STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

Honorable G. Thomas Cooper, Circuit Court Judge

Opinion No. 5611 (S.C. Ct. App. Filed 1/4/2019)

2013-GS-32-0890;0891;1132

THE STATE,

RESPONDENT,

V.

JAMES BUBBA PATTERSON,

PETITIONER

APPELLATE CASE NO: 2019-000465

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

James Bubba Patterson, Appellant.

Appellate Case No. 2016-000863

Appeal From Lexington County
G. Thomas Cooper, Jr., Circuit Court Judge.

Opinion No. 5611
Heard October 3, 2018 – Filed January 4, 2019

AFFIRMED

Appellate Defender Kathrine Haggard Hudgins, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Assistant Attorney General Mark Reynolds Farthing, both of Columbia; and Solicitor Samuel R. Hubbard, III, of Lexington, for Respondent.

LOCKEMY, C.J.: James Patterson appeals his convictions of armed robbery, grand larceny, and possession of a weapon during the commission of a violent crime, arguing the trial court erred in (1) admitting DNA evidence that was not authenticated through proper chain of custody testimony, (2) admitting DNA evidence that constituted improper evidence of a prior bad act, and (3) indicating to the jury during opening statements that a trial was "a search for the truth." We affirm.

FACTS

On the afternoon of May 9, 2012, law enforcement responded to a reported armed robbery at the K&M Jewelry Store in West Columbia. According to witnesses, a man wearing a dark suit, sunglasses, and a dark fedora entered the store and pointed a handgun at the manager, Frank Mancine. The man then proceeded to gather various items of jewelry before Mancine pulled out a concealed pistol and attempted to shoot him. Mancine's gun jammed, and the man ran outside, where his hat fell to the sidewalk. Mancine followed the man to a nearby parking lot and watched him climb into the driver's seat of a light-colored van. As the van sped away, Mancine again fired his pistol, this time hitting the van's rear hatch window.

Following an initial investigation, the West Columbia Police Department (WCPD) transported the fedora found at the crime scene to the South Carolina Law Enforcement Division (SLED) for forensic analysis. SLED subsequently collected a DNA sample from the fedora; from this sample SLED developed a DNA profile that it then entered into CODIS[1], a national DNA database for law enforcement. Based on an existing DNA profile within the CODIS system, the search identified James Patterson as matching the DNA sample taken off the hat.

SLED notified the WCPD, who then created a photographic lineup containing pictures of Patterson and four other individuals. An investigator presented the lineup to Mancine and another witness; Mancine identified Patterson as the man from the jewelry store, although the other witness could not. Later that day, the WCPD obtained a search warrant for Patterson's vehicle, which they had located in the impound lot of a towing company. The vehicle matched the description of the van seen fleeing the jewelry store, and appeared to have a newly replaced rear hatch window as well as a puncture in its interior.

Patterson was subsequently arrested in connection with the armed robbery. Following his arrest, investigators collected a separate DNA sample directly from Patterson, which they tested and matched with the DNA profile taken off the fedora found at the crime scene. Based on the match, the State indicted Patterson for armed robbery, grand larceny, and possession of a weapon during the commission of a violent crime.

At the start of Patterson's trial, the trial court made the following preliminary comment to the jury:

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[1] CODIS is an acronym for the FBI's "Combined DNA Index System."

> It's a fundamental part of our democracy *in a search for the truth* in an effort to make sure that justice is done between the parties before the court. *Searching for the truth* and making sure that justice is done is often a slow, deliberate and repetitive process, the opposite of what you might have seen on television or in the movies or read in books. This courtroom is a place of honor dedicated to the protection and preservation of citizens' rights through what many have called the greatest justice system ever created.
>
> The attorneys appearing before you are advocates for the parties they represent, but first and foremost they are officers of this court, sworn to uphold the integrity and fairness of our judicial system and to help you *in a search for the truth.*

(emphasis added). Patterson objected, arguing these remarks were prejudicial in that they impermissibly shifted the burden of proof away from the State. The trial court overruled the objection.

During trial, the State presented testimony from an eye witness who confirmed seeing a man matching Patterson's description enter and leave the jewelry store. Mancine also testified regarding his recollection of the events, which was corroborated by surveillance footage from the store's internal camera. In addition, the State introduced testimony regarding Patterson's purchase of the van, the subsequent replacement of the rear hatch window, and the puncture in the van's interior. Finally, the State sought to introduce testimony regarding the DNA evidence that matched Patterson to the fedora, including testimony regarding the DNA database search.

First, the State presented evidence establishing DNA samples were collected from the fedora recovered at the scene and also from Patterson following his arrest.[2] Maryann Boehm was qualified as an expert witness in the fields of DNA analysis and statistical calculations. Boehm discussed the unique nature of DNA and the process for extracting, preserving, and using it for identification. She explained

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[2] Patterson does not contest that the State established a complete chain of custody for the fedora or the DNA sample taken directly off Paterson.

she developed a DNA profile for the suspect after taking a buccal swab of the inside of the fedora then locating and extracting a DNA sample. Boehm said she tested the DNA profile from the buccal swab of the hat against a DNA sample taken directly off Patterson following his arrest, resulting in an identification.[3] The buccal swab was marked and identified at trial with its assigned ID number: L12-06246.

