EFiled: Aug 15 2016 05:28PM EDT
Filing ID 59426649
Case Number 511,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEFFREY PHILLIPS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	No. 511, 2015
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

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

APPELLANT'S REPLY BRIEF

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DATED: August 15, 2016

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I. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING JEFFREY PHILLIPS' MOTIONS FOR MISTRIAL AFTER THE STATE ELICITED TESTIMONY FROM KELMAR ALLEN THAT HE WAS IN WITNESS PROTECTION IN VIOLATION OF THE COURT'S ORDER NOT TO INTRODUCE ANY SUCH EVIDENCE.

"A prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement." *People v Warren*, 754 P.2d 218, 224-25 (internal citations omitted). Where the trial court has made a ruling that certain evidence is inadmissible, instructs the prosecution to admonish its witness not to testify to that inadmissible evidence, and the prosecutor nevertheless asks questions which elicit the very evidence which was excluded, the appropriate remedy is a mistrial. *See, e.g. State v. Lloyd*, 2002 Del. Super. LEXIS 335 (May 10, 2002).

The State argues in its answering brief that, in deciding whether the trial court should have declared a mistrial as a result of the State's introduction of excluded evidence, this Court should utilize the four factor test described in *Revel v. State*, 956 A.2d 23, 28 (Del. 2008) *(citing Pena v. State*, 856 A.2d 548, 550-51 (Del. 2004)). Unlike *Revel*, however, the evidence in this trial was

elicited by the State following an explicit ruling by the trial court that such evidence was inadmissible. Accordingly, this Court should utilize the prosecutorial misconduct test set forth in *Hughes v State,* 437 A.2d 559, 572 (Del. 1981), and *Hunter v State, 8*15 A.2d 730, 737-38 (Del. 2002).

In determining whether prosecutorial misconduct requires reversal, this Court has adopted a three-part test: "the closeness of the case, the centrality of issue affected by the (alleged) error, and the steps taken to mitigate the effects of the error." *Hughes,* 437 A. 2d at 571 (*citing Dyson* v *United States,* 418 A.2d 127, 132 (D.C. App. 1980)). Applying this analysis to the misconduct in this case, it appears that the State's case against Jeffrey Phillips with respect to the murder of Herman Curry was based upon accomplice liability. All of the testimony at trial indicated that Otis Phillips had the motive to kill Curry and in fact was the one who shot him in Eden Park. Accordingly, a determination of Jeffery's state of mind at the time Otis Phillips shot Herman Curry was essential to the jury's determination of whether or not Jeffery was an accomplice to first degree murder. The only State witness who provided evidence as to Jeffrey's state of mind was Kelmar Allen. Kelmar Allen was at the heart of the State's case against Jeffrey Phillips. As noted in Defendant, Jeffrey Phillips' Opening Brief, it was Allen's testimony alone that was presented by the State to establish

that Jeffrey Phillips was a member of the Sure Shots, that he was a willing participant in the shoot-out at Eden Park, and that he had received the firearm that he utilized during that shoot-out from the leader of the Sure Shots, Seon Phillips just prior to going to Eden Park on July 8, 2012. When Kelmar Allen testified that he was in witness protection in response to the State's questioning, the jury was led to believe that Allen's life was in danger as a result of his cooperation with the State in the prosecution of Jeffery Phillips. Although untrue, such evidence was powerfully corroborative of the State's allegation that Jeffrey Phillips helped Otis Phillips eliminate Herman Curry, a cooperating State witness.

The curative instruction given by the trial court in this case was insufficient to eliminate the taint created by this powerful evidence. Notwithstanding an instruction by the trial court that there was no evidence before the jury that the defendants personally made any threats against Kelmar Allen, there can be no other conclusion drawn from the fact that he is in witness protection.

In a case where the theme of the trial was witness intimidation and elimination, when the State elicits testimony that their star witness is in witness protection in violation of an explicit ruling that such evidence was inadmissible, there can be no suitable remedy other than the declaration of a mistrial. The trial

court erred in denying the defendant's motions for mistrial. This Court should reverse.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN ENTERING PROTECTIVE ORDERS WHICH PROHIBITTED JEFFREY PHILLIPS FROM CONSULTING WITH HIS LAWYERS ABOUT HIS DEFENSE WHICH DENIED HIM A FAIR TRIAL.

