STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Sumter County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARSENIO D. COLCLOUGH,

APPELLANT

APPELLATE CASE NO. 2016-000724

ANDERS BRIEF OF APPELLANT

ROBERT M. DUDEK
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STATEMENT OF ISSUE ON APPEAL

Whether the court erred by admitting the DNA evidence involving a hat found at the crime scene, since the risk of contamination of the hat was substantial where the decedent's mother took the hat home, she did not turn it over to the police for a substantial time, and the expert testimony that the DNA on the hat had a one in sixteen probability to "match" appellant was likely to impermissibly confuse the jury under Rule 403, SCRE?

STATEMENT OF THE CASE

Appellant was indicted by the Sumter County Grand Jury for two counts of murder, and two counts of possession of a weapon during a violent crime. R. 430. His case was called to trial on March 21, 2016 before the Honorable William Jeffrey Young. Lir Patrick Dereig represented appellant. Edgar Donald was the Assistant Solicitor. R. 1.

On March 24, 2016, the jury found appellant guilty on all counts. R. 409, l. 10 – 410, l. 2. Judge Young sentenced appellant to life imprisonment on each count of murder, and did not impose sentences on the weapons charges, given the life sentences. R. 427, ll. 1-11.

This appeal follows.

ARGUMENT

The court erred by admitting the DNA evidence involving a hat found at the crime scene, since the risk of contamination of the hat was substantial where the decedent's mother took the hat home, she did not turn it over to the police for a substantial time, and the expert testimony that the DNA on the hat had a one in sixteen probability to "match" appellant was likely to impermissibly confuse the jury under Rule 403, SCRE.

Relevant Facts

A pre-trial hearing was held on the admissibility of the DNA evidence. Janice Chatman was the mother of one of the decedents, and the other decedent was her nephew. R. 55, l. 25 – 26, l. 7. Their bodies were found shot to death in the hallway of the home they shared about a mile from Chatman's house. Chatman called 911 after the trauma of discovering the bodies. R. 56, l. 8 – 57, l. 4.

Chatman and her sister, Evelyn, were left with the task of cleaning up the bloody house. While cleaning up the house, Chatman recalled: "I found a lot of hats. Rayshawn [her decedent son] was a hat person. He was known to wear a lot of hats." R. 57, ll. 9-13.

Chatman "thought" she found the red hat in question lying on the floor at the bloody scene. "I can hardly remember where I got the hat from, but I know I got it out of the house and I know I had it hanging up on his hat rack [in his old bedroom at her house] among his other hats." R. 57, l. 22 – 58, l. 6. Chatman noted that the hat, Court's Exhibit 2, was size extra-large, which was not her son's hat size. R. 58, l. 13 – 59, l. 20.

While cleaning the house "I got all [of] Rayshawn's stuff and I took it home. What they didn't steal out of the house, I took home and I burnt up (sic) almost everything he had or gave it

away and I kept all of his hats because he has a son, a four-year-old son, and eventually one day he might be wearing those hats." R. 63, ll. 2-10.

Chatman remembered she laid all of her son's hats on "top of each other" back at her house. "Nobody goes in his room now, since Rayshawn got killed, except me, his father, or either his son, who is four years old, and the hats hanging up in the ceiling." Chatman admitted that the decedent's room was not locked. However, she reasoned only "about four or five people" had come into her house since she moved the hats back to her house. R. 63, l. 13 – 64, l. 12.

SLED DNA analyst Catherine Leisy testified she had not seen the hat itself, and she only tested cuttings and swabs taken from the hat. R. 67, l. 3 – 68, l. 13. The DNA overwhelming "matched the profile of Mr. Holmes [one of the decedents]." She said there were minor DNA. profiles "from at least two other individual . . ." R. 71, ll. 6-14. Leisy opined that appellant could not be excluded as a minor contributor, and that the probability the DNA was his was "approximately one in sixteen." R. 71, l. 7 – 72, l. 24.

At the conclusion of the in camera hearing, the judge took the matter under advisement "until I see what other evidence is presented. It may be that it is pertinent. It may be relevant." R. 79, ll. 8-16.