The State then attempted to call SLED Agent Rhonda Fields to testify as to the identification of Patterson through the DNA database search; however, Patterson objected on the basis that Lieutenant David McClure, not Agent Fields, had conducted the database search that matched Patterson to the DNA from the fedora.[4] Patterson also argued the State had not established the chain of custody for the DNA profile that was already contained in the DNA database. The trial court allowed the State to proffer the testimony outside the presence of the jury prior to ruling on its admissibility.

During the proffer, Agent Fields testified she was employed in the DNA database unit at SLED and was involved in reviewing the information from the database search that identified Patterson. Agent Fields explained that once a match is identified, SLED goes through a "confirmation process" to "ensure that the original analysis was performed properly and that the same results are generated upon reanalysis." Agent Fields stated each individual DNA profile is given a separate ID number, Patterson's being SC00499452. Furthermore, each DNA match is given an identification number attributed to the search, which for Patterson's match was SA0000077927.

Agent Fields testified she personally reanalyzed the data after Lieutenant McClure conducted his search, and she confirmed the DNA match with Patterson's profile in the database. Agent Fields conceded, however, that she did not have the complete chain of custody for the DNA sample already in the DNA database. But in explaining how the DNA database gathers information, Agent Fields proffered for the trial court outside the jury's presence that the DNA sample was usually taken at the time an individual was arrested and that SLED has a tracking system that shows when a sample was collected for the database. Following the proffer, the

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[3] Boehm testified the probability of randomly selecting an unrelated person with a matching DNA profile was a one-in-730-quintillion chance.

[4] Lieutenant McClure retired from SLED prior to trial.

trial court found the State had sufficiently authenticated the DNA sample and that Agent Fields could testify regarding the DNA database search.

In addition, Patterson objected to the DNA database testimony on the grounds it constituted evidence of a prior bad act under Rule 404(b), SCRE. Specifically, Patterson argued the evidence implied he had a prior record because that would be the only reason his DNA would be in a database in the first place.[5] The trial court overruled the objection, finding the inclusion of DNA in a database was not indicative of a prior record as DNA can be collected for a variety of reasons and from various sources.

At the conclusion of the trial, the jury convicted Patterson as indicted. The trial court sentenced Patterson to an aggregate term of twenty years' imprisonment. This appeal followed.

STANDARD OF REVIEW

"The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.*

LAW/ANALYSIS

I. DNA Chain of Custody and Authentication

Patterson argues the trial court erred in admitting testimony that his DNA was contained in a DNA database because the State failed to authenticate and establish the chain of custody for the DNA samples used in the match. We disagree.

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. That requirement can be satisfied in a number of ways, including through testimony by a witness with knowledge "that a matter is what it is claimed to be"; comparison by an expert witness "with specimens which have been authenticated"; by evidence of

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[5] Patterson has an extensive criminal record, although no evidence of his prior convictions were admitted at trial.

"[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Rule 901(b)(1), (3), (4), SCRE. "The ultimate goal of chain of custody requirements is simply to ensure that the item is what it is purported to be." *State v. Hatcher*, 392 S.C. 86, 95, 708 S.E.2d 750, 755 (2011).

In the case at bar, the DNA evidence was authenticated through the testimony establishing the DNA profile developed from the fedora matched both the DNA profile attributed to Patterson in the database and the DNA profile developed from Patterson after he was arrested. First, the State established the authenticity of the DNA profile that SLED entered into the database through the testimony of Boehm and Fields. Boehm had first-hand knowledge of the procedures that went into collecting, storing, maintaining, and testing the DNA profile, while Fields personally reviewed and verified the results of the DNA profile match. *See* Rule 901(b)(1), SCRE (allowing authentication through testimony by a witness with knowledge that a matter is what it is claimed to be). Boehm also testified regarding the distinctive characteristics of each DNA strand and the specific ID numbers assigned to the ones tested here. *See* Rule 901(b)(4), SCRE (providing evidence can be authenticated through proof of distinctive characteristics).

