STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Steven H. John, Circuit Court Judge

Opinion No. 2013-UP-062 (S.C. Ct. App. filed 1/30/2013)

07-GS-26-2974,2975, 2976

THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

PETITIONER

Appellate Case No. 2013-000793

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

ROBERT M. DUDEK
Chief 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.

INDEX

CERTIFICATE OF COUNSEL

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

QUESTIONS PRESENTED

1.

Whether the Court of Appeals erred by holding that the error of the trial court in admitting the testimony of SLED "victimologist expert" Mike Prodan was harmless error, since his speculative, irrelevant, and inadmissible testimony under State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) impermissibly led the jury to believe the relationship between petitioner and the decedent was consistent with the motive for and the circumstances of the murder?

2.

Whether the Court of Appeals erred by holding the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at petitioner in anger about the money he owed her for drugs was admissible as an "adoptive admission" since petitioner was present and did not deny it since some accusations or assertions, including this one, are not worth of a response and the legal principle of an "adoptive admission" was therefore inapplicable?

STATEMENT OF THE CASE

Petitioner was indicted by the Horry County Grand Jury for two counts of accessory before the fact of murder and one count of accessory before the fact of armed robbery. R. p. 1059. Petitioner's co-defendant, Jimmy Lee Sessions, was indicted for two counts of murder, burglary in the first degree and armed robbery. R. p. 1051.

Their joint cases were called to trial on February 2, 2009, before the Honorable Stephen H. John and a jury. Bobby Frederick and Laura Hiller represented petitioner. Johnny Gardner represented co-defendant Sessions. Bradley Coy Richardson and Donna Elder were the assistant solicitors. R. 1.

At the conclusion of the trial on February 6, 2009, the jury found petitioner guilty of two counts of accessory before the fact of murder and one count of accessory before the fact of armed robbery. R. 1032, ll. 7-25. Co-defendant Sessions was found guilty of two counts of murder, burglary in the first degree and armed robbery. R. 1032, l. 13 – 1024, l. 25.

The judge sentenced petitioner to sentences totaling forty years. Co-defendant Sessions was sentenced to life imprisonment. R. 1047, l. 9-1048, l. 13.

The Court of Appeals confirmed petitioner's convictions in State v. Christopher M. Stephens, 2013-UP-062 (filed January 30, 2013). App. 1-4. Petitioner sought rehearing. App. 5-9. Rehearing was denied. App. 10.

This petition for writ of certiorari follows.

1.

The Court of Appeals erred by holding that the error of the trial court in admitting the testimony of SLED "victimologist expert" Mike Prodan was harmless error, since his speculative, irrelevant, and inadmissible testimony under State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) impermissibly led the jury to believe the relationship between petitioner and the decedent was consistent with the motive for and the circumstances of the murder.

Relevant trial facts

James Pearl was the star witness for the state. He was an acknowledged cocaine addict, and he even admitted that he had smoked marijuana the night before petitioner's trial. R. 161, l. 17 – 165, l. 25. Pearl claimed he knew Jamilla Hightower and Monica Wall. Hightower was a major drug dealer and she shared a house with Wall. R. 117, ll. 9-10. Pearl said he also knew petitioner and co-defendant Sessions. R. 117, ll. 20-22.

Pearl learned that the decedents had been killed when he received a call from Hightower's cousin on a Friday. R. 118, ll. 5-21. Pearl said he had seen Hightower on Wednesday, two days before, while he was conversing with petitioner and co-defendant Sessions. Over defense counsel Frederick's repeated hearsay objections, Pearl testified that Hightower was screaming at petitioner about the money he owed her. Defense counsel made clear he understood the witness could repeat what petitioner said but that he continued to object to the hearsay testimony about what Hightower was allegedly said to petitioner. The judge continued to allow the solicitor to pursue this line of hearsay question and answer. Pearl said the decedent was yelling "about drug money that was owed [her by petitioner]." R. 120, l. 6 – 123, l. 5.

