

APPENDIX

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

1/15/2020

BRYAN, JOE D

Tr. Ct. No. CR 01319-A

WR-89,339-01

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Deana Williamson, Clerk

JOE D BRYAN
HUNTSVILLE UNIT - TDC # 419509
815 12TH STREET
HUNTSVILLE, TX 77342

7/1/2020

BRYAN, JOE D

Tr. Ct. No. CR 01319-A

WR-89,339-01

On this day, this Court has denied applicant's motion for reconsideration/rehearing. Judge Hervey, Judge Richardson, Judge Newell, And Judge Walker would grant and file and set.

Deana Williamson, Clerk

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HUNTSVILLE UNIT - TDC # 419509
815 12TH STREET
HUNTSVILLE, TX 77342

CAUSE NO. 1319

THE STATE OF TEXAS

VS.

JOE D. BRYAN

§ IN THE 220TH JUDICIAL
§ DISTRICT COURT OF
§ COMANCHE COUNTY,
§ TEXAS
§

REPORTER'S RECORD
JURY TRIAL

APRIL 26, MAY 28, AND JUNE 16, 1989

VOLUME 3 OF 16
PAGES 89 THROUGH 90

REPORTER'S CERTIFICATE
PAGE 288

ORIGINAL

1 (Whereupon, the proceedings
2 progressed in open Court, in the
3 presence and hearing of the jury
4 (panel, to-wit:

5
6 THE COURT: All right. If you'll return to your
7 places.

8 MR. McMULLEN: I want to thank each and every one of
9 you for coming forward and if in any of you have other
10 questions that you wish to address to the Court, please
11 raise your hand.

12 Ladies and Gentlemen, this is a case that the State
13 has no eyewitness -- eyewitness testimony concerning the
14 murder itself and we have no eyewitness testimony of the
15 murderer coming or going from the scene. The State of
16 Texas has not been able to find a gun. This is a case that
17 will require evidence about the surrounding facts and the
18 circumstances surrounding the scene, the death scene and
19 the circumstances. Some people refer to that as
20 circumstantial evidence.

21 Now, circumstantial evidence is just like any other
22 evidence. It is not eyewitness evidence of the crime
23 itself, but it is evidence of surrounding facts,
24 surrounding circumstances, and in this case I expect that
25 some of the most important evidence that you will receive
will be the actions of the Defendant in this case
subsequent to the death of Mickey Blue Bryan, statements

1 and actions of the Defendant in this case. A way to talk
2 about circumstantial evidence, many of you I'm sure have
3 been to, say large rivers where boats go up and down the
4 river. If you were to see a boat that went by and saw the
5 boat's wake, you would know that a boat was going by.
6 However, if you came on the scene after the boat had passed
7 the field of vision and had gone around the bend, but you
8 saw the wake, that would be evidence that a boat had gone
9 by and the State, as to the twelve jurors that are selected
10 in this case, will put those twelve jurors, in effect,
11 after all of the evidence is in, all of the evidence has
12 been accumulated -- the State will put those twelve jurors
13 on a mountain top, and if you have ever thought about how
14 do you know you are on the top of a mountain, it's because
15 all of the points converge. From that point on the
16 mountain you'll look and from every direction it will
17 converge at that point. That's how you know you are on the
18 mountain top, so, Ladies and Gentlemen, I want to explain
19 to you once again that circumstantial evidence is evidence.
20 It is like any other evidence. It is evidence that when
21 taken together with all of the other evidence in the case
22 points to one sure result and that's the way the State will
23 try this case.

24 Now, is there anyone in this room that could not
25 convict a Defendant, any Defendant, if the evidence all

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16 possession at the conclusion of the trial on the merits.

17 WITNESS MY HAND this the 20th day of January, 1990.

18
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20 Don McDonald, Official Court Reporter
21 C.S.R. No. 479, Expires 12-31-90
22 Hamilton County Courthouse 817-386-3157
23 Hamilton, Texas 76531

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25 (See Volume IX Reporter's Certificate)

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VOLUME 3 OF 16
PAGE 218

REPORTER'S CERTIFICATE
PAGE 288

ORIGINAL

1 A Yes, sir, I did.

2 Q What did -- were you in your office?

3 A Yes, sir, I was in my office.

4 Q What did Joe Bryan tell you?

5 A Mr. Bryan told me that he had found the missing money that
6 was supposed to have been missing from their bedroom, that
7 he had been on his way to school that morning and stopped
8 to get gas, had opened his trunk to get out some kind of
9 additive for his fuel injectors, and he found the money in
10 a brown box in the trunk of his car, and that he had
11 recalled that he had put the money there a couple of weeks
12 before so when he and his wife were going to Waco they were
13 going to look for some shrubbery, and he had found the
14 money, and it was eight hundred and fifty dollars versus
15 the thousand dollars he thought that it might have been at
16 the time and that he had stopped at the bank on the way
17 into Clifton and deposited it.

18 Q Now, to set the stage there, at the time that you visited
19 with Joe Bryan outside of his residence --

20 A Yes, sir --

21 Q -- had you visited about property that might have been
22 missing from the master bedroom?

23 A Yes, sir.

24 Q Or from the house?

25 A Yes, sir.

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COMANCHE COUNTY,
TEXAS

REPORTER'S RECORD
JURY TRIAL

APRIL 26, MAY 28, AND JUNE 16, 1989

VOLUME 4 OF 16
PAGES 225 THROUGH 228

REPORTER'S CERTIFICATE
PAGE 328

ORIGINAL

1 this picture of where -- was the wastebasket in this
2 position shown in State's Exhibit 36 when you got there?

3 A Yes, sir.

4 Q All right. The wastebasket had not been moved, to your
5 knowledge?

6 A No, sir.

7 Q And so 37 would have been directly underneath this counter;
8 is that right?

9 A Yes, sir.

10 Q All right. Where you found what purports to be a
11 bloodstain?

12 A Yes, sir.

13 Q Where was this particular pair of mans underwear that you
14 found, please, sir?

15 A Right there (indicating), right underneath that receipt and
16 piece of paper.

17 Q All right, sir. And were you able to identify the type?

18 A Yes, sir.

19 Q And the size?

20 A Yes, sir.

21 Q Did you consider that to be significant in this case?

22 A Yes, sir.

23 Q Why?

24 A Well, the sticky stain hadn't dried, which led me to
25 believe they hadn't been there --

1 Q These Jockey shorts were still moist?

2 A Well, sticky, moist --

3 MR. MCDONALD: Objection, Your Honor, it's
4 repetitious. I believe we went over this yesterday and
5 this morning in his examination. I think it's about the
6 third time he's gone over this.

7 MR. LEWELLEN: I didn't mention it yesterday. He's
8 the only one that's asked about it.

9 MR. MCDONALD: Excuse me, Your Honor. I believe --
10 can I address the Court without Counsel -- with the
11 side-bar remarks? Your Honor, I object to the side-bar
12 remarks, also.

13 THE COURT: I'll overrule the objection. I'm going to
14 allow him to ask the question.

15 MR. MCDONALD: Would the Court caution him about the
16 side-bar remarks? When I stand up to make an objection, I
17 would like to be able to do it under the rules of
18 procedure, Your Honor.

