STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

Honorable Eugene C. Griffith, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ERIC EMANUEL ENGLISH,

APPELLANT

APPELLATE CASE NO. 2018-000850

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in appellant's trial for criminal sexual conduct with a minor who had gonorrhea where it admitted test results showing appellant had gonorrhea and another man the minor accused of sexually assaulting her did not, where no one from the laboratories responsible for the analyses testified, since pursuant to *State v. James*, 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971), test results offered to "connect a defendant directly with the commission of a crime" "must be substantiated by the person who conducted the tests?"

STATEMENT OF THE CASE

On October 16, 2017, a Lexington County Grand Jury indicted appellant for the offense of first degree criminal sexual conduct with a minor. R. 246 – 247. Appellant was tried in his absence before the Honorable Eugene C. Griffith, Jr., and a jury from January 8 – 10, 2018. R. 1. Jason Chehoski and Stephen Story represented appellant. R. 1. Rhonda Patterson and Bradley Pogue represented the state. R. 1.

On April 9, 2018, appellant appeared before the court and Judge Griffith unsealed his sentence. R. 205; R. 208, ll. 5-15. Appellant was sentenced to forty years imprisonment. R. 247. On April 27, 2018, the parties appeared before the court for a motion to reconsider the sentence, which was denied. R. 218; R. 220, ll. 6-9; R. 229, ll. 7-10.

This appeal follows.

STANDARD OF REVIEW

The admission or exclusion of evidence is within the discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *State v. Saltz,* 346 S.C. 114, 120, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the trial court's ruling is based on an error of law. *State v. McDonald,* 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). Evidentiary rulings of the trial court will not be reversed on appeal absent an abuse of discretion or the commission of legal error which results in prejudice to the defendant. *State v. Mansfield*, 343 S.C. 66, 77, 538 S.E.2d 257, 263 (Ct. App. 2000).

ARGUMENT

The court erred in appellant's trial for criminal sexual conduct with a minor who had gonorrhea where it admitted test results showing appellant had gonorrhea and another man the minor accused of sexually assaulting her did not, where no one from the laboratories responsible for the analyses testified, since pursuant to *State v. James*, 255 S.C. 365, 370, 179 S.E.2d 41, 43 (1971), test results offered to "connect a defendant directly with the commission of a crime" "must be substantiated by the person who conducted the tests."

Statement of facts

Appellant's seven-year-old daughter, the minor, was sexually assaulted. On or about March 4, 2014, the minor visited her school nurse and said she needed her "pants fixed," and eventually complained that her "private area" hurt. R. 84, l. 9 – 87, l. 21. The nurse asked the minor's mother to take her to the doctor. R. 87, l. 22 – 88, l. 5. The minor was later diagnosed with gonorrhea. R. 128, ll. 5-10.

The minor was interviewed at the Dickerson Center and said appellant "put his private in [her] private." R. 58, l. 2; R. 65, l. 23 – 66, l. 5. The minor claimed this occurred while they were lying on the floor and she claimed that her younger brother was also on the floor at the time. R. 56, l. 19 – 59, l. 17. The minor was interviewed at the Dickerson Center a second time and disclosed sexual abuse by her mother's boyfriend, Jamie Stroman. R. 70, l. 11 – 71, l. 3; R. 24, l. 21.

The parties stipulated that the minor had been sexually assaulted by the other man, Jamie Stroman. Stroman admitted to digitally penetrating the child and was convicted of first degree criminal sexual conduct with a minor prior to appellant's trial. *See* Court's Exhibit #5, R. 231; R.

38, l. 24 – 39, l. 15. The minor said she did not disclose sexual abuse by Stroman because she thought Stroman would hurt her mother if she did so. R. 77, ll. 10-18.

After the minor's mother learned the child had gonorrhea but before any charges were filed, both appellant and Jamie Stroman were tested to see if they had a sexually transmitted disease (STD). R. 24, ll. 20-21. Appellant's test results were positive for gonorrhea and Stroman's were negative. R. 145, ll. 5-7; R. 136, ll. 22-24. Pretrial, the state moved to introduce the test results of appellant and of Stroman pursuant to Rule 803(6), SCRE and argued the results were business records of tests done for the purposes of medical diagnosis and treatment. R. 24, l. 23 – 26, l. 15. The state cited *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 565 S.E.2d 293 (2002) (hereinafter *Ex parte DHEC*). R. 76, ll. 10-11.

Defense counsel moved in limine to suppress the results as inadmissible hearsay pursuant to *State v. James*, 255 S.C. 365, 179 S.E.2d 41, absent testimony by the persons who performed the tests. R. 27, l. 19 – 28, l. 13. Defense counsel quoted the *James* case in his argument to the trial court: "Where the tests or analyses are offered to prove an essential element of the crime or to connect the defendant directly with the commission of a crime, such results must be substantiated by the person that conducted the test or analysis." R. 28, ll. 2-7.

