DNA ISSUE

Court of Criminal Appeals Appellant's Supplemental Reply Brief

August 2, 2018

No. AP-77,046

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
AT AUSTIN

HENRY W. SKINNER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

On Appeal from the Finding Under Tex. Code Crim. Proc. Art. 64.04
by the 31st District Court of Gray County

APPELLANT'S SUPPLEMENTAL REPLY BRIEF

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Introduction

Defendant-Appellant Henry W. Skinner, through counsel, submits this reply to the Supplemental Brief filed by the State of Texas.

I. Mr. Skinner is not trying to argue that "inconclusive" STRmix results equate to exclusion.

In the 2012-13 DNA testing, Mr. Skinner was specifically excluded as a contributor to stains on certain items of evidence (a dishtowel, carpet stains in the boys' bedroom, and a blanket on Randy Busby's bed), and all of the victims were specifically excluded as contributors to stains on certain other items (blood stains on door frames and handles, a tennis shoe and a cassette tape). In the initial round of briefing on this appeal, Mr. Skinner argued that these results were exonerating because they would not be expected if Mr. Skinner were the killer.

The 2016-17 STRmix results changed some of those exclusions to "inconclusive," and the State claims that, in light of these changes, Mr. Skinner may no longer argue that the overall test results for these items are exonerating. *See* State's Supp. Br. at 14-16 (dishtowel); *id.* at 19-20 (carpet stains); *id.* at 20-21 (blanket); *id.* at 25-26 (tennis shoe and cassette tape[1]).

[1] Inexplicably, the State claims that Mr. Skinner is also relying on the results from stain 1 on a fitted sheet from the lower bunk bed in the boys' bedroom. *See* State's Supp. Br. at

The State insists that by arguing that the 2016-17 STRmix results did not materially change the 2012-13 results with respect to these items, Mr. Skinner in his Supplemental Brief is "attempt[ing] to turn inconclusive results into exculpatory ones," *Id.* at 15.

To accept this argument, the Court would have to ignore what the State's own witnesses said about "inconclusive" STRmix results. Take, for example, the blanket from Randy's bed. At trial, the prosecution told the jury that Mr. Skinner cut his hand when it slid down onto the blade of the knife as it struck Randy's shoulder blade. *See* RR (trial) Vol. 30 at 1556-67. This was an important development at the trial, as it converted a seemingly exculpatory explanation for the cut (*i.e.,* a defensive wound) into an incriminating one. But if the prosecution's theory about the injury were true, one would expect to find Mr. Skinner's blood on the blanket through which Randy was stabbed. As Mr. Skinner argued in the initial round of briefing, the 2012 results excluding Mr. Skinner as a contributor to any of the blood stains on the blanket would have provided strong rebuttal to that explanation for the cut on his hand. *See* Appellant's Opening Brief ("AOB") at 34-36.[2]

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25. Mr. Skinner has never ascribed any significance to, or even mentioned, this item in any of his briefing.

[2] The State argues that the 2012 and 2016 results on the blanket stains wouldn't have made any difference to Mr. Skinner's jury because DNA results showing that Randy's blood was on the blanket were introduced at his 1995 trial. State's Supp. Br. at 24. But that testing

The fact that STRmix now says that it is "inconclusive" whether Mr. Skinner contributed to one of the stains on the blanket does not change the force or effectiveness of his argument. The most important thing to come out of the 2018 evidentiary hearing is that all the experts agreed that in the context of STRmix results, "inconclusive" does *not* mean simply that the person in question can neither be included nor excluded as a contributor to a given sample. Rather, it means that no meaningful results were obtained, often because the quality of the underlying data was so poor. Every witness at the evidentiary hearing testified that "inconclusive" results – especially those with an LR within an order of magnitude of 1 – reflect not just uncertainty but *the absence of any informative information at all*. *See* Appellant's Supp. Br. at 19.[3] Thus, when asked specifically whether an "inconclusive" result like the

employed the RLFP methodology, which has long since been replaced by much more discriminating PCR/STR technology, and apparently involved only one of the three distinct stains on the blanket, as only one result for the blanket is mentioned. *See* Tr. 1078-1138 (testimony of Meghan Clement). Thus, the evidence at trial left wide open the possibility that the other bloodstains came from Mr. Skinner, consistent with the State's theory about his injury.

