

2005

Utah v. Terry Johnson : Petition for Rehearing

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Appellee, :
vs. : Case No. 20050169-CA
TERRY JOHNSON, :
Appellant. :

APPELLANT'S PETITION FOR REHEARING

THE APPELLANT IS PRESENTLY INCARCERATED
IN CONNECTION WITH THIS CASE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
ISSUES PRESENTED & STANDARDS OF REVIEW	1
ARGUMENT	2-15
I. THERE WAS REASONABLE DOUBT FOR THE MURDER CONVICTION	
A. The Baby Blanket Evidence is Less Than Cogent	2-4
B. There was no Incriminating Evidence on the Victim’s Body, Mr. Johnson’s Body or at the Crime Scene.. ..	4-7
C. Inconsistencies in Mr. Johnson’s Version of the Facts Is Understandable Under the Circumstances.	8-9
D. The Ten Minute Window to Kill the Victim is not a Cogent Theory.	9-11
E. The Evidence About Mr. Johnson Changing his Clothes in a Friend’s Bathroom is Also not Cogent.	11-12
F. There are Alternative Reasonable Inferences to be Drawn from the Fact Mr. Johnson Knew the Amount of Stab Wounds.	12-13
G. Other Facts Indicate That Mr. Johnson was not Guilty.	13-14
H. Mr. Johnson had no Motive to Kill the Victim.	14
I. The Statements by a Convicted Felon Should not be Given Great Weight.	14-15
J. Use of the Bad Acts Evidence was Crucial to Getting a Conviction. .	15
CERTIFICATE OF SERVICE	16

TABLE OF AUTHORITIES

CASES

<i>People v. Majka</i> , 849 N.E.2d 428, 426 (Ill. App. 2006)	4
<i>Ralph Child Constr. Co. v. State Tax Comm’n</i> , 362 P.2d 422, 427, 12 Utah 2d 53 (Utah 1961)	4
<i>State v. Houskeeper</i> , 2002 UT 118, P26, 62 P.3d 444	1

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APPELLANT’S PETITION FOR REHEARING

COMES NOW, Mr. Terry Johnson, through counsel, hereby petitioning this Court for a rehearing. Mr. Johnson respectfully alleges that this Court has overlooked certain material facts, which casts serious doubt on the accuracy of the Court’s ruling. Counsel for Mr. Johnson hereby certifies that the petition is presented in good faith and not for delay.

ISSUES PRESENTED & STANDARDS OF REVIEW

1. Whether this Court erred when it held that the evidence supporting the murder conviction was of sufficient weight to overcome various material errors made by trial counsel and the trial court, when the parties’ briefs focused more on the legal issues?

Standard of Review: *State v. Houskeeper*, 2002 UT 118, P26, 62 P.3d 444.

ARGUMENT

I. THERE WAS REASONABLE DOUBT FOR THIS MURDER CONVICTION.

A. The Baby Blanket DNA Evidence is Less Than Cogent.

The first issue is whether the baby blanket evidence was materially probative that Mr. Johnson had killed the victim. The victim's mother testified that there were two baby blankets at her home on the night of the murder, a blue baby blanket and a white one. (R. 615, p. 108, l. 19-24). The blue baby blanket was missing, when she returned from work on the night of the murder. (R. 615. p. 108, l. 25, p. 109, l. 1-2).

The State only offered exhibits and DNA testing of two baby blankets that were not found at the crime scene, i.e., exhibits 22 and 24, or 2 and 1 as referred to by the DNA experts. Exhibit 22 has a checkered pattern of different objects. Exhibit 24 is a white blanket with rocking horses. It is also clear from the record that Detective Lassig received exhibits 22 and 24 from Mrs. Johnson on the night of the murder, and that they (along with jumper the baby was wearing that night) were the subject of the testing for blood by forensic scientists. (R. 616. p. 265-66, p. 267, l. 3-9; R. 617, p. 414-416).

