STATE OF SOUTH CAROLINA

ORIGINAL

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

APPELLANT

APPELLATE CASE NO. 2016-000844

Appeal from Abbeville County

Eugene C. Griffith, Circuit Court Judge

Opinion No. 5694

PETITION FOR REHEARING

On December 11, 2019, this Court affirmed Appellant's conviction for burglary in a published opinion. State v. Henley, Op. No. 5694 (S.C. Ct. App. filed Dec. 11, 2019). Pursuant to Rule 221(a), SCACR, Appellant now files this Petition for rehearing due to the significant points overlooked and/or misapprehended by this Court.

Appellant's conviction violates Double Jeopardy.

On July 27, 2012, the Abbeville County grand jury returned indictments against Appellant for larceny and burglary. On April 8-9, 2015, Appellant proceeded to trial on both offenses before the Honorable R. Lawton McIntosh and a jury. The jury returned a verdict of **not guilty on**

larceny. However, the jury **hung on the count of first-degree burglary**, and Judge McIntosh declared a mistrial.

Following denial of the defense's motion to preclude retrial under the Double Jeopardy Clause of the Fifth Amendment, on April 4-6, 2016, Appellant faced re-trial for the offense of first-degree burglary before the Honorable Eugene C. Griffith, Jr., and a jury. The jury returned a verdict of guilty, and Judge Griffith sentenced Appellant to twenty-four years incarceration.

On appeal, Appellant argued his acquittal for larceny precluded his second trial for burglary in the first degree. Misapprehending Yeager v. United States, 557 U.S. 110 (2009), this Court held Appellant's "acquittal for larceny – the taking of the Dell computer – [was] not dispositive of whether the state could satisfy the elements necessary for a first-degree burglary conviction." Instead of employing the analysis from Yeager, this Court used Blockburger v. United States, 284 U.S. 299 (1932), to hold that "[e]ach of the offenses require[d] proof of different critical elements." According to this Court, "[b]ecause Henley's acquittal for larceny did not settle the critical issue of ultimate fact as to whether he entered Victim's home without consent with the intent to commit a crime, the state was not precluded from retrying him for first degree burglary." This holding misapprehends controlling Supreme Court law.

In Yeager v. United States, 557 U.S. 110, 112 (2009), the United States Supreme Court held that an apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the acquittals' preclusive force under the Double Jeopardy Clause. The Yeager case involved the criminal prosecution of one of the Enron executives, who was charged with 126 counts of federal securities offenses, which the Court grouped into two general categories – the "fraud counts" and the "insider trader counts" – for ease of reference. 557 U.S. at 112-14. The jury acquitted Yeager on the fraud counts but did not reach

a verdict on the insider trading counts. Id. at 114-15. At the re-trial, the government sought a new indictment that charged only Yeager, rather than several other previous co-defendants, and further refined the charges against him. Id. at 115.

Yeager moved the trial court to dismiss the indictments based on issue preclusion and the Double Jeopardy Clause, on the basis that the insider trading counts necessarily required a factual finding that was decided in his favor by virtue of the acquittal on the fraud charges. 557 U.S. at 115-16. Yeager was convicted after the trial court denied his motion, reasoning that "the question whether Yeager possessed insider information was not necessarily resolved in the first trial and could be litigated anew in a second prosecution." Id.

"A jury's verdict of acquittal represents the community's collective judgment regarding all the evidence and arguments presented to it." Id. at 122. Thus, "[e]ven if the verdict is based upon an egregiously erroneous foundation, its finality is unassailable." Id. (internal quotations and citations omitted). The Yeager Court wrote:

> **To decipher what a jury has necessarily decided, we held that courts should examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.**

Id. at 119-20 (internal quotation omitted) (emphasis added). In applying these principles to Yeager, the Court ruled that "if the possession of insider information was a critical issue of ultimate fact in all of the charges against petitioner, a jury verdict that necessarily decided that issue in his favor protects him from prosecution for any charge for which that is an essential element." Id. at 123.

