ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5694 (S.C. Ct. App. filed December 11, 2019)

2012-GS-01-348

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

PETITIONER

APPELLATE CASE NO. 2016-000844

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

SUSAN B. HACKETT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

INDEX

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on February 13, 2020. App. 35-36.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in denying Henley's motion to quash the burglary indictment based on Double Jeopardy where the Court erred as a matter of law in failing to apply the proper test under Yeager and where Henley's prior acquittal of larceny necessarily decided that Henley was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the state from relitigating Henley's identity as the intruder or intent to steal?

II. Did the Court of Appeals err by affirming the trial court's denial of the defense's motion to admit evidence of Henley's acquittal on the prior larceny charge where the state's theory of the case continued to be that the burglar's intention was to steal?

III. Did the Court of Appeals err in affirming the trial judge's limitation on the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Henley from outside of his home?

STATEMENT OF THE CASE

On December 11, 2019, the South Carolina Court of Appeals published its opinion in State v. Henley, 428 S.C. 649, 837 S.E.2d 639 (Ct. App. 2019). App. 1-19. Among the issues addressed was a double jeopardy matter interpreting the United States Supreme Court's opinion Yeager v. United States, 557 U.S. 110 (2009). App. 1-19. Although the Supreme Court issued Yeager over a decade ago, Henley is the first case in South Carolina interpreting Yeager. Thus, the instant matter presents a novel question of law for South Carolina. As such, this Court should grant certiorari to review the Court of Appeals' decision. See Rule 242(b)(1), SCACR.

Further, the Court of Appeals misapprehended the Supreme Court's opinion when it concluded Henley'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." App. 6. Instead of employing the analysis from Yeager, the 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." App. 7. According to the 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." App. 8. This holding misapprehends controlling Supreme Court law, and this Court should grant certiorari to address the conflict between the opinion from the Court of Appeals and the United States Supreme Court. See Rule 242(b)(5), SCACR.

Finally, it is without question that substantial constitutional issues are directly involved because the trial judge violated Petitioner's protection from double jeopardy pursuant to the Fifth Amendment to the United States Constitution by requiring him to stand trial for a second time

for the burglary charge after the jury acquitted him of larceny. In light of the substantial constitutional issues involved, this Court should grant certiorari. See Rule 242(b)(4), SCACR.

On February 23, 2012, Rickey Santoine Henley was arrested for first degree burglary and larceny the day. Supp. R. 1. On July 27, 2012, the Abbeville County Grand Jury returned indictments against Henley for the same offenses. R. 695. On April 8-9, 2015, Henley proceeded to trial on both offenses before the Honorable R. Lawton McIntosh and a jury. Henley was represented by Patricia Bolen and Yasha Patel, and the state was represented by Demetrios Andrews and Yates Brown. R. 1; R. 175.

When Ricky Culbreth was driving by the Moss' home at approximately 11:30 a.m. on February 15, 2012, he noticed a silver car that he did not recognize backed into their carport with its backdoor open. He saw a black man wearing a do-rag ran from the front of the house to the side of the house. R. 117, l. 6 – R. 119, l. 4. Culbreth did a U-turn and pointed at the man, who was standing in the doorway of the house. Culbreth said that it looked like the man threw something on the ground and then got into his car. The man pulled up next to Culbreth's white truck for a few seconds and asked if he needed any "yard help." R. 119, l. 12 – R. 120, l. 17; R. 130, ll. 22-24; R. 133, ll. 12-20. When Culbreth responded "no," the man left. R. 120, ll. 17-22. Culbreth walked to the house and called 911. R. 114, l. 16 – R. 116, l. 3; R. 120, l. 22 – R. 121, l. 1; R. 124, l. 16 – R. 125, l. 24.

When the police arrived, the side door to the Moss' home was open but there were no signs that anything had been tampered with inside of the home. The sole item missing was Ms. Moss' Dell laptop, valued at five hundred dollars, that had been on a bench just in side of the door. R. 136, l. 1 – R. 137, l. 9; R. 192, ll. 15-19. The laptop was never recovered. R. 231, ll.

17-19. Investigator Patrick Thompson photographed a boot print in the carpet inside of the home approximately one foot from where the laptop was taken. R. 196, l. 21 – R. 197, l. 6.