19 THE COURT: Yes, sir. Both of you be careful about
20 that.

21 MR. MCDONALD: Thank you.

22 BY MR. LEWELLEN:

23 Q Did you say the underwear was moist?

24 A It was moist enough to be sticky.

25 Q All right.

1 A Yes, sir.

2 Q Did you have occasion to ask Joe Bryan about this pair of
3 underwear found in his master bathroom?

4 A Yes.

5 MR. MCDONALD: Same objection, repetitious, Your
6 Honor. The whole line of questioning has been gone into
7 before. It's a rehashing of the same thing.

8 MR. LEWELLEN: I haven't mentioned it before now.

9 THE COURT: I'll allow it.

10 BY MR. LEWELLEN:

11 Q What did he tell you?

12 MR. MCDONALD: Can I have a running objection on this,
13 Your Honor?

14 THE COURT: Yes, sir.

15 MR. MCDONALD: The Court's same ruling, I take it?

16 THE COURT: Yes, sir.

17 MR. MCDONALD: Thank you.

18 BY MR. LEWELLEN:

19 Q What did he tell you?

20 A When I first told him about it?

21 Q Yes, sir.

22 A He said it was caused by a urine drip caused by him taking
23 the vitamins.

24 Q Did you send that off to the lab?

25 A Yes, sir.

1 Q Did it come back moist with semen?

2 A Came back semen, yes, sir.

3 Q Did you tell Joe Bryan it came back still moist from semen?

4 A No, sir.

5 Q Are you aware of any other man that had been in that

6 bedroom the last two days?

7 A No, sir.

8 Q Besides the killer?

9 A No, sir.

10 Q Did you tell Joe Bryan when the examination came back it

11 came back semen?

12 A I believe so.

13 Q And did he have -- did you have another conversation? Was

14 there another statement he made about the underwear after

15 that?

16 A Yes, sir.

17 Q And then what did he say when he found out it was still ~~moist~~

18 moist with semen?

19 A That's when he reported that his underwear had been stolen

20 by the killer, and deposited the seminal fluid in it and

21 put it in his trash.

22 Q How did he know the killer had stolen a pair of his

23 underwear? How did he tell you that he knew that? Did you

24 ask him?

25 A He reported it stolen.

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JURY TRIAL

APRIL 26, MAY 28, AND JUNE 16, 1989

VOLUME 5 OF 16
PAGES 58 THROUGH 60

REPORTER'S CERTIFICATE
PAGE 291

ORIGINAL

1 A Because Bud said he needed to relieve himself, so we
2 stopped there on the gravel road.

3 Q All right. And did just he get out of the -- of the car or
4 did both of you?

5 A Both of us got out, I believe.

6 Q Do you remember if both of you relieved yourselves?

7 A No, sir.

8 Q You don't?

9 A No, sir.

10 Q At any rate, during the course of that, did -- did Bud
11 Saunders realize that he had some mud on his boot?

12 A He did and I said to him, "Don't -- we need -- don't get
13 back in the car with that on." And he said, "All right.
14 Well, give me something to clean the boots off with."

15 I looked in the car, and I didn't see anything and I
16 took the keys out. They were in the ignition. I took them
17 out, walked back and opened the trunk to get a rag or
18 something out.

19 Q Okay. Now, let me stop you right there.

20 You say you removed the keys from the ignition and
21 went back to the trunk?

22 A Yes.

23 Q Now, do -- do you know if the key that fit the ignition is
24 also the key that fit the trunk?

25 A I'm not positive.

1 Q And you proceeded then to open the trunk?

2 A Yes, sir, I did.

3 Q All right. At that point was Bud Saunders looking in the
4 back floorboard of the car on the opposite side?

5 A He was on the opposite side of the car. I can't recall
6 what -- exactly what he was doing, but he was on the
7 opposite side of the car, yes, sir.

8 Q And you opened the trunk?

9 A Yes, sir.

10 Q And -- and did something catch your attention when you
11 opened the trunk?

12 A When I opened the trunk, there was a cardboard box and it
13 was -- my eyes just zoomed in on it, and there was this
14 flashlight that had specks all over it, and, you know, I --
15 I reached over like this (indicating) and picked the
16 flashlight up and said, "Bud, what does this look like to
17 you?" He stuck his finger in the flashlight and he said,
18 "That's blood on the flashlight."

19 Q I'm going to hand you what's been marked as State's Exhibit
20 Number 40.

21 Does that look familiar to you?

22 A Yes, sir.

23 Q What is it?

24 A It's the flashlight. It was a blue flashlight, and had a
25 white ring around it and that's what I see, the white part.

1 Here looks like the blue part.

2 Q Was it in a box?

3 A Yes, sir, it was.

4 Q Did it appear like State's Exhibit 40?

5 A Well, no, it was -- the box was organized, and there were
6 several things in the box and this flashlight was setting
7 down with the lens up.

8 Q All right. Bud Saunders told you that it appeared to him
9 that that was blood?

10 A Yes, sir.

11 Q Did he give you advice at that point about what you needed
12 to do?

13 A He put -- he said, "Let's put the flashlight back in the
14 box --" -- which he did -- " -- and go to town and call
15 the police."

16 Q All right. And is -- is that what you did?

17 A Yes, sir. First we drove by my sister's house. There had
18 been some people there cleaning it up and told him I
19 thought maybe the police would be there at her house. We
20 drove to her house. There was no one at the house, but we
21 walked in the house. I had not been to the house since her
22 death and so we walked in, walked back to the back bedroom.
23 As soon as we got there, I said, "Bud, let's get out of
24 here."

25 We turned around and walked back out of the house, and

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APRIL 26, MAY 28, AND JUNE 16, 1989

VOLUME 5 OF 16
PAGES 239 THROUGH 240

REPORT'S CERTIFICATE
PAGE 291

ORIGINAL

1 A Yes, seems like. I can't tell you for sure now.

2 Q Did your sons' have any report to you about the dog barking
3 or anything that disturbed them while they were there in
4 the house?

5 A No, sir.

6 Q And you know that Glen Nix came and got the key from your
7 son or knocked on the door and your son told him the key to
8 the vehicle was in the mailbox?

9 A Yes, sir.

10 Q While you were there with the car, did anybody look in the
11 trunk?

12 A No, sir.

13 MR. McMULLEN: Pass the witness.

14 CROSS-EXAMINATION

15 BY MR. MALONE.

16 Q Mr. Taylor, do you remember seeing the car in the parking
17 lot down in Austin?

18 A Yes, sir.

19 Q It was a particularly clean looking car, was it not?

20 A Yes.

21 Q Very shinny car?

22 A It always was clean, yes, sir.

23 Q You, of course -- how long have you lived in the Central
24 Texas, Waco area?

25 A Twenty years, twenty-two.

1 Q Just looking at that car on that parking lot, that car
2 didn't look like anybody got in that car in the middle of
3 the night and drove it through a blinding rain storm in
4 Central Texas, did it?

5 A I couldn't tell.

6 Q Didn't have any dirt on the windshield or on the car
7 itself?

8 A I never went around to the front of the car, I just stood
9 back by the back of the car, but it looked clean.

10 MR. MALONE: That's all. Pass the witness.

11 MR. McMULLEN: Nothing further.

12 THE COURT: Thank you. Witness excused?

13 MR. McMULLEN: Yes. We would ask that he would be.

14 MR. MALONE: No objection.

15 THE COURT: All right. You are free to go.

16 MR. McMULLEN: Glen Nix.

17 THE COURT: Mr. Nix, if you'll come on up, please,
18 come around this way.

19 (Witness sworn.

