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Case Number 523,2013 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON WILLIAMS,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	**No. 523, 2013**
	)	
	)	
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW CASTLE COUNTY

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DATE: DECEMBER 24, 2013

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NATURE AND STAGE OF PROCEEDINGS

On November 5, 2012, Brandon Williams, ("Williams"), was indicted on one count each of burglary second degree, theft < $1,500, unlawful use of a credit card < $1,500 and resisting arrest. A-1, 4-5. He went to trial on these offenses on March 5th and 6th, 2013. He was found guilty of all counts. A-2.

On May 1, 2013, the State filed a motion to declare Williams a habitual offender under 11 *Del.C.* § 4214 (a). A-2. On the day of sentencing, this motion was granted. As the result of a presentence investigation, the judge noted Williams had a horrible childhood. So, he drafted an unusual sentence. The judge sentenced him to 12 years in prison on burglary second degree. However, because it is possible that Williams "may mature and stabilize," the trial court retained jurisdiction to revisit the sentence after 8 years and take "his progress or lack thereof in to account." On their remainder of the offenses, the judge imposed probation. *See* Sentencing Order, att. as Ex. A.

Williams filed a timely notice of appeal. This is his opening brief in support of that appeal.

SUMMARY OF ARGUMENT

1. In this case, where identification of a burglar was at issue, several police officers were erroneously permitted to tell a jury that they arrested Williams after they responded to a call of an attempted burglary at a nearby location involving a suspect who matched the description of the suspect in this case. The prosecutor also erroneously made reference to that call in his closing argument. This background information was of slight value yet; it was unfairly prejudicial to Williams. The dispatch was an unnecessary statement of an alleged prior bad act. Because there was a much less prejudicial way to explain Williams' arrest to the jury, the introduction of this evidence jeopardized the fairness and integrity of the trial process and requires reversal.

2. The State's case consisted primarily of the testimony of the alleged victims and several police officers. No expert testimony was presented. However, the trial court erroneously provided a jury instruction defining an expert witness and explaining how the jury could assess expert testimony. At the conclusion of that instruction, the trial court also mentioned how a law enforcement officer's testimony must be considered. This instruction unfairly bolstered the officers' testimony. Because this error jeopardized the fairness and integrity of Williams' trial, his convictions must be reversed.

STATEMENT OF FACTS

On October 14, 2012, Jeffrey Fisher and his wife, who lived at 8 Chelwynne Road in New Castle, Delaware, had the windows in their house open all day. Later in the day, they closed all of the windows except the one in the computer room. A-13-14. After 11:00 p.m., Jeffrey Fisher, ("Fisher"), was sitting in his living room watching television when he purportedly heard the blinds in the nearby computer room being "battered." A-13-14. At first, because he believed it to be one of his two cats batting at the blinds, he ignored it. However, when he heard the blinds being "battered" again he became annoyed. Cursing the offending cat, he walked about 12' and into the computer room. A-17. When he got into the room, he saw the blinds pushed back through the window as if something had fallen out the window. A-14.

Fisher believed he may have scared the cat and that the cat went out the window. A-14. He looked out the window for his cat and purportedly heard a noise to his left. When he looked up he saw a tall skinny white male wearing what looked to be a white long-sleeved shirt. The man was about 75 feet away and was running. A-14. No evidence was presented at trial as to whether Fisher ever located either of his cats.

Fischer looked around the room and found nothing missing. His two laptop computers, two desktop computers with dual monitors and his wife's purse were still there. A-15. Fisher woke up his wife and told her what had happened. A-12, 15. At 11:18 p.m., Fisher's wife called 911. A-12, 27. The description of the suspect given to police was that of a tall, thin, white male. Meanwhile, Fisher got in his car and drove around the neighborhood looking for he suspect. He found no one. A-15.

After police arrived, Fisher heard over the police radio that someone had been stopped who was in possession of Fisher's wallet. Fisher reached in the back pocket and realized he did not have his wallet. He claimed that when it is not in his back pocket, the wallet sits on his computer desk. A-15.

