

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SEP 12 2022

SC Court of Appeals

Appeal from Horry County

Honorable Benjamin H. Culbertson, Circuit Court Judge

THE STATE,

Respondent

V

Derrick JaJuan Rivera

APPELLANT

APPELLATE CASE No. 2021-061285

Pro-se Brief of APPELLANT

Anders Brief

David Alexander
appellate defender

S.C. Commission on Indigent Defense
Attorney For APPELLANT

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF Authorities ii

Statement of Issue ON APPEAL 1

Statement of the Case 2

Standard of Review 3

Argument - Did the solicitors improper and mis-statements prejudice the appellant in violation of Rule 403?

→ was juror misconduct an issue at trial?

- Did the introduction of .357 ammo prejudice

The appellant 4

Conclusion 14

TABLE OF AUTHORITIES

Cases

• S.C. v Billy Phillips 430 S.C. 319, 844 S.E.2d 651 2020

..... 4, 6, 7, 10

• State Maryland v WHACK 433 Md. 728, 73 A.3d. 186, 189 (2013)

..... 7,

Rules 403

STATEMENT OF ISSUE ON APPEAL

• Did the States Solicitor Scott Hixson err by misstatements about Touch DNA evidence in Closing Arguments?

• Was juror misconduct an issue at trial?

• Was the appellant prejudiced by introduction of .357 ammo at trial?

STATEMENT OF THE CASE

Appellant was indicted in Horry County on two counts of murder and one count of armed robbery and on October 18, 2021, appellant was tried before the Honorable Benjamin H. Culbertson and a Jury. R. 1 Scott R. HIXSON represented the state and William S. McGuire represented appellant, R. 1. The Jury convicted appellant R. 802, 1. 20-803, 1, 9. Judge Culbertson sentenced appellant to concurrent terms of life imprisonment for the murder charges and thirty years imprisonment for armed robbery. R. 813, 1, 14-21. This appeal follows

STANDARD OF REVIEW

This court's Review of the trial court admission of scientific evidence is governed by the abuse

of Discretion Standard. Graves, v CAS medical
SYS, 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012)

also SC vs Council 335 S.C. 1 (1999) /

SC vs Jones 273 S.C. 723 (1979)

The admissibility of Touch DNA evidence is ruled under Rule 403 per the analysis in Phillips for STRmix computer software.

Argument

The appellant was prejudiced by solicitor Scott Hixson's ~~misstatements~~ regarding DNA evidence in closing arguments in violation to Rule 403.

There was a pretrial motion to exclude-suppress Touch DNA evidence according to SC vs Billy Phillips 430 S.C. 319, 844 S.E. 2d 651 (2020). R. Pg 45 - 51, Pg 51 - Pg 118. The motion to suppress DNA was Denied and that was a final Ruling.

At the beginning of the introduction of the Touch DNA evidence Defense Renewed the objection and got a final Ruling by the Trial Judge R. Pg 543 - 544.

During closing Arguments by state solicitor Scott Hixson the solicitor misstated the Value of The DNA Evidence and Implied that Appellant's DNA was Present on Items of evidence R. 729-767

Solicitor Scott Hixson stated that Appellant's DNA was present on shoe found at crime scene and that "Riveras DNA inside the shoe". He

~~stated he knows that, Read pg 766 - Line 14-16~~

Solicitor Scott Hixson also stated in closing arguments "Swab from the interior of the shoe is Derrick Rivera". Also see pg 765 line 7-9

Solicitor Scott Hixson misstated again the Hat contains DNA from appellant and that's from actual contact with the hat Read pg 766 Line 1-4

Solicitor Scott Hixson also stated the Reddish stain on pants is Derrick Rivera. R. Pg 766-23-25 767 Line 1.

Solicitor Scott Hixson stated again that "I know Derrick Rivera's Blood is on the pants"
Read pg 767 line 4-10

Those statements by the solicitor was improper and was misconduct that misled the Jury into Believing my DNA was Present when ~~experts testified that its only a likelihood~~ of these items of evidence containing appellants DNA.

Those misstatements implied that the DNA Results were conclusive to being my DNA in violation of Rule 403 in the case of S.C v. Billy Phillips 430 S.C. 319 (2020)

The solicitors misstatements didnt have to be objected to since Defense attorney already recieved a final Ruling in Pretrial motion and when Defense attorney Renewed objection before the introduction of Touch DNA evidence.

