id. at 20. The Court emphasized: “Importantly, our holding today does not preclude the admission of prior convictions for armed robbery; rather, it merely enables a trial judge to conduct a balancing test pursuant to Rule 609(a)(1) when the State seeks prior convictions for armed robbery to impeach a criminal defendant’s testimony.” Broadnax at 20.

In Bryant, the Supreme Court stated in dicta that “a conviction for robbery, burglary, theft, and drug possession, beyond the basic crime itself, is not probative of truthfulness.” Bryant at 517, 633 S.E.2d at 156. Yet, under the parameter set forth in Black and Broadnax, the conclusion that a particular crime is not one that “involved dishonesty” for purposes of Rule 609(a)(2) analysis, cannot possibly equate to that crime being “not probative of truthfulness” for purposes of Rule 609(a)(1) analysis. Indeed, such an interpretation is belied by the existence of the very rule under interpretation and by the detailed analysis in Broadnax itself. The Rule is titled “Impeachment by Evidence of Conviction of a Crime” and is generally described as being, “for the purpose of attacking the credibility of a witness.” Rule 609(a), SCRE. It provides separate rules for the admissibility of crimes that “involve dishonesty,” Rule 609(a)(2), and all other crimes, Rule 609(a)(1). Thus, the Rule itself stands for the proposition that a criminal conviction, standing alone, has some probative value in regard to credibility. If, as Robinson argues, 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. Such a ruling would eviscerate the Rule and only allow impeachment with crimes of dishonesty or false statement. As a result, the judicial limitations on the exception contained in Rule 609(a)(2) would swallow the rule contained in Rule 609(a)(1) in its entirety. This was clearly not the result contemplated by the Supreme Court in Bryant, where, after finding Bryant's prior firearms convictions "do not involve dishonesty," the Court nevertheless stated "their probative value should have been weighed against their prejudicial effect." Bryant at 517, 633 S.E.2d at 156. In Broadnax, the Supreme Court further clarified this interpretation. In other words, a balancing test pursuant to Rule 609(a)(1), SCRE, is always proper, even where the prior conviction and the current charge are identical. Here, the crimes were not identical. The trial court conducted a balancing test by weighing probative value against prejudicial effect and properly admitted the prior convictions.

(2) 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.

(3) 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. Since the prior crimes were not identical to the crimes for which Robinson was on trial, the State submits the trial judge was acting within his discretion in allowing their use for impeachment pursuant to Rule 609(a)(1), SCRE, the court’s balancing of the Colf factors on remand was sufficient.

(4) Importance of Robinson's Testimony and (5) Centrality of Credibility

In a case that hinged almost entirely on the credibility of the victim and the State's burden of proof, both the fourth Colf factor, "the importance of the defendant's testimony," and the fifth Colf factor, "the centrality of the credibility issue," were necessarily implicated in the court's decision to admit Robinson's prior convictions. These factors were in fact highlighted by the parties in arguments throughout the trial. 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,⁸ the focus at trial for both parties was on the

⁸ 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

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. That conclusion should be affirmed.

Harmless Error

To the extent this Court finds the trial court erred in admitting Robinson's prior convictions after specifically balancing of the Colf factors on remand, the State submits the conviction should nevertheless be affirmed because any such error was harmless in light of: (1) the eyewitness identification testimony presented at trial, (2) the court's jury charge on consideration of prior convictions, and (3) the cumulative nature of the evidence.

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.").

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, 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 all of these reasons, the State submits that any error by the trial court in failing to conduct a thorough on-the-record balancing of the Colf factors was harmless.

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 its ruling should be upheld. To the extent the trial court's analysis was somehow deficient, any error was nevertheless harmless in light of: (1) the eyewitness identification testimony presented at trial, (2) the court's charge on the jury's consideration of prior convictions, and (3) the cumulative nature of the evidence.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that the order on remand, the conviction, and the sentence of the lower court be affirmed.


Respectfully submitted,

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Columbia, South Carolina
February 16, 2016

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Doyet A. Early, III, Circuit Court Judge

Appellate Case No. 2014-002531

THE STATE,.....RESPONDENT

v.

STEPHON ROBINSON, APPELLANT.

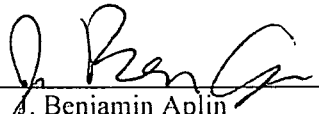
CERTIFICATE OF COUNSEL

The undersigned hereby certifies the Final Brief of Respondent complies with Rule 211(b), SCACR.

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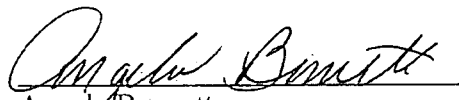
STEPHON ROBINSON,APPELLANT.

PROOF OF SERVICE

I, Angela Bennett, Administrative Assistant, hereby certify that I have served the within *Final Brief of Respondent* dated February 16, 2016, on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

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I further certified that all parties required by Rule to be served have been served.
This 16th day of February 16, 2016.