Here, both this Court and the trial judge erred in failing to apply the test set forth in Yeager to determine whether the state was collaterally estopped from re-prosecuting Appellant for first-

degree burglary following his acquittal for larceny related to the same incident. As noted by the Court in Abney v. United States, 431 U.S. 651, 659-60 (1977):

> [T]he very nature of a double jeopardy claim is such that it is collateral to, and separable from the principal issue at the accused's impending criminal trial, i.e., whether or not the accused is guilty of the offense charged. In arguing that the Double Jeopardy Clause of the Fifth Amendment bars his prosecution, the defendant makes no challenge whatsoever to the merits of the charge against him. Nor does he seek suppression of evidence which the Government plans to use in obtaining a conviction. **Rather, he is contesting the very authority of the Government to hale him into court to face trial on the charge against him.**

(internal citations omitted) (emphasis added). While Double Jeopardy does not bar retrial where a mistrial was declared out of "manifest necessity" due to a jury's inability to reach a decision, the Yeager Court made clear that the inquiry regarding a bar to retrial does not end there. 557 U.S. at 118. Rather, the trial court must determine whether the interest in preserving the finality of the jury's judgment on the decided count bars a retrial on the undecided count because "the jury's acquittals unquestionably terminated petitioner's jeopardy with respect to the issues finally decided in those counts." Id.

In making this determination, this Court's focus should have been on the evidence and arguments presented at the first trial as mandated by Yeager, not on whether the two offenses had the same elements.[1] Undertaking the proper analysis requires holding Appellant's second trial violated Double Jeopardy.

At Appellant's first trial for first-degree burglary and larceny the solicitor averred in his opening statement that Moss's door was kicked down and "[s]he had personal property taken."

[1] The trial court's failure to conduct the requisite analysis is illustrated by its failure to take the copies of the first trial transcript offered by defense counsel. R. 400, ll. 2-21. Thus, the trial judge erred as a matter of law in failing to determine what facts were necessarily decided in the first action and how those facts bore on the defense's argument of preclusion under the double jeopardy protection.

104, ll. 10-11. He said: "Mr. Henley has two indictments pending against him. One of them is for larceny; the other if for burglary in the first degree." R. 106, l. 24 – 107, l. 1. After reciting the elements of larceny and alleging that Henley took the personal property of Amanda Moss, he discussed the elements and anticipated proof of burglary. R. 107, ll. 1-16. He said:

> The elements of burglary are entry into a dwelling without the owner or the occupant's consent with the intent to commit a crime therein. **And in this case, our theory is that Mr. Henley went into Ms. Moss' home, did so without consent, took personal property. And that was the crime he intended to commit.**
>
> As to the burglary case, as to the burglary indictment rather, this is a charge of burglary first. And an additional element is that the person charged with burglary has been convicted of two prior burglaries. And there will be evidence about those two prior burglaries.

R. 107, ll. 6-16.

The testimony that developed during the trial indicated that when police arrived and found the side door to the Moss's home was open, and the sole item missing was Ms. Moss's Dell laptop, valued at five hundred dollars, that had been on a bench just in side of the door. R. 136, l. 1 – 137, l. 9; R. 192, ll. 15-19. The laptop was never recovered. R. 231, ll. 17-19.

In his closing argument, the solicitor again recited the elements of burglary and larceny in tandem. He said:

> Mr. Henley [is] charged with burglary in the first degree. He [is] also charged with larceny. So what is it we have to prove to you to be a burglar first degree? **Burglary is breaking and entering the dwelling of another with the intent to commit a crime inside that house, or inside that dwelling. In this case the dwelling of Amanda Moss and the intent to commit a crime in breaking and entering that dwelling. In this case, he's charged with larceny.** Larceny is the taking and carrying away the goods of another with the intent to permanently deprive that person of those goods. In this case, a laptop .. So those are the-- that's the law of the case. The burglary, going back to burglary first, to make it a burglary first is two prior convictions. And we'll deal with that a little bit later, but that makes it a burglary first.

R. 287, l. 21 – 288, l. 11 (emphasis added). In the latter portion of his closing, the solicitor argued Appellant kicked open the door and "went walking through **to go get that laptop**." R. 308, ll. 6-12

(emphasis added). He argued that Henley made a stop on his way to see his mother in Beech Island and "swung by Ms. Moss's house and decided he wanted to take advantage of what she had inside while she was at work. **What did he take? A laptop.**" R. 309, ll. 13-17 (emphasis added).

There was no dispute at Henley's first trial that the Moss' home was broken into and that her laptop was stolen. Rather, the focus was on the identity of the perpetrator. Thus, the acquittal on larceny was a finding that Henley was not the person who stole the laptop. This impacted the retrial in several ways. First, the state was precluded from re-litigating Henley's identity as the intruder. Second, the state was precluded from arguing that the stolen laptop was evidence of Henley's "intent to commit a crime therein." Relatedly, the prior jury's finding that Henley did not steal precluded the state's continuing theory that the criminal intent was to steal. As such, Henley's retrial for first-degree burglary was barred by the Double Jeopardy Clause because the state was precluded from re-litigating the issues that were necessarily decided by the jury's prior acquittal on larceny.

