

located at 1418 Farrar in the City of St. Louis. Joanne Tate sustained a stab wound to the left side of her chest and died as a result [Tr. 676]. Additionally she was impaled with a broomstick post-mortem [Tr. 692]. The children were stabbed repeatedly and the evidence suggested possible sexual assaults as well. Both children survived the attack. [Tr. 318-322; 472-474].

On November 4, 1983, Rodney Lincoln was sentenced by Judge Koehr to a term of imprisonment of fifteen (15) years in the Missouri Department of Corrections for the Manslaughter count, and two consecutive life terms for the Assault counts.

Mr. Lincoln filed an appeal with the Missouri Court of Appeals, Eastern District and the Court of Appeals affirmed the convictions, issuing its mandate on March 26, 1986. State v. Lincoln, 705 S.W.2d 576 (Mo.App.E.D. 1986). Defendant thereafter filed a motion for post-conviction relief pursuant to Rule 27.26.¹ Judge Koehr denied this motion without a hearing and the denial of post-conviction relief was affirmed. Lincoln v. State, 755 S.W.2d 706 (Mo.App.E.D. 1988).

¹ Rule 27.26 was the predecessor to current rules 24.035 and 29.15.

Defendant filed his Motion for Release on November 10, 2010.² The State filed Respondent's Motion to Dismiss Movant's Motion for Release on February 3, 2011. The parties filed a Stipulation to Post-Conviction DNA Testing on January 6, 2011 and September 28, 2012. On September 12, 2013, after the DNA testing had been performed, movant filed an Amended Motion for Release and the parties filed a Stipulation to Post-Conviction Results. On that same date, a hearing was held pursuant to § 547.037 on movant's Amended Motion for Release.

At said hearing, movant Rodney Lincoln appeared in person and by counsel Laura O'Sullivan of the Midwestern Innocence Project. Ms. O'Sullivan was assisted by her paralegal Christi Kennard and law student Sarah Jackson. The State of Missouri was represented by Assistant Circuit Attorneys Ed Postawko and Shirley Rogers.

Pursuant to the Stipulation to Post-Conviction DNA Results filed on September 12, 2013, the parties agreed that the following statutory requirements for post-conviction DNA testing pursuant to § 547.035 had been met:

- a) there was evidence upon which DNA testing could be conducted as evidenced by the reports from the

² Section 547.037 provides that if the DNA testing demonstrates the person's innocence, a motion for release may be filed in the sentencing court.

Seriological Research Institute, hereinafter referred to as, SERI and the Kansas City Regional Crime Laboratory;

- b) the evidence was secured in relation to the crime;
- c) the evidence was not previously tested by movant because the technology was not reasonably available at the time of trial;
- d) identity was an issue at trial.

As the State opposes movant's motion for release, pursuant to § 547.037.4 RSMo, a hearing was held. If this court finds that the DNA testing demonstrates movant's innocence of the crimes for which he or she is in custody, the court shall order his release from the sentences for the crimes for which the testing occurred. Otherwise, relief shall be denied. § 547.037.5. The burden of proof for this statutory challenge is the preponderance of the evidence standard. § 547.037.4 RSMo. Therefore it must be more probable than not that the DNA evidence demonstrates movant's innocence of the crimes for which he was convicted. George v. McLuckie, 227 S.W.3d 503, 507 (Mo.App.W.D. 2007).

In support of her argument for movant's release, movant's counsel presents several issues that are outside of the scope of § 547.037. The court will discuss these first before delving into the issues pertaining to the DNA

evidence. Counsel for movant references the mistrial and possible differences in the evidence presented and admitted by Judge Gallagher in the first trial. Counsel also argues that the verdict subsequently reached in the second trial was a compromise verdict in that the jurors failed to find the defendant guilty of Capital Murder and instead, found him guilty of the lesser included offense of Manslaughter. Movant argues that said verdict is indicative of insufficient evidence. Counsel further argues that the testimony of the minor child M.D. was inconsistent, unreliable and was the result of suggestive methods by the police and relatives of M.D. resulting in the identification.

