STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Appeal from Kershaw County

G. Thomas Cooper, Jr., Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JONATHAN WILLIAM RAY,

APPELLANT

APPELLATE CASE NO. 2019-001743

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing the state to impeach Appellant with evidence of his prior convictions for breaking and entering into an automobile where (1) the trial judge failed to conduct an on-the-record balancing test of the Colf factors, (2) balancing of the Colf factors weighed heavily against admission, and (3) the error was not harmless?

## STATEMENT OF THE CASE

On October 17, 2018, a Kershaw County grand jury indicted Appellant for criminal sexual conduct with a minor in the second degree. R. *(indictment). Specifically, the indictment alleged the sexual conduct occurred between May 9 and May 27, 2017. R. *(indictment). The state, represented by Curtis A. Pauling, III, and Donna Green, called the case to trial on October 1-4, 2019, before the Honorable G. Thomas Cooper and a jury. Tr. 39. Arthur K. Aiken represented appellant. Tr. 39. When defense counsel moved for a directed verdict based upon a variance between the evidence presented and the indictment, the trial judge encouraged the state to examine section 17-19-100 of the South Carolina Code prior to responding. Tr. 245, l. 15 – Tr. 246, l. 13. In response, the state moved to amend the indictment to conform to the testimony. Specifically, the state sought to expand the indictment to include May 28, 2017. Tr. 246, ll. 14-18. Despite defense counsel's objection, the trial judge amended the indictment. Tr. 246, l. 21 – Tr. 247, l. 12.

Ultimately, the jury found Appellant guilty as charged. Tr. 354, ll. 9-13. Judge Cooper sentenced Appellant to eight years' imprisonment. Tr. 372, ll. 21-23; R. *(sentence sheet). On October 11, 2019, Appellant served his notice of appeal. This brief follows.

## STATEMENT OF FACTS

Minor was adamant that she and her father, Arthur Mack, left Lufkin, Texas, on May 25, 2017, which was her last day of school. Tr. 62, ll. 4-25; Tr. 113, ll. 12-18. However, Arthur claimed they left Texas on May 9. Tr. 135, ll. 5-7; Tr. 135, ll. 23-25. When they arrived in South Carolina, they moved in with Arthur's mother, Rosalyn Harris. Tr. 63, ll. 1-17. Shortly after arriving in South Carolina, Minor ran into her step-grandmother, Gail Jefferson at IGA. Tr. 63, l. 18 – Tr. 64, l. 21. According to Minor, Gail encouraged her to call her grandfather. Tr. 65, ll. 19-24. When Minor spoke to her grandfather, Leon, he invited her to stay at house for a while. Tr. 66, ll. 2-7.[1] Thereafter, Arthur took thirteen-year-old Minor to Leon's home where he left her to stay for several days. Tr. 67, ll. 10-11; Tr. 68, ll. 1-3. According to Minor she arrived at Leon's home on May 27 or May 28. Tr. 115, ll. 14-21. Again, Arthur contradicted Minor on the timeframe, insisting that he dropped Minor off on May 13. Tr. 138, ll. 16-22; Tr. 151, ll. 8-23.

Arthur, who insisted he was "very, very cautious" with Minor, asked Leon if there were "any other guys inside." Tr. 141, ll. 10-22. Arthur was aware that Minor's cousin, Joshua Porte, was staying there. Tr. 141, ll. 1-4. Leon allegedly informed Arthur that the only people staying at the house, in addition to his wife and himself, were Trevon Coe and Joshua Porte, who were Minor's cousins. Tr. 142, ll. 20-24. However, Appellant, a family friend, also lived there. Tr. 72, ll. 6-17; Tr. 158, ll. 4-11. Appellant explained that his girlfriend, Alexis Cunningham and

[1] Arthur Mack, Minor's father, contradicted Minor on this point as well. He claimed her grandfather called her, asking if she could see him. Tr. 140, ll. 1-5. Further, Gail Jefferson, Minor's step-grandmother contradicted Minor on this point. She explained that she first ran into Minor in 2017 when Minor arrived at her house. Tr. 157, ll. 18-19. She noted that Minor "had called and wanted to come and to see [them]." Tr. 157, ll. 19-20.

their daughter, lived there as well. Tr. 265, ll. 5-22; Tr. 280, l. 11 – Tr. 281, l. 12; Tr. 309, ll. 5-7.