He also photographed and allegedly collected a Newport cigarette butt from the ground just outside of the doorway to the Moss' home. R. 194, l. 15 – R. 195, l. 22; R. 197, l. 7 – R. 200, l. 8; Second Trial State's Exs. 11-12 (photos of cigarette butt). Ms. Moss said that neither she nor her husband were smokers. R. 138, ll. 16-17. Culbreth provided the police with a license plate number of HSN454 for the Pontiac Parisienne car that he saw the man driving, which he saw through his rearview mirror. R. 121, ll. 9-22; R. 207, l. 24 – R. 208, l. 2. When the police could not find a car with that description and plate number, they obtained a list of other possible license plate numbers and makes of cars. Henley was on that list because he owned a Pontiac Bonneville with the license plate number HSM455. R. 200, l. 16 – R. 201, l. 9; R. 207, l. 1 – R. 208, l. 21.

On February 22, 2012, Thompson went to speak with Henley at his home. According to Thompson, Henley responded affirmatively that he had driven on Hwy 28 near Abbeville the week prior and spoken with a man in a white truck. He said that Henley explained that he had stopped to use the bathroom but denied going into any house. Thompson also claimed that Henley admitted to smoking Newport cigarettes and was wearing boots with a similar pattern as the print found in the Moss' home. R. 208, l. 12 – R. 209, l. 7; R. 212, l. 21 – R. 216, l. 19; R. 224, l. 21 – R. 230, l. 17. A photo array including Henley was shown to Culbreth, but he was only able to narrow it down to two people. R. 122, ll. 3-17; R. 209, l. 19 – R. 211, l. 15. The police lost the original photo array shown to Culbreth such that only a poor quality black and white copy was available at the first trial. R. 7, ll. 14-23; R. 222, l. 4 – R. 223, l. 4.

In addition to the lost photo array, the cigarette butt allegedly collected by law enforcement from the scene and accompanying chain of custody log were also lost and unavailable for Henley's trial. R. 219, l. 3 – R. 220, l. 5. Nonetheless, the judge admitted the state's DNA testing results, which found a match between the DNA on the cigarette provided to SLED and the known standard collected from Henley. R. 55-86; R. 160, l. 16 – R. 172, l. 6. Henley's ex-girlfriend, Jolene Gray, with whom he shared an apartment at the time of the incident, said that five police officers came to her house a second time when Henley was not there. They were walking around and picking something up off of the ground. R. 248, l. 14 – 249, l. 18; R. 259, ll. 5 – R. 260, l. 23; R. 261, ll. 14-25.

As far as his whereabouts on the date of the offense, Ms. Gray recalled that Henley left their apartment in Anderson between 8:00 a.m. and 9:00 a.m. to go to his mother's house in Beech Island. She confirmed that Henley owned boots that she had gotten him for Valentine's Day and that he smoked Newport cigarettes. R. 249, l. 19 – R. 252, l. 23; R. 257, l. 7 – R. 259, l. 4; R. 260, l. 24 – R. 261, l. 7. Henley's mother, Ella Johnson, said that on February 15, 2015, Henley arrived at her home at approximately 10:00 a.m. with leftovers from his dinner with Ms. Gray. They went to Moe's Convenience Store at approximately 2:00 p.m., where Henley bought a beer. R. 262, l. 22 – R. 274, l. 9.

Notably, the trial judge charged the jury both on alibi and identification. R. 325, l. 23 – R. 327, l. 2; R. 330, ll. 6-18. Regarding larceny, he charged:

> The State must prove beyond a reasonable doubt that the Defendant took and carried away the property of another against the will or without the consent of the other person. The slightest removal of the property or the complete possession of the property even if for an instance by the Defendant is enough to show a taking and carrying away of the property. The State must also prove beyond a reasonable doubt that the Defendant intended to permanently deprive the owner of the property.

R. 329, l. 21 – R. 330, l. 5. Following a charge pursuant to Allen v. United States, 164 U.S. 492 (1896), the jury returned a verdict of **not guilty on larceny.** However, the jury **hung on the count of first degree burglary**. R. 336-350.

Following denial of the defense's motion to preclude retrial under the Double Jeopardy Clause of the Fifth Amendment, on April 4-6, 2016, Henley faced re-trial for the offense of first degree burglary before the Honorable Eugene C. Griffith, Jr. and a jury. R. 363, R. 384-402.

The state presented much of the same evidence as it did at the first trial, but successfully excluded Jolene Gray's testimony that officers returned to the apartment that she shared with Henley and picked something up off the ground. See discussion *infra*, Issue III. In his closing argument at the second trial, the solicitor contended:

> The carport, the car backed in, the back door open, the door kicked in. Folks, I'll submit to you **his intent was to go in there and clean them out.** Just so happened, Mr. Culbreth came by at the right time and turned around and came back before Mr. Henley could start loading it up.