In this case there was no DNA Recovered that could be analyzed and Be Regarded as Conclusive To Items of Evidence Containing Appellants DNA.

Solicitor misstated and overvalued the DNA evidence in multiple statements during closing arguments. These statements did

misled the jury, and confused the issue in violation to Rule 403 and Whack vs

Maryland 433 Md. 728, 73 A.3d 186, 188, 2013),

S.C. v Billy Phillips 430 S.C. 319, 844 S.E.2d 651 (2020)

The case Whack vs State was argued and apart of S.C. v Billy Phillips which was argued in pre-trial motion to suppress DNA evidence.

The solicitor stated The likelihood of the shoe containing Appellant DNA is in the Quadrillions. Read Pg 765, line 7-11.

The actual DNA analysis states the likelihood of the interior of the shoe found at the scene of the crime was 1.2 billion times more likely if Derrick Riverg and two unidentified unrelated individuals contributed to the mixture.

Solicitors Scott Hixson improper statements
over valued the Item of evidence by stating

~~The likelihood of the DNA being Appellant Derrick~~

Rivera's being in the Quadrillions when the
actual DNA analysis of the Item of evidence
is 1.2 billion.

Quadrillions is a very big jump from
a billion. These misstatements were not isolated
nor did it occur only one time but two
different times. See closing Arguments by state.
see DNA analysis of Touch DNA evidence
SLED Lab No L19-13696, Proposition set VI
4.2 Swab from interior of Grey and Black Nike shoe
size 9.5 left in scene stating the likelihood being
1.2 billion and not in the Quadrillions as solicitor
Scott Hixson misstated in closing arguments

Solicitor Scott Hixson also misstated and overvalued the Touch DNA evidence by stating Hair from hat contains my DNA in the Trillions

R, Pg 766 line 1-4,

The solicitor stated "But I know Derrick Riveras Blood's on his Pants" see Pg 767 line 9-11. That's another misstatement. DNA experts who analyzed all items of evidence in this case testified that Appellant Derrick Rivera can't be identified by any Blood DNA evidence collected in this case.

These DNA statistics were generated by STRmix[®] computer algorithm. The DNA evidence was highly prejudicial and did confuse the issue and misled the Jury. The appellant was convicted off of one witnesses testimony which was a admitted liar Bradford Britton. Without this highly prejudicial Touch DNA evidence being improperly presented at trial no Jury would have believed the Co-defendant. This case was strictly Circumstantial evidence and there was no overwhelming

9

evidence of guilt. The solicitors improper statement did prejudiced the appellant by misrepresenting and overstating the value of Probabilistic Touch DNA Evidence.

STRmix has never been approved by a South Caroling appellate court. As discussed in Phillips use of statistics regarding Touch DNA has great potential to mislead the Jury. The states experts admitted that it was possible The appellant never touched the tested items, without this DNA Evidence, the state primarily had only the liar Britton's testimony to convict appellant. The appellant was prejudiced by the solicitors mistatement during closing arguments and appellants conviction should be reversed.

Issue # 2

During the Guilt phase of trial of appellant It was discovered by a witness that members of the Juror were discussing appellants case.

This constitutes Juror misconduct.
This misconduct in question was not discovered
until after trial. In which a witness notified
~~Defense attorney and reported this misconduct.~~

Defense attorney William S. McQuire did
note this and the Jurors were identified.
Therefore the Appellant Request a Post trial
evidentiary hearing to determine if Juror
misconduct prejudiced the appellant at trial.

This misconduct could have caused a guilty
Verdict. So the appellant ask the court of appeals
to grant a evidentiary hearing in this matter.

Issue 3

Did the trial court err in admitting .357
ammunition into evidence at appellant trial?

over defense counsels objection to .357 ammo
Trial Judge Ruled the ammo admissible see
Pg. 690-694.

During opening statement the solicitor Scott Hixson stated the weapon used in this case was a 38. special. R. Pg 141, line 14.

~~Also During interrogation the co-defendant described~~
the appellant as having a .32 or 38 caliber revolver on the night of the crime.

When appellant was arrested he was arrested at his step-father's trailer in agora court, smoaks S.C. Evidence use a trial was found there and 11,357 shells/ammunition was found and used against appellant.

The appellant argues he's been prejudiced by the presentation of these .357 ammo because .357 ammo cannot fit into a .38 special.

There was never a weapon recovered in this case to identify a certain caliber weapon used to murder the two victims.