Appellant worked as a line cook at Chili's in May 2017. Tr. 256, l. 22 – Tr. 257, l. 24. Generally, Appellant worked the evening shift, which made him responsible for closing the restaurant. Tr. 257, l. 19 – Tr. 258, l. 19; Tr. 309, ll. 13-19.

The three young men slept in three separate bedrooms at one end of the mobile home. Tr. 72, l. 6 – Tr. 73, l. 17. Two of the bedrooms had been a single bedroom until Appellant installed a makeshift wall, creating two bedrooms. Tr. 267, l. 8 – Tr. 268, l. 2. Trevon stayed in one of the newly created bedrooms while Appellant and his girlfriend stayed in the other. Tr. 267, l. 8 – Tr. 268, l. 2. Due to the makeshift nature of the wall, which consisted of "some think paneling and 2x4's," people in the rooms could carry on a conversation without ever having to step foot in the other room. Tr. 267, l. 20 – Tr. 268, l. 14.

Minor slept on a couch in her grandparents' bedroom, while her grandparents slept nearby in their bed. Tr. 71, ll. 15-23; Tr. 159, ll. 6-10. This master bedroom was on the opposite end of the mobile home. Tr. 72, ll. 22 – 25; Tr. 159, ll. 21-23.

Minor recalled that on the night of her arrival at Leon's house, Appellant, along with his girlfriend and small child, arrived at the house later in the evening. Tr. 75, l. 9 – Tr. 77, l. 14. According to Minor, Appellant stayed overnight, but his girlfriend and child left. Tr. 77 ll. 18-20. Initially, Minor denied having any conversation with Appellant on the night she arrived. Tr. 77, l. 24 – Tr. 78, l. 3. Later, however, she claimed that she asked Appellant's age. Tr. 83, l. 11 – Tr. 84, l. 11. When Appellant asked her age, she "didn't want him to know how old [she] was." Tr. 84, ll. 14-19. Ultimately, Minor claimed, she told Appellant she was thirteen-years old. Tr. 84, l. 23 – Tr. 85, l. 3.

On the third night of Minor's stay, which would have been May 30 or 31[2] if Arthur's recollection was correct, she was watching television while on the couch in her grandparents' room. Tr. 85, l. 18 – Tr. 86, l. 5; Tr. 115, l. 18 – Tr. 116, l. 3. Her grandparents were awake, but in their bed. Tr. 86, ll. 12-18. Minor received a text message from Appellant. Tr. 86, ll. 23-24.[3] Appellant's text message to minor was in response to a message she had sent the day before, asking for the whereabouts of her cousin Trevon. Tr. 88, l. 1-18. According to Minor, Appellant sent her another message telling her to go to his room. Tr. 89, ll. 21-23. Conveniently, Minor's grandparents were asleep at this point. Tr. 90, ll. 7-9.

Minor walked to Appellant's bedroom, passing the bedrooms of Joshua and Trevon along her route. Tr. 90, l. 17 – Tr. 91, l. 14. Minor claimed that Appellant was sitting on his bed in the dark and refused to answer when she asked what he wanted. Tr. 92, l. 9 – Tr. 93, l. 8. Minor sat down on the edge of Appellant's bed. Tr. 93, ll. 9-14. According to Minor, Appellant began rubbing on her thighs with his hands. Tr. 94, ll. 14-24. Minor claimed she told Appellant to stop, but he pushed her onto the bed and removed her pants. Tr. 95, l. 18 – Tr. 96, l. 1.

