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IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-147

No. COA21-241

Filed 1 March 2022

Mecklenburg County, No. 11 CRS 247933

STATE OF NORTH CAROLINA

v.

BOBBY JOHNSON

Appeal by defendant from order entered 23 September 2020 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 January 2022.

Attorney General Joshua H. Stein, by Assistant Attorney General Michael T. Henry, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

TYSON, Judge.

¶ 1 Bobby Johnson ("Defendant") appeals a trial court's order denying his motion for postconviction DNA testing and discovery. We affirm.

I. Background

¶ 2 Brandy Wells and David Rychlik stood while talking in the parking lot of the Thrift Motel on 2 May 2007 around 1:30 a.m., when three black males ran directly

towards them. Rychlik was the security officer for the motel, and his wife, Anita, was the motel manager.

¶ 3 Wells described the three men: "The first two were about five-six, five-seven, about maybe 150 pounds. The third one was about six, six-one. He was about 180, 200 pounds." Wells testified the taller man brandished a gun, with all three men talking at once and making demands. They frisked Wells and Rychlik and asked where the safe was located. The men stole cigarettes, a lighter, a cell phone, and motel office keys from Wells and Rychlik.

¶ 4 The taller man hit Rychlik in the head with the pistol. Rychlik fell to the ground. Wells was instructed to get on top of Rychlik. The taller man with the gun instructed the younger, shorter men to shoot Wells or Rychlik if they moved or talked.

¶ 5 The men fumbled with Rychlik's stolen keys and eventually gained access to the motel's office. Wells testified at least one man stayed outside, while two perpetrators, including the taller male with the pistol, entered the motel's office. The office was connected to a room where Rychlik and his wife, Anita, lived. Wells heard sounds of a scuffle inside the motel office, "like kicking over boxes . . . trying to find . . . a light or where they was going to try to go."

¶ 6 Wells heard a loud, panicked scream from the room where Anita Rychlik had been in her bed and asleep. Wells then heard a gunshot. The two men then ran outside of the motel and all three of them fled.

¶ 7 Wells called 911 upon finding Anita unresponsive. Officers and EMT ambulances arrived, but Anita was deceased. An autopsy revealed she was killed by "a single gunshot wound. The gunshot wound was located on the back of the neck."

¶ 8 Police collected a DNA sample from Defendant, which was sent for comparison with DNA material collected from beneath Anita's fingernails. The testing performed was the typical form of DNA analysis, known as "autosomal DNA analysis."

¶ 9 The results of the DNA analysis were returned in 2009. It showed a mixture of at least three people's DNA. Neither Anita's nor Defendant's DNA could be excluded. The DNA profiles found under Anita's fingernails were "consistent with the DNA profiles [of] Anita Rychlik and [Defendant]." The State's evidence tended to show the "expected frequency" of individuals possessing this DNA profile was approximately "1 in 16.6 million." The probability of randomly selecting another black male, other than Defendant, and who could have contributed an identical DNA profile to the mixture was 1 in 16.6 million.

¶ 10 Defendant was interviewed by police regarding the assaults, robberies, and Anita's murder on 24 October 2011. He initially denied any involvement or knowledge of the crime and denied having ever been inside the residential sleeping area of the office where Anita was shot and killed.

¶ 11 Officers discussed the DNA test results with Defendant. Officers spoke with Defendant for about four hours prior to placing him under arrest. After Defendant

signed his waiver of rights, he made inculpatory statements regarding his knowledge and involvement in the assaults and robberies and Anita's murder.

¶ 12 Both of the "shorter men," Wells had described were identified as brothers Joshua and Antonio Chaney, who both testified at trial and confirmed Ms. Wells' testimony regarding the events leading to Anita Rychlik's murder. Joshua Chaney testified only Defendant had a gun during the crimes and Antonio Chaney confirmed Defendant had struck David Rychlik with the pistol. Antonio testified he was in the bedroom and had watched Defendant "tussle" with Anita. He also testified he had left, while Defendant remained inside the room with Anita and then heard the gunshot.

II. Procedural Background

¶ 13 On 7 November 2011, Defendant was indicted for the first-degree murder of Anita Rychlik. Defendant was tried before a jury in September 2015, who returned a verdict of guilty. Defendant was sentenced to life imprisonment without the possibility of parole. Defendant appealed.

