IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

STATE OF DELAWARE,	:	
	:	
	:	Case No. 1002011017
v.	:	
	:	
JUAN C. RESTREPO-DUQUE,	:	
	:	
Defendant.	:	

O R D E R

In this case, the evidence educed at trial provided for the jury a very close case for its consideration between the charge of murder in the first degree or the lesser included charge of murder in the second degree. Accordingly, any judicial error relative to that issue cannot be said to be harmless beyond a reasonable doubt.

The issue in this case is the Court's providing, at the request of the jury made through a Bailiff and communicated to the Court immediately at the start of deliberations, a copy of the transcript of the Defendant's statement to the investigating officers. That statement was videotaped (with audio accompaniment). It was played to the jury during trial. Copies of the transcript were distributed to the jury during its playing without objection by either side. The videotape was made a jury trial exhibit. The transcript, however, was not. Rather, it was made a Court exhibit only. When the request for the transcript was made, the Court mistakenly thought it had been made a trial exhibit, and advised the Bailiff to provide it to the jury. That was done, given the misunderstanding, without any discussion with counsel and without any proper instruction as to its use or as to the videotape's being the only evidence on that subject.

A review of *Loatman v. Patillo*, Del. Supr.-1979, 401 A.2d 91, referred to in *Jacobs v. State*, Del. Supr.-1980, 418 A.2d 988, and analysed in *Anderson v. State*,

Del. Supr.-1997, 695 A.2d 1135, is dispositive.

The jury had "hands on" exposure to the transcript during the trial, while the videotape was being played. There was no noted discrepancy between the content of the videotape and the content of the transcript. Nothing in the record reflects that Defendant was actually prejudiced by its being given to the jury. Had the transcript itself been offered into evidence during trial – even if objected to by Defendant – it most likely would have been admitted as a trial exhibit. Nevertheless, were that the case, it would have been admitted with the appropriate limiting instruction regarding the primacy of the videotape.

Hence, the issue is not merely ministerial. It is a matter of substance. Therefore, the Defendant does not have any burden to demonstrate that actual prejudice resulted. Rather, the Defendant's burden is met by showing that prejudice is "conceivable," whether or not apparent on the record. *Anderson*, Super. at 1140.

The content of the transcript, devoid of any emotional content, which would exist on the videotape, could conceivably impact, to some degree at least, the jury's consideration of the interview between the Defendant and the arresting officers. It cannot be said that the record affirmatively demonstrates that no prejudice occurred. Prejudice is conceivable.

Under these circumstances, consequently, Defendant must be, and hereby is, **GRANTED A NEW TRIAL** on all charges.

IT IS SO ORDERED.

/s/ Robert B. Young
J.

RBY/lmc

State v. Restrepo-Duque
Case I.D. 1002011017
May 6, 2014

oc: Prothonotary
cc: Jason C. Cohee, Esq.
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