Minor indicated that she "blacked out," and therefore, she was unable to try to stop him from getting her pants off. Tr. 96, ll. 14-16. Despite having blacked out, she recalled that Appellant went to his dresser "for something" after removing her pants. Tr. 96, l. 17 – Tr. 97, l. 2. At the time of trial, she was unsure what Appellant got, but she previously claimed Appellant

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[2] Importantly, Appellant moved out of the Jefferson residence on May 28, 2017. Tr. 261, ll. 16-25; Tr. 310, ll. 14-16. On May 27, 2017, he went to the hospital to get checked out after suffering minor injuries due to a car accident on that date. Tr. 262, l. 4 – Tr. 263, l. 1; Tr. 292, ll. 22-25; Tr. 306, l. 22 – Tr. 307, l. 19; Tr. 310, ll. 20-25; Tr. 311, ll. 16-18. Additionally, Appellant was arrested on May 28, 2017, for breach of peace because he and Trevon Coe argued when Appellant accused Trevon of stealing from him. Tr. 263, ll. 9-14; Tr. 293, ll. 1-12.

[3] Minor and Appellant had each other's' phone numbers because Minor's cousin, Trevon, used her phone to call Appellant. Tr. 87, ll. 13-20.

retrieved a condom. Tr. 97, ll. 3-10; Tr. 122, l. 22 – Tr. 123, l. 21. Thereafter, she alleged Appellant returned to her, "took out his penis and put it inside [her] vagina and started forcing himself in [her]." Tr. 97, ll. 11-14. Minor claimed she loudly told Appellant to get off of her. Tr. 97, ll. 23-24; Tr. 121, ll. 12-16. Eventually, according to Minor, Appellant stopped and went to his bathroom. Tr. 98, l. 23 – Tr. 99, l. 9.[4] Further, Minor alleged Appellant warned her to not tell anyone. Tr. 99, ll. 10-20. While Appellant was in the bathroom, Minor put her pants on and returned to her grandparents' room. Tr. 99, l. 21 – Tr. 100, l. 3.

Minor stayed at her grandparents' house two more days before her father picked her up. Tr. 104, ll. 10-16. Later in the summer, Minor returned to her grandparents' house. Tr. 104, ll. 21-25. Her sister, Fatima Mack, took her for the visit. Tr. 105, ll. 1-8. Minor claimed she told Fatima that Appellant "raped" her at this time. Tr. 105, ll. 9-13. Much later, and Minor was unsure of the time period, Minor also told her father what Appellant allegedly did. Tr. 105, l. 16 – Tr. 107, ll. 15; Tr. 145, ll. 8-19.

On March 22, 2018, Arthur contacted law enforcement, who sent Minor for a forensic interview and medical examination. Tr. 107, l. 19 – Tr. 108, l. 20; Tr. 146, ll. 10-25; Tr. 152, ll. 12-18. As a result of the medical examination, Minor began taking medication, but she was unaware of the reason for the medication. Tr. 108, l. 23 – Tr. 109, l. 12; Tr. 147, ll. 9-16.[5]

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[4]Appellant contradicted Minor on this point. He explained there was only one working bathroom in the house, and it was the master bathroom that was connected to the master bedroom. Tr. 267, ll. 1-7.

[5] Michael Foxworth examined Minor in April of 2018. Tr. 207, ll. 5-10. He reported "two transections of the hymen at that time." Tr. 208, ll. 18-25. Further, Foxworth indicated Minor tested positive for chlamydia. Tr. 209, ll. 7-14. Foxworth admitted, however, that the use of a condom during sexual intercourse, made transmission of chlamydia less likely. Tr. 211, l. 19 – Tr. 212, l. 17. On August 18, 2017, almost a year *before* Minor's medical examination and approximately three months *after* the alleged sexual encounter, Appellant tested positive for chlamydia. Tr. 216, ll. 2-5; Tr. 220, ll. 3-11.