R. 640, ll. 16-19 (emphasis added); and

> He [Henley] left Anderson to go down to Beech Island, but he made a stop on the way. He made a stop at the Moss' house **to see what they had good in there.** They said the windows, you could see right in and **see what they had** in there and he stopped. **He thought he'd get a little treasure trove** as he went on down to Aiken.

R. 646, l. 20 – R. 647, l. 1 (emphasis added).

The jury returned a verdict of guilty, and Judge Griffith sentenced Henley to twenty-four years incarceration. R. 664-674.

On April 14, 2016, Henley served his notice of appeal. After entertaining brief and argument, the Court of Appeals affirmed. App. 1-19. Henley filed a petition for rehearing, which was denied. App. 20-36. This petition for writ of certiorari follows.

ARGUMENT

I. The Court of Appeals erred in denying Henley's motion to quash the indictment based on Double Jeopardy where the Court erred as a matter of law in failing to apply the proper test under *Yeager* and where Henley's prior acquittal of larceny necessarily decided that Henley was not the person who stole the homeowner's laptop, the sole item missing after the burglary, precluding the state from relitigating Henley's identity as the intruder or intent to steal.

Relevant facts

At Henley's first trial, the solicitor averred in his opening statement that Moss' door was kicked down and "[s]he had personal property taken." 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 – R. 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.

In his opening on the law at 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 – R. 288, l. 11 (emphasis added). In the latter portion of his closing, noted that a cigarette butt was found "on that side door, going in the side door, the same door that was kicked open and Mr. Henley went walking through **to go get that laptop**." R. 308, ll. 6-12. He argued that Henley made a stop on his way to see his mother 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). The solicitor sarcastically said that the boot print was "[m]iraculously close to that pedestal where that laptop was taken from that day." R. 312, ll. 15-16. Ultimately, the jury acquitted Henley of larceny but hung on the count of first-degree burglary. R. 343, l. 17 – R. 349, l. 11.

Importantly, the defense made no challenge to whether a laptop was actually taken from the Moss' home or its value. Rather, the defense focused on alibi, mistaken identity, and the unreliability of the DNA evidence. Counsel argued that the state's evidence regarding identity – namely the eyewitness testimony, DNA evidence, and alleged "confession" – were all flawed and failed to prove Henley's guilt beyond a reasonable doubt. R. 290, l. 3 – R. 306, l. 3. She argued: "[T]he person he [Culbreth] saw at Ann Moss' house was not Rickey Henley." R. 295, l. 15. Her argument regarding the state's failure to recover a laptop was not a suggestion that none was taken. Counsel pointed to that as another fact illustrating the shoddy police investigation. R. 299, l. 10 – R. 300, l. 18.

At the commencement of Henley's second trial, defense counsel filed a Motion to Quash the Indictment Based on Double Jeopardy pursuant to Ashe v. Swanson, 397 U.S. 436 (1970),

and Yeager v. United States, 557 U.S. 110 (2009) R. 352; see R. 384, l. 22 – R. 400, l. 22. Counsel argued that the provision against double jeopardy precluded prosecution in Henley's case on the same conduct for which he was tried in 2015. R. 384, ll. 12-17. Counsel argued that in light of its holding that a hung count was a non-event not to be considered in determining the preclusive effect of the acquitted count, the Yeager Court instructed lower courts to look at the acquitted count to determine what facts were decided by the jury. R. 384, l. 12 – R. 389, l. 8. In making such a determination the lower court must "examine the record of a prior proceeding . . . 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." Yeager, 557 U.S. at 119-20; R. 399, ll. 6-17; R. 400, ll. 18-21.

Though counsel recognized that the state is not required to prove the intended crime was actually committed, she argued that the acquittal on larceny necessarily decided that he did not take the laptop. R. 391, l. 8 – R. 392, l. 21. She noted that the facts in support of probable cause on the burglary warrant included:

> That on February 15, 2012, in the county of Abbeville, one Rickey Santoine Henley did enter a dwelling located at . . . Hwy 28 N in Abbeville County, SC, without consent and with intent to commit a crime therein. Once inside the defendant did take, steal and carry away a Dell laptop computer from said residence. The defendant has prior Burglary convictions dated 12/07/2006 and 3/15/2002. Information from affiant and Sheriff's Dept. investigation, report 12-2-55.