In its Answering Brief, rather than try to explain to this Court why the out of court statements of testifying co-defendants who were in witness protection must be kept from the Jeffrey Phillips who was being held without bail in the Secured Housing Unit of the James T. Vaughn Correctional Center, the State instead argues that they "provided substantially more material than contemplated by Superior Court Rule 16." State's Answering Brief, at p.18. The State points out that they provided "over 1,100 pages of transcribed statements of 49 witnesses" which they characterize as *Jencks* statements, subject to the protective order that they not be shared with the defendant. Ans. Br. at p. 20, fn. 29. While *Jencks* and Superior Court Criminal Rule 26.2 may not have required the State to produce the 1,100 pages of transcript of the yet unidentified witnesses prior to the completion of each witnesses' direct examination at trial, this Court has held that out of court statements of witnesses which may be utilized by the State pursuant to 11 *Del. C.* Section 3507 should be produced to the defense "at some reasonable time before trial" in order to allow the process of redaction of those statements to not interfere with the trial itself. *See Stevens v. State*, 3 A.3d 1070, 1073 (Del. 2010) ("the

process of redacting [a third party exchange should not] interfere with the trial, since it is a matter that can and should be resolved before the trial begins. Therefore, at some reasonable time before trial, the State must provide defense counsel with the entire recorded exchange between the witness and a third party, together with a copy of its proposed redacted version of that recording that it intends to introduce under Section 3507") (*quoting Miles v. State*, 985 A.2d 390 (Del. 2009)). Producing 49 statements of unidentified witnesses compiling 1,100 pages of transcript one month before trial can hardly be characterized as above and beyond the call of the State's discovery obligations; rather, the State complied with its obligations just prior to trial and under the terms of the protective orders which still prohibited counsel from consulting with their client about the contents of those statements. It was not until but ten days before Opening Statements that defense counsel was finally allowed to share the contents of literally dozens of hours and more than a thousand pages of statements of both cooperating co-defendants and other witnesses with their client. These conditions hardly satisfy the type of consultation between a defendant and his counsel that is contemplated by the Sixth Amendment to the United States Constitution. The protective orders entered in this case denied Jeffrey Phillips a fair trial. This Court should reverse his convictions.

III THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE DEFENDANT'S MOTION FOR SEVERANCE.

Severance of Defendants

The State contends in its answering brief that there was no prejudice in not severing the trial of Jeffrey Phillips from that of Otis Phillips because their defenses were not antagonistic. Ans. Br. at 27-29.[1] The core Jeffrey's defense, however, was that there was reasonable doubt that Jeffery engaged in the fatal shootings at Eden Park. On the other hand, the core of Otis's defense – that he had not engaged in the fatal shootings at Eden Park – was served by his objective of suggesting to the jury that the evidence showed that Jeffery had been responsible for the fatal shootings at Eden Park. Due to Otis's antagonistic cross-examination of witnesses against him thereby finger-pointing to Jeffery's involvement with the Eden Park homicides, Jeffrey moved for severance. (D.I. 127, 11/10/14, pp. 55-61). Otis also suggested that the evidence was sufficient to convict Jeffrey of the Eden Park murders, but that Otis could not credibly be placed in the events leading up to the Eden Park murders. (D.I. 118, 10/24/14, pp. 95-116). This produced substantial injustice if the jury could not accept Jeffrey's argument that there was a reasonable doubt that he participated in the

[1] Although they shared the same surname, Otis and Jeffery were not related. To avoid confusion, their first names are used.

Eden Park murders while part of Otis' defense strategy was that Jeffrey, not Otis, was involved. *Bradley v. State*, 559 A.2d 1234, 1241-42 (Del. 1987).