20 GLEN NIX.

21 was called as a witness on behalf of the State of Texas, and
22 after having been first duly sworn, testified as follows,
23 to-wit:

24

25

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VOLUME 5 OF 16
PAGES 84 THROUGH 85

REPORTER'S CERTIFICATE
PAGE 291

ORIGINAL

1 A My opinion, yes, sir.

2 Q Given the fact that you found blood on the floor of the
3 master bedroom, and that you had an opinion that whoever
4 fired the shots that killed Mickey Bryan would be covered
5 with blood, and yet you found no blood anywhere else in the
6 house, what did that tell you?

7 A Indicates to me consistent with the person cleaning up
8 prior to leaving that room and changing shoes or clothes or
9 something of that nature.

10 Q When people commit a burglary, is it customary, based upon
11 your experience as a detective, for them to take a change
12 of clothes and shoes with them?

13 A I never had one in thirty-four years that did.

14 Q Now, did you go into -- given that -- that opinion that you
15 had, did you go in and with your magnifying glass check the
16 shower?

17 A Yes, sir. I entered the bathroom area off of the master
18 bedroom and I did check the shower for bloodstains.

19 Q And were you frustrated when you didn't find any blood in
20 the shower?

21 A Very frustrated.

22 Q It didn't make any sense to you, did it?

23 A No, sir.

24 Q Did you find out only later that the shower did not work?

25 A Several -- several days later I believe it was, maybe a

1 month later.

2 Q All right. I'll hand you what's been marked and previously
3 introduced into evidence as State's Exhibit 36.

4 Is that a photograph of the master bedroom area?

5 A That's a photograph of the bathroom off the master bedroom,
6 the vanity area with the sink.

7 Q Did you examine that area?

8 A Yes, I did, sir. I -- I couldn't do the whole entire
9 section due to the fact there was latent fingerprint used
10 in certain areas, the top of this vanity, and once the
11 latent fingerprint is put on any area, I will not touch it
12 for bloodstain interpretations because it contaminates the
13 evidence fully.

14 Q Did you examine the trash can?

15 A Yes, sir.

16 Q Did you see evidence of a blood spattering in that trash
17 can?

18 A Yes, I did, sir, on a piece of paper.

19 Q All right. From your examination of the bathroom area,
20 were you able to develop an opinion as to whether the
21 killer cleaned up in the bathroom?

22 A Based on the bloodstains within the bathroom, I could not
23 make a determination if he did clean up, did not clean up
24 within the bathroom.

25 Q All right. Let's talk something about blood and how it

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VOLUME 6 OF 16
PAGES 162 THROUGH 166

REPORTER'S CERTIFICATE
PAGE 281

ORIGINAL

1 Q What is -- what is a centrifuge?

2 A A centrifuge is machine that separates liquid and solid
3 materials. It spins very quickly and the solid material
4 goes to the bottom of your tube and liquid stays on the
5 top.

6 The slides that I prepared were made from the bottom,
7 the material that goes to the bottom of the tube. The
8 other testing that I did on the stains I -- I did from the
9 liquid that I had.

10 Q And with regard to the stain, 115, it was obtained on this
11 slide -- it was obtained from the solid that came to the
12 bottom of the tube?

13 A Yes, sir.

14 Q And based upon your experience, does that have an affect on
15 sperm cells, the centrifuging process?

16 A Yes, it does. When you take a -- a stain or when you take
17 -- when you take a stain and certrifuge it, many times
18 sperm cells that are present in the stain are broken up by
19 the force of the centrifuge, so it's -- it's not uncommon
20 that you do not recover all of the sperm that could be
21 present in the stain.

22 Q And when a sperm cell is broken up, is it difficult to
23 identify if it's not in a whole microscopically?

24 A Yes, sir, it is.

25 Q It looks -- it can look like many other things; is that

1 correct, if it's broken up in parts?

2 A Yes, sir, it could.

3 Q All right. When you examined the stain -- the slide on the
4 stain that came from the underwear in comparison to the
5 slide that was taken from Joe Bryan's sample, did you find
6 that the Joe Bryan slide had sperm cells in it but that the
7 stain taken from the underwear did not?

8 A Yes, sir, I did. The slides that came from the semen
9 sample from Mr. Bryan did have sperm cells on it and I did
10 not find any on the stains from the underwear.

11 Q And once again, the stain from the underwear had been
12 centrifuged?

13 A Yes, sir.

14 Q Now, with the sample that you -- you then proceeded with
15 the liquid portion of the seminal sample from the underwear
16 and the liquid portion of the Joe Bryan sample to make
17 other comparisons; is that correct?

18 A Yes, sir, I did.

19 Q All right.

20 A When a stain is found on any piece of clothing or vaginal
21 swabs, the initial test to see if semen is present is
22 called an acid phosphatase test, and that was the initial
23 test that I did on the underwear, which was an acid
24 phosphatase test, and it was positive, and that tells me
25 this could be a semen stain and I will go ahead and do

1 addition testing to confirm that it is semen.

2 Q This is the underwear that you are talking about?

3 A Yes, sir.

4 Q The stain on the underwear?

5 A Yes, sir.

6 Q All right.

7 A The next test I did is called a P 30 test. It's a test for
8 -- look for protein, P 30, and this protein is only found
9 in seminal fluid, so just as -- if you find P 30 or you
10 find sperm cells, then you have confirmed the presence of
11 semen, so even though the slides did not have the sperm
12 cells on them, I did detect P 30 in that stain and so that
13 is a seminal stain.

14 Q Okay.

15 A I went ahead and attempted to do blood group testing on the
16 semen stain to see what the blood type of the semen donor
17 was.

18 Q This is on the underwear?

19 A Yes, sir.

20 Q The stain -- the -- this -- the sample that you took from
21 the fabric you cut out of this underwear, State's Exhibit
22 Number 114?

23 A Yes, sir. On the liquid portion of the sample is what I
24 did the blood group testing on and I picked up group
25 substance A, which would indicate the semen donor was an A

1 secretor.

2 Q Now, let me stop you right there.

3 An A, what percentage of the population is blood type
4 A?

5 A Approximately forty percent of the population would be
6 blood group A.

7 Q And then you mentioned another term there when you said
8 secretor.

9 Is -- does secretor mean that a person's blood type
10 appears in his body fluids such as semen and saliva?

11 A Yes, sir, it does.

12 Q In other words, that's where that term comes from that --
13 that blood type secretes through to those body fluids?

14 A Yes, sir.

15 Q Is everyone a secretor?

16 A No, everyone is not a secretor. Approximately seventy-five
17 percent of the population are secretors.

18 Q Now, if a person's blood type could be determined from a
19 stain left on underwear, would that person necessarily have
20 to be a secretor?

21 A Yes, sir.

22 Q Because if he wasn't a secretor, you couldn't tell what his
23 blood type was from the stain; is that correct?

24 A Yes, sir.

25 Q And you determined that Joe Bryan is a type A secretor?

1 A Yes, sir. I tested the blood sample that was submitted and
2 he is a blood group A. I also tested the saliva sample
3 that was submitted and I detected A in the saliva. I
4 tested the semen stain and detected A in the semen stain,
5 which would indicate that he is an A secretor.

