STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Steven H. John, Circuit Court Judge

Opinion No. 2013-UP-063 (S.C. Ct. App. filed 1/30/2013)

07-GS-26-2961, 2962, 2963, 08-GS-26-2698

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

PETITIONER

APPELLATE CASE NO. 2013-000805

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on 3/20/2013.

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming the trial court allowing into evidence a pair of tennis shoes alleged to connect Sessions with sole prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were removed from a bag at the detention center purported to contain Session's personal belongings.

2. Whether the Court of Appeals erred in affirming the trial court allowing SLED "victimologist" Mike Prodan to testify about the "victiomology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), and - since it involves the same witness—State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2010) *rev'd* 398 S.C. 376, 728 S.E.2d 468 (2012).

STATEMENT OF THE CASE

On February 2 through 6, 2009, Petitioner Jimmy Lee Sessions and Christopher Stephens stood trial in Horry County, before Judge Stephen H. John and a jury, on indictments charging Sessions with two counts of murder and one count each of first-degree burglary and armed robbery and for co-defendant Stephens accessory before the fact of the two murders and armed robbery. The State alleged that in June 2006 Sessions, with the assistance of Stephens, had robbed and murdered a mid-level drug dealer, Jamilla Hytower, and her roommate, Monica Wall.

The first trial of these charges in November 2008 ended with the judge declaring a mistrial (and dismissing accessory charges against Christopher Stephens' brother, Marshall, for lack of evidence) after the jury deadlocked. The State's case against Sessions and Stephens depends almost entirely upon the testimony of James Pearl, who claims he opted out of their plan to rob and murder Hytower. R. p. 122, line 22 – R. p. 125, line 18.

On trial, the defense focused upon the unreliability of the State's evidence against Sessions and Stephens. Counsel pointed out that several other suspects had motives to murder Hytower and Wall as well. The jury convicted both defendants as charged, and the judge sentenced Sessions to concurrent terms of life imprisonment for the two murders, thirty years for first-degree burglary and thirty years for armed robbery, and Stephens to concurrent terms of forty years on each of the two accessories before the fact of murder and thirty years for accessory before the fact of armed robbery.

Sessions filed a notice of appeal which the Court of Appeals affirmed on January 30, 2013. State v. Sessions, Op. No. 2013-UP-063 (Ct. App. filed January 30, 2013). App. 1 – 4. Appellate counsel filed a petition for rehearing which the Court of Appeals denied on March 20, 2013. App. 13. This petition for a writ of certiorari follows.

QUESTION

I.

The Court of Appeals erred in affirming the trial court allowing into evidence a pair of tennis shoes alleged to connect Sessions with sole prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were removed from a bag at the detention center purported to contain Session's personal belongings.

The State alleged that in June 2006, Sessions, with the assistance of his co-defendant Christopher Stephens, had robbed and murdered a mid-level drug dealer, Jamilla Hytower, and her roommate, Monica Wall. The State's case against Sessions and Stephens depends almost entirely upon the testimony of James Pearl, who claimed he opted out of their plan to rob and murder Hytower. R. p. 122, line 22 – R. p. 125, line 18.

An trial, the defense focused upon the unreliability of the State's evidence against Sessions and Stephens and pointed out that several other suspects had motives to murder Hytower and Wall as well. The person who murdered Jamilla Hytower and Melissa Gomez quite possibly left shoeprints in a bathroom and in the kitchen. R. p. 416, lines 14-19; R. p. 459, line 22- R. p. 460, line 10. The murders occurred in July 2006. Sessions was arrested in Connecticut three months later. R. p. 430, lines 8-19. A private extradition company transported him to Horry County on November 27, 2006. R. p. 434, lines 9-15.

On May 11, 2007, the detention center issued a memo stating that inmates would no longer be allowed to possess their own shoes. R. p. 436, lines 8-10. A captain with the detention center testified:

> The memo instructed the officers to begin on the following Sunday collecting them and placing them in the property bag. ... The officers would have collected them. They put them in a clear plastic bag and then they put them in the inmates' property bag.

R. p. 436, lines 10-17. The captain continued: "[W]e have no way of knowing that these are the ones [Sessions] wore in," she admitted, nor was she present "when they were collected." R. p. 490, lines 12-22. Moreover, "[a]ny officer" at the detention center had access to the room where the inmates' personal belongings were kept." R. p. 438, lines 20-25. The State seized the pair of shoes alleged to belong to Sessions from the property room in December 2008, a year and a half after the memo and nearly two years after the arrest. R. p. 429, line 24 – R. p. 430, line 6.

Defense counsel objected to the admission of the shoes on the ground that "we would need to have somebody to say how they got into this chain and I don't think we have that." R. p. 431, lines 5-22; R. p. 474, lines 22-24; R. p. 486, line 23- R. p. 487, line 3. The judge overruled the objection and the shoes were admitted into evidence. R. p. 487, line 20 – R. p. 489, line 25.