## STANDARD OF REVIEW

"In criminal cases, appellate courts sit to review errors of law only." State v. Robinson, 426 S.C. 579, 591, 828 S.E.2d 203, 209 (2019) (citing State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006)). "'The admission of evidence concerning past convictions for impeachment purposes remains with the trial [court's] discretion, provided the [trial court] conducts the analysis mandated by the evidence rules and case law.'" Id. (quoting State v. Dunlap, 346 S.C. 312, 324, 550 S.E.2d 889, 896 (Ct. App. 2001)) (alterations in original). "'An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law.'" Id. (quoting State v. Douglas, 369 S.C. 424, 429-430, 632 S.E.2d 845, 848 (2006)).

## ARGUMENT

The trial judge erred in allowing the state to impeach Appellant with evidence of his prior convictions for breaking and entering into an automobile where (1) the trial judge failed to conduct an on-the-record balancing test of the *Colf*[6] factors, (2) balancing of the *Colf* factors weighed heavily against admission, and (3) the error was not harmless.

**Relevant facts**

While the judge was advising Appellant of his right to testify, the judge inquired if the state intended to impeach Appellant with any prior offenses. Tr. 250, ll. 1-3. When the state indicted a desire to impeach Appellant with a conviction from 2014 regarding breach of peace and three counts of "auto break-in" from 2017, defense counsel objected. Tr. 250, ll. 4-18. Trial counsel relied on State v. Broadnax, 414 S.C. 468, 779 S.E.2d 789 (2015). Tr. 250, ll. 17-18. The trial judge "kn[e]w it very well" because the Supreme Court had reversed the trial judge's ruling on the admissibility of a defendant's prior record in that case. Tr. 250, l. 19 – Tr. 251, l. 2. Defense counsel argued that the offenses were "not categorically a crime of dishonesty," and that the "danger of unfair prejudice substantially outweigh[ed] the probative value of the evidence." Tr. 251, l. 5-10. Nevertheless, the judge overruled defense counsel's objection. Tr. 251, l. 11.

Thus, defense counsel asked Appellant about his prior record during direct examination. Tr. 263, ll. 15-19. Appellant readily admitted to the convictions. Tr. 263, ll. 15-19. Appellant explained:

> I was younger and I was going through a lot of tough times, finding my right place, but hanging still around the wrong crow[d], you know, my mind wasn't in the right place and I had literally just got off of a YOA and I was hanging around these wrong people, like, these are old friends that I've known since 6th grade and they w[ere] on Xanax and I was chilling with them and we were supposed to go to the bar and drink and then Alexis, the mother of my son had dropped us off in

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

> town and them boys took it upon themselves to start breaking into cars and needless to say, I knew about it, but I didn't report it and they tried to write statements on me and they ended up catching the charges that they tried to pin on me because they lied and needless to say, I ended up getting probation and probation terminated upon payment.

Tr. 263, l. 21 – Tr. 264, l. 11. Appellant summarized that he was "just hanging out with the wrong crowd, doing dumb stuff, you know, being around the wrong people, wrong place, wrong time." Tr. 264, ll. 12-14.

The solicitor also questioned Appellant about his prior convictions for "auto break-in." Tr. 302, l. 25 – Tr. 303, l. 5. Mockingly, the solicitor repeatedly referred to Appellant's explanation that he was "hanging with the wrong crowd." Tr. 302, l. 25 – Tr. 303, l. 2; Tr. 303, ll. 11-12; Tr. 304, ll. 2-7. Appellant informed the solicitor that he pled guilty to three counts of auto break-in. Tr. 303, l. 24 – Tr. 304, l. 1. In light of the solicitor's suggestion that Appellant would not have pled guilty if he were simply "hanging with the wrong crowd," Appellant explained that he was aware of the offenses, which led to him pleading guilty. Tr. 303, l. 24 – Tr. 304, l. 1.

Appellant strenuously denied any sexual contact with Minor. Tr. 300, l. 7 – Tr. 301, l. 4. Appellant denied ever speaking with Minor, including asking her about her age. Tr. 300, ll. 7-11. Appellant also denied contacted Minor by cell phone. Tr. 300, ll. 12-15. He was adamant that he never called Minor to his room, never touched her, never forced himself on her, and never had sex with her. Tr. 300, l. 22 – Tr. 301, l. 4.

