

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
)	
Respondent,)	
)	
Vs.)	No. SC 90503
)	
ZACKARY LEE STEWART,)	
)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI
THIRTY-FIRST JUDICIAL CIRCUIT, DIVISION
THE HONORABLE TIMOTHY W. PERIGO, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

Rosalynn Koch, MOBar #27956
Attorney for Appellant
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 882-9855
FAX (573) 884-4793
Rose.Koch@mspd.mo.gov

INDEX

	<u>Page</u>
TABLE OF AUTHORITIES	2
JURISDICTIONAL STATEMENT	3
STATEMENT OF FACTS	3
ARGUMENT	4
CONCLUSION	15

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES:</u>	
<i>Chambers v. Mississippi</i> , 410 U.S. 284 (1973).....	5
<i>State v. Mack</i> , No. 29477 (Mo. App., S.D. January 13, 2010).....	10, 11
<i>State v. Moses</i> , 265 S.W.3d 863 (Mo. App., E.D. 2008).....	8
<i>State v. Rogers</i> , 758 S.W.2d 199 (Mo. App., E.D. 1988).....	5
<i>State v. Terry</i> , No. 90332 (Mo. banc February 10, 2010).....	7, 9, 13
<i>State v. Whalen</i> , 49 S.W.3d 181 (Mo. banc 2001).....	8
 <u>RULES:</u>	
Rule 4-3.8.....	7

JURISDICTIONAL STATEMENT

Appellant adopts the jurisdictional statement as set forth in his original brief.

STATEMENT OF FACTS

Appellant adopts the statement of facts set forth in his original brief.

ARGUMENT

Tim Seaman's admissions entitled Zack to a new trial.

The state argues that Zack is not entitled to a new trial because 1) Tim Seaman's admissions were hearsay; and 2) the admissions did not establish Zack's innocence. Both arguments are incorrect.

I.

Consideration of whether Tim's statements are admissible at trial is premature at this point. The statements are not being used at a trial. As the dissent below noted, the state's argument "assumes that the evidence would be presented in the same manner it was presented at the hearing and ignores the possibility that Defendant may find alternative methods of offering it or simply use it to gather admissible evidence." (Slip opinion at 10). Some of this evidence may include, for example, the owner of the car with the damaged window that Gary Brown saw the night of the murder (Tr. 290).

This is especially true in view of the state's latest argument that Tim and Zack killed Dulin together. Tim's hat was found right where Dulin was killed; he is the only one linked to the murder by physical evidence; and he is the only one who has made incriminating statements to someone not serving time for a felony. It is not unreasonable to anticipate that the

state has or will charge Tim with murder in order to bring justice to Mr. Dulin. Given this possibility, and the attendant consequences, it cannot be assumed that there is no possible way to use these confessions to obtain a different result upon retrial.

Preparation for a new trial would entail different considerations and timeframes than preparation for the motion for new trial. Therefore, protracted speculation of side legal issues, such as the necessity of the presence of the declarant, is not a proper focus of the inquiry as to whether a new trial is warranted. The question is whether the information is credible and material, not whether it will be admissible in the exact same form upon retrial.

Although all cases cited by both parties can be distinguished in some way on their facts, one theme consistent throughout is the court's concern about false admissions made specifically for the purpose of defeating a prosecution. *See, e.g., Chambers v. Mississippi*, 410 U.S. 284, 301 fn. 21 (1973). This was also a central concern in *State v. Rogers*, 758 S.W.2d 199, 201 (Mo. App., E.D. 1988), cited by the state (Resp. Br. 22, 37), for example. Another concern is the credibility of those who allegedly heard the declaration--the new evidence in *Rogers* consisted of affidavits of the defendant's girlfriend, brother-in-law and friend. *Id.*

Neither of those concerns is present here. Seaman's nephew had no demonstrated connection to appellant. Seaman's admissions to Bales were made within hours of the offense, corroborated by Mills' presence and Bales' own observations of Mills vomiting (Tr. 751). The other statement was to Tim's brother Randy, around the time of the incident, as Tim was baring his soul concerning his marital problems with "Eby girl" Candy (Tr. 755). These statements are credible because of the circumstances under which Tim made them.

II.

In arguing that the evidence would not change the result at trial, the state makes several incorrect arguments.¹ First, the jury did not hear that the "DNA on the hat...did match Timothy Seaman..." (Resp. Br. 19). The jury heard that there was a "preliminary" match which introduced the concept of unreliability (Tr. 722-23). It was presented as a tentative, not definitive, match (Tr. 722-23).