The trial evidence indicates that the victim's blood found on exhibits 22 and 24 could have gotten there by other means, and at another time than the night of the murder. The State's DNA expert, Mr. Gabriel Bier, testified that the blood found on Exhibit 24 could have gotten there as result of previous contact. (R. 617. p. 436, l. 11-18). Mr. Beir and the other DNA witness, Mr. Dave Murdock, also testified that the faintness of the blanket blood stain could mean that it had been degraded over time, e.g., by washing machine, exposure to air, etc. (R. 617. p. 428, l. 10-20; p. 391, l. 8-18). Since the light

stains found on the baby jump suit also were light, one can also infer that they had been degraded over time, particularly since the DNA associated with this stain was not that of the victim. (R. 617, p. 392-93). The State's Exhibit 40, p. 4, paragraph 2, i.e., the report prepared by SERI, also indicates that DNA can be contaminated in various ways. (R. 311). Since the victim played with knives and held the baby routinely (R. 615, p. 107, l. 7-13), it is also reasonable to infer that the faint stains had been degraded before the murder had occurred. This inference is also supported by the fact that if the stains were fresh from the murder, they would have been more likely vibrant, rather than being faint. (R. 391, p. 391, l. 4-7).

Equally powerful, the DNA testing also indicated the following: (1) someone else's blood was found on baby blanket no. 2, i.e., exhibit no. 22 (R. 311, Ex. 42; R. 617, p. 385, l. 14-19); (2) a second person's DNA was also found on blanket no. 2 (R. 311, Ex. 42); (3) someone else's DNA was found on blanket no. 1 (rocking horses) (R. 617, p.390, l. 14-23; p. 436, l. 11-18; p. 437, l. 12-14); (4) there was a mixture of blood found on baby blanket no. 1, the identity of the second party being unknown (R. 617, p. 417, l. 22-25; p. 438, l. 1-3; R. 617, p. 439, l. 10-16, 21-25, p. 438, l. 1-3; p. 441-442; R. 311, Ex. 42); (4) none of Mr. Johnson's DNA or blood was found on either baby blanket or jump suit; (5) Mr. Johnson would have had to have picked up the baby blanket on the night of the murder and carried it to his house to be there when Mrs. Johnson gave the blankets to Detective Lassig; (6) there was no evidence that Mr. Johnson ever went to his house

immediately after the murder; and, (7) if Mr. Johnson's bloody hands had handled the baby blanket with the victim's blood, it is likely that his DNA would have been on the blanket (R. 617, p. 431, l. 7-18;).

It is a tenet of criminal law that when a prosecutor is in control of material evidence, and fails to produce it, the trier of fact may infer that the evidence would not have been beneficial to the prosecutor's case. *See e.g., People v. Majka*, 849 N.E.2d 428, 426 (Ill. App. 2006); *Ralph Child Constr. Co. v. State Tax Comm'n*, 362 P.2d 422, 427, 12 Utah 2d 53 (Utah 1961) (Crockett, J., concurring). Thus, since the State did not produce any evidence about the DNA for the human blood found on the jump suit, one must infer that the blood did not belong to Mr. Johnson or the victim, and due to its faintness had gotten there at some other time, and by some other means. Coupled with the fact that another person's DNA was found on the baby blankets, one must also infer that other persons besides Mr. Johnson handled those blankets, and that the victim's blood and DNA had gotten there by other plausible means.

Additionally, if Mr. Johnson had the presence of mind to go back to his home to get a change of clothes after killing the victim (so that he could bring them to Mr. Hassan's house to change), one would infer that he would have had the presence of mind to have also destroyed any baby blankets that he had brought from the crime scene.

B. There was no Incriminating Evidence on the Victim's Body, Mr. Johnson's Body or at the Crime Scene.

Because the victim was strong and knowledgeable in the area of self defense

(including the use of knife-fighting, R. 617, p. 463, l. 2-4), the victim: (1) was capable of adequately defending himself, even with a person who was trained in the martial arts. (R. 617, p. 461, l. 14-18, p. 462, l. 8-11; p. 464, l. 12); and, (2) required several people to overpower him R. 617, p. 462, l. 16; p. 464, l. 15-25). In fact, the victim practiced with an 11 inch kitchen knife, and identified with the comic-book super hero, "Wolverine" (R. 617, p. 464, l. 10-14).