**Discussion**

The Rules of Evidence permit the introduction of prior convictions for purposes of impeachment in limited circumstances. Specifically, the South Carolina Rules of Evidence provide:

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

Rule 609(a), SCRE. "[U]nder Rule 609(a)(1), when the accused chooses to testify during his trial, if the state seeks to introduce impeachment evidence that the accused has been convicted of a crime punishable by imprisonment for more than one year, the evidence is admissible if the state establishes the probative value of admitting the evidence outweighs its prejudicial effect upon the accused." State v. Robinson, 426 S.C. 579, 593, 828 S.E.2d 203, 210 (2019). "[U]nder Rule 609(a)(2), if a witness, even an accused, has been convicted of a crime involving dishonesty or false statement, evidence of such a conviction shall be admitted regardless of the maximum punishment and regardless of the probative value or prejudicial effect of the evidence." Id.

According to the South Carolina Supreme Court, "breaking into an automobile convictions are not automatically admissible as crimes of dishonesty or false statement under Rule 609(a)(2); therefore, the trial court was required to conduct an analysis under Rule 609(a)(1) … to determine whether the probative value of admitting these prior convictions outweighed the prejudicial effect to [Appellant]." See id. at 597, 828 S.E.2d at 212.

Importantly, the trial judge conducted *no* analysis in response to defense counsel's objection. Instead, the trial judge noted he was familiar with the case cited by defense counsel in support of his motion to exclude Appellant's prior convictions because he was the trial judge in that case as well. After remarking on his familiarity with the case law, the judge simply overruled defense counsel's objection. This was error. See State v. Howard, 384 S.C. 212, 220,

682 S.E.2d 42, 46 (Ct. App. 2009) (remanding to the trial court for the purpose of conducting "a proper balancing test" where the judge failed to conduct "an on-the-record balancing test weighing the probative value of Howard's prior convictions against their prejudicial effect").

Our Courts have approved a 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 under Rule 609, SCRE. See State v. Colf, 337 S.C. 622, 627, 525 S.E.2d 246, 248 (2000); State v. Bryant, 369 S.C. 511, 517–18, 633 S.E.2d 152, 156 (2006); State v. Howard, 396 S.C. 173, 178, 720 S.E.2d 511, 514 (Ct. App. 2011); State v. Scriven, 339 S.C. 333, 341-42, 529 S.E.2d 71, 75-76 (Ct. App. 2000). Thus, in conducting a Rule 609(a), SCRE, analysis, the trial court should consider the "[t]he following factors, along with any other relevant factors, . . . (1) the impeachment value of the prior crime; (2) the point in time of the conviction and the witness's subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue." Howard, 396 S.C. at 178, 720 S.E.2d at 514. In State v. Broadnax, 414 S.C. 468, 478, 779 S.E.2d 789, 794 (2015), the Court cautioned that "[u]ltimately, the Rule [609, SCRE] is designed to help the jury discern the truth. It is not a tool for the state to bolster its case against the criminal defendant for the mere fact that the defendant has engaged in prior criminal activity."

"The 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." Robinson, 426 S.C. at 597, 828 S.E.2d at 212 (internal quotation omitted). "The tendency to impact credibility … determines the impeachment value of the prior conviction. Impeachment value refers to how strongly the nature of the conviction bears on the veracity, or credibility, of the witness." Id. at 598, 828 S.E.2d at 212-213. "The purpose of the

impeachment is not to show the witness is a bad person but rather to show background facts which impact the witness's credibility." Id. at 598, 828 S.E.2d at 213.

"Although prior convictions for robbery, burglary, theft, and drug possession are not crimes of dishonesty or false statement, which would result in automatic admissibility under Rule 609)(a)(2), such convictions may still have impeachment value under Rule 609(a)(1)." Id. at 599, 828 S.E.2d at 213. The Supreme Court affirmed a trial judge's discretionary ruling that a prior conviction for breaking and entering an automobile had impeachment value. Id. at 600, 828 S.E.2d at 214.

