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,

APPELLANT

APPELLATE CASE NO 2016-000863

FINAL BRIEF OF APPELLANT

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2. Did the trial judge err in admitting testimony that Appellant's DNA was contained in the DNA database because the testimony constituted improper evidence of a prior bad act?

3. In his preliminary comments, did the trial judge err by indicating to the jury that a trial was a search for the truth?

STATEMENT OF THE CASE

In April of 2013, the Lexington County Grand Jury indicted Appellant Patterson for grand larceny, armed robbery and possession of a weapon during the commission of a violent crime, indictments #2013-GS-32-0890, 0891, 0892. On December 4, 2015, Appellant appeared before the Honorable Frank R. Addy, Jr. for a competency hearing as well as a motion by the State to obtain additional DNA samples. Robert M. Madsen represented Appellant at the hearing. Suzanne Mayes was the prosecutor. Judge Addy found Appellant competent to stand trial and order additional DNA samples.

On April 11, 2016, Appellant proceeded to jury trial before the Honorable G. Thomas Cooper. Robert M. Madsen and David Michael Mauldin represented Appellant at trial. Suzanne Mayes and Lester McGill Bell, Jr. prosecuted the case. The jury returned verdicts of guilty as charged. Judge Cooper sentenced Appellant to twenty (20) years in prison for armed robbery, ten (10) years concurrent for grand larceny and five (5) years concurrent for the weapons charge. A timely notice of intent to appeal was served on April 15, 2016. This appeal follows.

ARGUMENTS

1. **The trial judge erred in admitting testimony that Appellant's DNA was contained in the DNA database when the State failed to authenticate and establish the chain of custody for the DNA sample contained in the database.**

The jury found Appellant guilty of the armed robbery of the K&M Jewelry store on May 9, 2012. Appellant became a suspect in the robbery after his DNA 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 Appellant's DNA contained in the Combined DNA Index System [CODIS]. (R. pp. 337-344). Appellant 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 Appellant 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 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

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

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). Appellant again objected to the admission of Agent Fields' testimony. (R. p. 541, line 8 – p. 542, lines 1-2). Appellant argued that the testimony was irrelevant and even if relevant, more prejudicial than probative. Additionally, Appellant 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 Appellant's objections. (R. p. 542, lines 17-18). Appellant renewed the objection when Agent Fields testified before the jury. (R. p. 544, lines 5-6). Appellant 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 Appellant's DNA contained in CODIS.

In State v. Anderson, 386 S.C. 120, 128–29, 687 S.E.2d 35, 39 (2009) (fn #8 omitted), 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

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

> 901 further provides examples of authentication or identification which conform with the requirements of the rule. Rule 901(b), SCRE.

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).

The State's reliance on State v. Anderson, id. is misplaced because, unlike the fingerprint card at issue in Anderson, the DNA sample in the present case constitutes 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. 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 Appellant's DNA sample contained in CODIS when the State failed to authenticate the sample by establishing a proper chain of custody.

Pursuant to Anderson, the State was 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. Additionally, The State failed to call the person who initially searched the database and made the match, Lieutenant McClure, as a witness

The DNA database, CODIS, is an investigative tool utilized by law enforcement. 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 pursuant to Rule 901, SCRE.

Once Appellant was developed as a suspect through CODIS, the State obtained additional DNA samples from Appellant and compared those samples to the DNA found on the fedora at the scene of the robbery. The fact that Appellant's DNA was in the database was irrelevant. As argued by Appellant, "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. The trial judge abused his discretion in admitting the unauthenticated DNA sample from CODIS when the State failed to call the witness who conducted the search and failed to establish a proper chain of custody.

2. The trial judge erred in admitting testimony that Appellant's DNA was contained in the DNA database because the testimony constituted improper evidence of a prior bad act

In addition to objecting to Agent Fields' testimony in regard to Appellant's DNA contained in CODIS because the sample was not authenticated and lacked a proper chain of custody, Appellant 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). Appellant 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 Appellant 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, "Appellant contends the circuit court erred when it admitted a SLED letter into evidence because the letter implicitly referenced Appellant's

criminal record and therefore highly prejudiced Appellant. While we agree the admission of the letter was error, we hold that this error does not warrant reversal of Appellant'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 was other evidence of Appellant's DNA being in the CODIS database. "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 Appellant'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. Unlike Hill, Appellant in the present case objected to all references to his DNA being in the CODIS database.