There were several facts which strongly imply that a violent struggle had occurred between the victim and his murderer. The victim had knife cuts on his boots (R. 616, p. 323, l. 1-2). Thus, one must infer that the victim and the killer were on the floor, and the killer was trying to stab the victim from a distance. (R. 616, p. 323, l. 12-13). The bedroom in which the victim laid dead was in disarray. (R. 616, p. 235, l. 14). The door jam to the bedroom was materially damaged. (R. 616, p. 280, l. 17-25). The victim had 11 defensive wounds to his hands (R. 616, p. 239, l. 2-4). Blood spatter was on the wall where the victim was found. (R. 615, p. 196, l. 15-21). A violent struggle implies strongly that the killer's DNA would have been left somewhere on the victim's body.

In this instance, the State went to great lengths to search, gather and test prospective evidence which would show that Mr. Johnson had been at the crime scene on the night of the murder. It gathered the following evidence: (1) a multitude of objects from the victim's house, (R. 616, p. 213, l. 15-25, p. 214, l. 1-9, p. 229, l. 19-25, p. 230, l. 1-2; (2) various objects from the home where Mr. Johnson went after he had picked up the baby, (R. 616, p. 267, l. 24-25; p. 268, l. 1-2, 6-15, p. 229, l. 19-25; (3) evidence from

the victim's body, (R. 616, p. 222, l. 1-8); (4) clothes from Mr. Johnson (R. 616, p. 223, l. 2-12); (4) evidence from Mr. Johnson's body (R. 616, p. 280, l. 17-25, p. 281, l. 1); (5) clothing from the victim's mother (R. 617, p. 386-388 (the mother's clothing, plastic scrub pad and cloths found in the garbage at Mr. Hassan's house, bathroom rug found at Mr. Hassan's house, dish cloth from victim's house, blood swab from victim's dresser, the victim's fingernails, tissue on bathroom sink, drain plug from bathroom sink, beige rug from victim's house); (6) foot print evidence which did not match Mr. Johnson's shoes (R. 616, p. 275, l. 11-25, p. 276, l. 1-2); and, (7) hand print evidence (R. 615, p. 198, l. 15). Yet the State offered no DNA, fingerprint, footprint, hand, or any other evidence which showed that Mr. Johnson had been at the victim's house on the night of the murder! Indeed, Mrs. Johnson testified that Mr. Johnson would not buy new shoes unless his old ones had become unusable. (R. 615, p. 150, l. 19-21). Thus, referring to the authorities cited *supra*, one must infer as a matter of law that no such evidence exists. These facts are highly material that the State did not prove beyond a reasonable doubt that Mr. Johnson had committed the murder.

Indeed, the State's evidence actually implied that Mr. Johnson was not involved in the murder. The homicide detectives (R. 615, p. 189, l. 7-11; p. 264, l. 19-21) who interviewed Mr. Johnson immediately after the murder (R. 616, p. 277, l. 17-23) found no evidence on Mr. Johnson's body which implied that he had been involved in a physical encounter. That is, there were no visible bruises, scratches, blood spatter, contusions to

the hand, or carpet burns. Indeed, there was no evidence that Mr. Johnson bruised his leg by striking the door plate in the victim's mother's bedroom. (R. 616, p. 280, l. 17-25, p. 281, l. 1). The only prints found were those from family members and investigators. (R. 616, p. 280, l. 7-11; p. 214, l. 15-22). Thus, if Mr. Johnson had tried to clean himself, had stolen items or had touched anything in the house with his hands in a frenzy to leave, the prints should have been there.

Neither the victim's blood nor Mr. Johnson's blood was discovered in Mr. Johnson's vehicle, or on the baby's car seat (which needed to be carried out to Mr. Johnson's vehicle on the night of the murder (R. 616, p. 272, l. 20-21).

Also, Brandon Bray, the victim's knife-fighting buddy, who had a good understanding of the victim's strength and self-defense capabilities theorized that the victim must have been overpowered by a group of boys. (R. 617, p. 465-67). Mr. Bray also testified that around the time of the murder both he and the victim were trying to catch a crazed cat inside the victim's home. (R. 617, p. 474, l. 5-12). Hence, it is also possible that the victim had gotten scratched by the cat, and that is how his blood had gotten onto the baby blankets.