Moreover, the identity of each person that handled the DNA sample was conclusively established, and there was no evidence presented indicating the sample was tampered with. *See State v. Taylor*, 360 S.C. 18, 25, 598 S.E.2d 735, 738 (Ct. App. 2004) ("[I]f the identity of each person in the chain handling the evidence is established, and the manner of handling is reasonably demonstrated, no abuse of discretion is shown in the admission, absent proof of tampering, bad faith, or ill-motive."). Minor discrepancies in the chain of custody implicates the credibility of the evidence, but does not render the evidence inadmissible. *See id.* at 24-25, 598 S.E.2d at 738; *State v. Smith*, 326 S.C. 39, 41-42, 482 S.E.2d 777, 779 (1997) (affirming admissibility of blood tests even though the arresting officer stored the blood sample in his home refrigerator prior to testing, noting that there was no evidence of tampering); *State v. Kahan*, 268 S.C. 240, 244, 233 S.E.2d 293, 294 (1977) (ruling the ballistics test results of a nightgown worn by the deceased and placed in the evidence locker in a plastic bag were admissible even though there was no testimony as to the care and handling of the plastic bag containing the gown during the time it was in the evidence locker). Therefore, we find the testimony of Lieutenant McClure was not necessary to establish the authenticity of the match that first identified Patterson as a suspect.

Additionally, although a perfect chain of custody was not shown for the DNA evidence that was already contained in the CODIS database, we believe the authenticity of the DNA results were nevertheless established through the independent testing of Patterson's DNA profile. Boehm was qualified as an expert in DNA analysis and she testified she matched the DNA profile taken off Patterson after his arrest with the DNA profile taken off the fedora found at the crime scene. Both of these samples were properly authenticated at trial and are not challenged on appeal. *See* Rule 901(b)(3), SCRE (stating authentication requirement is satisfied through comparison by expert witness with specimens that have already been authenticated). Accordingly, we find no abuse of discretion and affirm as to this issue.

II. Evidence of a Prior Bad Act

Next, Patterson argues the trial court erred in admitting testimony regarding the DNA database search because it implied Patterson had a prior criminal record in violation of Rule 404(b), SCRE. *See Pagan*, 369 S.C. at 211, 631 S.E.2d at 267 (stating under Rule 404(b), "[e]vidence of other crimes, wrongs, or acts is generally not admissible to prove the defendant's guilt for the crime charged"). Relying on our supreme court's decision in *State v. Hill*, 409 S.C. 50, 760 S.E.2d 802 (2014), Paterson asserts the State's reference to the database was highly prejudicial and outweighed any probative value. We disagree.

In *State v. Hill*, the court held that the admission of a law enforcement letter in which references were made to the CODIS database, while irrelevant and inadmissible, was not reversible error. 409 S.C. at 58, 760 S.E.2d at 806. The court noted that the publication of the letter—which referred to Hill as a "suspect" and stated that if he was charged, "an additional biological specimen must be submitted for court purposes"—could "have created an inference in a juror's mind that [Hill] had a criminal record." *Id.* at 57-58, 760 S.E.2d at 806. The court held, however, that its admission did not amount to reversible error due to it being cumulative to the other evidence of the CODIS database admitted without objection, and furthermore, the State did not attempt to admit evidence as to why Hill's DNA was in the database in the first place. *Id.*

We believe the trial court did not err in admitting the testimony regarding the database search. Initially, we believe the case at hand differs from the error in *Hill* because (1) the State did not place a letter into evidence; (2) the reference to the database did not contemporaneously refer to Patterson as a "suspect"; and (3) the State did not mention the type of database that the match came from. Here, the

State's witnesses referred to the database as "the database" or "our database," rather than the "CODIS database." The State did not attempt to solicit testimony regarding the purpose of the database, nor did it bring up Patterson's prior record. Moreover, although SLED is a law enforcement agency, given the prevalence in which personal data is shared with public and private agencies for various purposes, e.g., military records and private commercial enterprises, we do not believe the testimony necessarily implied Patterson had a criminal record. *See* S.C. Code Ann. § 23-3-610 (2007) (instructing SLED to "develop DNA profiles on samples for law enforcement purposes and for humanitarian and non[-]law enforcement purposes").

Furthermore, we believe the reference to the database was relevant and highly probative because it explained a critical step in the investigation. Specifically, the database testimony explained how Patterson came to be identified as a suspect in the first place. Without the testimony, the jury would have been left to speculate as to the means law enforcement used to initially place Patterson at the crime scene. *See State v. Schmidt*, 288 S.C. 301, 303, 342 S.E.2d 401, 403 (1986) ("Evidence is relevant if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears."). Additionally, based on the fact the jury was presented with only limited information regarding the DNA database search, and given that Patterson's DNA was independently matched with the DNA found on the fedora, we believe any prejudice to Patterson was minimal. *See State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("[E]ven where the evidence is shown to be relevant, if its probative value is *substantially outweighed* by the danger of unfair prejudice, the evidence must be excluded." (emphasis added)); *State v. Council*, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999) (noting that an inadvertent vague reference to defendant's prior record will not amount to prejudicial error). Accordingly, we do not believe the trial court abused its discretion in admitting the DNA database testimony.

III. Trial Court's Opening Statement

Finally, Patterson argues the trial court's opening remarks to the jury regarding the trial being a "search for the truth" were prejudicial in that they impermissibly shifted the burden of proof away from the State. We agree the trial court erred; however, we find the remarks do not constitute reversible error under the facts of this case.