The reference to CODIS, by implication, improperly referenced Appellant's prior record. The reference was prejudicial. The reference to Appellant's DNA being contained in CODIS 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 Appellant's DNA was in the database and there was no specific reference to a prior crime, the clear inference was that Appellant 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 Appellant'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 Appellant, the DNA database testimony was irrelevant in light of the fact that the State obtained additional DNA samples from Appellant. (R. p. 541, lines 8-22). The

State could simply have argued that Appellant was developed as a suspect without regard to the DNA database. Even if relevant, the evidence does not meet an exception under Rule 4049b) and the testimony that Appellant'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 Appellant's DNA was in the DNA database.

3. The trial judge erred by indicating to the jury, in his preliminary comments, that a trial was a search for the truth.

In his preliminary comments to the jury the judge stated:

> All right, ladies and gentlemen. Before we actually begin the trial, I want to take a few minutes to explain our procedure, but even before I do that I want to tell you that a trial probably will be different from what you might expect. Now many people do not have the chance to attend court hearings as you are now doing and they may think that from watching television or movies or reading books that trial are always full of drama and intense action. While some of these things may be true at times, this trial is not for entertainment. 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 may be called the greatest justice system ever created.

(R. p. 179, line 13 – p. 180, lines 1-7). (emphasis added). Appellant objected to the comments arguing that, pursuant to State v. Daniels, 401 S.C. 251, 737 S.E.2d 473 (2012), the search for the truth language impermissibly shifted the burden of proof. (R. p. 243, lines 3-21). The judge overruled the objection noting that he was not charging the jury but simply making some opening remarks. (R. p. 243, line 25 – p. 244, lines 1-17). The judge found that the comment did not shift the burden of proof. The trial judge erred.

In State v. Daniels, 401 S.C. 251, 256, 737 S.E.2d 473, 475 (2012), the South Carolina Supreme Court wrote:

> Although the issue is not preserved, we instruct the trial judge to remove any suggestion from his general sessions charges that a criminal jury's duty is to return a verdict that is "just" or "fair" to all parties. 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. Moreover, to a lay person, the "all parties involved" in a criminal case may well extend beyond the defendant and the State, and include the victim. These inaccurate and misleading charges risk depriving a criminal defendant of his right to a fair trial.

In State v. Aleksey, 343 S.C. 20, 538 S.E.2d 248 (2000), the South Carolina Supreme Court held that jury instructions on reasonable doubt which also charge the jury to "search for the truth" run the risk of unconstitutionally shifting the burden of proof to the defendant but found the error in that case harmless. Recently in State v. Beaty, No. 2015-000718, 2016 WL 7474479, at *2 (S.C. Dec. 29, 2016), the Court wrote:

> It is true, as the trial judge noted, that the comments here can be distinguished from Aleksey in that his was a "statement" and not a jury charge. Further, the remarks were not linked to either reasonable doubt or circumstantial evidence as was condemned in Aleksey. However, we agree with appellant that a trial court should refrain from informing the jury, whether through comments or through its charge, that its role is to search for the truth, or to find the true facts, or to render a just verdict. These phrases may 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 it believes best serves the jury's perception of justice. We caution trial judges to avoid these terms and any other that may divert the jury from its obligation in a criminal case to determine, based solely on the evidence presented, whether the State has proven the defendant's guilt beyond a reasonable doubt.

The judge's comments in the present case are substantially the same comments addressed by the Court in Beaty. As the Court found in Beaty, the comments constituted error. Unlike Beaty, however, the error in the present case was not harmless. The State's evidence in the

present case was not overwhelming and the burden shifting comments were not cured by any subsequent comments or instructions.

CONCLUSION

Based on the above arguments, Appellant's convictions and sentence should be reversed and the case remanded for a new trial.

Kathrine H. Hudgins
Appellate Defender

ATTORNEY FOR APPELLANT

This 30th day of June, 2017.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final 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."

June 30th, 2017

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Final Brief of Appellant and Designation of Matter in the above referenced case has been served upon Mark R. Farthing, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201 this 30th day of June, 2017.

Kathrine H. Hudgins
Appellate Defender
ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 30th day of June, 2017.

(L.S)
Notary Public for South Carolina
My Commission Expires: July 3, 2023