Mr. Beir also testified that the police found bloody tissues in the victim's apartment, and that they did not match with the victim or Mr. Johnson. (R. 617, p. 423, l. 18-25; p. 424, l. 1-2). This evidence strongly implies that the killer's blood was there, but the police could not prove his identity. *Id.*

C. Inconsistencies in Mr. Johnson's Version of the Facts
Is Understandable Under the Circumstances.

Mr. Johnson's statements to the police were made over an eight year period (R. 616,. p. 294, l. 13-15). The first interview was also conducted shortly after Mr. Johnson had been consuming alcohol and taking crack cocaine on the night of the murder, when ostensibly his memory would have been impaired by the use of intoxicants. (R. 615, p. 172-73, p. 181-82).

Secondly, it is reasonable to infer that the discrepancy about where Mr. Johnson had been before picking up the baby, i.e., at a sexually-oriented business vs. being at school, happened because Mr. Johnson, married at the time of the first interviews and now divorced, had wanted to keep the information confidential from his wife originally, and at the interview eight years later, had no reason to hide it from his wife. (R. 616 p. 290, l. 12-23). Thus, it is reasonable to infer that he told the police the truth at the third interview in Kansas City.

Additionally, the other things that were inconsistent, i.e., whether Mr. Johnson had a problem with using a teenager babysitter, or whether he had used the bathroom while picking up the baby must be viewed as immaterial facts, and as opinions or memories which may have changed or faded over time, as Mr. Johnson changed his opinion about babysitters, or his memory faded. Nevertheless, to find that because Mr. Johnson's statements given to the police were inconsistent when he was either intoxicated and/or his memory had faded eight years after the murder had occurred appears unreasonable.

Additionally, during the course of the investigation, the police had disclosed certain facts about the murder to the victim's friend, Brandon Bray, and to the victim's mother. (R. 617, p. 471, l. 8-11). Thus, it also follows that the police would have disclosed similar information to Mr. Johnson.

D. The Ten Minute Window to Kill the Victim is not a Cogent Theory.

Detective Lassig testified that Mr. Johnson told him that he was at the victim's house to pick up his baby within an hour's time frame of 7:00 P.M. to 7:55 P.M. (R. 616, p. 278, l. 10-13). Yet, Mr. Johnson did not have a watch, and could only estimate when he was there. (R. 616, 278, l. 15-18). The victim's mother testified at trial that the baby was at the apartment at 7:10 P.M. (R. 615, p. 93, l. 17-18). The victim's grandmother testified that the baby was there at 7:30 P.M. (R. 616, p. 263, l. 4-6). There was conflicting evidence that the mother had called again at 7:45 and 8:00 P.M. with no answer. (R. 615, p. 93-94).

Indeed, the mother's testimony at trial was inconsistent with: (1) what she had told the police previously, i.e., that she never called at 7:45 P.M. (R. 615, p. 118, l. 13-19); and, (2) how she had testified at the preliminary hearing. (R. 615, p. 125). Moreover, the statement to the police around the time of the murder was when she was in shock (R. 615, p. 125, l. 24-25, p. 126, l. 1). Thus, the mother's statements about calling at 7:45 P.M. is conflicted, and based upon her inconsistent statements under oath. Thus, if Mr. Johnson's inconsistent statements are given weight, so should the mother's about Mr. Johnson's

opportunity to commit the murder.

Additionally, the evidence was that the victim's mother and grandmother were calling this 14 year old boy every 15 minutes. Thus, it is also not unreasonable to infer that: (1) the boy did not answer the phone after 7:30 P.M., because he did not want to be bothered again by his overly protective mother and grandmother again. There was no evidence that the boy sometimes did not answer the phone when he became annoyed; however, one can infer that he did not answer the phone because he become annoyed, because despite being concerned as to whether Mr. Johnson had picked up his baby or not, the victim's mother discontinued calling her son for 1 1/2 hours, after her son did not answer the phone for the second time at 8:00 P.M. (R. 615, p. 94).