Other testimony

Pearl claimed petitioner said after Hightower left that he could not rob her because she knew him. Pearl maintained that Sessions then offered that he could rob Hightower. Pearl said he told both men he did not want anything to do with a robbery and he left. R. 123, l. 6 – 124, l. 21.

Pearl's claim was that petitioner and co-defendant Sessions planned to rob and kill Hightower and steal her money and drugs. R. 124, l. 20 – 127, l. 14. Pearl maintained he later snorted cocaine with co-defendant Sessions and that the cocaine tasted like cucumbers. Pearl said that cocaine that tasted like cucumbers was "Jamilla's" signature cocaine. R. 126, l. 22 – 127, l. 14.

Pearl testified Hightower was major drug dealer and that he once saw her purchase two kilos of cocaine. Pearl also maintained **that a purchaser had to call Hightower in advance** to set up a drug buy: "You just couldn't go to her house and show up without calling." R. 131, ll. 13-25. As will be seen infra, witness Prodan worked this into his "profile" presentation that was strongly objected to defense counsel in this case, and was the subject of reversal in State v. Tapp, 387 S.C. 159, 691 S.E.2d 165 (Ct. App. 2009); *reversed*, State v. Tapp, 398 S.C. 376, 728 S.E.2d 468 (2012) (Prodan's testimony should not have been admitted but the error was harmless).

Prodan

Without any prior notice, the state called Michael Prodan as a witness. R. 568 ll. 5-18. Prodan testified that he had worked in California, and he said he had been qualified as a "behavioral science expert" in the past. Prodan admitted he had no "formal training . . ." He asserted he had "self-initiated education involving keeping abreast of the literature involving homicide and sexual assault, and violent crime in general, and involving the literature and the texts that are available, not only to law enforcement but to the general public." R. 569, l. 12 – 571, l. 24.

When the solicitor went to offer Prodan "as an expert in the field of crime scene interpretation and analysis," the jury was removed from the courtroom while the defense attorneys put their considerable objections to Prodan being qualified as an expert on the record. R. 571, l. 14 – 572, l. 22. Defense Counsel Gardner said the defense was taken completely by surprise by this testimony and said: "It's a shock to me. It's a surprise to me, and I would just put that on the record." R. 572, l. 14 – 573, l. 5.

Defense Counsel Frederick expanded on that objection noting that despite the voluminous discovery all he was aware of was that Prodan and other SLED "profilers" suggested "that they put an informant in Christopher Stephens's cell. This was before he was charged. They – and that's it, judge." R. 573, ll. 6-19.

Prodan then testified in camera that he had not written any report on his work during this investigation. R. 575, ll. 16-22; 578, l. 3 – 579, l. 9; 580, l. 12 – 581, l. 8. Both defense attorneys objected to Prodan being qualified to give an opinion as an expert. R. 582, l. 17 – 585, l. 22. The objections included that Prodan's testimony in this regard was not relevant and that it was pure speculation. R. 602, ll. 4-18. The judge ruled he was going to qualify Prodan "in the areas of behavioral science, violent crimes, methodology, motive behavior." R. 585, l. 11 – 586, l. 3; 602, ll. 6-18.

As in State v. Tapp, supra, Prodan said he asked for background information on the victim or victims. Prodan testified he tried to ascertain whether the victim was a high risk individual because of their life style. Prodan opined that some people who were "low risk" because they were not involved "in criminal enterprises, they are not selling drugs, they are not involved in sexual affairs or promiscuity or prostitution." R. 576, l. 4 – 588, l. 4.

Prodan also told the jurors there were "moderate risk life styles." These included people working in a convenience store and a cab driver. R. 588, l. 17 – 589, l. 12.