Jury in

The solicitor, in his opening statement, claimed appellant bragged about committing the murders to other people in jail. He could never back up that assertion with admissible evidence, so it was put before the jury in inadmissible and improper fashions. R. 108, ll. 6-20.

Those supposed jailhouse snitches, Christopher Robinson and John Colclough, refused to testify. R. 139, l. 7; r. 149, ll. 2-23. Another snitch, Corie Simon, testified he was in lockup with

appellant in Clarendon County. However, he said appellant told him that the police were attempting to frame him because "somebody's cousin's hat was left at the crime scene . . . and he said he was nowhere, he was nowhere to be at the crime scene." R. 151, l. 10 – 155, l. 16. In fact, Simon said he did not make the statement, and he said the signature on the statement, State's Exhibit 14, was not his signature. He was *not* impeached with his alleged prior inconsistent statement in the manner prescribed in Rule 613 (b), SCRE. The statement was nonetheless admitted without objection. There were allegations that former Investigator, and now grant writer, Melissa Addison, improperly offered incentives and made threats for the jailhouse snitches to come forward against appellant. Addison conceded, as she had to concede, that appellant and one of the decedents were "good friends." R, 28, l. 24 – 29, l. 5; r. 157, ll. 13-22; r. 276, 3 – 298, l. 13.

The DNA matter was revisited during the trial. Defense counsel objected to the admission of the DNA testimony based upon the one in sixteen potential "match," and "combined with the fact that there were seven months that it was out of the custody of law enforcement after this incident . . . on balance of Rule 403, [it] was more prejudicial than it would be probative and [it] potentially [would] confuse the jury." The judge overruled the objection stating that he would allow the DNA testimony before the jury, and he allowed it into evidence. R. 159, l. 19 – 161, l. 4.

Chad Smith, SLED ballistics expert, testified that nine millimeter and forty millimeter Smith and Wesson bullet cartridges were found at the crime scene. A gun was never found, but Smith opined that there was definitely more than one gun involved, and that possibly between three and seven guns were involved in the shooting. R. 179, l. 2 – 188, l. 16.

When the hat was introduced, defense counsel renewed his previous objection, which was overruled. R. 194, l. 15-25. When SLED DNA expert Catherine Liesy testified, she said the DNA may have a "one in sixteen" chance of it being appellant's DNA on the red hat. R. 207, ll. 10-25. The state introduced the SLED DNA report of Catherine Liesy, State's Exhibit 19, without objection. R. 209, ll. 14-21.

The state introduced the statement and the videotape of Christopher Robinson, State's Exhibit 21, without objection. R. 230, l. 13 – 233, l. 20. Also without an opportunity for confrontation or cross-examination, Lieutenant Melissa Addison testified that John Colclough told her appellant allegedly confessed to shooting one of the victims in the back. R. 246, l. 1 – 247, l. 25.

The statements from Christopher Robinson and John Colclough were given to police officers during police interrogation. Appellant did not have a prior opportunity to cross-examine Robinson and Colclough, and they both refused to take the oath. They also both invoked their Fifth Amendment right against self-incrimination. This violated Crawford v. Washington, 541 U.S. 36 (2004), and trial counsel's apparent reasoning that because Robinson and Colclough invoked their Fifth Amendment rights that their statements were automatically admissible without the opportunity for cross-examination was simply erroneous. In State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009), the Court recognized that Crawford changed the analysis, but in Stokes the attorney was invited to recall the witness to examine him. He had an opportunity for cross-examination in Stokes. Further, a witness, here Robinson, should not have been called as a witness before the jury knowing he is going to invoke his Fifth Amendment right against self-incrimination. State v. Hughes, 328 S.C. 146, 493 S.E.2nd 821 (1997). Yet, that was exactly what happened here. The jury was allowed to draw adverse inferences against appellant,

without the opportunity for cross-examination. That was improper. Further, the improper impeachment of Simon absent the foundation of Rule 613 (b), SCRE was also improper.