Our supreme court has consistently cautioned against using language that suggests the object of a trial is to find "the truth." *See State v. Beaty*, 423 S.C. 26, 34, 813

S.E.2d 502, 506 (2018) ("These phrases could be understood to place an obligation on the jury, independent of the burden of proof, to determine the circumstances surrounding the alleged crime and from those facts alone render the verdict the jury believes best serves its perception of justice."); *State v. Daniels*, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012) (holding while it was improper for the trial court to charge the jury "that a criminal jury's duty is to return a verdict that is 'just' or 'fair' to all parties," the issue was unpreserved); *State v. Aleksey*, 343 S.C. 20, 28 n.2, 538 S.E.2d 248, 252 n.2 (2000) ("Although settled law disfavors instructing jurors to seek the truth in some contexts because it might be misleading as to the burden of proof, we decline to hold any mention of 'the truth' in jury charges is unconstitutional."); *State v. Needs*, 333 S.C. 134, 155, 508 S.E.2d 857, 867-68 (1998) (noting jury instructions on reasonable doubt which charge the jury to "seek the truth" are disfavored because they "[run] the risk of unconstitutionally shifting the burden of proof to a defendant"). Accordingly, we believe the trial court erred in making such statements in its comments to the jury, and we take the opportunity to reiterate our supreme court's instructions that trial courts should "avoid these terms and any others that may divert the jury from its obligation in a criminal case to determine whether the State has proven the defendant's guilt beyond a reasonable doubt." *Beaty*, 423 S.C. at 34, 813 S.E.2d at 506.

Nevertheless, we do not believe the error warrants reversal. *See State v. Sherard*, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991) (providing appellate courts will not set aside convictions due to insubstantial errors not affecting the result). First, the trial court's improper comments came at the beginning of trial rather than during the charge on the State's burden of proof at the end, which, we believe, is when such a statement would have the most prejudicial effect. *See Daniels*, 401 S.C at 256, 737 S.E.2d at 475 ("Such a charge could effectively alter the jury's perception of the burden of proof, substituting justice and fairness for the presumption of innocence and the State's burden to prove the defendant's guilt beyond a reasonable doubt."). Furthermore, notwithstanding the improper comments, we note the trial court gave an accurate definition of reasonable doubt later during its opening statement and again in the jury charge. *See Aleksey*, 343 S.C. at 27, 538 S.E.2d at 251 ("[J]ury instructions should be considered as a whole, and if as a whole they are free from error, any isolated portions which may be misleading do not constitute reversible error."). Additionally, the trial court gave a supplemental instruction following the jury charge that further emphasized the State's burden of proof. Finally, in light of the overwhelming evidence against Patterson, we believe the error did not contribute to the verdict. *See Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (finding error in jury charge was harmless beyond a reasonable doubt when it did not contribute to the verdict obtained). Accordingly,

our review of the record reveals no prejudice sufficient to warrant overturning Patterson's conviction.

CONCLUSION

Based on the foregoing, we find no error in the admission of the DNA evidence at trial and further find the trial court's statements to the jury, while error, did not contribute to the jury's verdict. Therefore, Patterson's conviction and sentence are

AFFIRMED.

THOMAS and GEATHERS, JJ., concur.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

JAMES BUBBA PATTERSON,

PETITIONER

APPELLATE CASE NO 2016-000863

Appeal from Lexington County

Honorable G. Thomas Cooper, Circuit Court Judge

Opinion No. 5611

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, counsel for James Bubba Patterson petitions the Court for rehearing and respectfully submits that this Court, in finding that the State established the authenticity of the DNA evidence contained in CODIS, overlooked the fact that the identity of each person who handled the DNA sample found in CODIS was not established and the State failed to establish when and by whom the DNA profile was developed. Respectfully, in relying on Rule 901(b)(3), this Court overlooked the fact that the DNA expert, Maryann Boehm, only compared the DNA profile from the fedora with Petitioner's known DNA sample taken after his arrest. She did not compare the DNA profile already in CODIS. No chain of custody existed for the DNA sample

found in CODIS. Additionally, counsel respectfully submits that this Court overlooked the similarities between the admission of the letter, found error but harmless in State v. Hill, 409 S.C. 50, 760 S.E.2d 802 (2014), and the testimony in the present case that Petitioner's DNA profile was found in the DNA database. Counsel also respectfully submits that this Court overlooked the highly prejudicial nature of the testimony that Petitioner's DNA was found in the DNA database, improperly implying that Petitioner had a prior criminal record, and placed undue emphasis on the purported probative value of the State's desire to explain a step in the investigation. Counsel respectfully seeks rehearing on the three points discussed above.