¹ Appellant also directs the Court's attention to an incorrect statement in appellant's original brief. Gary Brown did not testify to seeing two people in the car, as was asserted in the brief (App. Br. 25, Tr. 290).

Secondly, the state claims that the hat was always available for DNA testing on the part of the defense (Resp. Br. 20). This may be true, but there is no indication in the record that anyone knew before trial that the hat did not belong to Dulin. Not being aware of the potential for exculpatory evidence, the defense did not fail to act with due diligence.

Nor is the defense attempting to blame the state for not testing the hat sooner. The state's fault or lack thereof is not a factor in whether a new trial is warranted² – the issue is fairness to appellant, not punishing the state.

Respondent also claims that Tim's statements did not aid Zack, because Zack could still have been with him and Mills (Resp. Br. 27). This argument, which was also the rationale of the lower court, looks only at

² Nevertheless, state's attorneys are bound by ethical norms that require them to "see that justice is done – not necessarily to obtain or sustain a conviction...." *State v. Antoine Terry*, No. 90322 (Mo. banc February 10, 2010), Slip opinion at 5, fn. 5. *See also*, Rule 4-3.8. The state is responsible for any investigation and actions necessary on its part to ensure that, in view of the DNA evidence and lack of demonstrated connection between Tim and Zack, Zack's conviction was not wrongfully obtained.

the nature of the admissions and disregards how these admissions impact the evidence.

Dulin said he was shot by two men. The state claims this statement did not preclude the presence of others at the scene. But the state's facts are that Dulin reported that two men "had come in and shot him" (Resp. Br. 5) – which excludes that argument.

Any argument that Dulin's report "two men" was not decisive on the number, because Dulin was supposedly focused on other things, lacks evidentiary support. There was no evidence at trial bearing on the effect that Dulin's "deteriorating condition" would have on his ability to count. Indeed, Dulin not only definitively indicated "two men," but he was able to provide a description.

Such treatment of the facts is troubling, because it goes beyond supplying missing inferences as condemned in *State v. Whalen*, 49 S.W.3d 181 (Mo. banc 2001) – it simply discounts important facts for no better reason than they are inconsistent with Zack's guilt. But in determining guilt, "considering the totality of circumstances requires us to take into account evidence that might cut both ways." *State v. Moses*, 265 S.W.3d 863, 867 fn.4 (Mo. App., E.D. 2008). Dulin was coherent enough to give the

men's' race and ages – and the hat found at the scene corroborated his mention of the Eby name.

The result of such reasoning is to give more credence to the jailhouse informants than the eyewitness victim. Even if the facts are manipulated to posit that Dulin was only referring to the two men in the room with him, with others elsewhere, Pollard and Parker do not have an “Eby girl’s boyfriend” attacking Dulin – instead, they have Zack and Robert Myers (Tr. 429). Every effort to mesh Pollard and Parker’s with the other, and the new, evidence results in improbable and incoherent scenarios.

Admittedly, Tim never explicitly admitted that he killed David Dulin, or that Zack (or anyone else) was not with him. Nevertheless, to warrant a new trial, the new evidence need not completely exonerate the accused. *State v. Terry*, No. 90332 (Mo. banc February 10, 2010), Slip op. at 8. If the new evidence is central to the case, and establishes that the defendant was convicted with the aid of false testimony, a new trial is required. *Id.*, Slip op. at 11.

The state argues that “it is not inconceivable that someone else wore the hat that night” (Resp. Br. 32). Zack’s conviction cannot, consistent with due process, rest on what “is not inconceivable.” The clear and obvious

inference was that Tim was wearing his own clothing. *See, State v. Travis Mack*, No. 29477 (Mo. App., S.D. January 13, 2010), slip opinion at 1 (defendant's DNA found on baseball cap at scene of shooting).

It is crucial, as the dissent below recognized, that no evidence in the record places Zack and Tim together. By contrast, Bales placed Tim and Mills together shortly after the murder (Tr. 751).