6 Q Because not only did his blood show type A, but his semen
7 that he submitted pursuant to Court order, his seminal --
8 so showed type A, which means he's a secretor?

9 A Yes, sir.

10 Q Now, I see some circles drawn on this underwear. They
11 appear to be made with a ball-point pen around the vicinity
12 of the stains.

13 Were those made by you?

14 A Yes, sir, they were.

15 Q I'm going to take State's Exhibit 114, 115 and 116 and put
16 it back in the bag marked State's Exhibit 113.

17 Okay?

18 A Yes, sir.

19 Q Now let's talk a little further about --

20 MR. McMULLEN: May I stand here, Your Honor?
21 Otherwise, I can't see the witness.

22 THE COURT: Yes, sir.

23 MR. McMULLEN: Thank you.

24 BY MR. McMULLEN:

25 Q Let's talk a little further about a semen stain in -- in

REPORTER'S CERTIFICATE

2 I, Don McDonald, Official Court Reporter in and for the
3 220th Judicial District Court of Bosque, Comanche and Hamilton
4 Counties, Texas, do hereby certify that the foregoing pages, the
5 same being Volume VI of Sixteen Volumes, when taken together
6 with all other Volumes One through Sixteen, inclusive, contain a
7 true and correct transcription of all portions of evidence and
8 other proceedings requested in writing by counsel for the
9 parties to be included in the statement of facts in the
10 aforesyled and numbered cause, all of which occurred in open
11 court or in chambers and were reported by me.

12 I further certify that this transcription of the record of
13 the proceedings truly and accurately reflects the exhibits, if
14 any, requested to be included in this transcription, marked
15 and/or offered by the respective parties that were left in my
16 possession at the conclusion of the trial on the merits.

17 WITNESS MY HAND this the 20th day of January, 1990.

Don McDonald, Official Court Reporter
C.S.R. No. 479, Expires 12-31-90
Hamilton County Courthouse 817-386-3157
Hamilton, Texas 76531

Certificate of Charges:

24 (See Volume IX Reporter's Certificate)

CAUSE NO. 1319

THE STATE OF TEXAS

VS.

JOE D. BRYAN

§ IN THE 220TH JUDICIAL
§
§ DISTRICT COURT OF
§
§ COMANCHE COUNTY,
§ TEXAS
§

REPORTER'S RECORD
JURY TRIAL

APRIL 26, MAY 28, AND JUNE 16, 1989

VOLUME 6 OF 16
PAGES 189 THROUGH 192

REPORTER'S CERTIFICATE
PAGE 281

ORIGINAL

1 Q And it came from inside the very box?

2 A Yes, sir.

3 Q Okay.

4 MR. McMULLEN: May I publish to the jury?

5 THE COURT: Yes, sir.

6 BY MR. McMULLEN:

7 Q You found no money in the trunk of that car?

8 A No, sir.

9 Q Now, when you removed the flashlight after these last
10 photographs inside the Texas Rangers offices -- the
11 flashlight was then removed from the box?

12 A Yes, sir.

13 Q And did you note some blue plastic on that flashlight?

14 A Yes, sir. At the Ranger office I -- I found one piece of
15 blue plastic on the lens itself.

16 Q And when you saw that, did you have some concern about that
17 plastic falling off the lens of the flashlight in transit
18 to the laboratory?

19 A Yes, sir, I did.

20 Q So did you remove that item of blue plastic from the lens?

21 A Yes, sir, I did.

22 Q I -- I didn't look closely at the photographs. They have
23 been with the court reporter. The --

24 Is that what the pencil is pointing to?

25 A It's hard for me to remember, but I believe that's what it

1 was pointing to, yes.

2 Q All right. Thank you.

3 So at that point at the offices of the Texas Rangers,
4 you removed the blue plastic?

5 A Yes, sir, I did.

6 Q And kept it for comparison?

7 A Yes, sir.

8 Q And that indeed is the piece of plastic that you compared
9 with State's Exhibit 104 or D.P.S. Exhibit 14 and with the
10 sample shot that was provided to you by the Clifton
11 officers?

12 MR. MALONE: Leading.

13 MR. McMULLEN: It is. I'm sorry. I was trying to
14 make it easy.

15 BY MR. McMULLEN:

16 Q What did you compare it with?

17 A I compared the blue plastic that was -- that I recovered
18 from the flashlight to my number -- D.P.S. Number 14, which
19 was at the scene and also the blue plastic that was
20 submitted, the rat shot brought by Clifton P.D..

21 After I brought the flashlight to the laboratory and
22 examined it, I also found a smaller piece of blue plastic
23 on the lens that I had not seen initially. There was blood
24 present on those pieces of blue plastic, also, and I could
25 test the blood on them and it did test to be human blood on

1 the pieces of blue plastic itself.

2 Q Human blood on top of the pieces of blue plastic on top of
3 the lens, is that another way of saying it?

4 A I can't say that the blood was on top, but there was blood
5 on the blue plastic.

6 Q All right. You were able to type it as human -- you were
7 able to classify it as human blood?

8 A Yes, sir.

9 Q And what about a blood grouping?

10 A There was not enough present on the blue plastic to do
11 anything other than say that it was human blood.

12 Q By the way, did you try that flashlight in the lab to see
13 if it worked?

14 A Yes, sir, I did.

15 Q And did it?

16 A Yes, sir, it did.

17 Q When I say "worked", it shined light?

18 A Yes, sir.

19 Q Did you then undertake with the flashlight to try to do
20 some tests on the blood that appeared on the lens of that
21 flashlight?

22 A Yes, sir, I did.

23 Q What did you come up with?

24 A I found human blood group O on the flashlight lens. I had
25 tried to do some enzyme typing on it, but I could not get

1 any results from enzyme typing.

2 Q There just wasn't enough to go down further for enzyme
3 typing; is that right?

4 A Either there wasn't enough or it didn't respond to testing.

5 Q Okay. Type O --

6 A Yes, sir --

7 Q -- and what was the blood type of the deceased?

8 A She is also a group O.

9 Q Now, we went back to group A and talked about the number of
10 people that are blood type group A.

11 What percentage of the population is of blood type
12 group O?

13 A Approximately forty-five percent of the population.

14 Q Now, you talked to us about the tests that you ran on the
15 plastic that you removed at the Ranger headquarters.

16 Did you also try to do some work on the second blue
17 plastic particle that you found on the flashlight?

18 A The second piece that I found was -- was smaller than the
19 piece that I had seen at the Ranger office. I examined
20 both of the pieces microscopically to see that they were
21 the same color, but I only did any chemical testing on the
22 larger piece.

23 Q All right. Thank you.

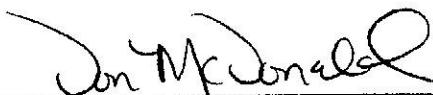
24 But at least from a microscopic examination they were
25 the same?

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CAUSE NO. 1319

THE STATE OF TEXAS

VS.