Movant's references to the mistrial to support a theory that evidence was not sufficient for a subsequent conviction will not be considered. This court has no way of knowing the thoughts and discussions of the twelve jurors who failed to arrive at a verdict in the first trial.

This court finds that any review of the evidentiary rulings of Judge Gallagher are also not appropriate and will not be considered. Judge Gallagher presided over the first trial and the rationale for his decisions and rulings is known only to him. Judge Koehr specifically adopted certain rulings previously made by Judge Gallagher.

Appropriate challenges and objections were made at the second trial, reviewed by the appellate court and no error was found.

In addition, this court will not acquiesce to movant's insinuations that the guilty verdict on a lesser included offense of manslaughter was a compromise verdict or in some way supports the theory that the evidence to convict was insufficient. The jurors found that defendant was guilty beyond a reasonable doubt, they were polled and the verdict accepted. Only those twelve jurors know how and why they arrived at the verdict of manslaughter rather than a higher degree of homicide.

Lastly, the court does not find the issue of the credibility or reliability of M.D.'s testimony to be a persuasive or relevant argument to movant's motion for release. A Motion for the Production of a Witness for a Psychological/ Psychiatric Examination was filed by movant's trial counsel Robert Hampe on April 27, 1983. In addition, a Motion for Determination of Competency of Witness was filed by Mr. Hampe on April 29, 1983. Both motions were heard, submitted and denied by Judge George Adolf on May 5, 1983.³ Mr. Hampe then filed on May 5, 1983 a Motion in

³These two motions were renewed by Mr. Hampe on July 6, 1983 and overruled by Judge Gallagher.

Limine and in the Alternative Motion for a Protective Order to prevent evidence that movant was identified in a photograph by M.D. and/or R.T. On July 5, 1983, Judge Gallagher ruled that said motion would be taken with the case. A Renewed Motion to Suppress Identification was filed by Mr. Hampe on July 6, 1983, arguing that any in-court identification of movant would be based upon prejudicial and suggestive police tactics. Said motion per Judge Gallagher was to be taken with the case. On July 6, 1983, Mr. Hampe filed another Motion in Limine and in the Alternative Motion for Protective Order to prohibit M.D. from testifying about certain facts regarding a park located near movant's home.⁴ That motion was overruled by Judge Gallagher. At the start of the second trial on October 3, 1983, Judge Koehr adopted the findings of Judge Gallagher pertaining to the competency of the two child witnesses, M.D. and R.T.

First of all, the trial court's finding that the minor child M. D. was competent to testify was reviewed on appeal. The appellate court found no error as to this challenge.⁵ Further, § 547.035 RSMo. and § 547.037 RSMo, do not give

⁴ The child witness M.D. testified that on one occasion prior to the attacks, she, along with her mother and sister R.T., spent the night at movant's home and that his home was located across the street from a park.

⁵ In the opinion filed January 14, 1986, the appellate court found that Judge Gallagher's finding that M. D. was competent to testify based upon the 4-prong test cited in Hildreth v. Key, 341 S.W.2nd 601, 609 (Mo.App. 1960) was correct.

movant the authority to attack the credibility of witnesses that testified at trial. These statutes only authorize movant's opportunity to prove his innocence with DNA results. Frederico Lowe-Bey v. State of Missouri, 272 S.W.3d 378, 384 (Mo.App.E.D. 2008). Therefore the only issue for this court to decide is whether movant's innocence is more probable than not, based upon the DNA evidence presented.

Numerous pieces of physical evidence obtained during the course of the investigation have been examined. For purposes of movant's motion, only two items are relevant: a pubic hair found on a blue children's blanket, and a pubic hair found on R.T.'s perineum. The parties have agreed that aside from these two items, the reports of the Metropolitan Police Department for the City of St. Louis Laboratory dated June 11, 1982 and July 23, 2003, of SERI dated November 3, 2010, and of the Kansas City Police Crime Laboratory dated February 21st and March 7th of 2013, yielded no results that could place movant at the scene of the crimes for which he was convicted.

