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Alabama Court of Criminal Appeals

OCTOBER TERM, 2020-2021

CR-18-0377

Alyssa Sue Watson

v.

State of Alabama

**Appeal from Tuscaloosa Circuit Court
(CC-18-887)**

CR-18-0435

Marcus King George

v.

State of Alabama

**Appeal from Tuscaloosa Circuit Court
(CC-18-886)**

After Remand by the Alabama Supreme Court

KELLUM, Judge.

Alyssa Sue Watson and Marcus King George were each convicted of felony murder (murder committed during the course of a kidnapping in the first degree), see § 13A-6-2(a)(3), Ala. Code 1975, and kidnapping in the first degree, see § 13A-6-43(a)(4), Ala. Code 1975, in connection with the kidnapping and subsequent death of Samantha Payne. The trial court sentenced both Watson and George to 30 years' imprisonment for each conviction.

On January 10, 2020, this Court affirmed Watson's and George's convictions and sentences for felony murder, but reversed Watson's and George's convictions and sentences for kidnapping in the first degree on the ground that those convictions violated double-jeopardy principles, and we remanded the cause for the trial court to set aside those convictions

CR-18-0377 and CR-18-0435

and sentences. Watson v. State, [Ms. CR-18-0377, January 10, 2020] ___ So. 3d ___ (Ala. Crim. App. 2020). In affirming Watson's and George's felony-murder convictions, we held, among other things, that the trial court properly allowed Allison Duncan, an intelligence analyst with the Alabama Law Enforcement Agency ("ALEA"), to testify regarding her analysis of the historical cell-site-location data of Watson's and George's cellular telephones. Specifically, we concluded that Duncan's testimony was properly admitted as lay testimony under Rule 701, Ala. R. Evid. Because we concluded that Duncan was properly permitted to testify as a lay witness, we did not address Watson's and George's arguments that Duncan -- who was not tendered by the prosecutor as an expert nor found by the trial court to be an expert -- was not qualified to testify as an expert on historical cell-site data or that Duncan's testimony did not satisfy the requirements for the admissibility of scientific evidence under Rule 702(b), Ala. R. Evid.

The Alabama Supreme Court granted certiorari review to consider the admissibility of Duncan's testimony, and it issued a plurality opinion, with four Justices joining in the main opinion, one Justice concurring in

CR-18-0377 and CR-18-0435

the result, two Justices concurring in part and dissenting in part, and two Justices dissenting. Ex parte George, [Ms. 1190490, January 8, 2021] ___ So. 3d ___ (Ala. 2021). It appears from the main opinion and the four special writings accompanying it that eight Justices agreed that Duncan's testimony -- to the extent it went beyond simply identifying the locations of the cellular towers through which calls to and from Watson's and George's cellular telephones were routed¹ -- was expert, not lay, testimony and, thus, that it was subject to the admissibility requirements of Rule 702(a), Ala. R. Evid. It also appears that five Justices agreed that her testimony was based on scientific theory, principle, methodology, or procedure and, thus, was also subject to the admissibility requirements of Rule 702(b). The Court reversed this Court's judgment affirming Watson's and George's felony-murder convictions and remanded this cause for this Court to remand the cause for the trial court to hold a hearing "to

¹The Court did not disturb this Court's holding that Duncan's testimony identifying the locations of the cellular towers through which the calls to and from Watson's and George's cellular telephones were routed was admissible as lay-witness testimony under Woodward v. State, 123 So. 3d 989 (Ala. Crim. App. 2011).

CR-18-0377 and CR-18-0435

determine whether Duncan's scientific testimony satisfies the admissibility requirements of Rule 702(b)." Ex parte George, ___ So. 3d at ___.

As noted above, an issue not addressed by this Court originally was whether Duncan was qualified as an expert on historical cell-cite data. The issue of Duncan's qualifications was mooted by our holding that she was properly allowed to testify as a lay witness, but the Alabama Supreme Court's plurality opinion now makes that issue ripe for adjudication. Duncan's qualifications are an integral part of the admissibility of her testimony. As Justice Mitchell recognized, "[i]f an expert cannot satisfy the qualification requirements of Rule 702(a), the analysis is over and the testimony is inadmissible." Ex parte George, ___ So. 3d at ___ (Mitchell, J., concurring in part and dissenting in part). However, just as it is "for the trial court to make an initial determination as to whether Duncan's testimony meets the admissibility requirements of Rule 702(b)," Ex parte George, ___ So. 3d at ___ n.4, it is likewise for the trial court to make an initial determination as to whether Duncan is qualified as a scientific expert. See, e.g., Bailey v. State, 574 So. 2d 1001, 1003 (Ala. Crim. App.

CR-18-0377 and CR-18-0435

1990) ("Whether a witness is sufficiently qualified to testify as an expert is a question for the trial court in its discretion to resolve."). Therefore, it is necessary for the trial court make that determination on remand as well.

Based on the foregoing, we remand this case for the trial court to conduct a hearing to determine whether Duncan was qualified to testify as a scientific expert and whether Duncan's scientific testimony satisfies the admissibility requirements of Rule 702(b). The court shall make specific findings of fact regarding these issues. In addition, our instructions on original submission to set aside Watson's and George's convictions and sentences for kidnapping in the first degree still stand. Due return shall be filed with this Court within 63 days of the date of this opinion and shall include the trial court's findings, a transcript of the hearing conducted on remand, and any other evidence received or relied on by the trial court in making its findings.

REMANDED WITH INSTRUCTIONS.

Windom, P.J., and McCool, Cole, and Minor, JJ., concur.