STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

ORIGINAL

Appeal from Sumter County

Honorable William Jeffrey Young, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ARSENIO D. COLCLOUGH,

APPELLANT

APPELLATE CASE NO. 2016-000724

BRIEF OF APPELLANT

ROBERT M. DUDEK
Chief Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

STATEMENT OF ISSUE ON APPEAL

Did the trial court err 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 came on for 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.

Undersigned counsel submitted a brief pursuant to Anders v. California, 368 U.S. 738 (1967), raising the identical issue above. By order dated December 16, 2018 this Court ordered that this issue be re-briefed as a merit issue, and therefore denied the petition to be relieved as counsel.

This brief of appellant on that issue follows that order.

ARGUMENT

The trial court err 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, Rayshawn, 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 in the bloody crime 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 individuals . . ." 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 said he was not as concerned about law enforcement not being in possession of the hat "as I initially thought" since "[w]e have testimony now that she says she took it, you know, up in his room and in her house the whole time . . ." R. 78, ll. 6-21. 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. It may be, if nothing else is presented, it may just confuse the jury and that could be the situation so I'm not going to rule on that at this particular point in time. I'm going to wait to see what other evidence might develop." R. 79, ll. 8-15.

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 an improper manner. R. 108, ll. 6-20.

Janice Chatman testified that she remembered the morning of April 13, 2013 when she was told there was "a shooting at Rayshawn's [her only son's] house," which was less than a mile from her house. R. 112, l. 6 – 113, l. 5. Janice maintained she was only of the "first people to go into that house, and her son and nephew, Willie Chatman" were dead in the hallway. R. 113, ll. 6-24.

Janice said her decedent son was renting the house, he was in the process of moving, and the electricity was already off. Janice said when she cleaned up she either threw things away, "gave it away or kept it." As to the hats, "I kept them all. I put them on his hat rack in the bedroom *at this room at my house*." R. 117, ll. 3-24.

On cross-examination, Janice said appellant and her son were close friends. R. 119, 17 – 120, l. 9. As for the hats Janice said she retrieved the red hat "the same day" or the next day. "I'm no exactly sure." R. 120, l. 20 – 121, 1. She "thought" she gave the hat to Detective Gardner in November, 2013. In the six months between April 13, 2013 and "the first week in November, 2013, when she turned over the hat to law enforcement, Janice said she did not know how many people came in and out of her house." R. 121, ll. 7-15.

Corie Simon was in the Department of Corrections. He said he was in lock-up with appellant. Simon estimated seven or eight people were in the lock-up area with them. R. 153, ll. 11-21. Simon said appellant told him about the murder charges was "something about somebody's cousin or somebody's hat or something, somebody's cousin hat was left at the crime

scene and they tried to frame him for it and he said he was nowhere, he was nowhere to be at the crime scene. He said he was nowhere at the crime scene. He told me this. And so when they try to claim [frame] him (sic) about the hat or something, about a hat or something, he said he didn't know what they was talking about." R. 154, l. 21 – 155, l. 24. Appellant said it was not his hat, and "[h]e say he didn't know nothing about the hat, you know." R. 155, ll. 7-24.

Those supposed jailhouse snitches, Christopher Robinson and John Colclough, refused to testify. R. 139, l. 7; r. 149, ll. 2-23.

On cross-examination, Simon said he did not make a statement to Wesley Gardner, 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. 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 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 also 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. R. 230, l. 13 – 233, l. 20. Without an opportunity for confrontation or cross-examination, Lieutenant Melissa Addison testified that John Colclough told her appellant allegedly confessed to shooting Willie Chatman in the back.[1] R. 246, l. 1 – 247, l. 25.

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

---

[1] 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). 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, there was the improper impeachment of Corie Simon absent the foundation of Rule 613 (b), SCRE which also was prejudicial.

distinguishable from State v. Ramsey, 345 S.C. 607, 550 S.E.2d 294 (2001), where the Supreme Court found that the DNA evidence which connected the victim to Ramsey was not so tainted that it was totally unreliable pursuant to State v. Ford, 301 S.C. 485, 393 S.E.2d 781 (1990). The Court noted that the admission of DNA evidence was subject to traditional challenges such as the chain of custody questions and the contamination of the sample. However, at the time of Ramsey, the Court wrote that "these issues relate to the weight of the evidence." State v. Ramsey, 345 S.C. 607, 614-615, 550 S.E.2d 294, 298 (2001).

In Ramsey, the Court also wrote 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 Supreme 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.

The Court also stated that even if the evidence was admissible pursuant to Rule 702, SCRE, that the judge still had to determine "if its probative vale is outweighed by its prejudicial effect under Rule 403, SCRE." State v. Ramsey, 345 S.C. 607, 615-616, 550 S.E.2d 294, 299 (2001). Here, of course, defense counsel also objected on the "confusion" of the issue component of Rule 403, SCRE.

Eight years subsequent to Ramsey, our Supreme Court held in State v. White, 382 S.C. 265, 274, 676 S.E.2d 684, 689 (2009), that "the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, 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." (emphasis added).

Consequently, the weight and not the admissibility reasoning of Ramsey on the evidence preservation integrity reasoning in that case appears to be superceded by the reasoning of State v. White on the judge's gatekeeping function on reliability, here of the DNA evidence given the lack of evidence preservation for at least six months while the hats were in the possession of the decedent's mother.

Further, unlike Ramsey, there was 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.

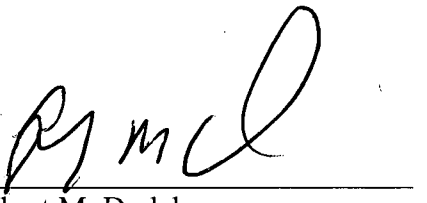
Furthermore, the expert's opinion that the DNA on the hat had a one in sixteen chance of appellant being a minor contributor had the very real likelihood of confusing the jury as defense counsel correctly objected, and argued. The jury here was left with evidence that the DNA found on the hat had a one 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 for that reason in addition to its tendency to be confusing to the jury. See, State v. Hamilton, 344 S.C. 344, 543 S.E.2d 586 (Ct.App. 2001).[2] This trial does not inspire confidence in its result.

[2] 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 14th day of January, 2019.