[3] Recall that a likelihood ratio (LR) is a fraction, whose numerator is STRmix's calculation of the probability of inclusion, and whose denominator is the probability of exclusion. *See* Appellant's Supp. Br. at 6-7. When the data is too weak to provide useful information in support of either proposition – as it is for many of the items in Mr. Skinner's case because of, for example, degradation and the tiny quantities of biological material involved (*see id.* at 11-13) – the numerator and denominator of the fraction will both tend toward zero, *and the resulting LR will tend toward 1*. Thus, an LR in the "inconclusive" range, and especially near 1, does not infer that inclusion and exclusion are equal possibilities, but rather that there is not enough information to draw even that inference from the result.

one found by STRmix for Mr. Skinner on blanket stain 3 could accurately be described to a jury as meaning that Mr. Skinner "cannot not be excluded" as a contributor to that stain, State's witness Brent Hester, who prepared the STRmix reports, was emphatic that it would be wrong to so characterize the result. RR 244. There is a "very big difference," he said, between "not being excluded" and "inconclusive." *Id.* at 245.[4]

Thus, to be sure, Mr. Skinner would be precluded from arguing that STRmix *excluded* him as a contributor to any DNA on the blanket,[5] but he would be fully accurate in arguing that, even after applying the latest technology for interpreting DNA test results, *DPS was unable to find any*

[4] For this reason, DPS should be encouraged to employ a different label for STRmix results that fall into what it presently calls the "inconclusive" category. The STRmix results for the fitted sheet (*see* note 1 *supra*) is but one of many examples showing why the "inconclusive" label leads to bizarre results. The State calls the STRmix results for Mr. Skinner, Elwin Caler and Randy Busby on this stain "inconclusive" (State's Supp. Br. at 25), but in fact the STRmix results for all *eight* of the persons for whom DPS had reference samples (including not only Mr. Skinner and the victims but a police officer, the court reporter, and lawyers and consultants for both parties) are labeled "inconclusive" – this despite the fact that DPS says the stain is a mixture of only two. SX 40 at 8. The STRmix computer program relentlessly tries to calculate a likelihood ratio for every known sample, even when there is little data to go on; as a consequence, as with stain 1 on the fitted sheet, the program can come up with results that place far more persons in the "inconclusive" category than could possibly have contributed to the sample. It would be more accurate if DPS simply stuck with the language it used to describe the results on this stain in its 2012 Report: "No interpretable DNA results were obtained." DX 10 at 9.

[5] It should also be kept in mind that STRmix did not change all prior exclusions to "inconclusives." Importantly, the victims all remain excluded from the blood stains on the back doors and from Mr. Skinner's bloody handprint on the bedroom door jamb – all locations where, given the constellation of facts in this case, one would expect to find their DNA mixed with Mr. Skinner's if he were the killer. *See* SX 40 at 5-6, 9.

evidence whatsoever that Mr. Skinner's DNA was on the blanket. This is not, as the State claims (*see id.* at 19, 20), an effort to argue that "the absence of evidence is evidence of absence." It is simply a scientifically accurate statement – and a compelling one, when trying to persuade a jury of reasonable doubt – that if Mr. Skinner were the killer, you would expect to find his DNA on the blanket (and the dishtowel and the carpet), but DPS did not find it on any of those items.

II. The State continues to misapply the Art. 64.04 standard of review.

Throughout its Supplemental Brief, the State continues to speak as though it should prevail in this Art. 64.04 proceeding if there is even one non-exculpatory explanation for the DNA test results on which Mr. Skinner relies. This strategy of offering up alternative explanations might have currency in a case where the defendant's burden is to show by clear and convincing evidence that he is innocent. But that is not the burden Mr. Skinner faces under Art. 64.04. That provision places on Mr. Skinner only the burden of showing a reasonable probability that the DNA test results, together with the other evidence submitted at trial, would have convinced at least one juror that there is reasonable doubt as to his guilt. *See, e.g.,* AOB at 16-18. Mr. Skinner easily meets that standard.

It is unnecessary to review all the places in the State's Supplemental Brief where it advances the view that it should prevail under Art. 64.04 if there are alternative explanations for otherwise exculpatory results. Looking at the State's arguments about the hairs in Twila Busby's hands and the palm prints on the back door knobs is enough to make the point.

Mr. Skinner relies on the fact that the three hairs recovered from Twila Busby's hands have the same mtDNA profile as Twila Busby and her maternal relatives, including alternative suspect Robert Donnell. *See* AOB at 24-30; Appellant's Supp. Br. at 16. The State responds that those hairs *could* have been picked up off the floor, and *could* have originated with Twila herself or one of her sons. State's Supp. Br. at 7. True enough, but they could also have come from *Donnell*, and that inference is supported by evidence the State fails even to mention – the two reports from DPS's trace analyst Lan Bundy, a professional trained in visual hair comparisons. Bundy, after examining these three hairs under magnification, opined that they were visually different from the many other hairs recovered from the victims' bodies. The State in the past has argued that this opinion isn't enough to *prove* that those hairs belonged to Robert Donnell, but that is not what Art. 64.04 requires. The inference that they may have belonged to Donnell is plenty – especially when coupled with the other evidence presented at trial about Donnell and his suspicious conduct

on the night of the murders – to cause a reasonable juror to be concerned that it was Donnell who struggled with, and ultimately killed, Twila Busby. That concern equals reasonable doubt about the State's case against Mr. Skinner.

