STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. Supreme Court

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

PETITIONER

APPELLATE CASE NO. 2013-000805

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Jimmy Lee Sessions, Appellant.

Appellate Case No. 2009-116987

Appeal From Horry County
Steven H. John, Circuit Court Judge

Unpublished Opinion No. 2013-UP-063
Heard October 3, 2012 – Filed January 30, 2013

AFFIRMED

Joseph L. Savitz, III, and LaNelle Cantey DuRant, both of Columbia, for Appellant.

Senior Assistant Attorney General W. Edgar Salter, III, of Columbia, for Respondent.

PER CURIAM: Jimmy Lee Sessions and co-defendant Christopher Stephens were convicted in a joint trial on indictments charging Sessions with murder, first-degree burglary, and armed robbery and Stephens with various counts of accomplice liability. On appeal, Sessions argues the trial judge erred in admitting

certain physical evidence and in allowing a SLED employee to testify about victimology and related matters. We affirm.

1. The bodies of the two victims were found in the apartment they shared. Evidence at the crime scene included shoe prints that were left in fecal matter on the floor of the bathroom where one of the victims was found. About five months after Sessions was arrested and charged, the Horry County Detention Center, where Sessions was in custody awaiting trial, instructed its staff to collect all inmates' shoes and place them in the property bag assigned to the respective inmate. Pursuant to a search warrant, the State seized a pair of tennis shoes that had been taken from Sessions after they were confiscated by the Detention Center staff and placed into his property bag. Over Sessions's objections, the trial judge allowed the State to introduce the shoes taken from his property bag so that the jury could compare them with the impressions found at the crime scene. On appeal, Sessions argues this evidence should have been excluded because the State failed to establish an adequate chain of custody. We disagree. There was no dispute that this evidence was non-fungible and that Sessions had the shoes in his possession when all inmates' shoes were taken by the Detention Center staff. *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741-42 (2005) ("[W]here 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."). Furthermore, we agree with the trial judge that any arguments about the ownership or possession of the shoes would go to the weight of the evidence rather than its admissibility. *Cf. State v. Rogers*, 361 S.C. 178, 187, 603 S.E.2d 910, 915 (Ct. App. 2004) ("South Carolina law does not require testimony as to the exclusion of any possibility of tampering.").

2. Sessions further argues the trial judge should not have allowed SLED Agent Michael Prodan to testify as an expert about victimology, method of operation, motive, and related subject matter, arguing admission of this testimony violated Rule 702, SCRE, *State v. White*, 382 S.C. 265, 676 S.E.2d 684 (2009), and this court's opinion in *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). We find no reversible error.

In *State v. White*, the South Carolina Supreme Court held:

> [T]he trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702 [of the South Carolina Rules of Evidence],

> whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

White, 382 S.C. at 274, 676 S.E.2d at 689. The *White* decision was issued several months after the trial in the present case took place.

At trial, Sessions objected to Prodan's testimony, arguing among other grounds that it was not relevant. The trial judge qualified Prodan as an expert in the areas of behavioral science and violent crime without evaluating the reliability of the substance of his testimony. Although Sessions did not specifically request the trial judge to exercise a gatekeeping role in determining whether Prodan's testimony was admissible, we hold Sessions's objection on the ground of relevance was sufficiently specific to address this argument on appeal. *See* Rule 401, SCRE ("'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."); *State v. Tapp*, 398 S.C. 376, 385-86, 728 S.E.2d 468, 473 (2012) ("While our preservation rules require that objections to the admissibility of evidence be specific, they most certainly do not require clairvoyance.") (citation omitted). Moreover, we hold that even though the law at the time of Sessions's trial allowed the reliability of nonscientific expert testimony to be determined by the jury, the trial judge erred in admitting Prodan's testimony without making his own determination as to whether it was reliable. *See id.* at 389, 728 S.E.2d at 475 (acknowledging the trial judge erred in admitting certain expert testimony after making an initial determination of the witness's expertise but without vetting the testimony for its reliability).

Nevertheless, we hold that "beyond a reasonable doubt the trial error did not contribute to the guilty verdict[s]" against Sessions. *Id.* at 390, 728 S.E.2d at 475. Here, Prodan's testimony concerned only the victims and the crime scene. He never identified Sessions, the co-defendant, or anyone else as a perpetrator and testified that at his insistence, he was not given any information about any suspects developed in the case. As was the case in *Tapp*, the jury made numerous factual

determinations in arriving at its verdict, including (1) whether shoe prints found at the crime scene matched the shoes taken from Sessions's property bag, (2) whether the shoes taken from Sessions's property bag were the same shoes he had on his person when he was initially taken into custody, (3) the reliability of a witness who allegedly heard Sessions and his co-defendant discussing how they would rob and possibly kill one of the victims, (4) the same witness's claims that the defendants requested his assistance in the crime, (5) the reliability of the testimony of Sessions's own expert in the field of footwear identification. Given these and other factual questions, we hold that any error in the trial judge's failure to properly vet Prodan's testimony for its reliability was harmless, and (6) the credibility of testimony that certain individuals knew about the deaths of the victims before the police found their bodies.

AFFIRMED.

HUFF, THOMAS, and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

APPELLANT

APPELLATE CASE NO. 2009-116987

Appeal from Horry County

Steven H. John, Circuit Court Judge

Opinion No. 2013-UP-063

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on January 30, 2013. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Sessions argued two issues on appeal: (1) the trial judge committed reversible error by allowing into evidence a pair of tennis shoes alleged to connect Sessions with prints left at the crime scene, as the State failed to establish the provenance of the shoes before December 2008, when they were taken from a bag at the detention center purported to contain Session's personal belongings;

(2) the trial judge committed reversible error by 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.

The Court of Appeals affirmed the trial court on both issues. On Issue One, the Court held 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. On Issue Two, the Court 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.

The court misapprehended the issues.

ISSUE ONE: 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 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 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. "[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. R. p. 429, line 24 – R. p. 430, line 6.

Defense 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 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. The Court misapprehended th 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.

Due to this failure in the chain of custody, the Court should reverse Sessions' convictions and remand for a new trial.

ISSUE TWO: 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, in an opinion since withdrawn, 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).

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 certiorrai, 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).

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 closing to bolster the State's case. 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. 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 error and was not harmless.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its ruling.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

This 14th day of February, 2013.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Horry County

Steven H. John, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JIMMY LEE SESSIONS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of February, 2013.

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 14th day of February, 2013.

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

The South Carolina Court of Appeals

The State, Respondent,

v.

Jimmy Lee Sessions, Appellant.

Appellate Case No. 2009-116987

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:
W. Edgar Salter, III
LaNelle Cantey DuRant
Melanie Huggins-Ward

MAR 20 2013

OFFICE OF APPELLATE COURT

FILED
March 20, 2013