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHON ROBINSON,

APPELLANT

APPELLATE CASE NO. 2014-002531

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ARGUMENT IN REPLY

The trial court's error in admitting Petitioner's prior convictions did not constitute harmless error where there was not overwhelming evidence of Robinson's guilt, the jury instructions did not remedy the unfair prejudice, and the admission of one other prior conviction did not obviate the need to exclude three other prior convictions.

Introduction

In the Brief of Appellant, Appellant Stephon Robinson raised the following issue:

Whether the remand court erred in finding that the probative value of the admission of Appellant's prior convictions for second degree burglary, strong arm robbery, and breaking and entering into a motor vehicle with intent to commit a felony or theft, outweighed the prejudice to him under Rule 609(a)(1), SCRE?

Appellant's Brief, p. 1. Respondent contends that even if the trial court did error in admitting Robinson's prior convictions, that his convictions should "nevertheless be affirmed because any such error was harmless in light of: (1) the eyewitness identification testimony presented at trial, (2) the court's jury charge on consideration of prior convictions, and (3) the cumulative nature of the evidence." Respondent's Brief, p. 23-24. As will be more fully discussed below, the evidence against Respondent was far from "overwhelming" and Respondent's credibility was essential to his defense.

Initially, Appellant notes that Respondent raised this same "harmless error" argument in its Brief filed in petitioner's direct appeal. See Appellate Case No. 2011-202987, Respondent's Brief, p. 19-21. If this Court were persuaded by Respondent's argument, it could have found the error harmless and affirmed Robinson's conviction. See, e.g. State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (2012) (finding trial court "simply denied Heller's motion to exclude the prior convictions without performing an on-the-record Colf analysis" but determining any error in that failure harmless). Instead, this

Court remanded Petitioner's case for a meaningful analysis of the impeachment value of Petitioner's prior convictions versus their prejudicial effect. See State v. Robinson, 2014-UP-068 (Ct. App. Feb. 19, 2014). It is unlikely that this Court would have wasted limited judicial resources on a remand hearing if it viewed the error as harmless.

Harmless Error Standard

"Before an error can be held harmless, a court must find the error harmless beyond a reasonable doubt. That requires a court to determine whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." State v. Henson, 407 S.C. 154, 166-67, 754 S.E.2d 508, 515 (2014) (internal citations and quotations omitted). In determining whether an error is harmless, the circumstances of each individual case are to be considered. State v. Bryant, 369 S.C. 511, 518, 633 S.E.2d 152, 156 (2006) (finding improper admission of Petitioner's prior firearms conviction was erroneous and did not qualify as harmless error where the Petitioner's credibility was essential to his defense). Thus, "[w]hether the improper introduction of [the] evidence is harmless requires [the appellate court] to look at the other evidence admitted at trial to determine whether the defendant's guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached." State v. Brooks, 341 S.C. 57, 62-63, 533 S.E.2d 325, 328 (2000) (quoting State v. Parker, 315 S.C. 230, 234, 433 S.E.2d 831, 833 (1993)).

The Evidence Against Robinson Was Not Overwhelming

The sole evidence against Robinson was the alleged victim's uncorroborated testimony and unreliable identification. Despite that, the Respondent argues that the State presented overwhelming evidence of Robinson's guilt. Respondent's Brief, p. 24-25. The

Respondent treats harmless error like a directed verdict issue by mentioning only the evidence favorable to the State. Compare State v. Bostick, 392 S.C. 134, 139, 708 S.E.2d 774, 777 (2011) (“On appeal of the denial of a directed verdict of acquittal, [the appellate] Court must look at the evidence in the light most favorable to the State.”), with State v. Byers, 392 S.C. 438, 447-48, 710 S.E.2d 55, 60 (2011) (“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.” (internal citations and quotations omitted)). He failed to mention the testimony of Robinson and his two alibi witnesses. R. 130, l. 12 – 154, l. 16. Additionally, the police failed to collect the bullet allegedly shot by the intruders. They also failed to collect any fingerprints and did not perform any gunshot residue test on Robinson or his co-defendants. R. 57, l. 21 – 59, l. 10; R. 73, ll. 10-16; R. 74, l. 5 – 78, l. 17. Thus, there was no physical evidence connecting Robinson to the crime scene or having fired a weapon on the date of the incident.

Regarding alleged victim Williams’ testimony, he said had seen Robinson before when he came over to play videogames with Williams’ nephew. R. 102, l. 10 – 103 l. 2. Williams knew Robinson’s parent’s more so than he knew Robinson himself, stating:

Well, I really know his parents. I knowed [sic] his father and his mother. I knowed [sic] his grandmother also. **You know the kids, they get bigger and, you know, you don’t recognize them.** You know their parents and then you’ll know them. But I know him. Not personally, but I know him.