Counsel for movant's argument regarding the DNA evidence is twofold: first, she argues that movant was convicted based upon scientific evidence, namely hair comparison evidence, which we now know is unreliable and

impermissible. Her second argument is that the pubic hair found on R.T.'s perineum was never used in the trial, and as DNA results show that this hair does not belong to movant/defendant, it exonerates movant/defendant.

The court will first address the hair comparison testimony. The DNA test results show that the hair found on the blue blanket did not belong to the movant/defendant nor any other household resident. In her argument for movant's release, counsel stated that the pubic hair on the blue blanket was in counsel's words, the "lynchpin" of the State's case.

In his opening statement at trial, counsel for the State referenced the pubic hair found on the blue blanket. Assistant Circuit Attorney Joseph Bauer stated in his opening that Harold Messler⁶ compared the defendant's [movant's] pubic hair with the hair found on the blue blanket. Mr. Bauer further stated in his opening that the two pubic hairs were "found to be identical or comparable, and his [Harold Messler] testimony will be that as an expert in the field, he will be able to say that that pubic hair

⁶ Harold Messler was Chief Criminalist of the St. Louis Metropolitan Police Department.

[on the blue blanket] **could have come**⁷ from the defendant.”

[Tr. 304]

During the trial, Joseph Crow, a criminalist at the time with the St. Louis Metropolitan Police Department, testified about the pubic hair found on the blue blanket. The blanket was labeled Exhibit 22a at trial [Tr. 634]. He examined the blue blanket for the presence of any hairs that did not appear to come from the victim Joanne Tate [Tr. 634]. Mr. Crow testified that he found one such hair, labeled at trial as Exhibit 22bb [p. 634-635]. Mr. Crow testified that while he could not say that all of the hairs that he examined and appeared to be similar to Joanne Tate's were in fact hers, he could definitely say after looking at the hairs microscopically, that one hair definitely did not belong to Joanne Tate [Tr. 636-637].

Chief Criminalist Harold Messler testified at trial as well. Mr. Messler examined the hair from the blue blanket, Exhibit 22bb; a known pubic hair of movant, Exhibit 22cc; and a known pubic hair of victim Joanne Tate, to determine if the hairs were comparable or different [Tr. 643; 646]. Mr. Messler testified that his examination was a three-step process. First Mr. Messler examined the hair samples with a

⁷ Emphasis added by the court to reflect that the State, at least in its opening statement, did not definitively tell the jury that the evidence would show that the hair found on the blue blanket was that of defendant/movant.

naked eye for comparison. If the samples were comparable, he would then look at the samples under a low-power microscope. Again, if comparable, he would then examine the samples under a higher-power microscope [Tr. 646-647]. Mr. Messler further testified that he compared the hair from the blanket, Exhibit 22bb, to thirty-seven other hairs, excluding victim Tate and movant's [Tr. 648 - 652]. It was Messler's opinion that the hair on the blanket was not comparable to any of the thirty-seven (37) hairs tested [Tr. 650].

Initially on direct examination, Mr. Messler was asked if he had an opinion regarding the frequency in which he would expect to find a hair comparable to Exhibit 22bb, the hair located on the blue blanket, in the Caucasian population [Tr. 650]. He had no such opinion [Tr. 651]. Mr. Messler testified on direct examination that the only conclusions he could make in comparing the hairs was that Exhibit 22bb and the other thirty-seven (37) hairs were from Caucasian individuals [Tr. 651-652].

The following day, Mr. Messler was the first witness to take the stand as he was recalled by the State. Mr. Messler was asked if he compared the pubic hair found on the blanket to the thirty-seven samples in addition to hairs from movant and victim Tate. He indicated that he had [Tr. 717]. Out

of the now thirty-nine (39) hairs, movant Rodney Lincoln's hair was the only one that **matched**⁸ [Tr. 717-718].

Messler's testimony was further buttressed by his statement that in the over two hundred cases that he'd worked on which involved hair analysis and the Caucasian population, he had never had a situation in which a hair from a scene was matched to more than one person [Tr. 718].

Messler however admitted on cross-examination that his testimony that movant's hair "matched" meant that it "compared favorably and had more or less the same characteristics" [Tr. 718]. Messler also admitted that it is uncommon to be able to say that a particular hair came from a particular person [Tr. 718]. He further testified that he was not able to determine the sex, blood type or overall health of an individual from a hair sample [Tr. 719 - 720].

