

OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION ONE

STATE OF MISSOURI,)	No. ED102277
)	
Respondent,)	Appeal from the Circuit Court
)	of St. Charles County
vs.)	1111-CR05528-01
)	
CECIL RUSSELL MCBENGE,)	Honorable Daniel G. Pelikan
)	
Appellant.)	Filed: November 15, 2016

Cecil Russell 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 Brian McBenge¹ to evidence found on or near Victim’s property shortly after she was killed. In separate underlying cases, Defendant and Brian 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) there was insufficient evidence to support his first-degree murder conviction under a theory of accomplice liability; (2) the trial court erred in admitting evidence relating to a 1980 burglary of Victim’s home – a crime Defendant was not charged with; (3) the trial court erred in admitting a cheese wrapper into evidence; (4) the trial court erred in admitting a stocking into evidence; (5) the trial court erred in admitting some of the exhibits (Exhibits 117-121) and testimony from Daniel Fahnestock pertaining to DNA testing on the cheese wrapper; and (6) the trial court erred in excluding and admitting evidence pertaining to whether Victim’s Granddaughter and Defendant’s brother Brian were still dating at the time of the 1980 burglary of Victim’s home.

REVERSED AND REMANDED.

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

² Like Defendant, Brian appealed the trial court’s judgment entered upon a jury verdict in his case convicting him of first-degree murder, and some of Brian’s points on appeal are similar to those raised by Defendant in this appeal. Our Court’s opinion in *State of Missouri v. Brian Keith McBenge* (No. ED102147), which reverses the judgment in Brian’s case and remands his cause for a new trial, is handed down the same day as this decision involving Defendant.

Division One holds:

- (1) 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.
- (2) The evidence relating to the 1980 burglary was inadmissible under the motive, intent, 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.
- (3) 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.
- (4) 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.
- (5) Defendant's argument regarding the admission of Exhibits 117-121 and testimony from Fahnestock pertaining to DNA testing on the cheese wrapper goes more to the credibility of Fahnestock as a witness and the weight to be given to his testimony and the challenged exhibits rather than to the admissibility of the evidence. In addition, Defendant's remedy was not to be entitled to the exclusion of the challenged evidence but to have the opportunity to cross-examine Fahnestock and call expert witnesses of his own – an opportunity which Defendant had and exercised in this case. Therefore, the trial court did not abuse its discretion in admitting Exhibits 117-121 and testimony pertaining to DNA testing on the cheese wrapper.
- (6) We do not consider the merits of Defendant's claims that the trial court erred in excluding and admitting evidence pertaining to whether Victim's Granddaughter and Defendant's brother Brian were still dating at the time of the 1980 burglary of Victim's home because the claims involve matters which are highly unlikely to arise on retrial.

Opinion by: Robert M. Clayton III, P.J.
Mary K. Hoff, J., and Lisa P. Page, J., concur.

Attorney for Appellant: Rosemary Percival and John G. Mermelstein
Attorney for Respondent: Chris Koster and Daniel N. McPherson

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