Evidence of Appellant's acquittal on the larceny charge was admissible.

This Court held Appellant's acquittal on the larceny charge was irrelevant because "it did not make the existence of any fact of consequence in the proceeding more or less probable with respect to the elements of first-degree burglary." According to this Court, the state was required to prove Appellant entered Moss's home without her consent and with the intent to commit a crime, but "there was no requirement that the state prove [Appellant] entered Victim's home without consent and successfully committed the crime of taking Victim's Dell computer." Next, this Court held that assuming the evidence was relevant, the trial judge "did not abuse [his] discretion in determining that any probative value was substantially outweighed by the danger of unfair prejudice and misleading the jury." In this Court's view, Appellant's "prior acquittal had

little to no probative value as it did not prove or disprove any element necessary to the first degree burglary charge; yet admission of the evidence would have likely led to jury confusion because it would have invited the jury to speculate about what occurred at the first trial." This Court misapprehended the relevant case law and Appellant's constitutional rights when arriving at this conclusion.

South Carolina addressed the admissibility of a prior acquittal in State v. Houston, 17 S.C.L. 300 (S.C. App. L. & Eq. 1829). Houston was indicted for uttering and publishing a forged note, purporting to be the promissory note of C. B. Atwood, knowing the same to be forged. 17 S.C.L. at 300. In the prior term, Houston was acquitted on a similar indictment for uttering another forged note. Id. At the second trial, the judge permitted admission of evidence that the note on which the first indictment was based was a forgery. Id. Both notes were in Houston's handwriting and he was convicted on the Atwood forgery. Id. The Houston Court ruled that the defendant's prior "acquittal on the note, which was produced in evidence, cannot affect the principle, **although it may weaken the force of the evidence**." Id. at 303 (emphasis added). The Court noted that there was evidence that the prior acquittal may have been the result of a defect in the original indictment or the absence of witnesses. Id. The Court wrote: "It does not follow, that because a man is acquitted, he is innocent: the legal consequence is, that he cannot be tried again. But still he may have been guilty, and this guilt may be sh[o]wn in a collateral matter." *Id.* Thus, Houston recognized the relevance of facts related to a prior acquittal to a subsequent trial for a separate offense.

Similarly here, the trial judge's denial of the motion to quash the indictment under Double Jeopardy did not render the prior acquittal on larceny irrelevant to the current proceedings. Rather, the defense properly sought its admission to attack the state's theory that Appellant had any intent.

to commit a crime inside of the residence, specifically to steal. Notably, the solicitor repeatedly argued in his closing that the crime that the intruder sought to commit was theft – saying "I'll submit to you his intent was to go in there and clean them out;" that Appellant stopped "to see what they had good in there;" and that "[h]e thought he'd get a little treasure trove." R. 640, ll. 16-19; R. 646, l. 20 – 647, l. 1. Any confusion or speculation that concerned the trial judge or solicitor could have been cured with a simple limiting instruction by the trial court rather than exclusion of the evidence or through the solicitor's argument regarding the weight to be given to prior acquittal. Further, the trial judge never made the requisite finding that the probative value of the evidence *was substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury. See R. 614, l. 22 – 615, l. 5; R. 616, ll. 13-15. As this Court has noted, "[a]ll evidence is meant to be prejudicial; it is only *unfair* prejudice which must be scrutinized under Rule 403." State v. Gray, 408 S.C. 601, 616, 759 S.E.2d 160, 168 (Ct. App. 2014).

The trial judge's limitation on the admission of Jolene Gray's prior testimony was not harmless beyond a reasonable doubt.

At Appellant's first trial, Jolene Gray, his girlfriend at the time of the incident, testified on redirect examination that five law enforcement officers came to their apartment complex a second time after they had spoken with Appellant. She said that they were walking around and picked something up off of the ground, though she was unsure what they picked up. R. 261, ll. 14-25. In the closing argument at the first trial, defense counsel argued:

> Jolene said that one of the times the officers came to talk to Rickey, there were some cars parked out and she saw the officers picking stuff up. She didn't know what they were picking up. It may seem crazy, crazy for us to ask you to draw an inference they were picking up a cigarette butt. But what is equally crazy, is that we've got all this lost evidence in this case and we know it's lost. You would think, you know, that things like this don't happen, but they really do. And the State

> acknowledges that these things happen. So it's really not that far of a stretch to say, well, maybe, maybe they picked something up that day. Because we don't know where that cigarette butt was until March 29th of 2012.