The judge noted he was the trial judge in *State v. Chisholm*, 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011), which was not reversed where records of a defendant's HIV status kept by DHEC were admitted as business records. R. 26, l. 16 – 27, l. 5.

Pamela Levi, a nurse practitioner who worked at an urgent care center in Swansea, testified Jamie Stroman was seen by another medical professional who took a sample and sent it to the lab for STD testing. R. 130, ll. 9-16; R. 132, l. 7 – 134, l. 1. Levi said two days later she saw the Stroman's test results in the office computer system and "reviewed them and signed off

on them because no additional treatment was needed." R. 134, l. 5 – 135, l. 10. Levi's testimony that Stroman's gonorrhea test was negative and the lab report were admitted over objection. R. 136, ll. 22-24; R. 241 – 243.

Dr. Wesley Frierson, who worked at a Lexington urgent care, saw appellant when he came in for an STD test. R. 140, l. 19 – 141, l. 3. Frierson said he took a swab and submitted it to the lab.[1] R. 142, l. 16 – 143, l. 6. Frierson viewed and "verified" the results on his computer system. R. 143, ll. 9-20. Dr. Frierson did not perform the STD test, he was not at the lab when the sample was tested, and he did not treat appellant. R. 145, l. 15 – 146, l. 6. Dr. Frierson's testimony that appellant's test results were positive for gonorrhea and the lab report were admitted over objection. R. 244; R. 144, l. 14 – 145, l. 7.

The solicitor relied heavily on this evidence in closing, arguing, "[Y]ou heard testimony from Ms. Pamela Levi that Jamie Stroman tested negative for gonorrhea, so he did not do this." R. 171, ll. 11-13. The solicitor said, "When y'all go back to deliberate, just remember [the minor] tested positive, Jamie tested negative. [Appellant], who [the minor] identified as her perpetrator, tested positive. Positive plus a positive equals a positive and I'm positively sure that you will come back guilty." R. 179, ll. 4-8.

Discussion

The court erred when it admitted the STD test results of appellant and of Stroman, since the analysts—the persons who tested the samples and determined the test results—did not testify in court, and the solicitor used the test results to directly connect appellant to the crime. To be clear, appellant does not object to the admission of the test results on the basis of chain of

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[1] The urgent care offices visited by appellant and by Stroman were both affiliated with the Lexington Medical Center, and their tests were sent to the same lab. R. 140, ll. 12-16; R. 134, ll. 16-17; R. 140, ll. 8-22; R. 143, ll. 2-6.

custody—he does not argue that every person who put their hands on the specimen needed appear in court. Here, appellant objected to the admission of the test results pursuant to *State v. James*, 255 S.C. 365, 179 S.E.2d 41, because without the persons who performed the tests present in court to say what their testing methods and qualifications were, the test results were inadmissible hearsay.

In *State v. James*,[2] 255 S.C. at 370, 179 S.E.2d at 43, the South Carolina Supreme Court held that "[w]here the results of tests or analyses are offered to prove an essential element of a crime **or connect a defendant directly with the commission of a crime**, such results **must** be substantiated by the person who conducted the tests or analyses." (emphasis added).

The defendant in *James* was tried for attempting to poison her husband by putting arsenic in his Christmas dinner coffee and attempting to poison him again while he was in the hospital. *James*, 255 S.C. at 367, 179 S.E.2d at 42. A sample of the husband's urine was taken at the Greenville hospital and sent to a lab in California for chemical analysis. *Id.* Over a hearsay objection, two Greenville doctors testified the California lab report showed arsenic in the husband's urine. *Id.* at 368, 179 S.E.2d at 42. The California analyst was not called as a witness and the doctors admitted: they did not know the method used for determining arsenic content; the analysis was not done under their supervision; and they could not vouch for the validity of the report. *Id.* at 368-69, 179 S.E.2d at 42-43.

The South Carolina Supreme Court reasoned that the "method used and qualifications of the tester give the results their veracity" and the doctors "knew nothing save through hearsay."

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[2] The United States Supreme Court in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 361 (2009), noted *James* illustrates that South Carolina is among states that "interpret state hearsay rules to require confrontation of the results of routine scientific tests or observations of medical personnel."

Id. at 370, 179 S.E.2d at 43. In finding it was error to admit this incompetent evidence, the Court noted the effect of this admission deprived the defendant of the right to confront and cross-examine her accusers. *Id.*

Here, as in *James*, the medical professionals who testified about the test results of appellant and of Stroman knew nothing save through hearsay. They simply read a result, without knowing what had been done by whom. They did not know the methods or qualifications of the testers and the analyses were not done under their supervision. Evidence that appellant had gonorrhea and Stroman did not was impermissibly admitted since the state used the test results to directly connect appellant to the crime without calling the analysts to substantiate the results.

