STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Marlboro County

Howard P. King, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JOHN L. HOGAN,

APPELLANT

APPELLATE CASE NO. 2012-208526

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by refusing to allow the psychopharmacological testimony of Dr. William Morton about how appellant's drug use affected his perception of events, since this was relevant to the jury's consideration of voluntary manslaughter -- provocations causing a heat of passion and a cooling off period -- and it was not offered as a defense or to prove diminished capacity?

STATEMENT OF THE CASE

Appellant was indicted by the Marlboro County grand jury for the offense of murder. His case was called to trial on February 6, 2012 before the Honorable Howard P. King, and a jury. Daniel L. Blake represented appellant. Mary Thomas Johnson-Lee and W. Shipp Daniel III were the assistant solicitors. Tr. 1

On February 8, 2012, jury found appellant guilty of murder. Tr. 477, ll. 8 -13. Judge King sentenced appellant to life imprisonment. Tr. 462, ll. 17 – 23.

This appeal follows.

ARGUMENT

The court erred by refusing to allow the psychopharmacological testimony of Dr. William Morton about how appellant's drug use affected his perception of events, since this was relevant to the jury's consideration of voluntary manslaughter -- provocations causing a heat of passion and a cooling off period -- and it was not offered as a defense or to prove diminished capacity

Relevant facts

A pre-trial hearing held on December 9, 2011. Appellant proffered the testimony of psychopharmacologist, Dr. William Alexander Morton. Tr. 1, p. 7, l. 10 – p. 8, l. 6. Dr. Morton had practiced psychopharmacology for thirty-five years. He was retired, but still consulting with the University of South Carolina Medical School as a professor emeritus of "pharmacy and associate clinical professor of psychiatry and behavioral sciences." Tr. 1, ll. 3 – 18.

Dr. Morton had been involved in routinely collecting data and rendering opinions -- both on an inpatient and outpatient basis – on drug abuse matters for about twenty-eight years. Tr. 1, p. 10, ll. 9 – 12, l. 4. Dr. Morton explained and gave several examples of how he dealt with his staff as the "team leader" on such issues as withdrawal symptoms, and detoxifying patients. Tr. 1, p. 10, l. 9 – p. 12, l. 5. T Dr. Morton had previously testified numerous times as an expert in matters related to cocaine use and its effect on a person's cognitive ability. Tr. 1, p. 18, ll. 8 – 11. The state stipulated to Dr. Morton's qualifications as an expert in the fields of addiction and psychopharmacology. Tr. 1, p. 15, ll. 13 – 24.

Dr. Morton testified that crack cocaine was more likely to cause violence than powdered cocaine. In working with emergency room physicians, he attempted to teach them that they risk coming under attack under by a person on crack cocaine because they "are suddenly explosively violent." Tr. 1, p. 41, ll. 6 – 24. Dr. Morton explained: "[O]ne of the things is does is it releases tremendous amounts of chemicals that are used if you were in a violent situation to help you either fight or run away. And that term is 'flight or fight.'" A person's heart would be racing as they attempted to handle the stress of an encounter. Tr. 1, p. 42, ll. 4 – 25.

Dr. Morton specifically addressed appellant's relapse into using crack cocaine: "Absolutely....it would have had effect on his behavior during the week of his use, which was rather a recent onset." Tr. 1, p. 45, ll. 23 – p. 46, l. 11. Dr. Morton said from his years of treating people on these drugs he learned their thinking was not clear and that it was impaired. Tr. 1, p. 46, ll. 4 – 23. It affected the frontal part of the brain where decisions were made, and it caused suspiciousness, agitation, and restlessness.

Dr. Morton noted evidence that the **decedent** also had cocaine and hydroxyzine in her blood, as well, as alcohol in her system Tr. 1, p. 47, ll. 9 – 16. Given the evidence in this case, Dr. Morton opined there was a "pretty high likelihood," based on the amount of crack cocaine appellant had used, that would have caused him to be aggressive, irritable and uncomfortable on the night of the fatal incident. Tr. 1, p. 51, ll. 20 – p. 53, l. 13. As will be seen infra, the fatal encounter occurred when appellant spotted the decedent going through his wallet. When caught, the decedent also reacted violently in her drug induced state of mind.

The trial judge then questioned Dr. Morton about the effects of such drug use. Dr. Morton said that the paranoia associated with cocaine use could last for days, months, and could affect the ability of the user to make rational decisions for as long as eighteen months. Dr. Morton testified that appellant was still criminally responsible for his behavior because voluntary intoxication was not a defense from a legal standpoint. Tr. 1, p. 57, ll. 7 – p. 58, l. 9; Tr. 1, p. 60, ll. 4 – 11. Dr. Morton further offered that appellant knew right from wrong despite his drug use, but that the drug causes "incredible changes in a person's perception." Tr. 1, p. 60, l. 4 – p. 62, l. 12.