The jury found Petitioner guilty of the armed robbery of the K&M Jewelry store on May 9, 2012. Petitioner became a suspect in the robbery after his DNA from the Combined DNA Index System [CODIS] was matched to DNA found on a black fedora hat left at the scene and worn by the robber during the armed robbery, as seen on video surveillance tape from the store. At trial the State attempted to introduce testimony from witness Rhonda Fields from the South Carolina Law Enforcement Division [SLED] in regard to matching DNA found on the hat to Petitioner's DNA contained in CODIS. (R. pp. 337-344). Petitioner objected to the testimony based on three separate grounds: 1.) Lieutenant David McClure of SLED, not Agent Fields, searched CODIS and made the match but the State did not plan to call Lieutenant McClure because he retired from SLED[1] (R. p. 338, lines 9-25); 2.) the State failed to establish the proper chain of custody for the DNA sample found in CODIS (R. p. 339, lines 13-15); and 3.) the testimony improperly indicated that Petitioner had a prior record (R. p. 338, lines 10-16).

The State proffered the testimony of Agent Fields. (R. pp. 342-344). Although Lieutenant McClure conducted the CODIS search, Agent Fields testified, "I'm familiar with the

[1] The State did not argue that Lieutenant McClure was unavailable.

procedures. I don't have the documentation with me, but I believe I was involved in the review process because I worked in the DNA database unit at the time this letter was generated, so there were a couple of us assigned to the database and depending on who would have been on rotation for review I could have been involved in the review. But, again, I don't have that information on the stand with me." (R. p. 344, lines 1-8). The State decided to call Agent Fields as a witness later in the trial, presumably so she could verify that she was involved in the review of Lieutenant McClure's match. (R. p. 344, lines 11-12).

Later in the trial the State again proffered Agent Fields' testimony. (R. pp. 532-541). Agent Fields confirmed that she was involved in reviewing Lieutenant David McClure's database search. (R. p. 533, lines 13-18). The Agent admitted that there was no chain of custody for the sample stored in the database. (R. p. 538, lines 1-16). The agent testified, "Actually we do have a tracking system that shows when the item was – the sample was collected and it also – and it also – like I said, we get in cards along with the biological samples from these individuals and the individual collecting the item sometimes will sign and date the cards. It doesn't always happen. And, again, there's no chain of custody once it's collected though." (R. p. 539, lines 5-11). Agent Fields, however, did not testify when Petitioner's purported sample was taken or by whom.

Petitioner again objected to the admission of Agent Fields' testimony. (R. p. 541, line 8 – p. 542, lines 1-2). Petitioner argued that the testimony was irrelevant and even if relevant, more prejudicial than probative. Additionally, Petitioner specifically argued, "We've got argument under due process, Your Honor, that they can't authenticate or give any type of chain of custody as to this sample." (R. p. 541, lines 11-13). The State argued, "Your Honor, we do believe that

we have met the criteria for admissibility pursuant to State versus Anderson[2] using the AFIS analogy." (R. p. 542, lines 4-6). The trial judge overruled Petitioner's objections. (R. p. 542, lines 17-18).

Agent Fields testified before the jury that she worked in the DNA database unit with SLED. (R. p. 543, lines 17-25). She testified that a DNA profile from the fedora found at the scene was entered into the DNA database and Petitioner was developed as a suspect. (R. p. 544, line 1 – p. 545, lines 1-7). The agent referenced the DNA database rather than CODIS. Petitioner renewed the objection when Agent Fields testified before the jury. (R. p. 544, lines 5-6). Petitioner renewed all objections at the close of the trial (R. p. 556, line 23 – p. 557, lines 1-4) and renewed all objections after the jury returned a verdict. (R. p. 608, lines 20-23). The trial judge erred in admitting the testimony in reference to Petitioner's DNA contained in the DNA database.

First, The State's reliance on State v. Anderson, 386 S.C. 120, 122, 687 S.E.2d 35 (2009), is misplaced because, unlike the fingerprint card at issue in Anderson, the DNA sample in the present case involves fungible evidence more analogous to the blood sample at issue in State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992). See Anderson, fn #4. In Cribb, 310 S.C. 518, 522, 426 S.E.2d 306, 309 (1992), the South Carolina Supreme Court wrote:

> While the admission of evidence is within the discretion of the trial judge, we have held that it is an abuse of discretion to admit the results of a blood alcohol test where the identity of those who sealed, labeled, and transported the blood sample is not established. State v. Williams, 301 S.C. 369, 392 S.E.2d 181 (1990). The evidence in the record of this case does not identify those persons who handled the blood from the time it was drawn until the time it was tested.

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2 State v. Anderson, 386 S.C. 120, 122, 687 S.E.2d 35 (2009).

> Accordingly, we conclude that the trial judge abused his discretion in admitting the blood alcohol test.

The trial judge in the present case abused his discretion in admitting testimony in regard to Petitioner's DNA sample contained in CODIS when the State failed to authenticate the sample by establishing a proper chain of custody. In the present case the State failed to establish who took the DNA sample, who sealed, labeled and transported the sample for testing, or even who did the initial comparison.