JOE D. BRYAN

IN THE 220TH JUDICIAL

DISTRICT COURT OF

COMANCHE COUNTY,
TEXAS

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REPORTER'S RECORD
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VOLUME 8 OF 16
PAGES 287 THROUGH 290

REPORTER'S CERTIFICATE
PAGE 321

ORIGINAL

1 Q Is that a place you essentially relied on to trade and
2 did most of your gas purchases?

3 A Yes, it is.

4 Q Do you recall where you stopped to refuel?

5 A Yes, sir, I do.

6 Q And where, sir?

7 A There is a Gulf station on Interstate 35 and Loop 340,
8 that is where I stopped.

9 Q Now then, sir. From the time of October the 11th, I
10 believe it was on a Friday at Mr. Bryn's, until this
11 time, had you bought or purchased any fuel for this
12 vehicle?

13 A Absolutely not.

14 Q Again, I will ask you whether or not the government has
15 access or has had access by subpoena since October of
16 1960-- I mean, 1985, for all of your gas purchase cards?

17 A They do.

18 Q And did they find at all, anywhere where you had purchased
19 any of the gas other than Bryn's on the 11th and at this
20 Gulf station on the 20th?

21 A They did not.

22 Q When you opened the trunk of that vehicle, Mr. Bryan,
23 what, if anything, did you find?

24 A I was reaching in to get the Mixarow to put in the gas
25 tank and I saw the brown money bag with the money, just

1 laying there on the top of the box, and the items in the
2 box.

3 Q What did you think of, about the money bag being there?

4 A Well, I remembered putting the money in the car and then I
5 was upset with myself, because I hadn't remembered it, and
6 I also know that is not where I had put it.

7 Q All right, sir. Is this the same money that you mentioned
8 or that you said you usually kept in this brown object,
9 safe, or whatever it is called by your bed?

10 A Yes, sir.

11 Q All right, sir. All right. Now, you think it is there,
12 you mentioned it to Mr. Wilie. Now, you see a money bag.
13 Would you tell us how it got from that place to the money
14 bag?

15 A From the brown file box into the money bag?

16 Q Yes, sir.

17 A I put it there.

18 Q And into the car?

19 A I put it there.

20 Q Why?

21 A On October the 5th, Mickey and I were going into Waco to
22 go to a movie, and to go shopping. We were going to look
23 at some shrubbery to place around the house and we had
24 discussed it. We thought we might as well use that money,
25 and I got the money out that day, on October the 5th, and

1 put it in the brown bank bag, and put it in the car.

2 Q All right, sir. Did you ever have an occasion back then
3 that you would ever have to be called upon to be that
4 detailed and that accurate in memory, where you would have
5 to have something exact or specific, or you would be
6 charged with a heinous crime? Did that ever occur to you
7 back on October 5th, 1985?

8 A Absolutely not.

9 Q Do you have any-- or, of course, have any reason at that
10 time or before all of this came down to keep a detailed
11 record of every move and thing you did in your life?

12 A No.

13 Q What did you do on Monday?

14 A Monday morning, when I got to Clifton, I take the money
15 and deposit it in the bank, and call Mr. Brennand and
16 told him that I had found the money.

17 Q All right, sir. Did you think anything about making the
18 call or were you trying to hide or cover up anything at
19 all, Mr. Bryan?

20 A There was nothing to hide. He had asked me to call him if
21 I found anything unusual, or anything was any different,
22 and I told him that I would, and I called him.

23 Q At any time after you got back into that home, did you
24 ever try to give them a reason or a motive for this crime
25 by saying, "Look, there is lots of things missing from my

1 home, lots of thefts, items taken", or "This cash in the
2 amount of a thousand dollars, that has never been found"?

3 Did you try to mislead them in any way by giving
4 some indication that somebody did it for a reason?

5 A No, sir.

6 Q Were you expecting anybody at all to-- were you expecting
7 anyone at all at that time to arrest or accuse you of
8 this horrible murder of your wife, Mr. Bryan?

9 A No, sir.

10 Q What was the first indication that you had that you were
11 first being considered as a suspect?

12 A When I heard my mother or my aunt, one, talking to Mr.
13 Wilie and Mr. Brennand and Mr. Profitt, and I heard them
14 say they wanted to see me, and I walked in and Mr. Wilie
15 said, "You are under arrest for the murder of your wife."

16 Q That was the first knowledge you had there was any-
17 thing afoot to accuse you of this crime?

18 A That's right.

19 Q Do you have any idea, to this day and time, who in the
20 world might have killed your wife?

21 A No, sir, I don't; but, I can tell you, if I did, I
22 wouldn't be up here fighting for my life.

23 Q Do you have anything or have you done anything at all to
24 hide or conceal or impede in any manner the investigation
25 of Wilie, as far as him looking ever since October 16th,

THE STATE OF TEXAS *

COUNTY OF COMANCHE *

I, PATRICIA S. FRENCH, Certified Shorthand Reporter, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings in the above styled and numbered cause, held upon the date of June 28, 1989, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

Witness my hand this the 19 day of

January, 1990.



Patricia S. French
Certified Shorthand Reporter
State of Texas, #1633
Exp. 12/31/90
1517 Seaman's Way
Abilene, Texas 79602
(915) 673-9273

Opinion filed November 27, 2019



In The

Eleventh Court of Appeals

No. 11-17-00236-CR

THE STATE OF TEXAS, Appellant

V.

JOE D. BRYAN, Appellee

**On Appeal from the 220th District Court
Comanche County, Texas
Trial Court Cause No. 1319**

MEMORANDUM OPINION

We withdraw our former opinion and judgment dated August 30, 2019, and we substitute this opinion and judgment therefor. Having considered Appellee's motion for rehearing and the State's response thereto, we deny the motion for rehearing. We note that the State's response to Appellee's motion for rehearing is well-taken.

In 1985, in Bosque County, a jury convicted Appellee of the offense of murder; the victim was Appellee's wife, Mickey Blue Bryan. The Waco Court of Appeals reversed that conviction and held that the trial court erred when it refused

to allow Appellee to reopen and present rebuttal testimony before jury arguments began. The Waco court remanded the case to the trial court. Subsequently, the trial court transferred venue to Comanche County.

After a lengthy trial in 1989, a Comanche County jury convicted Appellee, for the second time, of the offense of murder and assessed his punishment at confinement for 99 years and a fine of \$10,000. The same trial judge who presided over the Bosque County trial also presided over the Comanche County trial. This court affirmed Appellee's Comanche County conviction in an opinion and judgment issued in 1991. *Bryan v. State*, 804 S.W.2d 648 (Tex. App.—Eastland 1991), *aff'd*, 837 S.W.2d 637 (Tex. Crim. App. 1992), *abrogated in part by Trevino v. State*, 991 S.W.2d 849 (Tex. Crim. App. 1999).

In 2011, Appellee filed a motion for postconviction DNA testing. That motion is not at issue here. In 2017, Appellee filed another motion for postconviction DNA testing under Chapter 64 of the Texas Code of Criminal Procedure. *See TEX. CODE CRIM. PROC. ANN. arts. 64.01–.05* (West 2018). The same trial judge who presided over both the Bosque County trial and the Comanche County trial heard the 2017 motion for DNA testing and granted it as to each item upon which Appellee requested testing. The State has brought this appeal from that ruling. *See id.* art. 44.01(a)(6).

In a single issue on appeal, the State contends that “[t]he trial court erred in finding that Appellee established by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing of each of the items ordered to be tested.” We vacate the trial court's order and remand the cause to the trial court.