"[E]vidence 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." Id. (internal quotation omitted). "[W]hen 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." Id. (internal quotation omitted).

The right of a criminally accused to testify or not to testify is fundamental. State v. Rivera, 402 S.C. 225, 241, 741 S.E.2d 694, 702 (2013); Rock v. Arkansas, 483 U.S. 44, 52 (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." Rivera, 402 S.C. at 241, 741 S.E.2d at 702. "The right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution," including the due process clause of the Fifth Amendment and the compulsory process clause of the Sixth Amendment, applicable to the states through the Fourteenth Amendment. Id. at 214-42, 741 S.E.2d at 703. "The opportunity to testify is also a necessary

corollary to the Fifth Amendment's guarantee against compelled testimony." Id. "A person's right to be heard in his defense—a right to his day in court—is basic in our system of jurisprudence." Id. (citations omitted).

In the instant case, the impeachment value of Appellant's prior convictions for breaking and entering into automobiles was very low. Appellant acknowledges this Court affirmed a trial judge's discretionary ruling that a prior conviction for breaking and entering an automobile had impeachment value. See Robinson, 426 S.C. at 600, 828 S.E.2d 214. Nevertheless, the impeachment value offered by Appellant's prior convictions was very low. The fact that Appellant was convicted of breaking into cars did little to call into question his credibility due to the nature of the offense. Nothing about the offense requires one to be inherently dishonest and offers little evidence that one committed of such an offense would act dishonestly. Thus, any impeachment value afforded by the prior conviction was of very little value.

The record fails to disclose "the point in time of the conviction and [Appellant]'s subsequent history." Although the solicitor questioned whether the charges arose in March 2017, which would have been two months before the alleged sexual encounter, Appellant indicated he was unsure of the timing of the charges, and the state failed to carry its burden of proffering evidence to support this factor. See State v. Colf, 337 S.C. 622, 626-627, 525 S.E.2d 246, 248 (2000) (explaining that "Rule 609(b) establishes a presumption against admissibility of remote convictions, and the state bears the burden of establishing facts and circumstances sufficient to substantially overcome that presumption") (internal citation omitted). In light of the state's failure to carry its burden or present any evidence at all regarding the timing of the prior charges, this factor weighs heavily in favor of excluding the prior offenses.

Appellant readily acknowledges that the prior offenses of breaking and entering automobiles were not similar to the offense for which he stood trial. Thus, while the risk that the jury would use the prior offenses to determine Appellant was guilty of the current charge due to any similarity between the two was not present, the risk that the jury would use the prior offenses to conclude Appellant was a criminal, and thus, guilty of the current offenses was still present. Notably, the judge provided the jurors with no guidance on how to use evidence of Appellant's prior convictions. Instead, the judge instructed the jurors to determine the credibility of the witnesses by "consider[ing] whether any witness has exhibited to you any interest or bias or prejudice or other motive in this case. You may also consider the appearance and manner of the witness while on the witness stand." Tr. 353, ll. 20-24. Not once did the judge limit the jury's consideration of Appellant's prior offenses to judging his credibility. Therefore, the jurors were free to use the evidence as substantive evidence of Appellant's guilt.

Appellant's testimony was extremely important to his defense. Although Appellant presented evidence to support his defense, including the testimony of his girlfriend, it was necessary that Appellant deny the alleged sexual encounter. According to Minor, only she and Appellant were in the room when the alleged act occurred. Thus, only Appellant would be able to deny the event. Further, due to the conflicting testimony regarding the date on which the alleged encounter occurred, it was necessary for Appellant to testify to counter Minor's accusations. While he presented some evidence of alibi, he was unable to present a complete alibi in light of the vast date span alleged in the indictment and the inconsistent testimony among the state's witnesses. Frankly, no one would be able to provide a complete alibi in these circumstances. Appellant's testimony was not cumulative to that of other witnesses. Contra

Robinson, 426 S.C. at 603-604, 828 S.E.2d at 215-216 (concluding the defendant's testimony was largely cumulative to the testimony of two other witnesses).