Assistant solicitor Daniel argued that voluntary intoxication in South Carolina was not a defense, and he claimed the defense was putting forth Dr. Morton's testimony to argue to the jury that appellant was guilty of voluntary manslaughter and not murder. The state also argued that, even if Dr. Morton's testimony was relevant, it should be excluded under Rule 402, SCRE, because of its unduly prejudicial nature to the state's case. Tr. p. 87, l. 18 – p. 92, l. 16.

Defense counsel argued that evidence of the crack cocaine would come in during the case before the jury anyway because it was part of the *res gestae*. He noted that in Judge Anderson's Requests to Charge book, Judge Anderson had instructions that the jury had to consider all surrounding circumstances when determining whether heat of passion existed and the mental state involved in a defendant cooling off. Tr. 1, p. 92, l. 20 – p. 99, l. 23.

Further argument was heard on the matter on January 10, 2012. Tr. 2, p. 4, ll. 13 – p. 5, l. 3. Defense counsel Blake argued under State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) and Rule 702, SCRE, that the court had to consider whether scientific

evidence would assist a trier of fact. Counsel Blake argued that Dr. Morton's testimony would assist the jury in understanding how appellant and the decedent were acting since they were both on drugs that evening. Counsel noted that the jury needed to understand how crack cocaine affected behavior. Again, Dr. Morton's testimony could be helpful to the jury as to the issues of heat of passion and the cooling off period. Tr. 2, p. 5, ll. 4 – p. 9, l. 8.

Assistant solicitor Daniel argued the defense was only attempting to disguise voluntary intoxication as a defense -- a "backdoor attempt." Tr. 2, p. 9, ll. 11 – p. 14, l. 22. The judge, after hearing extensive arguments, ruled that Dr. Morton's testimony was not the proper subject of expert testimony in this case, and he denied the motion to reconsider that ruling. Dr. Morton's testimony was thus excluded entirely from the jury's consideration. Tr. 2, p. 18. l. 18 – p. 19, l. 3.

Trial facts

Appellant met the decedent after he began using crack cocaine again after having gone through drug rehabilitation. Queen Brown was the mother of the decedent, Monesha Brown. Tr. 68, l. 8 – 69, l. 8.

Ms. Brown usually cooked dinner for the family and some people at her church on Wednesday evenings. When the decedent did not arrive one Wednesday Ms. Brown reported her missing and the police began searching for her. Tr. 69, ll. 2 – 73, l. 9. Ms. Brown admitted her daughter was addicted to crack cocaine, and that she was consequently very worried about her safety. Tr. 73, ll. 16 – 18.

Bennettsville investigator Larry Turner remembered the decedent was reported missing on June 2, 2010. Tr. 74, ll. 4 – 75, l. 11. Appellant became a suspect because he

was the last person seen with the decedent. There was evidence a confidential government informant was involved in crack cocaine purchases with the decedent and appellant on the night she was killed. Tr. 77, ll. 1 – 78 l. 23.

Turner interviewed appellant July 21, 2010 at the Bennettsville police station. Tr. 79, ll. 7 – 9. Turner testified appellant confessed that he had killed the decedent during a confrontation. Tr. 87, ll. 17 – 25.

Investigator Sean Feldner was also involved in interrogating appellant. Feldner testified appellant initially denied responsibility for the decedent's death. Feldner remembered that he told appellant: "You owe it to the family to bring closure for her and to the kids, and you need to man up, and you need to tell us the truth and what really happened to Monesha Brown." Tr. 126, ll. 13 – 18.

Appellant then confessed that he was doing crack cocaine with Brown and they went to his trailer intending to have sex. They took a bath together, but appellant got out of the bathtub and went into the kitchen to get a beer. When he reentered his bedroom, he saw Brown going through his wallet. Appellant became enraged and he began fighting with the decedent who was violently angry at being confronted while apparently stealing appellant's money. Brown was thrown into a wall, and there was a "big hole" in that wall where she hit the wall. Tr. 126, ll. 25 – 132 l. 7.

Decedent Brown grabbed a knife and stabbed appellant in his side. Appellant then grabbed a knife and stabbed Brown in the neck. He duct taped her hands behind her back, and placed her in the bathtub. Appellant then smoked some more crack cocaine. Appellant told Feldner that "the devil told him" that he needed "to finish her off." Tr. 126, ll. 25 – 132 l. 7.

Appellant then got a knife from the kitchen and sliced the victim's neck on both sides. Appellant told investigators that he placed the decedent's body in a barrel, and disposed of the barrel. Tr. 126, ll. 25 – 132 l. 7. Appellant then led the police to the victim's body which was found in "the barrel located off of 38 South." Tr. 132, ll. 8 -17.