The State offers a series of elaborate speculations to account for the absence of the victims' DNA from the back doorknobs of the house. One tortured explanation is that maybe their blood ended up only on the "ulnar" or "radial" edges of Mr. Skinner's hand, and not on the "palmar" part of the hand with which he would have grasped the knobs. State's Supp. Br. at ll. That the State believes this is all it need show to prevail on the materiality question is revealed by its statement that "whatever blood may have been on Appellant's hand from stabbing the boys, it would not have *necessarily* been on Appellant's palm and thus not transferred to the door knobs." *Id.* (emphasis added); *see also id.* at 12 ("if there had been any blood transfer from either of the boys, Appellant *could* have wiped it on his pants leg before touching the door") (emphasis added).

It is hard to believe that any juror would have credited the notion that the victims' blood stayed neatly segregated at the very edges of Mr. Skinner's hand during the chaotic events in the house that night or, alternatively, that the indisputably intoxicated and disoriented Mr. Skinner must have succeeded in completely wiping their blood off his hands onto his pant leg. Smeared it

around is more likely. But, even a juror who accepted one of the State's far-fetched accounts as *possible* would still find it much more plausible that if Mr. Skinner had been the killer, he would have had the blood of one or more of the victims on his hands and would have transferred it to items he touched. *See* AOB at 30-33. That would be more than enough to cause her to have reasonable doubt as to his guilt, which is all Art. 64.04 requires Mr. Skinner to show.[6]

III. The State misrepresents its own expert's testimony regarding mixtures.

As Mr. Skinner has pointed out, the State's experts at the evidentiary hearing expressed grave doubt that several of the evidentiary samples DPS labeled as mixtures in its 2016 STRmix report are mixtures at all. *See* Appellant's Supp. Br. at 23-28 (regarding the blanket stain); *id.* at 29-30 (regarding the tennis shoe and cassette stains). If these stains are not mixtures, then of course there is only one contributor – Randy Busby in the case of the blanket stain and Mr. Skinner in the case of the tennis shoe and cassette. In each instance, the result is favorable to Mr. Skinner.

[6] The State also claims that the DNA results on the doorknobs "add little" to what the jury already knew because evidence was introduced at trial that the blood on the knobs was in the form of Mr. Skinner's palm print. State's Supp. Br. at 13. This statement misses the whole point. Jurors knew from the prints that Mr. Skinner had touched the door knobs, but *didn't* know that he had none of the victims' blood on his hands when he did so.

In its Supplemental Brief, the State selectively quotes from the testimony of its witness Dr. Bruce Budowle about blanket stain 3 to make it appear that he supported the notion that that stain is a mixture. But this parsing distorts what Dr. Budowle actually said. What he stated, repeatedly, is that blanket stain 3 is a "*single source profile* with 1 trace allele." *E.g.,* RR 148, 153, 170-72 (emphasis added). Dr. Budowle was hesitant to attribute the one trace allele (an 18 at locus vWA) to drop-in, but only because the lab had not seen drop-in in its validation studies. *See* RR 170. And even when pressed, he emphatically rejected the suggestion that this trace allele (which he acknowledged barely reached the lab's analytic threshold at 50 rfus, *see id.*) warranted DPS's decision to call the stain a mixture:

> As I said, I would call it a single source with one trace allele just [*sic*] the way I would define it *so we wouldn't be overstating*. Because when you say a mixture, it sounds like there's a lot of stuff in there and there's a lot of things you're looking at and I just don't think that's a fair way to do -- to do that . . . .

RR 172 (emphasis added).

This testimony is sufficient to show that Dr. Budowle does not consider blanket stain 3 a mixture, but there's more: A week before the 2018 hearing, the State's lead hearing counsel (who also signed the State's Supplemental Brief), wrote an email to undersigned counsel to supplement the State's pre-hearing witness and data disclosures. That email left no ambiguity about

where Dr. Budowle stood on this issue: "Additionally, Dr. Budowle is of the opinion that I.24.3[7] *is not a mixture.*" *See* Attachment A hereto (emphasis added). When asked at the hearing about this email, Dr. Budowle confirmed that it correctly stated his opinion:

> Q. . . . We received an e-mail from . . . the Attorney General's office the other day that said that it was your opinion that the profile -- that the blanket stain number 3 is not a mixture?
>
> Q [*sic*]. *Yeah.* And the way I interpret it, because see, this is why I think we get into this whole problem here is how you deal with it. When I look at a profile like this, I classify it as a single source with one trace allele. Because as soon as you start getting the mixtures you start getting all this kind of haranguing around of what's real and what's not real. The evidence only supports one trace allele. *So I would treat this as a single source sample.* Say there's one trace allele, inconclusive, doesn't even become part of the interpretation at all.

RR 170-71 (emphasis added).

[7] I.24.3 is the identifying number DPS assigned to blanket stain 3.

Conclusion

For the reasons stated herein and in his prior briefing, Mr. Skinner respectfully requests that this Court reverse the district court's adverse finding under Art. 64.04. The Court should hold that, had the 2012-13 and 2016-17 DNA test results been available at the time of trial, there is a reasonable probability Mr. Skinner would not have been convicted.

Respectfully submitted,

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