Second, the State failed to authenticate the DNA sample found in the database even under the less stringent test for non-fungible fingerprint evidence discussed in Anderson. In Anderson, the South Carolina Supreme Court wrote:

> In terms of initial admissibility, Rule 901(a) provides: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. Although not exhaustive, Rule 901 further provides examples of authentication or identification which conform with the requirements of the rule. Rule 901(b), SCRE.

386 S.C. at 128–29, 687 S.E.2d at 39 (fn #8 omitted).

One example of authentication provided by Rule 901(b)(3) is comparison by the trier of fact or by expert witnesses with specimens which have been authenticated. The DNA sample found in CODIS in the present case, however, was not authenticated. Agent Fields admitted that no chain of custody existed in regard to DNA in the database. (R. p. 538, lines 1-3).

Pursuant to Anderson, the State was at least required to establish when the DNA sample contained in CODIS was taken and by whom the sample was taken. "As discussed by the Court of Appeals, Rich does not establish an authentication requirement that necessitates the testimony of the actual person who took the fingerprints on the master fingerprint card. Instead, it merely requires " 'evidence as to *when and by whom* the card was made and that the prints on the card were in fact those of this defendant.' " Anderson, 378 S.C. at 248, 662 S.E.2d at 464 (quoting

Rich, 293 S.C. at 174, 359 S.E.2d at 282)." State v. Anderson, 386 S.C. 120, 128, 687 S.E.2d 35, 39 (2009). The State failed to establish when and by whom the DNA sample contained in CODIS was taken.

The DNA database, CODIS, is an investigative tool utilized by law enforcement. The profiles contained in the database, however, are not admissible in court. In State v. Hill, 409 S.C. 50, 57, 760 S.E.2d 802, 806 (2014), a letter from SLED to a local law enforcement agency was introduced in evidence and read:

> Dear Neil Livingston, the short tandem repeat, STRPCR DNA profile developed from item 19 was compared to the Combined [sic] DNA Index System, CODIS. This profile matches the STRPCR DNA profile developed from Bruce Antwain Hill. This information is provided for investigative purposes only. If the suspect is charged, an additional biological specimen must be submitted for court purposes. This search was conducted by Lieutenant David McClure with the South Carolina Law Enforcement Division.

As noted in the SLED letter in Hill, the DNA contained in CODIS does not meet the standard for admissibility.

Once Petitioner was developed as a suspect through CODIS, the State obtained additional DNA samples from Petitioner and compared those samples to the DNA found on the fedora at the scene of the robbery. The fact that Petitioner's DNA was in the database was irrelevant. As argued by Petitioner, "And then obviously it is cumulative to the DNA that they've already submitted and for those reasons we do not believe that it is appropriate on top of the fact that you've got someone else who's done a review – or reviews what someone else has done, but if the State wanted to they could certainly have had Lieutenant McClure here." (R. p. 541, lines 19-25). Even if relevant, the testimony was far more prejudicial than probative as discussed further in issue two in the brief. The trial judge abused his discretion in admitting the

unauthenticated DNA sample from CODIS when the State failed to establish a proper chain of custody.

In regard to the authentication of Petitioner's purported DNA in the database, this Court wrote:

> Additionally, although a perfect chain of custody was not shown for the DNA evidence that was already contained in the CODIS database, we believe the authenticity of the DNA results were nevertheless established through the independent testing of Patterson's DNA profile. Boehm was qualified as an expert in DNA analysis and she testified she matched the DNA profile taken off Patterson after his arrest with the DNA profile taken off the fedora found at the crime scene. Both of these samples were properly authenticated at trial and are not challenged on appeal. *See* Rule 901(b)(3), SCRE (stating authentication requirement is satisfied through comparison by expert witness with specimens that have already been authenticated). Accordingly, we find no abuse of discretion and affirm at to this issue.

Agent Boehm testified at trial that she compared a swab from the black fedora hat found at the scene to a known buccal swab taken from Petitioner after his arrest. (R. pp. 509-526). She did not testify that she compared the profile already contained in CODIS. The DNA profile in CODIS was not authenticated pursuant to Rule 901(b)(3).

In addition to objecting to Agent Fields' testimony in regard to Petitioner's DNA contained in CODIS because the sample was not authenticated and lacked a proper chain of custody, Petitioner also objected to the testimony based on the fact that it constituted improper evidence of a prior bad act. (R. p. 338, lines 10-16). Petitioner argued, "The solicitor has indicated that they are not going to refer to CODIS, but call it a database. Your Honor, my DNA is not in a database, yours or Solicitor Mayes, so I think referring to that is going to basically be a comment on the fact of saying his DNA has been placed in there and that he has a prior record and I don't think that is appropriate." (R. p. 338, lines 10-16). After the second proffer Petitioner specifically argued, "We believe it's an attempt basically by the State under 404(b) to

show a bad act. This is a law enforcement agency, SLED, and their database that's collected DNA samples. Additionally, kind of in conjunction with 404(b), it kind of goes along with 609, evidence of prior crime, so we don't believe it should come in there." (R. p. 541, lines 13-19).