The hair comparison testimony was not mentioned in the first half of the state's closing argument. [Tr. 919-931]. In the second half of his closing argument, Assistant Circuit Attorney Bauer stated as follows:

"He separated out the pubic hairs that were not Joanne Tate's. There was one of them that matches that man's pubic hair. That was compared to thirty-seven others in addition

⁸ Emphasis added by the court.

to Joanne Tate. That's thirty-nine people. One out of thirty-nine people. None, no hair that that other hair was compared with other than Rodney Lincoln's, matched."

Mr. Messler told you that in two hundred cases, he's never had more than two -- more than one match. He's never had two people match one hair found at a scene." [Tr. 957]

This court disagrees with movant's argument that the hair comparison testimony was the "lynchpin" to his conviction. While there was substantial testimony about the physical evidence, the lynchpin to the conviction in this court's opinion was the testimony of M.D. M.D. picked movant defendant's photograph, Exhibit 117a, and identified him as the perpetrator [Tr. 332-333, 752]. While the photo-spread may have been improper and suggestive⁹, M.D. had other occasions in which she identified movant/defendant as the attacker.

M.D. also identified movant/defendant in a lineup [Tr. 755]. A photograph of the lineup marked Exhibit 11 was shown to M.D. at trial and she picked movant/defendant as the perpetrator [Tr. 333]. M.D. also made an in-court identification of movant/defendant [Tr. 334]. In addition,

⁹ Defense argues that the tactics used in the photo lineup were suggestive in that M. D. was only shown two photos, and of the two, movant's was the only one that was black and white.

on re-direct examination, the following exchanged occurred between Mr. Bauer and the child witness M.D.:

Q. Do you remember that same day when Mr. Hampe and me were there, and Mr. Hampe was asking you some questions, and he asked you the questions, "Okay. [M], who told you that Rodney Lincoln did this?" Do you remember your answer?

"Nobody. All I knew that it was him."

A. Yes, sir.

Q. And when Mr. Hampe asked you a question that same day and asked you, "Is Bill¹⁰ taller than Rodney?" Do you remember your answer, "They're the same person"?

A. Yes, sir. [Tr. 387-388]

The child's testimony never wavered that it was in fact movant/defendant who attacked the family. The hair comparison testimony therefore was not the only evidence that the State had, and determining what was or was not the lynchpin would require the court to read the minds of the jurors, and it cannot be decided after a review of the transcript 30 years later.

It is true that the testing established that the hair on the blue blanket could not have originated from movant. But with no knowledge of where the blanket came from, how

¹⁰ From the onset of the investigation, the minor child M. D. said that "Bill did it". [Tr. 394]

long it had been in the residence, who had contact with the blanket outside of the date of the offense, there is no way to argue that the lack of a DNA match exonerates movant. While movant was not the source of the hair, this in no way demonstrates that movant was not in the residence at the time of the crime and the perpetrator of the offenses.

As for the hair located on R.T.'s perineum, this piece of evidence was not used in the trial as Messler in his report found that this hair was comparable to the head hair of R.T. Movant was excluded as a source for this hair in Messler's 1982 report. The testimony at trial suggested that the minor children were sexually assaulted, though allegations of a sexual nature were not filed. Movant's counsel would have this court make the leap and draw an inference that a hair found in the private area of R.T. must have belonged to the perpetrator, thereby eliminating movant.

There was no evidence as to how long the hair on R.T.'s perineum had been there. The lack of the identity of the source does not prove movant's innocence of the crimes. The source of this hair and how it came to be on R.T.'s perineum will never be known, but this fact does not exonerate movant.

For the reasons cited above, the court finds that defendant has failed to show by a preponderance of the evidence that the mitochondrial DNA results prove his innocence. Movant's motion for release and amendment to his motion for release are hereby denied.

SO ORDERED:

Judge R. R. Vannoy
Circuit Judge
Division 3

Dated: _____

cc: Laura O'Sullivan, Attorney for Movant/Defendant
Ed Postawko, Assistant Circuit Attorney