A K-9 officer and his dog attempted to track a scent from outside the house in front of the computer room window. A-17, 19. Purportedly, a scent let the team to the intersection of Castle Hills Drive and Route 9. A-19. After learning that a possible suspect was arrested, however, the track was discontinued with no results. A-19-20.

While sitting in his car, Officer Torres heard a dispatch regarding the possible burglary at Fisher's house. So, he assisted in the search by blocking off certain streets. About seven minutes later, he heard another dispatch. This time it was about an alleged burglary by a tall white male of the BP gas

station located at 2038 Newcastle Avenue. A-21. Torres went to the station and found nothing out of the ordinary. However, he parked his car in the lot of the shopping center next to the gas station and sat there. Torres told the jury that he saw a tall, white male, who was shirtless and wearing black pants, walk from the south corner of the station across the parking lot. A-21. The unknown male supposedly started to sprint after the two men made eye contact.

Torres followed the unknown male in his car. He left the parking lot, turned onto New Castle Avenue and made a U-turn. He then saw the individual running into Collins Park across Killoran Drive. A-21. Torres got out of his car and followed on foot. He lost sight of the male. A-21. He then set up a perimeter in the area of Collins Park. When he heard a noise coming from the backyard of a house in the area, he investigated. He saw the same unknown male straddling a 6' wooden fence. According to Torres, it was at this point that the officer ordered the man to stop. However, the unknown male continued over the fence. A-21-22.

On the other side of the fence were other officers who ordered the male to the ground, struck him in the back with a Taser, cuffed him and searched him. A-24. Police then found a wallet on the ground. Inside the wallet was Fisher's driver's license and credit cards. A-24. There was also a receipt for

a purchase at 11:17 p.m. at the Rite Aid on Newcastle Avenue for $2.39. A-28.

The detective obtained a surveillance video from the Rite Aid. A-28. A thin, shirtless male with short-cropped hair wearing black pants was staggering in the store at 11:14 p.m. A-29, 33-34. He went to the register, spread out several credit cards on the counter, then purchased a drink with one of the cards. A-29. The man also purportedly had a tattoo on his chest and on each of his arms, which police later learned, matched those on Williams. A-29.

Police were not able to obtain any helpful fingerprint information at the Fisher's house. A-30, 34. No information was gathered from any neighborhood canvas and neither of the Fisher's was able to identify the suspect. A-30, 34. No one ever saw Williams take off a shirt and no shirt was ever recovered. A-33-34.

I. THE TRIAL COURT VIOLATED WILLIAMS' RIGHT TO A FAIR TRIAL WHEN IT ALLOWED THE STATE TO EMPHASIZE THROUGH 4 POLICE OFFICER'S AND CLOSING ARGUMENT THE FACT THAT HE WAS ARRESTED IN THIS BURGLARY CASE, AFTER POLICE RESPONDED TO A CALL OF AN ATTEMPTED BURGLARY AT ANOTHER LOCATION.

Question Presented

Whether a defendant's right to a fair trial is violated when the State is permitted to present background evidence that implicates the defendant in another crime similar to that at issue in the instant case. *See Del.Sup.Ct.Rule* 8.

Standard and Scope of Review

When an error is not challenged below, it "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

Argument

In this case, where identification of a burglar was at issue, several police officers were erroneously permitted to tell a jury that they arrested Williams after they responded to a call of an attempted burglary at a nearby location involving a suspect who matched the description of the suspect in this case. The prosecutor also erroneously made reference to that call in his closing argument. This background information was of slight value yet; it

was unfairly prejudicial to Williams. The dispatch was an unnecessary statement of an alleged prior bad act. Because there was a much less prejudicial way to explain Williams' arrest to the jury, the introduction of this evidence jeopardized the fairness and integrity of the trial process and requires reversal. U.S.Const., Amend.V.