Pursuant to *James*, when evidence this critical—evidence used to directly connect the defendant with the crime—is to be introduced, the person who performed the test (or his supervisor) must appear in court and confirm he was qualified to perform the test and describe the testing methods used. *State v. James*, 255 S.C. at 370, 179 S.E.2d at 43.

The state cited *Ex parte DHEC* to support its argument the results were admissible. However, that case was inapplicable to the situation at hand as its holding was narrow—it was limited to the disease HIV, the agency DHEC, and the offense of exposing others to HIV. Also, the issue addressed by the Court in *Ex parte DHEC* was chain of custody—not whether the methods and qualifications of the analysts must be established pursuant to *James*.

In *Ex parte DHEC*, 350 S.C. at 246, 565 S.E.2d at 295, Doe was indicted for knowingly transmitting HIV to another and for CSC with a minor. The South Carolina Supreme Court held that "HIV tests taken for purposes of medical diagnosis before any charges are pending are trustworthy and should be admitted as business records without a chain of custody." *Id.* at 251, 565 S.E.2d at 297. The Court found the trustworthiness of medical records to be presumed since

the test was relied on for diagnosis and treatment. *Id.* at 250, 565 S.E.2d at 297. Critically, however, the Court reasoned that because HIV is a permanent condition, Doe could be retested at any time to refute the DHEC test results. *Id.* The Court observed that if DHEC's records were wrong, "Doe could be retested at any time to refute the evidence presented against him at trial. If Doe tested negative at the time of trial, the DHEC test results could be ruled out as a false positive as HIV is a permanent condition." *Id.* The Court noted that a "person charged with DUI based on a blood alcohol test taken at the time of his arrest has no such protection and, therefore, needs the indicia of reliability provided by a chain of custody." *Id.*

The Court "h[e]ld that HIV test results and other relevant medical information in DHEC's custody are admissible as business records without a chain of custody under Rule 803(6), SCRE, for purposes of S. C. Code Ann. 44-29-145." *Id.* at 252, 565 S.E.2d at 298. This holding is narrow—it is limited to the disease HIV, the agency DHEC, and the offense of exposing others to HIV. *Ex parte DHEC* did not govern the admissibility of the evidence in the case at hand due to its narrow holding. Furthermore, *Ex parte DHEC* was concerned with the issue of chain of custody—not the issue raised by appellant and addressed in *James*, regarding the need for the analyst's appearance in court to substantiate the results by establishing his qualifications and methods.

Here, the trial court cited *State v. Chisholm*, 395 S.C. 259, 717 S.E.2d 614 (Ct. App. 2011), as an authority for the admission of the test results. However, *Chisholm* is like *Ex parte DHEC*—specific to the disease of HIV and the agency DHEC, and inapplicable to the case at hand. *Chisholm*, like *Ex parte DHEC*, addressed the issue of chain of custody, not the issue raised by appellant pursuant to *James*.

In *Chisholm*, a DHEC medical records supervisor testified that DHEC records showed the defendant and the victim were HIV positive. *Id.* at 264-65, 717 S.E.2d at 616-17. Although the supervisor did not know who performed the test or handled the samples, the supervisor said DHEC had procedures in place to "keep the blood samples straight." *Id.* Chisholm argued that the test results should have been excluded because the chain of custody was not established, and since the tests were administered for criminal investigation purposes, not medical purposes. *Id.* at 268-69, 717 S.E.2d at 619.

This Court in *Chisholm* did not decide the question left open by *Ex parte DHEC*—whether an HIV test result is admissible without a chain of custody when it was not performed for purposes of medical diagnosis. *Id.* at 271, 717 S.E.2d at 620. Instead, this Court found that any error admitting the results was harmless because Chisholm (who was tried for first degree CSC with a minor) was seen by an eyewitness with his penis "inside [the] child's butt," and the child's underwear contained a mixture of Chisholm's semen and the child's blood. *Id.* at 271-72, 717 S.E.2d at 620. This Court also noted a rationale of *Ex parte DHEC* was that a distinctive characteristic of HIV—its permanency—allowed an accused to be retested at any time to refute the evidence. *Id.* at 270-71, 717 S.E.2d at 619-20.