There are threshold requirements that a defendant must prove before he is entitled to postconviction DNA testing. *See id.* art. 64.03. A plain reading of the State's issue on appeal reveals that the only one of those requirements that the State

contests in this appeal is the one that is contained in Article 64.03(a)(2)(A). *Id.* art. 64.03(a)(2)(A). Under that provision, a movant must establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. *Id.* “Exculpatory results” means results excluding the convicted person as the donor of the material. *Holberg v. State*, 425 S.W.3d 282, 287 (Tex. Crim. App. 2014). We are to presume that the results of the postconviction DNA tests would be favorable to the defendant. *Routier v. State*, 273 S.W.3d 241, 257 (Tex. Crim. App. 2008). “A ‘favorable’ DNA test result must be the sort of evidence that would affirmatively cast doubt upon the validity of the inmate’s conviction; otherwise, DNA testing would simply ‘muddy the waters.’” *Ex parte Gutierrez*, 337 S.W.3d 883, 892 (Tex. Crim. App. 2011) (citing *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002)). A convicted person is not entitled to DNA testing unless he first shows that there is a greater than 50% probability that he would not have been convicted if the presumed exculpatory results had been available at the time of his trial. *Holberg*, 425 S.W.3d at 286–87.

In our review of the trial court’s ruling in this case, we are to give almost total deference to the trial court’s findings of historical fact and application-of-law-to-fact issues that turn on witness credibility and demeanor. *See Gutierrez*, 337 S.W.3d at 890; *Routier*, 273 S.W.3d at 246. But we review *de novo* all other issues applying law to fact. *Gutierrez*, 337 S.W.3d at 890; *Routier*, 273 S.W.3d at 246. The *de novo* review includes the issue of whether the convicted person has established by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. *Rivera*, 89 S.W.3d at 59; *see CRIM. PROC.* art. 64.03(a)(2)(A).

The State has taken the position that, in our review, we cannot consider the trial record from the Comanche County conviction because it was not offered as a part of the record in the DNA hearing in the trial court. When we review a trial

court's ruling on a postconviction DNA motion, we may take judicial notice of the contents of our file in the direct appeal of the conviction. *Ware v. State*, No. 01-03-00073-CR, 2004 WL 440425, at *1 n.1 (Tex. App.—Houston [1st Dist.] Mar. 11, 2004, no pet.) (mem. op., not designated for publication); *see also Turner v. State*, 733 S.W.2d 218, 223 (Tex. Crim. App. 1987) (an appellate court may take judicial notice of its own records in the same or related proceedings involving the same or nearly the same parties)

Further, insofar as the State's challenge to the evidence available to the trial court is concerned, the same trial judge had twice tried this same case. In fact, when the State questioned whether the trial court had an adequate record upon which it could rule on the motion, the trial judge made the statement: "I tried it twice. I'm fairly familiar with it." As the court said in *Jacobs*, "the trial court would have before it the court's entire file when ruling on [the] motion for post-conviction DNA testing. Because this case had been previously appealed, the trial court had access to testimony in the reporter's record." *Jacobs v. State*, 115 S.W.3d 108, 112 (Tex. App.—Texarkana 2003, pet. ref'd). The State's challenge to the sufficiency of the record, either before the trial court or this court, is overruled.

In the direct appeal of this case, we found that the evidence, though circumstantial, was sufficient to support the finding of the jury that Appellee murdered his wife, Mickey. *Bryan*, 804 S.W.2d at 651. In this appeal, however, the sole issue presented is whether Appellee has met his burden to show, by a preponderance of the evidence, that with the presumed exculpatory DNA test results, he would not have been convicted. The answer to that issue necessitates a review of the evidence. That is so because we are to limit our review to whether exculpatory results would "alter the landscape if added to the mix of evidence that was available at the time of trial." *Reed v. State*, 541 S.W.3d 759, 774 (Tex. Crim. App. 2017)

(quoting *Holberg*, 425 S.W.3d at 285). For that review, we refer to our opinion on direct appeal of this case, to the record in that appeal, and to the record in this appeal.

Before Mickey was murdered, she was an elementary school teacher in Clifton; Appellee was the high school principal there. Appellee and Mickey had been married for sixteen years, and there was no outward indication of any trouble in their marriage.

The coroner who testified at the Comanche County trial testified that Mickey was killed in the early morning hours of October 15, 1985, sometime between 12:00 a.m. and 6:00 a.m. On the afternoon of October 13, 1985, Appellee drove from his and Mickey's home in Clifton to the Hyatt Regency Hotel in Austin to attend the annual meeting of the Texas Association of Secondary School Principals (TASSP). Appellee called Mickey long distance from the hotel at 9:00 p.m. on the evening of October 14.

Around 8:00 a.m. on October 15, Mickey's body was found after she did not show up at the elementary school to teach her class; she was found on the bed in the master bedroom of the Bryans' home. An alarm clock in the room was set for 6:00 a.m., and it had not been turned off. Mickey's folded robe was found at the foot of the bed.

Mickey had been shot three times in the head and once in the stomach. The coroner testified that all four wounds indicated that Mickey had been shot at very close range, and given the extensive amount of blood throughout the room, the coroner expressed the opinion that Mickey's assailant would have been spattered with her blood. Additionally, the coroner observed that three of the gunshot wounds contained small pieces of blue-green plastic, which the coroner claimed came from "snake-shot" ammunition. The Bryans kept a .357 magnum pistol, loaded with "snake-shot," in their bedroom. Mickey's wounds were caused by small shot such

as would have been fired from the .357 magnum pistol. When authorities found Mickey's body, the .357 magnum pistol was missing from the Bryans' bedroom.

Around 10:00 a.m. on October 15, someone from the TASSP convention located Appellee at a TASSP meeting and informed him of Mickey's death. Some of Appellee's acquaintances drove him back to Clifton; other acquaintances drove Appellee's vehicle first to Woodway and eventually to Clifton. When Appellee arrived in Clifton, he appeared to cooperate with the investigating officers. Among other things, Appellee told investigators that there should be \$1,000 in cash in a safe or file box in the bedroom. When investigators looked for the money, it was not there. Further, based on the amount of dust on the top of the file box, it did not appear that the file box had been opened recently. Appellee told investigators that the money was missing.

The next day, Appellee loaned his vehicle to Mickey's brother, Charlie Blue. Later that week, Blue found a bloody flashlight in the trunk of Appellee's vehicle and reported what he had found to Joe Willie, the Texas Ranger in charge of the investigation. The evidence at trial showed that the blood on the flashlight matched Mickey's blood and that there were small pieces of plastic on the flashlight that matched the small pieces of plastic found on Mickey's body, which came from the "snake-shot" ammunition.

Ranger Willie secured a search warrant and searched Appellee's vehicle. Ranger Willie found the bloody flashlight, among other things, in a box in the trunk of Appellee's vehicle. At the bottom of that box, there was a "crust of human blood"; Patricia Almanza, a chemist from the Texas Department of Public Safety, said that the crust of human blood was consistent with having come from the flashlight. There were also two human head hairs inside of the box that, according to Almanza, did not match either Appellee or Mickey. Neither Ranger Willie, nor anyone else who searched the vehicle, found any money.