A SLED expert in footwear impression examination testified that the tennis shoes taken from the detention center were consistent with the sole prints found in the kitchen and the bathroom at the crime scene. R. p. 498, lines 19-24; R. p. 505, line 23- R. p. 506, line 20. The Assistant Solicitor exploited this evidence in closing:

> Told you these shoes came off Jimmy Lee Sessions... [T]hey are consistent with a print left where no print should be. ... Don't reward him because he was not smart enough to get rid of those shoes.

R. p. 1009, lines 1-20.

State v. Glenn, 328 S.C. 300, 492 S.E.2d 393, 395 (1997), succinctly summarizes the chain-of-custody law:

> Because fungible items such as drugs or blood samples are not readily identifiable and may be easily tampered with, the party

> offering such items into evidence must establish a chain-of-custody as far as practicable. [Citations omitted.] Where the analyzed substance is passed through several hands, the evidence must not leave it to conjecture as to had it and what was done with it between the taking an analysis. However, the proof of chain-of-custody need not negate all possibility of tampering, but instead must only establish a complete chain of evidence as far as practicable. [Citations omitted.]
>
> While the chain of custody requirement is strict where fungible evidence is involved, where the issue is the admissibility of non-fungible evidence – that is evidence that is unique and identifiable – the establishment of a strict chain of custody is not required ... [i]f the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the item is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit nearly on the basis of testimony that the item is the one in question and is in a substantially unchanged condition. On the other hand, if the offered evidence is of such a nature as not to be readily identifiable, or to be susceptible to alteration by tampering of contamination, the sound exercise of the trial court's discretion may require a substantially more elaborate foundation. A foundation of the latter sort will commonly entail testimony tracing the "chain-of-custody" of the item with sufficient completeness to render it reasonably probable that the original item has neither been exchanged with another nor been contaminated or tampered with. [Citations and quotation marks omitted.]

See, also State v. Freiburger, 366 S.C. 125, 620 S.E.2d 737 (2006).

In short, the State was unable to account for these tennis shoes until after they were removed from personal-property room in December 2008, one month after the case against Sessions and Stephens ended in a mistrial. No witness testified that those shoes were ever worn by Sessions.

The Court of Appeals held that that where the issue is the admissibility of non-fungible evidence—that is, evidence that is unique and identifiable, the establishment of a strict chain of custody is not required, and that the possession of the shoes would go to the weight of the evidence. App. 2. The Court misapprehended the issue in this case because there was no way to prove that the shoes were Sessions' based on all that had happened in between as described above.

Tennis shoes are hardly unique. It is not as though they have serial numbers. The law should not be read, as the Court of Appeals did, to utterly do away with a chain requirement in the disturbing vague factual context here. Due to this failure in the chain of custody, the Court should reverse Sessions' convictions and remand for a new trial. The shoes were significant evidence against Sessions and were not reliable evidence due to the lack of a chain of custody.

QUESTION

II.

The Court of Appeals erred in affirming the trial court allowing SLED "victimologist" Mike Prodan to testify about the "victiomology, method of operation, motive, things like that," of the murders, as his testimony violated Rule 702, SCRE, State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), and - since it involves the same witness—State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2010) *rev'd* 398 S.C. 376, 728 S.E.2d 468 (2012).

In February 2009, SLED "victimologist" Mike Prodan testified about "victimology, method of operation, motive, things like that" – the Assistant Solicitor's description of his content—in an effort to bolster the State's forensically-troubled prosecution of Sessions and Stephens. On April 9, 2009 the Court of Appeals found Prodan's testimony about "victimology" to be both irrelevant and unduly prejudicial. State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2010)) *rev'd* 398 S.C. 376, 728 S.E.2d 468 (2012).

Shortly afterwards, the Supreme Court decided State v. White, 676 S.E.2d 687, which held, "All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's singular gatekeeping function in insuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration." The Court of Appeals then granted rehearing in *Tapp*, and in its refiled opinion, reversed and remanded for a new trial finding that it was error to qualify Prodan as an expert witness because:

> [W]ithout the guidance of the White decision, Tapp was not able to sufficiently develop and pursue theories in which to challenge Prodan's qualification; nor was the trial court given the opportunity to address the issue. We find that given the deficient nature of the record on this issue it would be imprudent of this court to attempt to fashion a test or rule for the qualification of a crime scene analyst or victimologist. Rather, justice demands this burden first be placed

> upon the trial court after allowing the parties to fully develop the issue.

The Supreme Court granted the state's petition for certiorari, and issued an opinion in 2012 reversing the Court of Appeals and reinstating Tapp's convictions. State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012). This Court elsewhere agreed with the Court of Appeals regarding the inadmissibility of the evidence under challenge.

In the present case, the State gave the defense no notice that they intended to call Prodan as an expert witness in victimology. R. p. 572, line 21 – R. p. 573, line 16.