Supp. R. 1. She further noted that "[t]he State's theory as presented in both of their opening and closing, as well as by their witness testimony, . . . was that Mr. Henley went into this home and took a Dell laptop computer. She submitted that there was no other evidence that any other crime was intended to have been committed inside the home other than theft of the laptop. R. 386, ll. 6-9; R. 390, l. 18 – R. 391, l. 8.

In response, the solicitor noted that the indictment on burglary made no reference to larceny. However, he admitted that the acquittal on larceny "puts us in a much tougher spot with regard to proving the burglary," understanding that the state could not mention the laptop at the retrial like they did in their arguments at the first trial. R. 392, l. 23 – R. 393, l. 23. He pointed the court to State v. Peterson, 336 S.C. 6, 518 S.E.2d 277 (Ct. App. 1999), in support of the state's position that it is merely required to prove that there was an intent to commit a crime in the dwelling, not that the underlying crime actually occurred. R. 394, ll. 4-21. He further referenced State ex rel. Taylor v. Janes, 693 S.E.2d 82 (W.Va. 2010), wherein the defendant was acquitted of conspiracy but the state was allowed to retry him on the hung count of murder. R. 394, l. 21 – R. 395, l. 7. The solicitor submitted that their proof of intent to commit a crime therein would be in the form of testimony that Henley's car was backed up under the Moss' garage with the back door open and Henley was startled by the witness who saw him in the house – probably caught right at the beginning of his burglary and didn't have time to get into that much. R. 395, l. 23 – R. 396, l. 15.

In response, defense counsel distinguished the West Virginia case by noting that there was no overlapping fact necessary to prove murder and conspiracy to commit murder. However, she argued that in the present case Henley was found not guilty of the only crime that the state could possibly try to prove that he had the intent to commit therein. R. 396, l. 16 – R. 399, l. 6. Though counsel averred that review of the transcripts of the first trial was necessary to the court's finding, the trial judge did *not* take a copy of the transcript. R. 399, l. 6 – R. 400, l. 21. Instead, he ruled that counsel's argument was a directed verdict type argument, which she could renew at that stage. He found that the state has the "burden of proving with the intent to commit a crime" but that the acquittal of the larceny did not preclude them from presenting facts from

which the jury could infer intent to commit a crime therein. R. 399, l. 18 – R. 400, l. 10. The trial judge said that he found the Peterson case "on point." R. 402, ll. 1-23.

Discussion

Misapprehending Yeager v. United States, 557 U.S. 110 (2009), the Court of Appeals held Henley'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, the 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 the 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." App. 8. This holding misapprehends controlling Supreme Court law.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, offers protection to citizens from being subjected to double jeopardy for the same offense. U.S. Const. amend. V ("No person shall be... subject for the same offense to be twice put in jeopardy of life or limb..."); U.S. Const. amend. XIV . The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003). In Ashe v. Swenson, 397 U.S. 436, 443 (1970), the United States Supreme Court found the previously civil concept of collateral estopped applicable to criminal cases, writing:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when

> an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.

See also State v. Hewins, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014).

The Double Jeopardy Clause embodies two vitally important interests. Yeager v. United States, 557 U.S. 110, 117 (2009). The first is the "deeply ingrained" principle 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." Id. at 117-18 (quoting Green v. United States, 355 U.S. 184, 187–188 (1957)). The second interest is the preservation of "the finality of judgments." Id. at 118 (quoting Crist v. Bretz, 437 U.S. 28, 33 (1978)).

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. The Court of Appeals affirmed, though it concluded from the record that the jury must have found when it acquitted petitioner that he did not have any insider information that contradicted what was presented to the public. Id. at 116. While the intermediate appellate court acknowledged that this factual determination would normally preclude the Government from retrying petitioner for insider trading or money laundering, it was persuaded "that a truly rational jury, having concluded that petitioner did not have any insider information, would have *acquitted* him on the insider trading counts." Id. (emphasis in original). Considering "the hung counts along with the acquittals," the Court of Appeals court found it "impossible to decide with any certainty what the jury necessarily determined." Id.

The Yeager Court noted a conflict between jurisdictions regarding whether a jury's failure to reach a verdict on some count should play any role in determining the preclusive affect of an acquittal. 557 U.S. at 116-17. In holding that the failure to return a verdict has no affect on such analysis, the Court noted the Double Jeopardy Clauses' interest in preserving the finalty of the jury's judgment. Id. at 117-18. The Court looked to the reasoning of Ashe v. Swenson, 397 U.S. 436, 437 (1970), that "the Double Jeopardy Clause precludes the Government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." Yeager, 557 U.S. at 119; but see State v. Easler, 327 S.C. 121, 134, 489 S.E.2d 617, 624–25 (1997) ("As to the double jeopardy issue, we affirm the Court of Appeals' holding that Blockburger is the only remaining test to determine a double jeopardy violation."). 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 (quoting Ashe, 397 U.S. at 444) (emphasis added).