R. 302, ll. 6-18.

At the second trial, during its pre-trial motions, the defense moved to admit the sworn testimony from the first trial of defense witnesses Jolene Gray and Officer Michael Belcher pursuant to Rule 804(b)(1). Defense counsel explained her investigator had been unable to locate Gray in order to secure her presence at the retrial. Counsel offered to call her investigator to testify regarding her attempts to located Gray; however, the solicitor said that he did not have any objection to admission of the prior testimony. R. 461, l. 12 – R. 462, l. 9.

After the trial judge granted the defense's motion to admit the former trial testimony, the solicitor said: "And, Judge, we are going to probably try to ask our investigator if he can find Ms. Jolene Gray just to see if there is a reason why she's not showing, though." R. 463, l. 20 – R. 464, l. 2. Judge Griffith responded: "Okay. If you can find her, get her." R. 464, l. 3. The solicitor said: "Yes sir. We'll do that;" and defense counsel said that was fine with her. R. 464, ll. 4-6.

The next day, with respect to Jolene Gray, the solicitor said:

> Judge, the other one is Jolene Gray; is a former girlfriend of the Defendant in this case. It's my understanding that she is not here today. We did, after yesterday, it was brought to our attention, we were able to contact her through our office, our investigator contacted her and she said she's in Anderson. She's never received a subpoena. Judge, I understand that the Defense just wants to read in a prior transcript of her testimony. **Your Honor, my, you know, we're not going to oppose that, but in my cross from a prior hearing, I'm only going to read a portion of it. And then I put on the record, I think, and once I stop at that one portion, that would, the reading of redirect from the Defense would be outside the scope of our cross.**

R. 594, l. 20 – R. 595, l. 8. (emphasis added). The Judge asked defense counsel to explain why the redirect testimony was necessary. R. 595, ll. 11-20. The following exchange occurred:

DEFENSE COUNSEL PATEL: Your Honor, the redirect portion goes to the officers coming out a second time, searching the home and not finding anything, leaving, searching the premises. The witness says that perhaps someone picked up something off the ground and we would want all of that testimony to come in to show that no items were collected, a doo-rag, burglary tools from the home since Mr. Henley did live there. It's our position that the entire testimony should come in. And, Your Honor, we, our office being multiple--

THE COURT: Well, now, we don't know whether something was picked up off the ground or not. That's unknown. She's speculating.

DEFENSE COUNSEL BOLEN: She says that she saw, so it was her, you know, what she saw at that moment, but she saw several officers, I think she says near her car.

MR. BROWN: And, Judge, one thing to go farther, she never said who those officers were associated with. So that's, that just is, we had our officer testify that he went up there twice. The first time he was not there. The second time he talked to Mr. Henley, and then there was no other times that he went up there. And I, and looking over the transcript again from my cross, that redirect would be out of the scope of that cross.

THE COURT: All right. I think I'm going to grant his motion to limit his cross-examination to where he wants to stop. But I do not believe that will limit you Or Ms. Bolen, whichever one closes, in saying nothing was taken or recovered from the house or you'd have seen it here today. I think y'all could say something along those Lines in your closing argument and you can summarize it
had they gone and found something in that search, certainly it would be here. It's not here.

MS. PATEL: Yes, Your Honor.

THE COURT: By me, the recross or redirect from you does not prohibit you from arguing what you choose.

MS. PATEL: Yes, Your Honor.

THE COURT: All right. So let's, we'll limit it to tell your witness, well, once you stop, she'll quit reading.

MR. BROWN: Yes, sir. I'll stop reading.

R. 595, l. 21 – R. 597, l. 10. The defense called Jolene Gray as a witness and a portion of her testimony was read into the record. R. 599, l. – R. 600, l. 1. 13; R. 676.

Rule 804(b)(1), SCRE, provides for the admission of former testimony where the declarant is unavailable as a witness. Specifically, it allows the admission of "[t]estimony given as a witness at another hearing of the same or a different proceeding . . ., if the party against whom the testimony is now offered . . . , had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Rule 804(b)(1), SCRE. One of the situations in which a declarant is deemed "unavailable" for purposes of the Rule is when the declarant "is absent from the hearing ***and the proponent of a statement has been unable to procure the declarant's attendance*** . . . by process or other reasonable means." Rule 804(a)(5), SCRE (emphasis added).