The state is relegated to arguing that “it could be” that Tim was present when Zack killed Dulin, or maybe “Tim could have been outside” when Zack killed Dulin; or possibly Tim “might not have been there at all” (Resp. Br. 34). This speculation is symptomatic of the enormous difficulties that the DNA evidence, and Tim’s statements, create for any effort to hypothesize appellant's guilt.³

³ In this connection, the state argues that Pollard and Parker were credible because they recounted details that they could not have known about the crime scene except by what Zack told them (fn. 14). Much of their testimony was hit-or-miss with a number of misses. While the state talked about keeping its warrant under wraps (Tr. 599), it did not foreclose the possibility of other mechanisms in small-town Hurley for this information to get out. The authorities revealed some of the facts to Zack and it is not known what all he was told (Tr. 579-83). Pollard and Parker

The state complains that “[a]ppellant’s argument that the state is presenting two contradictory prosecutorial theories is a bit of a red herring....” (Resp. Br. 35). Appellant agrees that the state is not presenting *two* contradictory theories, for there have become a multiplicity of theories – Zack and Leo (Tr. 674-75); Zack, Leo, and four others (Slip opinion 1); Zack and Tim (Resp. Br. 34); Zack wearing Tim’s hat (Resp. Br. 34). This hypertechnical argument seems to be the converse of the lower court’s holding that “two” can be construed to mean “including, at least, but not necessarily limited to, two.” *See, slip opinion* at 7.⁴

This “red herring” argument is a result of continual efforts to adapt the facts to save the conviction, with the increasingly jumbled and

knew the original informant, Alicia, who had spoken with the authorities about the incident (Tr. 476-77). There were reports on the scanner (Tr. 403). The state’s evidence did not preclude the existence of several other venues by which Parker and Pollard could have learned details of the incident.

⁴ Even making “two” into “three” or more, or arbitrarily deciding Tim and Zack must have been together, does not cure the problem of the Parker and Pollard accounts never having Tim in their story.

confused scenarios that are preventing getting to the truth of what really happened the morning of November 29, 2006. The state's acknowledgement that "[t]hat there are numerous scenarios that can be drawn from considering the totality of the evidence" (Resp. Br. 34) should lead to the conclusion that a jury should hear all the evidence; and that the state should fulfill its responsibility to investigate and get at the truth (i.e., which scenario is the correct one) to ensure that a guilty person is punished and an innocent man is not in prison.

From the beginning, the state has never offered a theory of Zack's guilt that is comprehensive, coherent and consistent with the known evidence. It was not coherent before the DNA results and was even less so after the testing was complete. The lower court has struggled mightily to reconcile the facts with Zack's guilt. On page 2 of its opinion, Zackary is with five others, Tim not included. On page 11 and 13, Tim and Zackary must have been together. The state admits it does not know what happened (Resp. Br. 34).

On the other hand, Zack's innocence is consistent with Dulin's statements regarding two men, the DNA evidence, and Seaman's admissions. The only inconsistency is with Pollard and Parker's

testimony, and a jury would be unlikely to construe their testimony as being as reliable as the other evidence.

The internal inconsistencies are the result of selectively evaluating (arguably to the point of manipulating) the evidence in order to come up with a predetermined outcome. It does not appear to work. If an impartial factfinder starts with all the facts and works backwards, the state's case against Zack unravels. As in *Terry*, the new evidence is central to the case.

Both Zack and the state have "reargue[ed] the evidence at trial" because it is relevant to whether the new evidence was central to the case. The issue still remains, as Zack has presented to the Court:

Is the defendant entitled to a new trial

- Where the parties learn for the first time only at the very end of the state's evidence, of new DNA evidence placing an entirely unrelated person at the scene of a murder; and
- Where the defense presents evidence at a motion for new trial that this heretofore unrelated person had confessed to being present at the scene, as well as to killing someone, around the time of the murder; and

- When the sole bit of evidence placing the defendant at the scene is his supposed confession to two jailhouse snitches, whose account contained several demonstrable factual errors?

Viewed impartially, and without any presupposition as to appellant's guilt, the answer must be yes.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in his original brief, Zack requests that this Court reverse and remand his case for further proceedings.

Respectfully submitted,

Rosalynn Koch, MOBar #27956
Attorney for Appellant
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, Missouri 65203
(573) 882-9855
FAX (573) 884-4793
Rose.Koch@mspd.mo.gov

Certificate of Compliance and Service

I, Rosalynn Koch, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2002, in Book Antiqua size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,282 words, which does not exceed twenty-five percent of the 31,000 words allowed for an appellant's brief..

The floppy disk filed with this brief contains a complete copy of this brief. It has been scanned for viruses using a McAfee VirusScan program, which was updated in March, 2010. According to that program, the disks provided to this Court and to the Attorney General are virus-free.

Two true and correct copies of the attached brief and a floppy disk containing a copy of this brief were mailed, postage prepaid this 5th day of March, 2010, to Karen Kramer, Assistant Attorney General, P.O. Box 899, Jefferson City, Missouri 65102-0899.

Rosalynn Koch