Appellant's mother Desiree Crockett did advise counsel that that was her trailer and ammunition because she used to own a .357 revolver

The presentation of the .357 ammo did prejudice the appellant because it made it look as if appellant possessed a .357 handgun which could fire a .38 special bullet.

There was never a .357 weapon found in this case. This evidence was argued and wasn't a fact in this case.

By the state introduction of this ammo it goes contrary to a witness/co-defendant Bradford Britton's testimony that it was a .38 special and solicitor Scott Hixson's testimony in opening statements that the weapon used was a .38 special.

Weapons expert Jana Weaver testified that .357 is bigger than a .38 special bullet.
R. 681 line 22-23

For the above referenced issue the appellant's sentence should be reversed and a new trial granted.

Conclusion

For the foregoing Reasons, appellants conviction should be reversed and this case remanded for a new trial

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✓

Derrick JaJuan Rivera

Appellant

Appellant Case NO. 2021-001285

Certificate of Service

The undersigned hereby certifies a true copy of Pro-se merits brief as part of Anders brief filed by counsel David Alexander. The above referenced case has been served to Court of Appeals Jenny ABBOTT KITCHINGS, clerk, P.O. Box 11629 Columbia SC 29211, this day August 19, 2022

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RESPONDENT,

V.

DERRICK JAJUAN RIVERA,

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APPELLATE CASE NO. 2021-001285

ANDERS BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

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Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993)..... 6, 7, 8

Graves v. CAS Medical Sys., 401 S.C. 63, 735 S.E.2d 650 (2012) 3

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)..... 6, 7, 8

State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) 6

State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020)..... 6, 7, 9

United States v. Gissantaner, 417 F.Supp.3d 857 (W.D. Mich. 2019) 8

Watson v. Ford Motor Co., 389 S.C. 434, 699 S.E.2d 169 (2010)..... 8

Other Authorities

Eli Siems, Katherine J. Strandburg, Nicholas Vincent, Trade Secrecy and Innovation in Forensic Technology, 73 Hastings L.J. 773 (April 2022) 9

Rules

Rule 403, SCRE..... 1, 4, 6

Rule 702, SCRE..... 1, 4

STATEMENT OF ISSUE ON APPEAL

Did the trial court err in admitting computer-generated statistical probabilities regarding DNA evidence in violation of Rules 702 and 403 of the South Carolina Rules of Evidence?

STATEMENT OF THE CASE

Appellant was indicted in Horry County on two counts of murder and one count of armed robbery and on October 18, 2021, appellant was tried before the Honorable Benjamin H. Culbertson and a jury. R. 1. Scott R. Hixson represented the State and William S. McGuire represented appellant. R. 1. The jury convicted appellant. R. 802, l. 20 – 803, l. 9. Judge Culbertson sentenced appellant to concurrent terms of life imprisonment for the murder charges and thirty years' imprisonment for armed robbery. R. 813, l. 14 – 21. This appeal follows.

STANDARD OF REVIEW

This Court's review of the trial court's admission of scientific evidence is governed by the abuse of discretion standard. Graves v. CAS Medical Sys., 401 S.C. 63, 74, 735 S.E.2d 650, 655 (2012).

ARGUMENT

The trial court erred in admitting computer-generated statistical probabilities regarding DNA evidence in violation of Rules 702 and 403 of the South Carolina Rules of Evidence.

Admitted liar Bradford Britton (“Britton”) robbed a bingo parlor in Myrtle Beach, South Carolina with at least one accomplice. R. 522, l. 22 – 523, l. 12. The father-and-son owners of the bingo parlor were shot and killed by one of the robbers. R. 345, l. 19 – 346, l. 10. After telling numerous lies to the police about his involvement and the identity of his accomplice, Britton finally settled on blaming appellant for the robbery and the shootings. R. 475, l. 13 – 477, l. 6. But for improperly admitted DNA statistics, no reasonable jury could have believed Britton and appellant would have been acquitted.

On the night of July 26, 2019, an armed man burst into Waccamaw Bingo. R. 164, l. 6 – 168, l. 21. The man ran to the office. R. 169, l. 5 – 17. An employee heard a struggle inside the office. R. 172, l. 4 – 18. The robber left through the back door. R. 179, l. 3 – 7. The employee found Stephen Johnson, Jr. and Stephen Johnson, Sr. injured inside the office. R. 179, l. 5 – 181, l. 2. Both men died from gunshot wounds. R. 345, l. 19 – 346, l. 10.