There was also evidence that there were gangs in the neighborhood, and that the victim carried a knife because he was afraid of them. (R. 615, p. 122, l. 7-15). Mrs. Johnson testified that she went to the victim's door between 8:15 and 8:30 P.M. on the night of the murder to pick up the baby, but there was no answer when she knocked on the door. (R. 615, p. 130, l. 1-4). Thus, if Mr. Johnson had picked up his baby shortly after 7:30 P.M., and the victim did not answer the phone after that because he was annoyed with his perceived overprotective parent and grandparent, the window of opportunity for gang members to commit emotional contagion in a heat of frenzy during a one hour and fifty minute interval after Mr. Johnson has picked up the baby (and when Mrs. Johnson was not knocking on the apartment door) is as equally plausible.

There was also evidence that the victim was being threatened by students at his school. (R. 617, p. 471, l. 12-25; p. 472, l. 1-8-8). There was also evidence that: (1) gang member graffiti was found on the railing of the victim's apartment shortly after the murder occurred; (R. 616, p. 225) and, (2) that knives left at the crime scene in the sink are more like an "in your face" signature crime of gang members, rather than the behavior of an adult, who allegedly had the presence of mind to hide incriminating evidence after the murder.

There was also evidence that a carload of disorderly youth were very close to the victim's house around the time of the murder. Neighbor Robert Carter testified that he observed a car load of youth, one identified as a troublemaker (R. 617, p. 454, l. 6), near the victim's house (R. 617, p. 454, l. 20-22), driving erratically (R. 617, p. 454, l. 9) near the time of the murder. (R. 617, p. 454, l. 15). Mr. Carter was so concerned about seeing the youth, that he reported the incident to the police. (R. 617, p. 453, l. 25). There was also fresh graffiti placed on brick fences in the area at the time of the youth sighting. (R. 617, p. 454, l. 3-6). All of this evidence suggests that violent youth and/or gang members had a motive and the opportunity to commit the murder.

E. The Evidence About Mr. Johnson Changing his
Clothes in a Friend's Bathroom is Also not Cogent.

Assuming arguendo, that Mr. Johnson did pick up his baby around 7:45 P.M. and then killed the victim, to stab him as many times as he did would have required a motive for the killing, an argument, and an overpowering physical encounter with a young man

who held his own against a martial arts expert, and who was big for his age. (R. 617, p. 471, l. 21). All of this seems quite improbable, given Mr. Johnson's past behavior, personality and relationship with the victim.

However, even assuming *arguendo* that Mr. Johnson did bring a change of clothes with him to Mr. Hassan's home, he would have had to have traveled back to his house to get a change of clothes, since presumably Mr. Johnson would not have been planning to kill the victim when he went to his home. Thus, it is far more reasonable to infer that Mr. Johnson would have hid the fact that he had blood on his clothes, and changed them at his home, rather than bringing a change of clothes to a friend's home unannounced, and changing his clothes in plain view for investigating detectives to learn about this fact later. (R. 615, p. 166, l. 22-24).

Moreover, the evidence about the clothes change in Mr. Hassan's bathroom was conflicting in that Mr. Hassan testified at trial that Mr. Johnson did not change his clothes at his home, but his baby's diaper. (R. 615, p. 167-169). Mr. Hassan also testified that Mr. Johnson did not take any soap from his home. (R. 615, p. 184, l. 23-25). In any event, Mr. Hassan's recollection of the facts about Mr. Johnson were clouded by his use of alcohol and crack cocaine. (R. 615, p. 165, l. 18-20).

F. There are Alternative Reasonable Inferences to be Drawn from the Fact
Mr. Johnson Knew the Amount of Stab Wounds.

The evidence at trial was that Detective Judd did not tell Mr. Johnson the number of stab wounds for the victim when he interrogated Mr. Johnson on the night of the

murder. However, Detective Judd also testified that he didn't know whether other officers had (R. 616, p. 240, l. 25; p. 241, l. 1-3). Since it is reasonable to infer that other officers spoke to Mr. Johnson about the killing during the course of his interrogation, it is reasonable to infer that the police had told Mr. Johnson why he was being interrogated, and undoubtedly told him some facts associated with the murder. Indeed, Detectives Lassig, Potter, and Carr spoke to Mr. Johnson about the murder, prior to the latter's disclosures to Mr. Hassan. (R. 615, p. 240, l. 7-8, p. 270, l. 9-10).