In State v. Hill, 409 S.C. 50, 760 S.E.2d 802 (2014), the South Carolina Supreme Court found that a letter from SLED to a local police department referencing CODIS and, by implication, Defendant's criminal record was inadmissible but found the error in that case harmless as cumulative. The Court in Hill wrote, "Petitioner contends the circuit court erred when it admitted a SLED letter into evidence because the letter implicitly referenced Petitioner's criminal record and therefore highly prejudiced Petitioner. While we agree the admission of the letter was error, we hold that this error does not warrant reversal of Petitioner's convictions." Hill 409 S.C. at 56-57, 760 S.E.2d at 806.

Agent Fields' testimony in the present case is the equivalent of the letter in Hill and inadmissible. In the present case, however, the error was not harmless. In Hill, unlike the present case, there were several unchallenged references to Hill's DNA being in the CODIS database.

> The circuit court ruled that the State was allowed to go into background information regarding the CODIS database to explain the delay between the 2005 crime and Petitioner's 2009 arrest. Additionally, the court clarified that the State would not be allowed to elicit testimony as to how or why Petitioner's DNA was in the database. Petitioner does not take issue on appeal with any evidence presented under these rulings, beyond the publication of the letter to the jury. For example, there was testimony regarding the CODIS database and how law enforcement agencies share it for investigative purposes. Additionally, there was testimony that there was a hit generated on the CODIS database from an evidence sample in this case. However, the only error that Petitioner contends the circuit court committed is in allowing the letter to be published to the jury as follows:
>
> Dear Neil Livingston, the short tandem repeat, STRPCR DNA profile developed from item 19 was compared to the Combined [sic] DNA Index System, CODIS. This profile matches the STRPCR DNA profile developed from Bruce Antwain Hill. This information is provided for investigative purposes only. If the suspect is

> charged, an additional biological specimen must be submitted for court purposes. This search was conducted by Lieutenant David McClure with the South Carolina Law Enforcement Division
>
> The admission of this letter will only constitute reversible error if it was a prejudicial abuse of discretion. State v. Clasby, 385 S.C. 148, 682 S.E.2d 892 (2009). While we do not condone the publishing of this letter to the jury, its admission does not amount to reversible error. The evidence contained in this letter was merely cumulative to other evidence of Petitioner's DNA being in the CODIS database. Accordingly, we find that the publication of this letter was harmless in light of the other evidence which was admitted without objection.

Hill, 409 S.C. at 56-57, 760 S.E.2d at 806. While there was one brief reference when the State asked, "Ultimately, Detective Wade, can you tell us whether or not you did receive any type of notification from the SLED DNA database in this case?" (R. p. 350, lines 2-4), there was no other evidence admitted in regard to Petitioner's DNA found in the database. Unlike the letter found harmless in Hill, Agent Fields' reference to the database was not merely cumulative to other evidence and not harmless.

The reference to DNA database, by implication, improperly referenced Petitioner's prior record. The reference was prejudicial. The reference to Petitioner's DNA being contained in the DNA database in the present case is distinguished from the vague reference to a fingerprint card that was found harmless in State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Fingerprints may be on file in the Integrated Automated Fingerprint Identification System [IAFIS or AFIS] and available to law enforcement for a number of reasons other than an arrest or conviction including employee background checks, licensing and other non-criminal justice purposes where authorized. The DNA database, on the other hand, contains convicted offender DNA profiles and, in some states, arrestee profiles. There does not appear to be a civil component, as with AFIS, in the DNA databases.

While the State in the present case did not attempt to introduce the letter, as in the Hill case, and did not introduce evidence as to why Petitioner's DNA was in the database and there was no specific reference to a prior crime, the clear inference was that Petitioner had been convicted of a crime of a serious nature requiring that a DNA sample be maintained in the database. Additionally, the State referenced the DNA database in closing argument. (R. p. 564, lines 6-8). The error in admitting the testimony that Petitioner's DNA was contained in the DNA database was not harmless in the present case.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Rule 404(b), SCRE; see State v. Lyle, 125 S.C. 406, 415–16, 118 S.E. 803, 807 (1923) (noting the rule "universally recognized and firmly established in all English-speaking countries, that evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged"). "However, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent." Rule 404(b). As a threshold matter, the trial court must determine whether the proffered evidence is relevant as required under Rule 401, SCRE. State v. Clasby, 385 S.C. 148, 154, 682 S.E.2d 892, 895. If the trial court finds the evidence is relevant, it must then determine whether the bad act evidence fits within an exception in Rule 404(b). Id. Even if prior bad act evidence falls within an exception, it must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. Clasby, 385 S.C. at 155, 682 S.E.2d at 896.

