OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION THREE

STATE OF MISSOURI,	)	No. ED102147
	)	
Respondent,	)	Appeal from the Circuit Court
	)	of St. Charles County
vs.	)	1111-CR05527-01
	)	
BRIAN KEITH MCBENGE,	)	Honorable Nancy L. Schneider
	)	
Appellant.	)	Filed: November 15, 2016

Brian Keith McBenge ("Defendant") appeals the judgment entered upon a jury verdict convicting him of first-degree murder for his alleged involvement in the 1984 killing of Eleonora Knoernschild ("Victim"). Over two decades after Victim's murder, a DNA analysis linked Defendant and his brother Cecil McBenge[1] to evidence found on or near Victim's property shortly after she was killed. In separate underlying cases, Defendant and Cecil were each charged with and found guilty by a jury of first-degree murder based on accomplice liability.[2] The information also gave Defendant notice that the State may submit an instruction for second-degree felony murder to the jury based on the death of Victim as a result of Defendant's perpetration of the class B felony of a first-degree burglary in 1984.

On appeal, Defendant argues, (1) the trial court erred in denying his motion to dismiss the crimes alleged in the information for pre-indictment delay; (2) there was insufficient evidence to support his first-degree murder conviction under a theory of accomplice liability; (3) the trial court erred in admitting evidence relating to a 1980 burglary of Victim's home – a crime Defendant was not charged with; (4) the trial court erred in admitting a cheese wrapper into evidence; and (5) the trial court erred in admitting a stocking into evidence.

REVERSED AND REMANDED.

Division Three holds:

(1) The trial court did not err in denying Defendant's motion to dismiss the crimes alleged in the information based on pre-indictment delay.

---

[1] Because Defendant and his brother Cecil share the same last name, we will refer to Cecil by his first name for clarity and ease of reading.

[2] Like Defendant, Cecil appealed the trial court's judgment entered upon a jury verdict in his case convicting him of first-degree murder, and some of Cecil's points on appeal are similar to those raised by Defendant in this appeal. Our Court's opinion in *State of Missouri v. Cecil Russell McBenge* (No. ED102277), which reverses the judgment in Cecil's case and remands his cause for a new trial, is handed down the same day as this decision involving Defendant.

(2) There was not sufficient evidence from which a reasonable juror could have found or inferred that Defendant personally deliberated in Victim's killing, and therefore, we reverse Defendant's conviction for first-degree murder. However, because the evidence was sufficient to support the submission of second-degree felony murder based on the death of Victim as a result of Defendant's perpetration or attempted perpetration of a first-degree burglary, and because the jury in this case was not required to find that Victim's death occurred as a result of the commission of a first-degree burglary, we remand the case for a new trial on the charge of second-degree felony murder.

(3) The evidence relating to the 1980 burglary was inadmissible under the motive and identity exceptions, and we cannot find the evidence falls within some other exception which may make evidence of an uncharged crime logically relevant. Additionally, we cannot find the evidence relating to the 1980 burglary is somehow otherwise logically and legally relevant. Therefore, the trial court abused its discretion in admitting evidence relating to the 1980 burglary.

(4) The trial court did not abuse its discretion in admitting the cheese wrapper into evidence because the State established a sufficient chain of custody for the wrapper.

(5) The trial court did not abuse its discretion in admitting the stocking into evidence because the State established a sufficient chain of custody for the stocking.

Opinion by: Robert M. Clayton III, P.J.
Lawrence E. Mooney, J., and James M. Dowd, J., concur.

Attorney for Appellant: Samuel E. Buffaloe

Attorney for Respondent: Chris Koster and Evan J. Buchheim

THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT. IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND SHOULD NOT BE QUOTED OR CITED.