Surveillance video inside the bingo hall captured portions of the crime. State’s Ex. 12. A Black man wearing a gray long-sleeved shirt, long gray pants, a black cap, and a white covering over his face runs into the bingo hall. State’s Ex. 12. The robber also has a black string backpack. State’s Ex. 12. Stephen Jr. runs into the office holding a gun to help his father. State’s Ex. 12. Both men had guns, but the bullets recovered from their bodies at the autopsies were either a .357 or .38 special and did not match the owners’ guns. R. 681, l. - 684, l. 4. The police never recovered the firearm used to shoot the Johnsons. R. 681, l. - 684, l. 4.

Surveillance video from other businesses and an alert security guard working in an adjoining neighborhood led police to a silver Volkswagen Jetta they tied to Britton. R. 361, l. 9 – 365, l. 8. R. 336, l. 6 – 338, l. 13. R. 414, l. 2 – 415, l. 15. The neighborhood had a license plate reader. R. 399, l. 9 – 403, l. 9. The police arrested Britton and interviewed him multiple times. R. 415, l. 12 – 15. R. 415, l. 13 – 427, l. 21.

Britton repeatedly lied to the police. Britton first denied any involvement and told the police he loaned his car to somebody. R. 420, l. 1 – 7. The officers could hear Britton's guts churning and Britton had to go to the bathroom. R. 420, l. 8 – 16. Britton then lied about the involvement of men named "G" and "Trey." R. 420, l. 17 – 424, l. 12. Britton eventually settled on naming "Mug" as his accomplice and "Mug" turned out to be appellant. Tr. 424, l. 10 – 426, l. 20.

The police agreed on cross-examination that whenever Britton made a statement that could be proved or disproved, it turned out to be a lie. R. 455, l. 15 – 19. The police told Britton that if he did not "give somebody up" that he would "eat this murder charge." R. 496, l. 12 – 16. The police also told him they could not count the number of lies he told. R. 455, l. 2 – 8. When asked by defense counsel to rate himself on a scale from one-to-ten for honesty, Britton told the jury he was a "Ten." R. 504, l. 1 – 5. Despite telling multiple lies and making up people who were involved, Britton rated his honesty with the police "a nine." R. 504, l. 7 – 13. Britton was the only person to identify Rivera as the robber.

The police found items the robber left behind at the bingo hall. R. 237, l. 8 – 241, l. 7.

They found a Nike sneaker, a string black bag, and a cap that had fake dreadlocks. R. 237, l. 8 – 248, l. 17. The shoe found in the office was size 9.5. R. 250, l. 10 – 15. The police also found clothing in the adjoining neighborhood that matched the clothing worn by the robber. R. 229, l.

18 – 230, l. 17. R. 261, l. 22 – 262, l. 6. The police obtained the other sneaker, a white t-shirt, a gray shirt, and gray pants. R. 229, l. 18 – 230, l. 17. R. 261, l. 22 – 262, l. 6.

When the police arrested appellant, he was wearing a size 11.5 shoe. R. 460, l. 10 – 461, l. 15. A police officer said he was not aware whether anyone measured appellant’s foot. R. 663, l. 15 – 16. Defense counsel gave the officer a measuring tool and offered to let him measure appellant’s foot in the courtroom, but the solicitor objected. R. 664, l. 3 – 19.

The police tested the items found at the bingo hall and the neighborhood for DNA. R. 536, l. 5 – 577, l. 15. Prior to trial, the court heard appellant’s motion to suppress the DNA evidence. R. 51, l. 16 – 118, l. 9. Appellant argued that under State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979), State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), the state’s use of an algorithm called STRMix to determine the probabilities of a person’s DNA being part of a mixture of DNA was unreliable. R. 51, l. 21 – 52, l. 6. The State argued the STRMix probabilities were admissible under State v. Phillips, 430 S.C. 319, 844 S.E.2d 651 (2020), and proffered the testimony of three witnesses on the DNA procedure used. R. 52, l. 9 – 53, l. 20. The trial judge ruled the STRMix testimony was reliable and admissible under Daubert, Council, and Rule 403 per the analysis in Phillips. R. 117, l. 19 – 118, l. 9.