¶ 14 On 17 January 2017, this Court issued a unanimous, published opinion finding no prejudicial error occurred in Defendant's trial. *State v. Johnson*, 251 N.C. App. 639, 795 S.E.2d 625 (2017) ("*Johnson I*"). This Court reasoned both Joshua and Antonio Chaney had identified Defendant as the third perpetrator during the Thrift Motel assaults, robberies, and murder on 2 May 2007. Defendant did not move to

suppress their testimony. *Id.* at 664, 795 S.E.2d at 640-41. The Chaney brothers both testified to Defendant wearing a mask, carrying a gun, pistol whipping Rychlik, entering the motel office and entering Anita's bedroom. *Id.* at 640, 795 S.E.2d at 627. Wells' testimony corroborated the Chaney brothers' testimony. *Id.*

¶ 15 Defendant's DNA was found under Anita Rychlik's fingernails. *Id.* This Court stated, "[a]lthough Defendant's admission of participation in the crime, which we have held was involuntary, clearly prejudiced Defendant, in light of the overwhelming evidence presented pointing to Defendant as one of the three men involved in the robbery and murder, we hold the prejudice to Defendant was harmless beyond a reasonable doubt." *Id.*

¶ 16 Our Supreme Court granted both Defendant's and the State's petitions for discretionary review and issued an opinion modifying and affirming this Court's decision. *State v. Johnson*, 371 N.C. 870, 821 S.E.2d 822 (2018) ("*Johnson II*"). In *Johnson II*, our Supreme Court upheld the trial court's conclusion that, under the totality of the circumstances, Defendant's inculpatory statements were voluntary. *Id.* at 878, 821 S.E.2d at 828.

¶ 17 Defendant filed a motion for postconviction DNA testing and provided a sworn and notarized affidavit dated 18 March 2019, asserting "I am innocent of all charges relating to the murder of Anita Rychlik."

¶ 18 The State's detailed response to Defendant's motion included an affidavit from

Aby Moeykens, "a trained and qualified forensic DNA analyst," who is the "DNA Technical Leader" of the Charlotte-Mecklenburg Police Department Crime Laboratory, which asserted in part:

> 4. Forensic YSTR testing is typically used when standard autosomal STR testing is not informative or suitable for comparison, when there is an overabundance of female DNA and male DNA is the very minor/trace donor, and/or when that excess of female DNA masks the limited male DNA profile. These conditions do not apply to the DNA testing results previously obtained from the left-hand fingernail swab of Anita Rychlik as reported on 01/21/2009. The mixture DNA profile was suitable for comparison and, therefore; the proportion of female DNA present did not prevent an inclusionary or exclusionary conclusion to be made when compared to known standards.
>
> 5. The alleles obtained at 15 of 15 autosomal loci tested support the conclusion of both Anita Rychlik and the defendant being included as possible contributors to the mixture DNA profile obtained from the left-hand fingernail swab of Anita Rychlik. YSTR testing would strengthen the inclusion of the defendant and not provide a reasonable probability of contradicting the prior autosomal test results.
>
> 6. Unlike autosomal DNA testing that can associate an individual to a forensic profile, YSTRs can only associate paternal lineage. Due to this limitation, YSTR testing is not significantly more accurate and probative of the identity of the perpetrator when compared to autosomal DNA testing. It would be fully expected that YSTR testing conducted on the left-hand fingernail swab of Anita Rychlik would include the defendant and his paternal line as possible contributors to the profile obtained.

Defendant's motion was denied. Defendant appeals.

III. Jurisdiction

¶ 19 Jurisdiction over this appeal is proper pursuant to N.C. Gen. Stat. §§ 7A-27(b), 15A-270.1. (2021).

IV. Issue

¶ 20 Defendant argues the trial court erred in denying his motion and he is entitled to postconviction DNA testing.

V. Argument

A. Standard of Review

¶ 21 "In reviewing a denial of a motion for postconviction DNA testing, '[f]indings of fact are binding on this Court if they are supported by competent evidence and may not be disturbed absent an abuse of discretion. The lower court's conclusions of law are reviewed *de novo*.'" *State v. Lane*, 370 N.C. 508, 517, 809 S.E.2d 568, 574 (2018) (citations omitted).

B. Analysis

¶ 22 Pursuant to N.C. Gen. Stat. § 15A-269(a):

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing and, if testing complies with FBI requirements and the data meets NDIS criteria, profiles obtained from the testing shall be searched and/or uploaded to CODIS if the biological evidence *meets all of the following conditions*:
>
> (1) Is material to the defendant's defense.

> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C. Gen. Stat. § 15A-269(a) (2021) (emphasis supplied).

¶ 23 The trial court shall grant the motion if it determines:

> testing complies with FBI requirements, the run of any profiles obtained from the testing, . . .
>
> (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
>
> (3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269(b) (2021).

¶ 24 Defendant must present a sworn affidavit of innocence and bears the burden of proving every essential fact supporting his motion for postconviction DNA testing by a preponderance of the evidence. N.C. Gen. Stat. § 15A-269(b)(3). Defendant must

show the testing he requested would provide results "significantly more accurate and probative of the identity of the perpetrator or accomplice." N.C. Gen. Stat. § 15A-269(a)(3). Defendant must also enumerate specific reasons explaining how this would be the case. N.C. Gen. Stat. § 15A-269(b)(1).