Jury instructions

The judge instructed the jury on the law of murder and voluntary manslaughter. Tr. 433, ll. 18 – 439, l.18. He also instructed the jury that voluntary intoxication was not an excuse or a defense to a crime "regardless of whether the crime is one involving general or specific intent." This rule also extended to voluntary ingestion of drugs. The judge went on to explain in detail that anyone ingesting alcohol or drugs was "no less responsible for his acts while in such condition." Tr. 438, ll. 19 – 439, l. 7.

Discussion

In State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009), the Supreme Court noted the gatekeeping function of the trial judge in insuring the reliability of expert testimony. Here, there was not any contention that Dr. Morton was not qualified to give an expert opinion on the effects of crack cocaine on appellant's perceptions. Rather, the single objection was that Dr. Morton's testimony was a "backdoor" attempt to offer a "diminished capacity" defense or mislead the jury on how to analyze the "cooling off period" of voluntary manslaughter.

There can be little doubt that Dr. Morton's testimony would have aided the jury in understanding the effects of crack cocaine on the human body. It affected appellant's perception of the provocation where he and the decedent were both using crack cocaine. The evidence showed the decedent also reacted violently even though her behavior was

not natural given that she was caught in the wrongful act of going through appellant's wallet. Yet the situation irrationally escalated out of hand. People who kill in a heat of passion are acting irrationally by the nature of the situation. The jury needed guidance on how chemicals here affected perception since a "rational person standard" is by fact of life not applicable to "heat of passion."

Before scientific evidence such as Dr. Morton's is admitted, the judge must determine the evidence is relevant, reliable and helpful to the jury. See State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). Even if relevant scientific evidence can be considered "**shaky**" it must be remembered that "vigorous cross examination, presentation of contrary evidence and careful instructions on the burden of proof are the traditional appropriate means of attacking shaky but admissible evidence. See State v. Dinkins, 319 S.C. 415, 418, 462 S.E.2d 59, 60 (1995).

Under Rule 702, SCRE if scientific, technical, or other specialized knowledge will assist the trier a fact to understand the evidence or determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify there to in a form of an opinion or otherwise. Here Dr. Morton's testimony was within the broad definition of relevance under Rule 401, SCRE. See, also, State v. Schmidt, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986).

The judge's instructions here made it very clear, in great detail, that voluntary intoxication was not a defense or excuse, and it did not in any other way mitigate an unlawful killing. The purpose of Dr. Morton's testimony in this case was merely to have the jury understand that appellant, and the decedent, both reacted, in some part, given the

crack cocaine ingestion. If this was "shaky" scientific evidence, the remedy was the well crafted jury instructions that the trial judge **in fact** gave in this case.

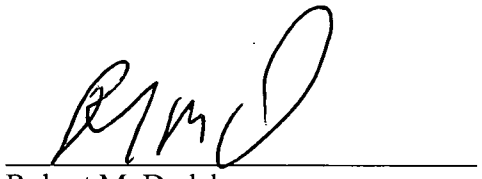
The exclusion of Dr. Morton's relevant scientific evidence in its entirety was prejudicial because the lay people on the jury needed the guidance of this relevant evident because it assisted it in understanding this unusual encounter -- where the effects of drugs were inextricably combined – with actions involving the heat of passion and a possible cooling off period.

Finally, the evidence should not have been excluded under Rule 403, SCRE. The danger of unfair prejudice usually arises in the context of unfair prejudice to the defendant. Given the judge's thorough jury instruction in this case on drug use not being a defense or a mitigating factor in any way, the state was more than adequately protected against any undue prejudice to the state. Appellant should be granted a new trial due to the wrongful exclusion of Dr. Morton's testimony.

CONCLUSION

By reason of the forgoing argument, appellant's conviction should be reversed and this case remanded to the Marlboro County Court of General Sessions for a new trial.

Respectfully submitted,



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of September, 2013.

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

From Transcript dated December 9, 2011:

1. Cover Page;
2. Tr. 6 – 27;
3. Tr. 85-100;

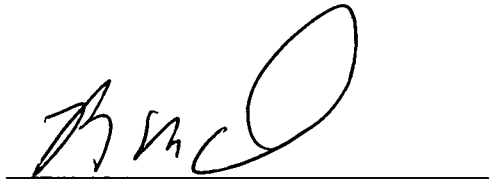
From Transcript dated February 6 – 8, 2012:

4. Cover Page;
5. Tr. 61 – 104;
6. Tr. 120 – 146;
7. Tr. 148 – 164;
8. Tr. 174 – 184;
9. Tr. 187 – 221;
10. Tr. 242 – 282;
11. Tr. 290 – 387;
12. Tr. 391;
13. Tr. 395 – 444;
14. Tr. 447
15. Tr. 462,

16. Indictment:

I certify that this designation contains no matter which is irrelevant to this appeal.

September 4th, 2013



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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation of Matter in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 4th day of September, 2013.

Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 4th day of September, 2013.

(L.S.)
Notary Public for South Carolina
My Commission Expires: October 30, 2022 .