The solicitor asked Prodan about the decedent's "risk level." Prodan opined decedent Hightower was probably a moderate risk because of her drug sales. "It was not – it doesn't give rise to the level of multi-national cartels, but it's not a college student selling five dollar baggies of marijuana to their dorm mates either, so it has to kind of fall in the middle." Prodan said the other decedent had an "exceedingly low risk" life style, other than her living with decedent Hightower. R. 589, l. 16 – 590, l. 5.

Prodan opined that there is a misconception perpetuated by the media that violent crimes just happen and are random events. "Our experience and our training indicate that is not the case. There is a motive for murder. There are victims who are selected by the offender for that reason." R. 590, ll. 6-21.

Prodan said he had to ask himself how the person got into the house in this case since there was no forced entry. Prodan then stated his "background information" indicated that Hightower only sold drugs *"if there was previous notification."* R. 595, l. 1 – 596, l. 14. (emphasis added).

Prodan offered there was no evidence either of the decedents were a "victim of blunt-forced trauma." Prodan opined that both decedents were able to be controlled by the murderer, and he noted the fact decedent Wall was found nude. "The question you ask yourself is, while the individual is having Ms. Wall disrobe, what's Ms. Hightower doing." Defense counsel Frederick objected that this testimony was pure speculation. R. 597, l. 14 – 598, l. 21. As Prodan continued, the defense made further relevance and speculation objections that were overruled. R. 602, ll. 4-18.

Prodan again opined 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.

In his closing argument, the solicitor noted Prodan's testimony and argued that petitioner and co-defendant Sessions planned the crime carefully and that one decedent was shot with a pillow over her head "because as Mike Prodan said, it's a lot easier to shoot that pillow than to shoot Jamilla Hightower." R. 1010, l. 5 – 1011, l. 5.

Court of Appeals

The Court of Appeals held that the "[t]he trial judge erred in admitting Prodan's testimony without making his own determination whether it was reliable." *Citing* State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012). The Court found the error harmless because "Prodan's testimony concerned only the victims and the crime scene. He never identified Stephens, 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 this case." App 3-4.

Discussion

The reasoning of the Court of Appeals above is respectfully what gave Prodan's testimony the illusion that his "expert victimology" should be given credence. The testimony was that the drug dealing victim would not allow a stranger into the house, and there had to be previous notification from a known buyer. The jury knew that petitioner apparently knew the drug dealer well, and vice versa.

In State v. Tapp, 398 S.C. 376, 389, 728 S.E.2d 468, 475 (2012), this Court held it was error to qualify Prodan as an expert witness. In State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), this Court overruled State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (1997) inasmuch as it held that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission into evidence.

This Court in Tapp noted that the holding of White was that all expert testimony must satisfy Rule 702, SCRE, must pass the trial court's gate keeping function. This insures that the proposed expert testimony meets a threshold level of reliability, regardless of whether it is scientific or unscientific.

The White Court stated that simply ruling a challenge to expert testimony went to its weight and not its admissibility was an improper delegation of responsibility. The Court held the trial judge had to serve the gate keeping function of insuring that expert testimony and evidence were reliable before it was heard by the jury.

This Court in Tapp specifically rejected the state's position that Prodan's credentials, his education and experience, and his ability to rule out scenarios of whom or why the crime transpired made his testimony admissible. This Court also rejected the argument the relative success of "victimology" or profiling as an investigative tool made Prodan's "expert" testimony admissible. It is apparent the Court of Appeals correctly held it was error to admit Prodan's "expert" testimony. See State v. Council, 335 S.C. 1, 23, 515 S.E.2d 508, 519 (1999).

However, the Court of Appeals erred in finding the error harmless. The point is this junk science was meant to lead the jury to believe that Prodan's "victimology" could help identify the murderer by pseudo piling inference upon pseudo inference from the facts before it.

As seen, Prodan testified he tried to ascertain whether the victim was a high risk individual because of their life style. Prodan opined that some people who were "low risk" because they were not involved "in criminal enterprises, they are not selling drugs, they are not involved in sexual affairs or promiscuity or prostitution." R. 576, l. 4 – 588, l. 4.