On the same day that law enforcement officers searched Appellee's vehicle, Blue returned the vehicle to Appellee; Appellee was not specifically informed that a search warrant had been executed, although Blue left a copy of the search warrant in the trunk. The next day, Appellee told local police that he had found \$850 in the trunk of his vehicle. He explained that he had placed the money in the trunk two weeks before so that he could buy "shrubbery."

Local law enforcement personnel asked Appellee to give a statement about the money that he claimed he had found in his vehicle and to include anything else that Appellee felt was "important." In that statement, Appellee detailed his actions at the TASSP convention, and he also explained how the money ended up in the trunk of the vehicle that he had driven to Austin. With regard to the money, Appellee stated, "Because of the events I simply forgot that we had taken the money out of the file box." Appellee also claimed in his statement that on the night of October 14, the night before Mickey was murdered in the early morning hours of October 15, he "went to bed at approximately 11 p.m." in his hotel room in Austin.

Generally, the State's theory of the case was that Appellee had driven from Austin to Clifton, entered his home with his key, shot Mickey with the .357 magnum that was kept by their bed, cleaned himself up after getting her blood all over himself, changed clothes and shoes, and disposed of the gun and some missing jewelry. The State claims that Appellee then drove back to his hotel room in Austin in time to attend the October 15 morning session of the TASSP convention. The State presented testimony that it would take about two and one-half hours to drive the distance between Appellee's home in Clifton and the Hyatt Regency Hotel in Austin.

Although the record reflects that the stopper of the sink tested negative for human blood, and although no blood was found in the shower, the State elicited other testimony that indicated that Mickey's killer cleaned up in the master bedroom or the master bathroom of the Bryans' home. Based upon the amount of blood in the

master bedroom, the officers expressed the opinion that the killer had to clean up and change clothes; otherwise, there would have been traces of blood in the hallway leading to the unlocked door and there was only one bloodstain in the hallway. The State presented expert testimony that blood spatter on the blades of the bedroom ceiling fan indicated that the ceiling fan was turned on after the murder. This same expert opined that the one bloodstain in the hallway got there when the ceiling fan was turned on after the murder. Appellee did not report that any of his shirts, pants, or shoes were missing. Also, the State argued in closing argument that Appellee had been in the master bathroom, at one point, because there was a bloodstained receipt in the trash can, which, according to the State, indicated “movement in the trash can.”

Additionally, the State presented evidence that a pair of Appellee’s underwear was found in the bathroom trash can, that the underwear contained moist semen, and that the semen on the underwear matched the semen sample secured from Appellee. Further, Appellee gave inconsistent statements to Ranger Willie about the underwear; the State, in closing argument, relied upon Appellee’s inconsistent statements as evidence of his guilt. Initially, Appellee explained to Ranger Willie that he placed the pair of underwear in the trash can on Saturday before he left for Austin because they were in “terrible shape.” When Ranger Willie asked Appellee about the stains on the underwear, Appellee explained that he took a lot of vitamins and that the stains found on the underwear were from his urine because he had a leaky bladder. Ranger Willie subsequently informed Appellee that the underwear contained seminal fluid. Then, Appellee stated that the underwear that was found in the trash can was not the underwear that he put there and that the killer had taken his underwear and “put the seminal fluid in there, stuck them in the trash.”

The State also argued in closing argument that no sexual assault took place and that no struggle ensued between Mickey and her killer. Although Ranger Willie

initially suspected a sexual assault, he ruled out that possibility based on limited testing and examinations of biological materials from a sexual assault kit that was collected from Mickey after the murder. Almanza testified at trial that she examined and conducted limited testing of a portion of the sexual assault kit, which included oral swabs/smears, vaginal swabs/smears, anal swabs/smears, and fingernail clippings; she did not examine the hand swabbing that was referred to in the evidence as hand “washings.” Almanza concluded that no semen was detected on the oral swabs/smears, the vaginal swabs/smears, or the anal swabs/smears; that no foreign hairs were detected in an examination of Mickey’s pubic hairs; and that blood typing of the right and left fingernail clippings showed that human blood was present. However, there was not enough blood to determine a blood type. The coroner also concluded that there was no evidence of defensive wounds, specifically on the hands or arms, but he could not “say for certain whether there was a struggle involved in this death.”

Appellee testified at trial that he was in Austin at the time of Mickey’s murder and that he did not kill her. Appellee suggested that, while he was staying at the Hyatt Regency, someone must have taken his keys, made copies of them, used the duplicate of the house key to enter the house, murdered Mickey, and then placed the bloody flashlight in his car to frame him. Appellee testified that a person named Jack Shaw, a Hyatt Regency security officer whom Appellee said that he met at the Hyatt Regency before Mickey’s death, could have been involved in Mickey’s murder. Appellee stated that Shaw approached him and asked him to help in a hotel investigation of the maids at the Hyatt Regency. According to Appellee’s testimony, Shaw asked him to leave his keys, along with other valuables, in his room. We note that, in his statement to local law enforcement officers, Appellee did not mention Shaw. The State presented evidence that there was no Hyatt Regency security

employee named Jack Shaw and that the Hyatt Regency would not ask a guest to participate in any investigation of hotel employees.

As we have stated, Appellee did not have possession of his vehicle for four or five days after he returned to Clifton. He seemed to suggest at trial that the flashlight and money were placed in his vehicle at some point after the murder and during the time that he did not have possession of his vehicle. During the time that Blue had possession of Appellee's vehicle, Blue kept it at Blue's parents' home when it was not being used. At trial, Appellee testified that he had heard that a neighbor of Blues' parents had said that, at about 3:00 a.m. a couple of days after the murder, the neighbor saw a blue truck parked by Appellee's vehicle outside Blue's parents' home. Appellee testified that this was "significant" to him "because that could be when some of these exchanges all took place." In closing argument, defense counsel suggested that Blue could have been involved in planting the flashlight and possibly the money; yet, the defense maintained that Blue was not the murderer.

In its August 14, 2017 order for DNA testing, the trial court provided for testing of:

- A. Coin envelope right fingernail clippings (from sexual assault kit)
- B. Coin envelope left fingernail clippings (from sexual assault kit)
- C. Item 50 coin envelope containing hand swabbings (from sexual assault kit)
- D. Vaginal swabs in swab box and vaginal slides in slide box (from sexual assault kit)
- E. Anal swabs in swab box and anal slides in slide box (from sexual assault kit)
- F. Remaining oral swab in swab box and oral slides in slide box (from sexual assault kit)
- G. Public [sic] hair combings in Petri dish with unknown foreign substance
- H. Glassine envelope labeled "59 crust from bottom of box"

- I. Glassine envelope labeled "hair from bottom of the box"
- J. Labeled "16 robe from bed"; specifically, (1) front of robe near openings on each right and left side and (2) wrist cuff-areas on each side.¹
- K. Both 1988 postmarked anonymous letters with companion envelopes (one to The Blues; the other to Andy McMullen); specifically the envelopes' seals and stamps.
- L. Select hairs.²

¹ As to the robe, Item (J), the Court GRANTS Defendant request that each side of each area is swabbed individually (e.g. left-side opening individually swabbed, right-side wrist-cuff area individually swabbed). It is further ORDERED that Y-STR testing be conducted on each of these specific swabs.

² Glassine envelopes labeled "11 hair from center of bed"; labeled "19 two hair from top of white plastic bag in front of closet on S. wall"; "20 hair from trashcan in master bath"; "26 hair from bedspread near thigh area"; "35 hair from floor by bed, closet side". Transparent envelope with hairs from bedding; two slide folders of mounted hairs.