Though the Yeager Court noted that Ashe involved an acquittal after trial on a single offense, it found that its reasoning was still controlling "because, for double jeopardy purposes, the jury's inability to reach a verdict on the insider trading counts was a nonevent and the acquittals on the fraud counts are entitled to the same effect as Ashe's acquittal." 557 U.S. at 120. The Court explained that a hung count is not a relevant part of the record of the prior proceeding because there is no way to determine what the hung count represents or why the jury hung. Id. at 121-22. Conversely, "[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). 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. The Court remanded the case for further proceedings consistent with its opinion. Id. at 126.

Here, both the Court of Appeals 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 Henley for first-degree burglary following his acquittal for larceny related to the same incident. The trial judge improperly likened defense counsel's argument to that of a motion for directed

verdict. See R. 399, l. 18 – 400, l. 10. 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 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(s) bars a retrial on the undecided count(s) 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, the focus of the Court of Appeals 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. Undertaking the proper analysis requires holding Henley's second trial violated Double Jeopardy. Specifically, Yeager provides that the court 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." 557 U.S. at 119-20 (quoting Ashe, 397 U.S. at 444). The trial court's failure to conduct the requisite analysis is further 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.

At retrial, the state was required to prove both the intruder's identity and his intent to commit a crime therein. S.C. Code Ann. § 16-11-311(A)(2) ("A person is guilty of burglary in the first degree if the person enters a dwelling without consent and *with intent to commit a crime in the dwelling*, and . . . the burglary is committed by a person with a prior record of two or more convictions for burglary or housebreaking or a combination of both." (emphasis added)); see Gibbs v. State, 403 S.C. 484, 496, 744 S.E.2d 170, 176 (2013) (finding no prejudice from failure to request alibi charge "[g]iven the clarity of the jury charge requiring the State to prove identity beyond a reasonable doubt"); see also Roseboro v. State, 317 S.C. 292, 294, 454 S.E.2d 312, 313 (1994) (stating that an alibi charge places "emphasizes that it is the State's burden to prove the defendant was present at and participated in the crime."). 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 relitigating 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 relitigating the issues that were necessarily decided by the jury's prior acquittal on larceny.

II. The Court of Appeals erred by affirming the trial court's denial of the defense's motion to admit evidence of Henley's acquittal on the prior larceny charge where the state's theory of the case continued to be that the burglar's intention was to steal.

Relevant Facts

Defense counsel moved to admit the record of the indictment for larceny that reflected Henley's prior acquittal. R. 612, ll. 1-9; R. 691. The solicitor objected, claiming that it would bring to the jury's attention that the case was tried previously, which would invite speculation on what happened at the prior hearing. R. 612, ll. 13-20. Defense counsel noted there are often separate trials for lower court charges and General Sessions charges. R. 612, l. 21 – R. 613, l. 2. She further argued that the acquittal was exculpatory and a permissible part of the constitutional right to present a defense to the state's attempt to prove that there was "an intent to commit a crime therein." R. 613, ll. 2-11. She noted that there was no reference on the document to the prior trial on the burglary charge. R. 613, ll. 11-18.

The solicitor argued that admission of the document would open the door "to talking about the missing evidence," presumably referring to evidence that a laptop was located on a bench through the window, that the boot print in the carpet was located within a foot of the bench, and that the laptop was missing from the house when the Mosses returned. He said: "Again, if they want to put that in, I mean, we'd agree that he's been acquitted of it. But the element of burglary is the intent to commit the crime." R. 613, ll. 19-23.

The trial judge responded:

> I don't believe this is allowed. I think it would confuse the jury. It does mention the same date, the same victim, and a piece of personality. To some extent it opens the door to a whole slew of issues. But it seems to me this would confuse the jury more than help the jury in their findings of fact as to his guilt or innocence on this charge. And I'll tell you, it's a novel issue for me. I've never

> had this presented, so I commend y'all for coming up with this. But I've never thought about that. But I think my ruling would be under, I'm not sure which rule.