As argued by Petitioner, the DNA database testimony was irrelevant in light of the fact that the State obtained additional DNA samples from Petitioner. (R. p. 541, lines 8-22). The State

could simply have argued that Petitioner was developed as a suspect without regard to the DNA database. Even if relevant, the evidence does not meet an exception under Rule 404(b) and the testimony that Petitioner's DNA was in the database, inferring that he had a prior record, was certainly more prejudicial than probative. The trial judge erred in admitting the testimony that Petitioner's DNA was in the DNA database.

In affirming this Court wrote:

> We believe the trial court did not err in admitting the testimony regarding the database search. Initially, we believe the case at hand differs from the error in Hill because (1) the State did not place a letter into evidence; (2) the reference to the database did not contemporaneously refer to Patterson as a "suspect"; and (3) the State did not mention the type of database that the match came from. Here, the State's witnesses referred to the database as "the database" or "our database," rather than the "CODIS database." The State did not attempt to solicit testimony regarding the purpose of the database, nor did not bring up Patterson's prior record. Moreover, although SLED is a law enforcement agency, given the prevalence in which personal data is shared, e.g., military records and private commercial enterprises, we do not believe the testimony necessarily implied Patterson had a criminal record. *See* S.C. Code Ann. §23-3-610 (2007) (instructing SLED to "develop DNA profiles on samples for law enforcement purposes and for humanitarian and not[-]law enforcement purposes").

As discussed above, Agent Fields' testimony was the equivalent of the letter in Hill. The State asked Agent Fields, "As a result, was a **suspect** developed?" (R. p. 544, line 19) (emphasis added). The State asked Agent Fields to name the **suspect** and she named Petitioner. (R. p. 545, lines 5-7). While CODIS was not referenced, the database was referred to as SLED's database. Agent Boehm testified, "At SLED we have a database. This database consists of profiles from known individuals as well as profiles developed from evidence at crime scenes. If the item of evidence that I am testing is eligible to enter into this database, I will put it in, which this item was, to see if there is any match to either a known individual or to another crime scene." (R. p.

513, lines 2-8). The testimony clearly implied that Petitioner had a prior record. The testimony was irrelevant and improper.

Finally, while irrelevant and improper as evidence that Petitioner had a prior criminal record, the testimony that Petitioner's DNA was in the database was also far more prejudicial than probative. This Court wrote, "Furthermore, we believe the reference to the database was relevant and highly probative because it explained a critical step in the investigation. Specifically, the database testimony explained how Patterson came to be identified as a suspect in the first place. Without the testimony, the jury would have been left to speculate as to the means law enforcement used to initially place Patterson at the crime scene." The testimony, however, was not needed to explain how Petitioner came to be identified as a suspect. There was video surveillance of the robbery and of a person in the store a few days before the robbery. (R. p. 81, lines 7-25). The jury could easily have inferred that Petitioner was developed as a suspect based on the surveillance video without need to reference the DNA database. This is not a cold case that remained unsolved for many years where an explanation for the delay might be necessary. See Hill, 409 S.C. 50, 760 S.E.2d 802 (2014) (unsolved for four years); People v. Jackson, 232 ill. 2d 246, 903 N.E.2d 388 (Ill. 2009) (unsolved for six years); State v. McMillian, 295 S.W.3d 537 (Mo. Ct. App. 2009) (unsolved for twenty years); Scales v. State, 310 Ga. App. 48, 712 S.E.2d 555 (Ga. Ct.App. 2011) (unsolved for fourteen years).

As discussed above, the reference to Petitioner's DNA being contained in the database in the present case is distinguished from the vague reference to a fingerprint card that was found harmless in State v. Council, 335 S.C. 1, 13, 515 S.E.2d 508, 514 (1999). Fingerprints may be on file in the Integrated Automated Fingerprint Identification System [IAFIS or AFIS] and available to law enforcement for a number of reasons other than an arrest or conviction including

employee background checks, licensing and other non-criminal justice purposes where authorized. The DNA database, on the other hand, contains convicted offender DNA profiles and, in some states, arrestee profiles. There does not appear to be a civil component, as with AFIS, in the DNA databases. Any possible probative value is substantially outweighed by the danger of unfair prejudice.

Based on the above arguments, counsel for Petitioner respectfully seeks rehearing.

Respectfully Submitted,

KATHRINE H. HUDGINS
Appellate Defender

This 18th day of January, 2019.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable G. Thomas Cooper, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JAMES BUBBA PATTERSON,

PETITIONER

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a copy of the Petition for Rehearing in the above-entitled case has been served upon Mark Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and James Bubba Patterson, #217543, at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 18th day of January, 2019.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 18th day of January, 2019.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 5, 2027.

The South Carolina Court of Appeals

The State, Respondent,

v.

James Bubba Patterson, Appellant.

Appellate Case No. 2016-000863

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.

_____ C.J.

_____ J.

_____ J.

Columbia, South Carolina

FILED

February 21, 2019

cc:
Alan McCrory Wilson, Esquire
Kathrine Haggard Hudgins, Esquire
Mark Reynolds Farthing, Esquire
Samuel R. Hubbard, III, Esquire