Previously, the Supreme Court explained that "when credibility is central to a case, the introduction of prior convictions for impeachment purposes becomes even more legitimate." Robinson, 426 S.C. at 606, 828 S.E.2d at 217. Appellant acknowledges that credibility was central to the case. In fact, during his closing argument, the solicitor informed the jurors that "[c]redibility is key" and that "[c]redibility is always key in cases such as this." Tr. 324, ll. 14-17. At first blush, then, it appears this factor weighs in favor of admitting Appellant's prior convictions of breaking and entering an automobile. However, a closer examination shows that while Appellant's credibility was important, Minor's credibility was more critical to the state's case. If the state had completely discredited Appellant, the state's evidence against Appellant depended entirely upon Minor's credibility, which was undermined by the state's other witnesses. Therefore, this factor weighs heavily in favor of excluding the evidence of Appellant's prior convictions.

To demonstrate how the entirety of the state's case depended upon the believability of Minor, one need look no farther than the state's closing argument. Importantly, the solicitor tried to explain away Minor's testimony that was internally inconsistent and inconsistent with his other witnesses and documentation. According to the solicitor, Minor's inconsistent testimony was the product of her memory being "affected" by the alleged sexual contact. Tr. 331, ll. 8-15. Relying upon Allison Foster's expert testimony, the solicitor claimed Minor's memory was "affected by anxiety… suppressing, trying to suppress that memory of what happened. Trying to wash it away. Especially, when the child is intent on keeping it a secret." Tr. 331, ll. 8-15.

Comparing what the solicitor said about Minor's credibility against what the solicitor said about Appellant's credibility drives home the point. As seen, the solicitor spent considerable time trying to shore up Minor's credibility. He knew Minor's testimony differed significantly from the testimony of every other witness called by the state, including on the most basic fact of when she arrived in South Carolina. Minor claimed she "blacked out," yet she alleged she could recall every detail of the encounter. Minor provided inconsistent testimony on whether Appellant used a condom. Minor claimed she screamed out; yet, no one in the mobile home heard her. Minor claimed she left her grandparents' bedroom while the two were sleeping; yet, neither heard her leave the room. Recognizing the weaknesses in his case, which depended entirely upon Minor's credibility, the solicitor even called an "expert witness" in an effort to account for Minor's inconsistent and wholly incredible testimony.

On the subject of Appellant's credibility, the solicitor "flipped the script" on defense counsel by using his theme in opening, which was "one of a desperate battle," into "desperate times call for desperate measures." Tr. 335, l. 19-23; Tr. 338, ll. 1-2. The solicitor told the jurors, "Test the evidence. Test the testimony. The judge will mention about credibility and somebody having a reason to lie. Desperate times call for desperate measures." Tr. 337, l. 24 – Tr. 338, l. 2. This was the entirety of the solicitor's attempt to discredit Appellant, which demonstrates that although credibility was central to the case, it was Minor's credibility that was truly at the center of the jury's decision.

The trial judge erred in admitting evidence of Appellant's prior convictions of breaking and entering into automobiles where the Colf factors weighed heavily in favor of exclusion. As discussed, the impeachment value of the offenses was low, the state failed to present evidence of the timing of the prior convictions, there were few similarities between the past crimes and the

charged crimes, Appellant's testimony was extremely important, and the credibility of Minor's testimony was central to the case.

"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). 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 harmless error doctrine "should be employed guardedly . . . and on a case by case basis." State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986).