In *Ex parte DHEC* and *Chisholm*, the appellate courts explicitly noted the distinctive characteristic of HIV—that it is an incurable disease.[3] However, gonorrhea does not have HIV's distinctive characteristic of permanency because it can be cured by an antibiotic. *See Gonorrhea*, The Gale Encyclopedia of Medicine (Jacqueline L. Longe, ed., 4th ed. 2012). An accused cannot simply be retested for gonorrhea to refute an erroneous test result, since a negative test for

[3] Although HIV treatments have become more effective over time, there is still no cure. *See* Meiring de Villiers, *Acquired Immunodeficiency Syndrome: A Forensic Perspective*, 37 J. Legal Med. 389, 392 (2017).

gonorrhea may only mean the accused was successfully treated for the disease. Moreover, both *Ex parte DHEC* and *Chisholm* discussed the results of tests performed by the state's public health department, an entity with more oversight and arguably more trustworthy than an urgent care.

Rule 803(6), SCRE, provides an exception to the general prohibition on hearsay for records of regularly conducted activity. In *Ex parte DHEC*, 350 S.C. at 249–50, 565 S.E.2d at 297, the Court explained that to be admissible under Rule 803(6), SCRE,

> memorandum, reports, records, etc. in any form, of acts, events, conditions, or diagnoses, are admissible as long as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and **(5) found to be trustworthy by the court**.

(emphasis added). Here, neither Pamela Levi, who testified to Jamie Stroman's test results, nor Dr. Frierson, who testified to appellant's test results, knew the methods and qualifications of the testers. Without that critical information the records could not be found trustworthy by the court. The court here did not make a finding of trustworthiness on the record, although it found the results to be business records. R. 135, l. 23 – 136, l. 7; R. 44, ll. 11-21.

Both *Chisholm* and *Ex parte DHEC* looked at whether a chain of custody was required and found that it was not. However, the issue in *James*—the issue raised by appellant—is that the analyst who performed the test (or that analyst's supervisor) must appear and testify to the qualifications of the analyst and the methods he used to arrive at the test results in order to substantiate the validity of the results. Appellant does not argue the presence of every chain of custody witness is required to admit the results. Instead, appellant asserts that as held in *James*, 255 S.C. at 370, 179 S.E.2d at 43, since the state used the test to "connect a defendant directly

with the commission of a crime, [the] results must be substantiated by the person who conducted the tests or analyses."

Pamela Levi, who testified to Jamie Stroman's test results, and Dr. Frierson, who testified to appellant's test results, could only say that a specimen was taken and submitted to a lab and they read the results. This was insufficient to substantiate the results. Neither witness could speak to the methods of testing used or the qualifications of the testers.

The admission of the test results of appellant and of Stroman was error and cannot be deemed harmless. There was no overwhelming evidence of guilt. Absent appellant's gonorrhea test results, no eyewitness testimony or other physical evidence corroborated the minor's allegation that it was appellant who assaulted her.[4] Although the minor alleged her brother was in the room at the time, his testimony was not offered.

Another man, Stroman, admitted he had molested the child. Given that gonorrhea can be cured, it is possible Stroman infected the child before being treated and subsequently tested. The minor admitted she did not identify Stroman as a perpetrator during her first interview at the Dickerson Center, where she identified appellant, because she feared Stroman would hurt her mother. R. 77, ll. 4-20. Stroman was still living with the minor and her mother when she claimed it was appellant who assaulted her. R. 77, ll. 17-25. However, once Stroman was no longer in the home, the minor disclosed the sexual abuse by him. R. 78, ll. 8-16.

The state's heavy reliance on the inadmissible evidence in its closing argument highlights the prejudice to appellant. The solicitor told the jury that when it went "back to deliberate, just

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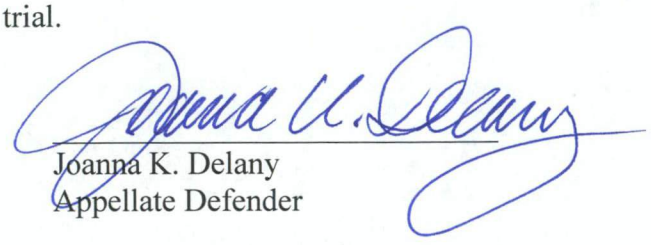
[4] The state presented the testimony of an expert in public health who said that a child was likely to show symptoms of gonorrhea within two to five days from the time of exposure. R. 159, ll. 16-21. The minor said the assault occurred during the last weekend visit she had at appellant's home. R. 65, l. 21 – 66, l. 1. However, the state did not present testimony by any adult that the minor had, in fact, visited appellant shortly before her symptoms appeared.

remember [the minor] tested positive, Jamie tested negative. [Appellant], who [the minor] identified as her perpetrator, tested positive. Positive plus a positive equals a positive and I'm positively sure that you will come back guilty." R. 179, ll. 4-8.

CONCLUSION

Based on the foregoing argument, appellant respectfully requests this Court reverse his conviction and sentence and remand for a new trial.



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This 19th day of September, 2019.

CERTIFICATE OF COUNSEL

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."

September 19, 2019.

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