The Texas Department of Public Safety collected about 100 hair samples during the investigation. DPS concluded, with regard to the hairs collected from the master bedroom and bathroom area that were "suitable for comparison," that they all matched either Appellee or Mickey.

The two letters that the trial court ordered tests upon were sent after Appellee's first trial and before the second trial and contained the following message:

Joe Bryan did not kill Mickey Bryan.

Mickey wanted to Black-male [sic] us.

She had info on names of drug dealing in the county.

The gun is in Lake Whitney. We took the gun away from her.

She offered us everything she had to not hurt her.

I was in the house when Joe called. The others came later.

It was easy to frame Joe, he is to [sic] trusting, he is a really good person. Sorry about this, Joe, we had to take care of us.

She told me when Joe was leaving and where was staying.

Yes, Mickey had to Die!!! She was going to tell if we didn[']t pay.

Our connections wanted Joe killed while he was in prison—but we could not get it done.

We now believe that Joe doesn[']t know anything or he would tell it regardless of the cost.

Mickey's family is as greedy as she was. Shame—Shame—Shame.

We almost got caught putting the flashlight in Joe's car—plus taking the money.

Ha Ha Ha

DPS conducted handwriting analysis on the letters. However, because the writing on the letters was “uncharacteristic of natural handwriting,” DPS concluded that it was unlikely “that the questioned writing submitted would be identified if suspect standard writing were obtained.”

The record contains various DPS scientific reports related to posttrial testing of the evidence in this case. The additional testing and reports were either at the direction of the trial court or in response to agreements between the State and Appellee.

A June 2012 forensic biology report shows that a screen for biological evidence revealed that no semen was detected on the underwear that was found in the trash can in the bathroom. A presumptive test for blood on the flashlight and lens was negative on the lens. A June 2012 DNA report indicates that a portion of the stain from the underwear was extracted using a two-step DNA recovery method; a DNA profile was not obtained from the epithelial fraction or the sperm fraction using this method. As far as the flashlight and lens are concerned, two swabs were extracted by a method that recovers DNA from nucleated cells. The partial DNA

profile that was obtained from the lens was too limited for interpretation. With regard to oral swabs from Mickey's sexual assault kit, "[a] portion of one swab was extracted by a method that recovers DNA from nucleated cells"; a DNA profile was not obtained.

The record also contains a supplemental DNA report from September 2016. That report reflects that a partial DNA profile from the lens of the flashlight was interpreted as a mixture of two individuals but was inconclusive as to whether Appellee was a contributor. The report additionally reflects that a partial DNA profile obtained from the oral swabs was unsuitable for use as a reference.

The appellate record also contains a supplemental forensic biology report dated August 30, 2018, and a supplemental DNA report also dated August 30, 2018. At Appellee's request, the trial court entered an order in connection with those reports. Both the testing reflected in those reports and the order of the trial court in relation to them are dated subsequent to the trial court's order on the 2017 motion and subsequent to the notice of appeal filed in this court. The trial court's order on the 2017 motion is the only order that is the subject of this appeal. We will consider only that evidence that was before the trial court at the time that it ruled on the 2017 motion. *See Asberry v. State*, 507 S.W.3d 227, 229 (Tex. Crim. App. 2016). Therefore, we will not consider proceedings that occurred subsequent to the 2017 proceedings.

The careful trial judge in this case took a very practical approach to the DNA testing sought under the 2017 motion. In fact, in response to the State's argument, the trial judge made that very clear when he made the statement: "If we don't [find the assailant's DNA] then what's the harm? If it's not there, it's not there, and then you can slam the door on this one, can't you?"

Although the trial judge's approach was a very practical one, the question that we must ask and answer in this appeal is: Did Appellee prove that, if the results of

DNA testing had been available at his trial, there was a 51% chance that he would not have been convicted of the offense of murder? *Routier*, 273 S.W.3d at 257. When we answer that question, we are to assume, without deciding, that the results of the DNA testing would be favorable to Appellee. *Id.* “A ‘favorable’ DNA test result must be the sort of evidence that would affirmatively cast doubt upon the validity of the inmate’s conviction; otherwise, DNA testing would simply ‘muddy the waters.’” *Ex parte Gutierrez*, 337 S.W.3d at 892 (citing *Rivera*, 89 S.W.3d at 59). Appellee is not entitled to DNA testing unless he shows that there is a greater than 50% chance that his jury would not have convicted him if it had been aware of the presumptively favorable test results. *Holberg*, 425 S.W.3d at 286–87. In other words, an inmate must show by a preponderance of the evidence that, in light of the presumed exculpatory DNA test results, he would not have been convicted. *See Reed*, 541 S.W.3d at 774.

Appellee contends that, if DNA tests were performed on the items he wanted to have tested, those results would exonerate him as being Mickey’s killer. We cannot agree with Appellee.

Even if the results of further DNA testing were to show some third party’s DNA, that evidence would not be such as to exonerate Appellee. DNA testing of the letters and envelopes would not exonerate Appellee. If we assume that some third party’s DNA was present on the letters and envelopes, that would show no more than that some third person wrote the letters. None of the evidence sought to be tested would mark any such third person as Mickey’s killer and thereby exonerate Appellee. “DNA is durable; it does not evaporate or dissipate, and the time at which it was deposited on a surface cannot be directly determined.” *Wilson v. State*, 185 S.W.3d 481, 491 (Tex. Crim. App. 2006) (Johnson, J., concurring).

Unlike the facts in *Routier* where the presumed DNA results would have placed an unknown party at the scene at the time of the murders, here, there is no

way to know when any presumptive DNA might have been deposited. The presence of another DNA donor would not factually exclude Appellee as the individual who killed Mickey. *See State v. Swearingen*, 424 S.W.3d 32, 39 (Tex. Crim. App. 2014) (the fact that the victim encountered another person would not factually exclude the defendant as the victim's killer); *see also Hall v. State*, 569 S.W.3d 646 (Tex. Crim. App. 2019) (the presence of a third party's DNA may not have any tendency to exonerate defendant).

Our task in this appeal is not to determine whether there is sufficient evidence to support Appellee's conviction. Rather, the issue is whether Appellee has met his burden to prove, by a preponderance of the evidence, that, had the presumptive DNA results been available at trial, he would not have been convicted. We cannot say that Appellee has met that burden. A presumptive redundant DNA profile does not sufficiently alter the evidentiary mix, in this case, to a degree that would have a strong tendency to engender a reasonable doubt as to Appellee's guilt in an average juror's mind. *See Reed*, 541 S.W.3d at 777. We sustain the State's sole issue on appeal.

We vacate the August 14, 2017 order of the trial court, by which it granted Appellee's motion for postconviction DNA testing, and remand this cause to the trial court for further proceedings consistent with this opinion.

JIM R. WRIGHT

November 27, 2019

SENIOR CHIEF JUSTICE

Do not publish. *See* TEX. R. APP. P. 47.2(b).

Panel consists of: Bailey, C.J.,
Stretcher, J., and Wright, S.C.J.¹

Willson, J., not participating.

¹Jim R. Wright, Senior Chief Justice (Retired), Court of Appeals, 11th District of Texas at Eastland, sitting by assignment.