Also, to think that a murderer would have counted the number of stab wounds he had made, without being highly preoccupied with escaping and covering the evidence immediately, seems very far-fetched. Indeed, it is far more plausible that the only way that Mr. Johnson would have known the number of stab wounds of the victim is for the police to have told him.

G. Other Facts Indicate that Mr. Johnson was not Guilty.

There was not even enough evidence for probable cause to get a search warrant to search Mr. Johnson's home and clothing, let alone arrest him in 1994. (R. 616, p. 240, l. 9-21). Mr. Johnson did not flee, but immediately spoke with homicide detectives about the murder without an attorney, even showing them his body parts. (R. 615, p. 149, 7-18). Mr. Johnson was not indicted until eight years later, when some secondary DNA testing was done. Mr. Johnson's demeanor was not of someone who had just committed a murder immediately after the murder had occurred. (R. 615, l. 13-16). This can also be

inferred by the fact that the homicide detectives did not arrest Mr. Johnson after interviewing immediately after the murder, because they did not have probable cause to do so.

H. Mr. Johnson had no Motive to Kill the Victim.

Mrs. Mosier testified that Mr. Johnson had a good relationship with her son, that the former had a happy personality, and that he had not motive to kill her son. (R. 615, p. 113, l. 6-25). She also testified that the relationship between Mr. Johnson and her son was extremely casual. (R. 615, p. 114). Since it is common knowledge that most crimes of violence occur between persons who have a significant enough relationship that they have something which agitates them, these facts also imply that Mr. Johnson did not kill the victim.

Additionally, Mrs. Johnson, the witness who testified about the illegal and incredibly damaging Rule 404(b) evidence, also testified that she had told the police that she was not afraid of Mr. Johnson, and that she believed that he was not involved in the murder. (R. 615, p. 147, l.11-24). Thus, Mrs. Johnson made material inconsistent statements. At trial, this divorced witness, who was testifying against her ex-husband, may have very easily had a bias to slant the truth.

I. The Statements by a Convicted Felon Should not be Given Great Weight.

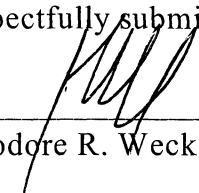
The Court credits the testimony of Mr. Alan Rushton, who was not only convicted of a felony, but was convicted of a felony involving the character trait for dishonesty. (R.

616, p. 344, l. 7-11). Even assuming that there was some basis to think that Mr. Rushton had told part of the truth at trial (despite getting a deal from the State for less time in prison (R. 616, p. 356, l. 7-8)), like the defendant in *North Carolina v. Alford*, 400 U.S. 25 (1970), Mr. Johnson was a Black man in a predominantly White state of jurors. He may have feared getting convicted for a crime that he did not commit, and may have tried to do something to help himself out of desperation. This is especially true if he had no confidence in his lawyers to help him (which judging from their abilities at trial was well-founded).

J. Use of the Bad Acts Evidence was Crucial to Getting a Conviction.

Based upon the foregoing, it is evident that the State felt compelled to use the undisclosed Rule 404(b) evidence to shore up its case. Moreover, it is common knowledge that a true drug addict (which was the State's theory for motive), is normally a driven, petty thief, normally unemployed (because of his drug addiction), and steals smaller pieces of property by stealth to get money to support his or her habit without making a scene. It is totally out of character for such a person to murder someone for a snort of cocaine, especially when the addict has ready cash to pay for it. In this instance, Mr. Johnson had money to score some coke, and to go buy beer on the night of the murder. (R. 615, p. 165, l. 14-24; p. 172, l. 25, p. 173, l. 1-3).

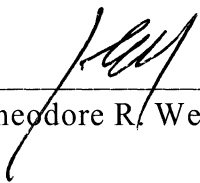
Respectfully submitted,



Theodore R. Weckel

CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies, that he late mailed a copy of this pleading upon Christopher D. Ballard, Esquire, Appellate Division of the Attorney General's Office, State of Utah, POB 140854, Salt Lake City, UT 84114-0854, by first class mail, postage pre-paid, on the 5th day of July, 2007.



Theodore R. Weckel