The State’s experts, using STRMix, testified that DNA found on the crotch of the gray pants was “single source” and 210 million times more likely to be appellant’s than an unrelated unidentified individual. R. 551, l. 1 – 24. DNA from the thigh of the gray pants was a mixture of two individuals and STRMix said it was 13 million times more likely to be appellant and an unknown individual than two unknown individuals. R. 552, l. 21, - 553, l. 24. The knee area of

the pants was a mixture of two people and STRMix said it was 180 septillion times more likely to be appellant than two unknowns. R. 554, l. 4 – 555, l. 2.

The strings from the black bookbag produced DNA from three individuals. R. 567, l. 22 – 568, l. 19. The computer algorithm calculated a probability that appellant and two unknowns contributed to the mixture as 31 trillion times more likely. R. 567, l. 22 – 568, l. 19. Mixtures and similar probabilities with gigantic numbers including appellant were also given by STRMix on the dreadlocks hat and shoe found at the bingo hall. R. 568, l. 20 – 574, l. 20.

Defense counsel asked Britton whether he ever let appellant use his house to “entertain a lady” and Britton denied it, stating his honesty was a “ten” on this point before the jury. R. 528, l. 12 – 19. After being confronted with transcripts of his interviews with police, Britton admitted he told them that appellant had “the run of” his house. R. 528, l. 22 – 529, l. 13. Britton denied that he and his accomplices used appellant’s clothing that appellant left behind at Britton’s house to commit the robbery. R. 530, l. 21 – 531, l. 2. Britton was a “ten” on this answer. R. 531, l. 3 – 4. The State’s DNA experts candidly admitted that this scenario, called transference, was a possible explanation for the DNA results. R. 556, l. 22 – 557, l. 4. R. 575, l. 17 – 576, l. 15. One of the experts admitted it was possible appellant never touched any of the items. R. 577, l. 13 – 15.

The trial court erred in admitting the highly prejudicial and unreliable STRMix testimony. In order to be admissible, scientific evidence must be evaluated to determine “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.” Council at 19, 515 S.E.2d at 517. After Phillips, also relevant is the inquiry from Daubert. Phillips at 343, 844 S.E.2d

at 663 (referring to a “Daubert/Council hearing”). The Council Court listed the Daubert factors as: “(1) scientific methodology; (2) peer review; (3) consideration of general acceptance; and (4) the rate of error of a particular technique.” Council at 20, 515 S.E.2d at 518. The trial court must be the gatekeeper to prevent unreliable, confusing, and misleading scientific evidence from reaching the jury. Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 174 (2010).

The State’s proffer did not satisfy these requirements regarding how STRMix works. The State’s experts described STRMix as software with algorithms that compute DNA probabilities for mixtures after the analyst develops the DNA profiles. R. 91, l. 4 – 8. While one of the experts said he learned the math for the algorithm, he admitted he had not reviewed the code for the software. R. 91, l. 19 – 24. He assumed that no one at SLED had reviewed the code. R. 91, l. 25 – 92, l. 12. Furthermore, the experts could not provide the exact reliability statistics verifying STRMix’s calculations. R. 112, l. 15 – 115, l. 25.

STRMix has never been approved by a South Carolina appellate court. A federal district judge in Michigan ruled that STRMix did not satisfy the Daubert standard. See United States v. Gissantaner, 417 F.Supp.3d 857 (W.D. Mich. 2019) reversed United States v. Gissantaner, 990 F.3d 457 (6th Cir. 2021). The district judge found that STRMix had not been adequately tested and validated for the type of DNA evidence the government presented in that case. Gissantaner, 417 F.Supp.3d at 877. The judge found the peer review data to be “equivocal.” Id. at 879. The court did not find either the error rate or the general acceptance in the scientific community factors to weigh heavily towards admission of STRMix. Id. at 880-84. While the Sixth Circuit reversed
Judge Sutton’s decision on STRMix, appellant would urge this Court to adopt the district court’s conclusions. Scholars have criticized the use of algorithms and other forensic technology hidden

behind trade secrets. See Eli Siems, Katherine J. Strandburg, Nicholas Vincent, Trade Secrecy and Innovation in Forensic Technology, 73 *Hastings L.J.* 773 (April 2022).

As discussed in Phillips, use of statistics regarding touch DNA has great potential to mislead the jury. The State's experts admitted that it was possible that appellant never touched the tested items. Without this DNA evidence, the State primarily had only the liar Britton's testimony to convict appellant. The trial judge erred in allowing the STRMix testimony and appellant's convictions should be reversed.

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