In Horton v. State, 306 S.C. 252, 411 S.E.2d 223 (1991), the Supreme Court found trial counsel provided ineffective assistance based upon his erroneous advice concerning Horton's prior record. Trial counsel advised Horton not to testify in his own defense because counsel feared Horton would be cross-examined about two prior criminal convictions. The Court determined that one prior conviction, simple possession of marijuana, was clearly not admissible pursuant to governing legal rules and precedent. Turning to Horton's second conviction, the Court found that trial counsel was ineffective for failing to seek a ruling on the admissibility of the second conviction where the admissibility was within the discretion of the trial judge. Although the PCR court

determined that trial counsel's advice was based on tactical decision, the Court found that errors of law were involved which were "rendered more egregious by lack of ambiguity in the law." Further, the Court found trial counsel's errors to have prejudiced Horton where the sole evidence against him was testimony of an undercover police officer concerning an alleged drug buy. Id. at 254-255, 411 S.E.2d at 224-225.

In Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000), the Court found trial counsel ineffective for failing to argue the prejudicial effect of the defendant's prior convictions outweighed their probative value. At Green's trial for distribution of crack cocaine and distribution of crack cocaine within proximity of a school, the prosecutor impeached Green with two prior convictions of possession of crack cocaine and possession of cocaine. Id. at 431, 527 S.E.2d at 100. Although the Court declined to hold that all similar prior convictions are inadmissible, the Court held that trial 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. Id. at 433-434, 527 S.E.2d at 101. The Court held the trial counsel's failure prejudiced Green where his credibility was critical because the jury was forced to choose between his version of events and those expressed by SLED agents. Id. at 434, 527 S.E.2d at 101. Rejecting the state's argument that any error was cured by the trial court's limiting instruction, the Court found persuasive authority in a Fourth Circuit Court of Appeals case:

> Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while undoubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that the defendant committed the similar offense for which he is currently charged.

Id. at 434, 527 S.E.2d at 101 (quoting United States v. Beahm, 664 F.2d 414, 418-419 (4th Cir. 1981)).

In State v. Bryant, 369 S.C. 511, 633 S.E.2d 152 (2006), the Court reversed the defendant's murder conviction, finding that the admission of the defendant's prior firearms conviction was improper under Colf and rejecting the state's argument that its admission was harmless error. Bryant's sole defense was self-defense, which hinged entirely on his own testimony. 369 S.C. at 518, 633 S.E.2d at 156. The Bryant Court found that: "Although, the record contains evidence which may undermine Petitioner's self-defense theory, the record also contains evidence which supports Petitioner's self-defense theory." Id. The Court ruled 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." Id. at 518-19, 633 S.E.2d at 156. Thus, the Court held that the improper admission of Bryant's prior firearms convictions was not harmless. Id. at 519, 633 S.E.2d at 156.

Similar to Bryant, the solicitor should not have been allowed to attack Appellant's credibility with inadmissible prior convictions for three counts of breaking and entering into a motor vehicle. See also State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) ("Error which substantially damages the defendant's credibility cannot be held harmless where such credibility is essential to his defense." (citing State v. Morris, 289 S.C. 294, 297, 345 S.E.2d 477, 479 (1986))); Green v. State, 338 S.C. 428, 434, 527 S.E.2d 98, 101 (2000) (upholding finding of prejudice from failure of trial counsel to argue that the prejudicial effect of the defendant's prior convictions outweighed their probative value where the defendant's "credibility was critical, as the jury had to choose between his version of events and that of the SLED agents"). This error was not harmless due to the necessity of Appellant testifying in his defense to deny the charges and establish his limited alibi defense.

## CONCLUSION

Appellant respectfully requests this Court reverse his conviction and remand for a new trial.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 26th day of October, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Oct 26 2020
SC Court of Appeals

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Appeal from Kershaw County

G. Thomas Cooper, Jr., Circuit Court Judge

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THE STATE,

RESPONDENT,

V.

JONATHAN WILLIAM RAY,

APPELLANT

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CERTIFICATE OF SERVICE

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Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is wblitch@scag.gov; and a copy of the Initial Brief of Appellant and Designation of Matter have been served on Jonathan William Ray, #381582, at Evans Correctional Institution, 610 Hwy. 9 West, Bennettsville, SC 29512, this 26th day of October, 2020.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender
ATTORNEY FOR APPELLANT