Discussion

The DNA evidence in this case was so unreliable, given the manner in which it was collected and "stored" by the decedent's mother, that it should have been excluded. This case is distinguishable from State v. Ramsey, 344 S.C. 607, 550 S.E.2d 294 (2001), where the Court found that there were two conflicting theories offered at trial as to how the evidence was collected, and its potential for contamination. Law enforcement officials testified they followed their chain of custody procedures. The Court found, given the conflicting theories, that this was a weight question for the jury, and the evidence did not need to be excluded based on the mere possibility it could have been contaminated.

Here, there is not any conflicting theory about the collection of the hat, the DNA evidence. The decedent's mother took several hats, including the red hat in question, from the bloody crime scene, and returned them to her own home. There, she stacked the hats together in the decedent's old bedroom. That alone, presented a substantial chance for contamination from any of the hats to the red hat. The expert opined the red hat had a one in sixteen chance that it contained appellant's DNA.

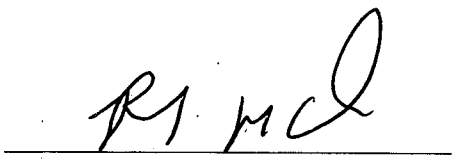
In addition, the decedent's mother admitted that the decedent's old bedroom was not locked, and that other people could have gone in and out of the bedroom. The hat was apparently in the bedroom for a substantial period of time before the hat was turned over to the police. The risk of contamination in this case was substantial, and it was error to admit the DNA evidence under these circumstances.

Furthermore, the expert's opinion that the DNA on the hat had a one in sixteen chance of appellant being a minor contributor had the very real likelihood of confusing the jury as defense counsel correctly objected, and argued. The jury here was left with evidence that the DNA found on the hat had a one in sixteen chance of it belonging to appellant. The expert admitted that from a sample of only fifty people in a courtroom, that evidence would mean three of the fifty people potentially could be responsible for the DNA. The confusion was the jury would simply conclude that because appellant's DNA was apparently on the red hat that that was meaningful evidence of his guilt. This one in sixteen DNA opinion evidence -- given its very confusing nature -- also made its probative value substantially outweighed by its unduly prejudicial effect, and it should have been excluded under Rule 403, SCRE. See, State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct.App. 2001).[1] This trial does not inspire confidence in the result.

[1] Overruled on other grounds State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).

CONCLUSION

By reason of the foregoing arguments, appellant's convictions should be reversed, and this case remanded to the Sumter County Court of General Sessions for a new trial.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

This 28th day of April, 2017.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

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PETITION TO BE RELIEVED AS COUNSEL

Counsel for Arsenio D. Colclough states:

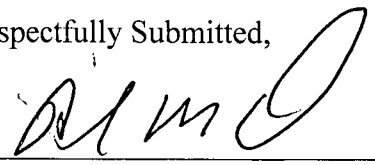
1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent appellant.

2. He has reviewed the record of appellant's trial before Judge William Jeffrey Young, which was held on March 21-24, 2016, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.

3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), briefed an arguable legal issue which arose during the course of the trial.

WHEREFORE, He asks the Court to relieve him as counsel for Arsenio D. Colclough.

Respectfully Submitted,



Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

This 28th day of April, 2017.

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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:

(1) True-billed indictment;
(2) Trial transcript (March 21-24, 2016)
(3) Transcript (April 17, 2015)
(4) Transcript (October 14, 2015)
(5) Transcript (October 28, 2015)
(6) Transcript (February 11, 2016)
(7) State's exhibits 14 & 21 (statements), and State's exhibit 19 (DNA report).

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

April 28, 2017

Robert M. Dudek
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CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of my ability this Anders Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

April 28, 2017.

Robert M. Dudek
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Anders Brief of Appellant and Designation of Matter in the above referenced case has been served upon J. Benjamin Aplin, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Anders Brief of Appellant and Designation of Matter have been served on Arsenio D. Colclough, #326969, at Lee Correctional Institution, 990 Wisacky Hwy., Bishopville, SC 29010, this 28th day of April, 2017.

Robert M. Dudek
Chief Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 28th day of April, 2017.

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