R. 103, ll. 3-11 (emphasis added). When Williams viewed the line-ups, he mixed up the names of Robinson and his brother, Felder, casting serious doubt on how well he knew them and whether their selection from the photo array was based upon Williams' recollection of the actual incident or other prior interactions with them. R. 69, ll. 11-16. Williams' ability to pick Stephon Robinson and Reginald Felder out of the photo array was hardly remarkable either since he gave the officers their names prior to the identification procedure. R. 107, l. 6 – 109, l. 22; R. 120, ll. 13-20. Likewise, his in-court identification of Robinson added nothing to his ability to perceive Robinson as the alleged burglar at the time of the incident. R. 109, l. 23 – 110, l. 9.

Shelly Gunnels, Robinson's girlfriend, testified consistent with Robinson's testimony. She said that Robinson borrowed her car the night before the alleged robbery and returned it to her on the afternoon of February 20, 2011. R. 94, l. 7 – 97, l. 23. As such, Gunnels' identification of a picture of her own vehicle as the one borrowed by Robinson was also unremarkable. Notably, the solicitor did not ask Williams to identify the photograph of the vehicle as the one that he saw driven by the intruders. R. 98, l. 5 – 110, l. 9; R. 121, l. 3 – 122, l. 2. Thus, while there was sufficient evidence to overcome the motion for directed verdict, the evidence against Robinson was not overwhelming such that "no other rational conclusion could be reached."

**The Trial Court's Limiting Instruction Did Not
Remedy the Unfair Prejudice**

The trial court's limiting instruction to the jury did not render the trial court's error in improperly admitting Robinson's prior convictions harmless. The trial judge 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. 180, ll. 17-24. In State v. Colf, 337 S.C. 622, 628, 525 S.E.2d 246, 249 (2000), our Supreme Court explained that "evidence of similar offenses inevitably suggests to the jury the defendant's propensity to commit the crime with which he is charged. This risk is not eliminated by limiting instructions." (citing United States v. Beahm, 664 F.2d 414, 418-19 (4th Cir. 1981) ("The 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.")). Furthermore, the trial court's instruction did not prevent the jury from considering the prior convictions in determining Robinson's credibility, which was the purported purpose of their admission. As discussed more fully in Appellant's Brief, Robinson's credibility was essential to his defense. With no physical evidence connecting Robinson to the crime scene, the jury's decision was based solely on which witnesses they believed. Therefore, the trial court's limiting instruction did not render the error in admitting Robinson's prior convictions harmless.

**Admission of One Prior Conviction Did Not Render
Improper Admission of Other Prior Convictions Harmless**

At trial, the court allowed the solicitor to ask Robinson about his prior second degree burglary conviction but limited its reference to "a felony conviction in 2009 that carried more than one year." R. 129, ll. 6-11; R. 136, l. 24 – 137, l. 2. The State's contention that the failure to challenge the admission of that reference to one other prior conviction in Robinson's direct appeal renders the improper admission of his other convictions harmless is without merit.

Respondent cites State v. Heller, 399 S.C. 157, 731 S.E.2d 312 (Ct. App. 2012), in support of its position. In Heller, the appellant complained of the admission of his five prior drug convictions where no balancing of the probative value versus prejudicial effect was conducted. 399 S.C. at 168-70, 731 S.E.2d at 318-20. The Heller Court first discussed the defendant's identification by both the victim and multiple witnesses and his confession to the crimes. Id. at 171-72, 731 S.E.2d at 320. The Court then stated: "Further, an abundance of evidence was presented concerning Heller's participation in illegal drug activity such that the admission of Heller's prior drug convictions was cumulative to the other evidence." Id. at 172, 731 S.E.2d at 320. It accordingly found that any error in the admission of the drug convictions was "insubstantial and could not reasonably have affected the result of the trial." Id.

Here, the "other evidence" that Respondent attempts to analogize was another prior conviction for a felony. If this Court accepted Respondent's position, then the trial court could improperly admit all of a defendant's prior convictions so long as admission of one was proper and such error would always be found harmless.¹ That would be an absurd result and ignore the obvious increased prejudice that resulted from mentioning four of Robinson's prior convictions rather than one.

¹ Petitioner does not concede that admission of his prior second degree burglary conviction was proper, even when its reference was limited to "a prior felony conviction within one year." See Brief of Appellant, pp. 17-19 and 23.

CONCLUSION

For the reasons set forth herein and in Appellant's Brief, Appellant Stephon Robinson respectfully requests that this Court reverse his convictions and sentences and grant him a new trial.

Respectfully submitted,



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

This 17th day of February, 2016.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Barnwell County

Doyet A. Early, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

STEPHON ROBINSON,

APPELLANT

CERTIFICATE OF SERVICE

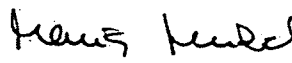
The undersigned attorney hereby certifies that a true copy of the Final Reply Brief of Appellant in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 17th day of February, 2016.



Laura R. Baer
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 17th day of February, 2016.

 (L.S.)

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