In the present case, defense counsel represented that their investigator had been able to locate Jolene Gray in order to serve a subpoena, but that if the solicitor could find her and procure her attendance, she was fine with that. R. 461, l. 12 – R. 102, l. 6. Though the solicitor was able to contact Gray, the relevant inquiry is whether the proponent of the evidence has been able to procure the declarant's attendance by process of other reasonable means. The solicitor confirmed that Gray had not been served a subpoena. R. 594, l. 20 – 595, l. 1; Rule 804(a)(5), SCRE. While the solicitor again represented that he did not oppose the reading of the testimony, he then sought to qualify that by arguing that he should be permitted to read only a portion of his redirect examination, consequently excluding the redirect testimony. R. 595, ll. 1-8. Notably, the solicitor did not argue that there was any evidentiary basis for excluding Gray's testimony and no objections to her redirect were made at the first trial. See R. 261, ll. 14-25.

This Court held that Gray's testimony was inadmissible hearsay in accordance with Rule 804(a)(5), SCRE, because she was not served with a subpoena. This Court neglected to consider the remaining portion of the rule, which provides the declarant is unavailable if the proponent of the statement has been unable to procure her attendance by process "or other reasonable means."

Defense counsel offered to call her investigator to detail the "other reasonable means" undertaken by the defense to secure Gray's attendance; however, this presentation was rendered unnecessary when the state conceded Gray's unavailability. This Court's holding that Gray's prior testimony was hearsay is error in light of the state's concession making the development of the record in this regard unnecessary.

This Court expressed "concern" that the trial judge permitted the state to select portions of Gray's testimony to be read and excluded portions Appellant sought to present. Appellant requests this Court hold the trial judge committed error in allowing the state to cherry pick portions of Gray's testimony to be presented to the jury and disallow the portions Appellant desired.

Although this Court showed concern over the trial judge's handling of the prior testimony, this Court found the error was not prejudicial to Appellant. Appellant respectfully requests this Court hold the error was not harmless beyond a reasonable doubt. The real reason for the state's request is apparent from the record – he wanted to exclude the defense's evidence regarding law enforcement's opportunity to obtain a cigarette butt with Appellant's DNA from his yard. This testimony was essentially to the defense's attack on the reliability of the DNA analysis on the cigarette butt, which was lost along with the Sheriff's Department's chain of custody log. Additionally, Gray's testimony revealed another opportunity for law enforcement to look for corroborating evidence, such as the missing laptop, doo-rag, or burglary tools, which they failed to do. R. 595, l. 21 – 596, l. 10.

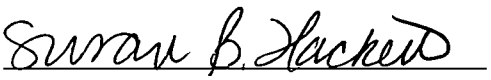
The solicitor's attempt to exclude the evidence that he rightly perceived as detrimental to the state's case at the first trial raises double jeopardy concerns, as the United States Supreme Court ruled that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment,

expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Yeager v. United States, 557 U.S. 110, 117-18 (2009) (quoting Green v. United States, 355 U.S. 184, 187–188 (1957)). It is reminiscent of Ashe v. Swenson, 397 U.S. 436, 440 (1970), where the state "refined its case at the second trial by declining to call one of the participants in the poker game whose identification testimony at the first trial had been conspicuously negative." There, the Court noted the state's concession in its brief that "[n]o doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial." 397 U.S. at 447. The Court held that "this is precisely what the constitutional guarantee [against double jeopardy] forbids." Id.

Juxtaposing the evidence presented at the first trial with the evidence presented at the second trial along with the outcomes of those trials also demonstrates how the error was not harmless beyond a reasonable doubt. The state's evidence was almost identical in each trial. The defense too presented almost the identical evidence in the second trial as it had the first. The greatest difference between the two trials was the exclusion of the portion of Gray's testimony in which she described law enforcement showing up at her home and picking up items off the ground. At the first trial, Gray's testimony combined with the other evidence showing the police conducted a poor investigation – lost evidence, lost chain of custody – resulted in the jury acquitting Appellant of larceny and being unable to render a verdict on the burglary count. Speculation is unnecessary here to determine what effect the erroneous ruling had on the jury's verdict because the first trial demonstrates the absence of Gray's testimony was substantial.

Appellant respectfully requests this Court rehear the matter pursuant to Rule 221(a), SCACR.

Respectfully Submitted,



SUSAN B. HACKETT
Appellate Defender

This 27th day of December, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Eugene C. Griffith, Circuit Court Judge

THE STATE,

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V.

RICKEY SANTOINE HENLEY,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Rickey Santoine Henley, #290970, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 27th day of December, 2019.

Susan B. Hackett
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO BEFORE
ME this 27th day of December, 2019.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: October 30, 2022