Cpl. Breitigan testified that the reason he terminated the K-9 track at the intersection of Route 9 and Castle Hills Drive was that he

> heard over the radio that there was a subject attempting to break into an establishment which was approximately a quarter, a quarter mile north on Route 9 from our location from where the track was. And briefly after that we heard officers from another agency get involved in a foot pursuit with that subject.

A-19. Officer Torres testified that he responded to the BP gas station because

> RECOM advised that an unidentified tall white male subject was now in the area of the BP station which is located at 2038 Newcastle Ave., which is about a quarter-mile away from where my current location was. The report was that he was there at the BP station attempting to kick in the front window or break into the business.

A-21. Sgt. Norris testified that, over the radio, there came in

> a call from the BP station stating that there was a white male either out front kicking the gas pumps or kicking the front door to the business. So myself and the Newcastle city officers responded over there, just, it's a very odd coincidence that the description of the guy at

> the BP station in the description of our suspect were very similar.

A-23. Det. Sendek testified that, "reports came in that a subject was at the BP gas station, which would be right here, and that the subject was a skinny white male attempting to kick in front door of the residence or a gas pump." A-31. And, in closing, the prosecutor told the jury that a call went out over 911 that "the BP gas station called, there's a white guy who skinny and tall with no shirt who's making a scene. So that's when Cpl. Torres and other officer see the defendant." A-41.

It is true that background information "may be necessary to give the jury a complete picture at trial and to ensure the jury is not confused in a way that would be unfavorable to the prosecution."[1] However, it "can also be unfairly prejudicial to the defendant."[2] When the State seeks to present an out of court statement relating to a defendant's "prior bad act" or "an element of the offense charged" as background evidence, the trial court must determine if there is a less prejudicial way to provide the background

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[1] *Sanabria v. State*, 974 A.2d 107, 112 (Del. 2009) (*citing Johnson v. State*, 587 A.2d 444 (Del. 1991) ("The officers should not be put in the misleading position of appearing to have happened upon the scene and therefore should be entitled to provide some explanation for their presence and conduct.").
[2] *Id.*

information to the jury.[3]

The need for background evidence is "slight," and is accompanied by a great likelihood of misuse. This Court has found that the great likelihood of misuse could be avoided by an explanation to a jury that the officer "acted 'upon information received,' or words to that effect[.]"[4] Thus, this Court holds "that where the background can be provided as based 'upon information received' neither the contents of a third party's out-of-court statement nor evidence of other bad acts should be presented to the jury."[5]

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[3] *Id.*

[4] *Sanabria*, 974 A.2d at 113.

[5] *Sanabria*, 974 A.2d at 116. *See McNair v. State*, 703 A.2d 644 (Del. 1997) (holding that it is the "preferable practice" to "permit the State to introduce background evidence limited to a statement that the police were present based "upon information received."); *People v. Resek*, 821 N.E.2d 108 (N.Y.Ct.App. 2004) (concluding, where police testified they had received a report that the car defendant was driving was stolen, even though the defendant was being prosecuted not for stealing the car, but for unrelated drug offenses, that there was a less prejudicial way to provide the background information). *But see Fullerton v. State*, 919 A.2d 561 (Del. 2007) (finding that a report of shots fired and a description of the possible shooter's car was admissible to explain why police were inside the house looking for a gun); *Sullins v. State*, 945 A.2d 1168 (Del. 2008) (finding that fact that police were conducting surveillance was appropriate to explain why they stopped the defendant as it was interwoven with the facts of the crime at issue); *Hefton v. State*, 574 A.2d 263 (Del. 1990) (finding background information admissible where police told the jury that they were waiting for a particular car or person when they arrested the defendant and where the court issued a limiting instruction).

In our case, the jury was told 4 times by police that they arrested Williams for the burglary in this case after responding to a call of an attempted burglary by an individual who matched the description of the suspect in this case. The State also reminded the jury of this fact in closing. Police could have testified that they followed Williams from the BP gas station based on "information received" about the location of an individual with a similar description to that of the suspect in this case. There was no need for police to tell the jury that the dispatcher relayed that the individual attempted to break in to the gas station. *See Sanabria*, 974 A.2d at 112-14.