The defense objected to Prodan's testimony on the grounds of relevance and as speculative. R. p. 582, lines 8-18; R. p. 602, lines 6-18. The judge overruled the objections and allowed Prodan to testify. He essentially took the facts as presented by the State and constructed a narrative supporting the State's theory of the case. Prodan's testimony is reproduced in the Record on Appeal at pages 568 through 611. A sense of its content is given by the following exchange:

> Assistant Solicitor: What is the significance of finding no drugs [and] no money in the house of [a] mid-level drug dealer?
>
> Prodan: It's a reasonable conclusion that the motive was... the forcible taking of the money and the drugs and that the individual was willing to kill to do that.

R. p. 605, lines 13-17. The Assistant Solicitor exploited Prodan's testimony in his closing to bolster the State's case.

> He[Sessions]takes Jamilla [Hytower] back to the bedroom. Doesn't know Monica is in bathroom yet. And he takes her and he put her down on the floor. He grabs these pillows, grabs it, slams down on her head, puts the gun to the back of her head because as Mike Prodan said, "it's a lot easier to shoot that pillow than to shoot Jamilla Hytower."

R. p. 1010, lines 17-20.

The Court of Appeals held that the trial judge erred in admitting Prodan's testimony without making his own determination as to whether it was reliable. However, the. Court found no reversible error because beyond a reasonable doubt the trial error did not contribute to the guilty verdict. App. 2-4. That the error had little, if any, likelihood of affecting the verdict must be stated beyond a reasonable doubt. See State v. Black, 400 S.C. 10, 27, 732 S.E.2d 880, 890 (2012) *citing* Chapman v. California, 386 U.S. 18 (1967).

The Court misunderstood the issue as Prodan's testimony was unduly prejudicial to Sessions without a finding of its reliability. In short, Prodan's testimony violated Rule 702, State v. White and –obviously—State v. Tapp. Prodan's testimony was very prejudicial given that he led the jury to believe that his "science" dictated that the murderer or murderers knew the victim and he told the jurors that Hightower only sold drugs "if there was previous notification." R. 595, l. 1 – 596, l. 14.

The Supreme Court held in State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) that "under White, after qualifying Prodan as an expert, the circuit judge should have then evaluated the substance of Prodan's testimony to determine if it was reliable, as required by Rule 702, SCRE." Although the Supreme Court found that admitting Prodan's testimony before vetting it for its reliability was error, they found the error to be harmless. The Supreme Court found no reversible error because beyond a reasonable doubt the trial error did not contribute to the guilty verdict.

The admission of Prodan's testimony in Sessions' case was certainly error and was certainly not harmless. Sessions' case is distinguished from Tapp because Prodan testified in Tapp that the victim had a low risk for encountering a violent crime. Prodan said the decedent Hytower had a moderate risk of encountering a violent crime due to her drug sales. R. 589,ll. 16 - 590, ll. 5. Prodan said Hightower only sold drugs if there were previous notification. R. 595, ll. 1 – 596, ll. 14. Tapp confessed to a cellmate that he murdered the decedent in that case.

The Supreme Court held in Tapp, Id., that whether an error is harmless depends on the circumstances of the particular case.

Prodan's testimony in Sessions' case was not harmless because he also testified that both decedents were controlled by the murderer. R. 597, ll. 14 – 598, ll. 21. Prodan stated that there was "always a motive for murder and that the concept of murder without motive was a media myth." R. 608, l. 11 – 609, l. 8.

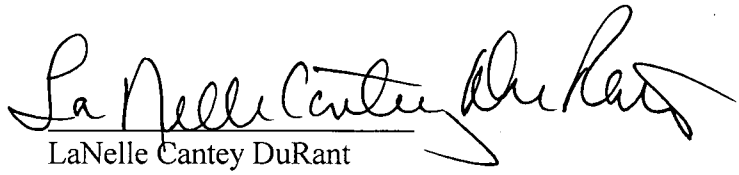
Appellant respectfully submits that Prodan's junk science testimony – which the solicitor exploited – was very prejudicial and this Court should reconsider its holding that the error was harmless beyond a reasonable doubt. The Supreme Court wrote in Tapp, *supra,*: " engaging in the harmless error analysis, we note that our jurisprudence requires us not to question whether the State proved its case beyond a reasonable doubt, but whether beyond a reasonable doubt the trial error did not contribute to the guilty verdict."

Prodan's testimony was very prejudicial given that he led the jury to believe that his "science" dictated that the murderer or murderers knew the victim. And, that murder without motive was also a media myth. The solicitor argued for Prodan in his closing argument. The state strongly desired the jury to believe that the motive here for the murder was a drug dispute between people who knew each other well.

CONCLUSION

Based on the above, certiorari should be granted, and the convictions and sentences reversed, and the case remanded for a new trial.

Respectfully submitted,



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of June, 2013

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CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on William Edgar Salter, III, Esquire, and the S.C. Court of Appeals this 19th day of June, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 19th day of June, 2013.

_____(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.