Prodan also told the jurors there were "moderate risk life styles." These included people working in a convenience store and a cab driver. R. 588, l. 17 – 589, l. 12.

The solicitor asked Prodan about the decedent's "risk level." Prodan opined decedent Hightower was probably a moderate risk because of her drug sales. "It was not – it doesn't give rise to the level of multi-national cartels, but it's not a college student selling five dollar baggies of marijuana to their dorm mates either, so it has to kind of fall in the middle." Prodan said the other decedent had an "exceedingly low risk" life style besides her living with decedent Hightower. R. 589, l. 16 – 590, l. 5.

Prodan opined that there is a misconception perpetuated by the media that violent crimes just happen and are random events. *"Our experience and our training indicate that is not the case. There is a motive for murder. There are victims who are selected by the offender for that reason."* R. 590, ll. 6-21. (emphasis added).

Prodan said he had to ask himself how the person got into the house in this case since there was no forced entry. *Prodan then stated his "background information" indicated that Hightower only sold drugs "if there was previous notification."* R. 595, l. 1 – 596, l. 14. (emphasis added).

Prodan offered there was no evidence either of the decedents were a "victim of blunt-forced trauma." Prodan opined that both decedents were able to be controlled by the murderer, and he noted the fact decedent Wall was found nude. R. 597, l. 14 – 598, l. 21. As Prodan continued, the defense made further relevance and speculation objections that were overruled. R. 602, ll. 4-18.

Prodan again opined 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.

In his closing argument, the solicitor emphasized Prodan's testimony as for conviction grounds and argued that petitioner and co-defendant Sessions planned the crime carefully and that one decedent was shot with a pillow over her head "*because as Mike Prodan said, it's a lot easier to shoot that pillow than to shoot Jamilla Hightower.*" R. 1010, l. 5 – 1011, l. 5.

It cannot, respectfully, be stated that the error in admitting Prodan's testimony had little, if anything, to do with the guilty verdict in this case. 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).

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. (emphasis added). Further, Prodan told the jurors that murder without motive was also a media myth. 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. Prodan's testimony was inextricably interwined wit the state's theory of the evidence and cannot be deemed harmless.

2.

The Court of Appeals erred by holding the hearsay testimony of James Pearl that decedent Jamilla Hightower was screaming at petitioner in anger about the money he owed her for drugs was admissible as an "adoptive admission" since petitioner was present and did not deny it since some accusations or assertions, including this one, are not worth of a response and the legal principle of an "adoptive admission" was therefore inapplicable.

Relevant Facts

As seen, Pearl said he also knew petitioner and co-defendant Sessions. R. 117, ll. 20-22. R. 118, ll. 5-21. Pearl said he saw Hightower on Wednesday, two days before the decedents were killed while he was conversing with petitioner and co-defendant Sessions. Over defense counsel Frederick's repeated hearsay objections, Pearl testified that Hightower was screaming at petitioner about the money he owed her. The judge continued to allow the solicitor to pursue this line of hearsay question and answer. Pearl said **the decedent was yelling "about drug money that was owed [her by petitioner]."** R. 120, l. 6 – 123, l. 5.

On cross-examination, Pearl acknowledged his prior criminal convictions and admitted that he had pending charges of second offense possession of cocaine and threatening a public official. Pearl acknowledged that he hoped the state would assist him with these charges. R. 149, ll. 9-12; 162, l. 6 – 163, l.3; and 168, l. 22 – 169, l. 8.

Court of Appeals

The Court of Appeals held the statements were made in Stephens's presence, and "he never attempted to refute them; therefore, they were admissible as adoptive admissions." App. 2. The Court also reasoned because the decedent was unavailable that her accusation about petitioner

owing her money branded her as a drug dealer and was therefore a statement against penal interest under Rule 804(b)(3), SCRE. App. 2.