The State's failure to comply with this Court's holding was extremely prejudicial to Williams. The call about the BP station involved an attempt to commit a crime identical to that for which he was charged in this case. While there was overwhelming evidence against Williams on the charges of the unlawful use of a credit card and resisting arrest, there was not overwhelming evidence against him on the burglary and theft charges. A-14. For that reason, he disputed only the burglary and theft charges at trial.

No one saw anyone unlawfully enter or stay in the Fisher's house. And, no one was seen actually leaving the house. All that Fisher could provide was a description of a thin, white male who was wearing what

appeared to be a white shirt. That man was 75 feet away from Fisher's house and was running. No one ever identified Williams as the person Fischer saw. There were no results obtained from the K-9 track and there was no conclusive fingerprint evidence.

Additionally, the Fischers had all the windows in their house open most of the day. There came a point where they closed all the windows except the one in the computer room. There was no evidence as to the last time Fisher saw his wallet in the computer room. And, the possibility that one of his cats was the one batting at the blinds was never dispelled. In other words, there remained a possibility that someone other than Williams committed the burglary and theft at some point prior to when Fisher heard the blinds and that the wallet was later passed off to Williams.

The erroneous admission of the burglary attempt at the gas station allowed the jury to erroneously conclude that Williams committed the burglary in this case because he was seen trying to commit burglary at another location shortly thereafter. Thus, the error in the admission of that evidence was so clearly prejudicial to Williams' substantial rights that it jeopardized the fairness and integrity of his trial. Therefore, this Court must reverse Williams' convictions of burglary second degree and theft < $1,500.

Assuming, *arguendo*, this Court finds that the evidence that police

responded to an alleged attempted burglary at the gas station was necessary background information, it must still reverse Williams' convictions because the jury was never given any instruction that "the third-party statement or other bad acts [we]re not being admitted for the truth of their content but only to provide the jury with a background explanation for the actions taken by the police." *Sanabria*, 974 A.2d at 116.

II. THE TRIAL COURT UNFAIRLY BOLSTERED THE TESTIMONY OF SEVERAL POLICE OFFICERS WHO TESTIFIED AS FACT WITNESSES WHEN, EVEN THOUGH NO EXPERTS TESTIFIED, IT PROVIDED AN EXPERT WITNESS INSTRUCTION THAT ALSO REFERRED TO POLICE OFFICERS.

Question Presented

Whether, in a case where no expert witnesses testified, issuing an expert instruction that also refers to police officers unfairly bolstered the testimony of the several officers who testified as fact witnesses. *See Del.Sup.Ct.Rule* 8.

Standard and Scope of Review

When an error is not challenged below, it "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

Argument

The State's case consisted primarily of the testimony of the alleged victims and several police officers. Absolutely no expert testimony was presented. However, the trial court erroneously provided a jury instruction defining an expert witness and explaining how the jury could assess expert testimony. At the conclusion of that instruction, the trial court also mentioned how a law enforcement officer's testimony must be considered. This instruction erroneously and unfairly bolstered the testimony of the

officers. Because this error jeopardized the fairness and integrity of Williams' trial, his convictions must be reversed. U.S.Const., Amend.V.

The purpose of the police testimony was to provide the jury with facts that supported Williams' conviction of the charges at issue. The testimony also explained how the investigation unfolded. This was evidence which is commonly understood. The jury did not require an expert to explain the basic facts. Accordingly, no expert was presented. Thus, the following general witness credibility instruction the judge later provided was appropriate:

> You are the judges of the witnesses' credibility and the weight of the evidence. In weighing the testimony of any witness, you may consider the witnesses opportunity and ability to observe, memory and manner while testifying, any bias or interest in the case, whether the testimony is consistent with the witnesses earlier statements, the other evidence, or with common experience, and anything else bearing on believability. You need not believe any witness even though the testimony is uncontradicted. You may believe all, part, or none of the testimony of any witnesses. If the testimony conflicts, you should try to harmonize. If you cannot do that, however, it is your privilege as the judges of the fax to accept that part of the testimony you conclude is more credible and reject any part that you do not consider credible.