¶ 25 Here, Defendant's only effort to meet his burden consists of conclusory allegations providing no reasons tending to show the YSTR testing he requested met the requirements of the statute. Defendant's motion asserted the YSTR testing would remove any "masking effect" from Anita's female DNA and would purportedly show whether Defendant's DNA profile was included in the mixture beneath her fingernails, rather than the prior autosomal testing which showed only that his profile could not be "excluded." Defendant has failed to show by either his motion or the record anything suggesting these assertions accurately reflect the capabilities of or expected results from either YSTR or autosomal DNA testing.

¶ 26 Further, the trial transcript shows the State's forensic serology expert, Patricia Byron, DNA Criminalist II in the Biology Section of the Charlotte-Mecklenburg Police Department Crime Lab, obtained the known DNA profiles of Anita and Defendant, compared them to the DNA mixture found under Anita's fingernails, and readily determined that neither Anita nor Defendant could be "excluded as possible contributors." Byron explained that the probability of randomly selecting another black male, other than Defendant who could have contributed his DNA profile to the

mixture beneath Anita's fingernails, was 1 in 16.6 million. Byron never suggested her determination was impeded in any way by any sort of "masking effect" of Anita's female DNA.

¶ 27 The trial court found and reasoned due to overwhelming evidence of Defendant's guilt there was not a "reasonable probability that the jury's decision could have been different." The trial court concluded Defendant failed to show the testing was material to his defense under the statute. Further, as a separate and independent ground, the trial court concluded under N.C. Gen. Stat. § 15A-269(a)(3)(b) Defendant had failed to show the testing he sought would provide results, which were "significantly more accurate and probative of the identity of the perpetrator or accomplice" or had a "reasonable probability of contradicting prior test results." *Id.*

¶ 28 These conclusions of law in the trial court's eight-page order are fully supported by the trial court's seventeen findings of fact, which are supported by competent evidence in the record. Defendant's arguments are overruled.

VI. Defendant's Affidavit

¶ 29 Defendant made inculpatory statements to officers and those, along with other overwhelming evidence of guilt, were presented to a jury. This Court previously held "the overwhelming evidence of Defendant's guilt of first-degree murder, based upon the evidence that Anita was murdered in the course of a robbery in which Defendant

played an essential part, renders this error harmless beyond a reasonable doubt." *Johnson I*, 251 N.C. App. at 663, 795 S.E.2d at 640.

¶ 30 Our Supreme Court modified and affirmed this Court's opinion and held Defendant's inculpatory statements to police were made voluntarily. *Johnson II*, 371 N.C. at 882, 821 S.E.2d at 828. That opinion was filed 21 December 2018 and is binding legal precedent.

¶ 31 On 18 March 2019, Defendant submitted his sworn and notarized affidavit claiming under oath he "did not shoot Anita Rychlik" and he "was not involved in" her murder. The issue of the voluntariness of Defendant's inculpatory statements to police of his involvement in Anita Rychlik's murder and the jury's verdict of guilty were no longer in question. The courts of this state and all parties are bound by the holdings in *Johnson I* and *Johnson II*. Defendant's contrary assertions in a sworn affidavit are suspect. It appears that Defendant and/or his counsel caused the affidavit containing a statement of innocence to be filed to purport to comply with the threshold requirements of N.C. Gen. Stat. § 15A-269(b)(3), notwithstanding his prior voluntary statements and "the overwhelming evidence of Defendant's guilt of first-degree murder" as previously held by this Court and our Supreme Court. *Johnson I*, 251 N.C. App. at 663, 795 S.E.2d at 640; *Johnson II,* 371 N.C. at 878, 821 S.E.2d at 828. Caution should be exercised by defendants and their counsel when filing statements under oath.

VII. Conclusion

¶ 32 Upon *de novo* review, we hold the trial court's findings of fact and conclusions are based upon Defendant's own statements and overwhelming evidence supporting Defendant's jury verdict of guilty of the felony murder of Anita Rychlik. Defendant's motion and arguments on appeal fail to provide any basis to support and conclude that YSTR DNA testing would be significantly more accurate and probative of the identity of the asserted perpetrator or accomplice. Further, Defendant fails to show, if YSTR testing was conducted, a reasonable probability exists the jury's verdict would have been different. The trial court's order on Defendant's Motion for DNA Testing and Discovery is affirmed. *It is so ordered.*

AFFIRMED.

Judges ARROWOOD and CARPENTER concur.

Report per Rule 30(e).