R. 614, ll. 12-22.

The solicitor interjected that he believed the applicable rule was Rule 401, SCRE, regarding relevance. He argued that the prior acquittal "does not help resolve an issue we're here for on the burglary" and would cause confusion and speculation. R. 615, ll. 6-12. Defense counsel responded that the evidence was probative, arguing:

> He was found not guilty of the crime that the State had previously alleged was committed inside the home . . . . We'd be seeking to admit it to try to defend against the element of burglary that requires the State to prove intent to commit a crime therein. We'd be using it to show no crime was committed inside the home and that they can't prove any intent to commit a crime inside the home.

R. 615, l. 13 – R. 616, l. 12. Nevertheless, the trial judge denied the request for admission of the documentation of the prior acquittal. R. 616, ll. 13-15.

Discussion

The Court of Appeals held Henley'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." App. 9. According to the Court, the state was required to prove Henley entered Moss's home without her consent and with the intent to commit a crime, but "there was no requirement that the state prove [Henley] entered Victim's home without consent and successfully committed the crime of taking Victim's Dell computer." App. 9. Next, the 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." App. 10. In the Court's view, Henley'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." App. 10. The Court misapprehended the relevant case law and Henley's constitutional rights when arriving at this conclusion.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." Rule 402, SCRE. Rule 403, SCRE, provides: "Although relevant, evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (emphasis added).

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 prior acquittal on larceny was relevant to the current proceedings. The defense properly sought its admission to attack the state's theory that Henley 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 Henley 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 – R. 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 the Court of Appeals has noted previously, "[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). However, in this case, the Court neglected its duty by affirming the trial judge's decision to exclude the relevant and highly probative evidence.

III. The Court of Appeals erred in affirming the trial judge's limitation on the admission of Jolene Gray's testimony from the prior trial where Gray was unavailable to the defense and her testimony provided evidence that the police had an opportunity to obtain a cigarette smoked by Henley from outside of his home.

Relevant Facts

At Henley'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 Henley. 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). Counsel represented that Gray was Henley's girlfriend at the time of the incident but that their investigator had been unable to locate her 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. In response to the trial judge's question regarding

how much of the testimony they wanted to present, defense counsel said: "All of it. There's not much testimony." R. 462, ll. 10-13.

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, the solicitor again represented that he no objection to the reading of Officer Belcher's testimony from the prior trial. R. 593, l. 25 – R. 594, l. 20. However, with respect to Jolene Gray, he 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). Defense counsel responded that Gray's testimony on redirect was critical to the defense due to the testimony about the cigarette butt. R. 595, l. 21 – R. 597, l. 10. However, the judge ruled Gray's testimony would not be presented in full; instead, the jury would only hear the portions the state wanted. 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.

Discussion

The Court of Appeals held that Gray's testimony was inadmissible hearsay in accordance with Rule 804(a)(5), SCRE, because she was not served with a subpoena. App. 13. The 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. The Court erred by holding that Gray's prior testimony was hearsay in light of the state's concession making the development of the record in this regard unnecessary.

The Court of Appeals expressed "concern" that the trial judge permitted the state to select portions of Gray's testimony to be read and excluded portions Henley sought to present. Although the Court showed concern over the trial judge's handling of the prior testimony, the Court found the error was not prejudicial to Henley. 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 Henley's DNA from his yard. This testimony was essential 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 – R. 596, l. 10.

In summary, there being no dispute that the Gray was unavailable to the defense and subject to cross-examination by the same solicitors during the prior trial, the trial court had no

basis to exclude a portion of Gray's former testimony. In doing so, he abused his discretion, and the Court of Appeals by affirming the trial judge's ruling.

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 Henley 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.

CONCLUSION

Petitioner respectfully requests this Court grant certiorari on the issues presented and order full briefing.

Respectfully Submitted,

Susan B. Hackett
Appellate Defender

ATTORNEY FOR PETITIONER

This 16th day of March, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal from Abbeville County
Eugene C. Griffith, Jr., Circuit Court Judge

Opinion No. 5694 (S.C. Ct. App. filed December 11, 2019)
2012-GS-01-348

THE STATE,

RESPONDENT,

V.

RICKEY SANTOINE HENLEY,

PETITIONER

CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on V. Henry Gunter, Jr., Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Rickey Henley, #290970, at Kirkland Correctional Institution, 4344 Broad River Road, Columbia, SC 29210; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 16th day of March, 2020.

Susan B. Hackett
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 16th day of March, 2020.

_____ (L.S)
Notary Public for South Carolina
My Commission Expires: September 30, 2029