A-52.

Unfortunately, the judge decided to also give the following instruction on expert testimony:

> A witness who has special knowledge in a particular science, profession or subject is permitted to testify about that knowledge and to express opinions within the witness's field of expertise to aid you in deciding the issues. You should give expert testimony the weight you consider appropriate. In addition to the factors already mentioned for weighing the testimony of any other witness, you may consider the expert's qualifications, the reasons for the expert opinion, and the reliability of the information assumptions upon which it is based. Also, you must not give any more or less credit to a law officer's testimony simply because he is a law officer.

A-52.

This expert instruction not a correct statement of applicable law and was not reasonably informative. It was misleading and unnecessarily bolstered the testimony of the officers. *See Smith v. State*, 913 A.2d 1197, 1241 (Del. 2006) (citing several cases).[6] It was "unfairly prejudicial to put

[6] *See Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 540 (Del. 2006)). "A court is bound to charge the jury only on the law applicable to the factual parameters of a particular case, and it may not instruct the jury on inapplicable legal issues." 89 C.J.S. Trial § 784. *See Kessler v. Equity Mgmt., Inc.*, 572 A.2d 1144, 1152 (1990) ("There being no factual issue in the case relating to the concept of constructive discharge, appellant was not entitled to an instruction on the law of that subject."); *McGregory v. Lloyd Wood Constr. Co.,* 736 So.2d 571, 579 (Ala.1999) (stating that, while party entitled to a correct statement of the law, the law

an expert label or veneer on [that] evidence. A jury would be confused by the labeling." *Anker v. State*, 913 A.2d 569 (Del. 2006) (affirming trial court's decision not to label a witness an expert because testimony was to matters that are commonly understood and because the jury would be confused). The harm is heightened by the fact that several witnesses testified for the State and most of them were police officers.

The instruction allowed the jury to infer that the police officers were experts or, at least, that the judge considered them experts. It is likely that a jury would be more likely to defer to the testimony of an expert witness as opposed to a lay witness. In at least one other context, this Court has recognized the significance of the label of "expert." For example, it is impermissible for an expert to opine as to the credibility of another witness.[7]

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must be "relevant to the case" and "not confusing or misleading); *Geise v. Nationwide Life & Annuity Co. of Am.,* 939 A.2d 409, 422 (Pa. Super. Ct. 2007) (internal quotations omitted) ("Consequently, where the record [evidence fails] to satisfy the elements of a particular legal doctrine, the court may not discuss that doctrine in its charge.").

[7] *See Richardson v. State*, 43 A.3d 906, 910-11 (Del. 2012) (finding use of witness' background, training and interviewing protocol to introduce testimony of child complainant's statement was improper bolstering); *Graves v. State*, 648 A.2d 424 (Del. 1994) (reversing, in part, because lawyer for two prosecution witnesses testified as to his impressive credentials and that he urged the witness to cooperate with investigators and tell the truth); *Capano v. State*, 781 A.2d 556, 595 (Del. 2001); *Holtzman v. State*, 1998 WL 666722*5 (Del.) (attached as Ex. B) ("plain and reversible error to permit an expert witness for the State to directly or indirectly express a personal opinion about a particular witness' veracity.").

This Court recognizes the background and training of an expert could improperly bolster the testimony of the other witness. Thus, it will generally reverse convictions obtained in those situations.

The unfair prejudice resulting from the trial court's erroneous issuance of an inapplicable instruction that improperly bolstered the testimony of several officers requires this Court to reverse Williams' convictions.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that Williams' convictions should be reversed.

\s\ Nicole M. Walker
Nicole M. Walker, Esquire

DATE: December 24, 2013