Discussion

Hearsay is a statement, other than one made by the declarant, while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted. See Rule 801(c), SCRE. See, also, State v. Saltz, 346 S.C. 114, 551 S.E.2nd 240 (2001). Here, the state elicited Pearl's hearsay testimony that decedent Hightower was yelling at petitioner about the money petitioner owed her for drugs. This, respectfully, was inadmissible hearsay to prove petitioner bought drugs from the decedent which neatly fit Prodan's yet to come testimony. It was highly prejudicial hearsay because it was calculated to provide an alleged motive for the murder: That petitioner elicited the help of co-defendant Sessions to rob and kill decedent Hightower. This would simultaneously relieve him of the drug debt, and also have Hightower fill the need for a victim of a robbery the men wanted to commit to obtain money. See State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986). Petitioner should be granted a new trial based upon the admission of this prejudicial hearsay evidence. State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006).

The Court of Appeals applied the strange in and of itself legal concept of an adoptive admission too broadly. Ignoring the declarant in this situation was instead the reasonable thing for petitioner to have done. "The adoptive admissions rule allows admission into evidence of a defendant's failure to deny statements made in his presence which tend to incriminate him, *which a reasonable person would have denied under the circumstances as by his silence*, or his making an evasive, equivocal, unresponsive, or affirmative reply." State v. Nolan, 318 S.C. 253, 257, 456 S.E.2d 926, 928 (1995). (emphasis added).

"Statements made in the presence of a party are generally admissible, if he remained silent, when they are made, and the circumstances are such that he can speak and naturally would or ought to respond to them. In such circumstances, his silence may afford grounds for inferring that he acquiesces in the truth of the statements. But, where the situation is such that it would be improper for him to respond, statements made to him or in his person are inadmissible." State v. Nolan, 318 S.C. 253, 257, 456 S.E.2d 926, 928 (1995). (emphasis added). *Citing* State v. McIntosh, 94 S.C. 439, 78 SE. 327 (1913).

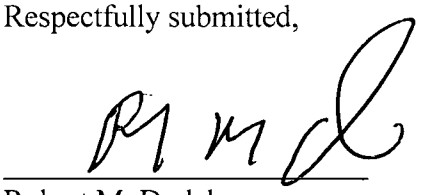
Second, an accusation "on the street" that a person owes another person for drugs is not the kind of statement that "so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." See Rule 804, (b)(3), SCRE. This was largely meaningless talk "on the street" that was not in the context that a reasonable person would have feared criminal prosecution for making the statement or accusation. The error also was not harmless as an accusation that a person was a drug user or drug dealer is explosively prejudicial in the minds of some jurors.

Instead the statement was prejudicial hearsay as petitioner argued. See Rule 801(c), SCRE. See, also, State v. Saltz, 346 S.C. 114, 551 S.E.2nd 240 (2001). The solicitor elicited Pearl's hearsay testimony that decedent Hightower was yelling at petitioner about the money petitioner owed her for drugs. It was highly prejudicial hearsay *because it was calculated to provide an alleged motive for the murder: That petitioner elicited the help of co-defendant Sessions to rob and kill decedent Hightower. This would relieve him of the drug debt, and also have Hightower fill the need for a victim of a robbery the men wanted to commit to obtain money.* See State v. Caulder, 287 S.C. 507, 339 S.E.2d 876 (Ct.App. 1986); State v. Davis, 371 S.C. 170, 638 S.E.2d 57 (2006).

CONCLUSION

By reason of the foregoing arguments, the petition for writ of certiorari should be granted.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR PETITIONER.

This 19th day of June, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

Opinion No. 2013-UP-062 (S.C. Ct. App. filed 1/30/2013)
07-GS-26-2974,2975, 2976

THE STATE,

RESPONDENT,

V.

CHRISTOPHER M. STEPHENS,

PETITIONER

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, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and the S.C. Court of Appeals this 19th day of June, 2013.

Robert M. Dudek
Chief 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: October 2, 2013