The State also contends that there was no prejudice from joinder of the offenses because 'no evidence was presented suggesting Jeffery's involvement in the Palmer murder [four years before on Locust Street].' Consequently, the State argues that "there was no danger that the jury would not be able to segregate the evidence of Otis's separately charged crimes from the Eden Park homicides." In addition, the State contends that the judge instructed the jury to weigh the evidence separately as to each defendant. Ans. Br. at 29. That was undermined by the corrosive bad character effect of the gang participation evidence, however, which permitted the jury to infer that if Jeffery was a member of the Sure Shots, he was more likely responsible for any acts carried out by the gang – including the Eden Park homicides. It this respect, the State itself did not resist in its answering brief the tendency to associate bad character evidence with that character's propensity to commit crime: "Jeffrey and Otis were active participants in the Sure Shots gang. [ ] In addition to their participation in the murders of Palmer, Curry, and Kamara, they participated in other gang-related activity throughout the State." Ans. Br. at 10. Jeffery could not have participated in the murder of Christopher Palmer on Spruce Street in

2008, however, because he did not enter the United States until 2011. That the State slips in its answering brief and states, in effect, that Jeffrey participated in the murder of Christopher Palmer illustrates how easy it would have been for jurors to do the same and associate character evidence of gang membership with crimes carried out by other members of that gang. Under these circumstances, the jury would have had more difficulty segregating the evidence against each defendant under these circumstances. *Floudiotis v. State*, 726 A.2d 1196, 1210 (Del. 1999).

In addition, Jeffrey's trial for the 2012 Eden Park homicides should have been severed from the 2008 Spruce Street homicide because the evidence introduced at trial showed that, besides his absence of involvement in it, there was legally insufficient reason to join Jeffery in the trial of the 2008 Spruce Street murder of Christopher Palmer. It was not the "same act or transaction" or the same series of acts or transactions" as the Eden Park murders. Superior Court Rule 8(b). Different defendants were charged and the offenses separated by more than four years. Otis, not Jeffery, was charged with shooting and killing Christopher Palmer in Wilmington in 2008. The Locust Street homicide in 2008 would have been a motive for Otis Phillips to kill Herman Curry, an eyewitness to the 2008 Locust Street homicide, but it could not have been a

motive for Jeffery because he had no involvement at all with the Locust Street homicide in 2008 and was not in the United States in 2008.

Severance of Charges

In its answering brief, the State also argues that the Defendant's gang participation and riot charges from Bridgeville should not have been severed from his trial for the Eden Park homicides because those offenses were relevant to his motive and were "inextricably intertwined" with the Eden Park homicides and would have been admitted in any event at a separate trial for the Eden Park homicides. Ans. Br. at 30-34. The riot and gang association charges were not "of the same or similar character," as the Eden Park homicides, however, and there was no trial evidence that they were "acts or transactions connected together or constituting parts of a common scheme or plan." Superior Court Criminal Rule 8(a). Offenses should only be tried together "where offenses are of the same general character, involve a similar course of conduct and are alleged to have occurred within a relatively brief span of time." *Younger v. State*, 496 A.2d 546, 550 (Del. 1985). The Bridgeville "riot" and the Eden Park homicides do not meet that criteria, however. In addition, the Defendant was acquitted of the alleged riot and gang activity at Shore Stop in Bridgeville. He was convicted of the included offense of disorderly conduct, but disorderly

conduct is not a predicate act under the gang participation statute. 11 *Del C.* §616(a)(2). Therefore, the States' evidence at trial failed to support the State's premise for admissibility of the gang participation evidence at Jeffery's trial because he did not engage in gang participation activity at the Bridgeville Shore Stop. Under these circumstances, there was a danger that a jury would cumulate the evidence and general criminal disposition and bad character of the Defendant through the alleged gang activity, but, legally speaking, there was no gang activity and for that reason the gang participation activity should not have been admitted in the first instance because its premise failed. *Wiest v. State,* 542 A.2d 1193, 1195 (Del 1988). The State relies in its answering brief on *Taylor v. State,* Ans. Br. at 31-33, but this case is different than *Taylor* and comparable to *Wiest* because Taylor was convicted of the gang participation offense as well as the predicate offenses, but the Defendant in this case was not convicted of gang participation. *Taylor v. State*, 76 A.3d 791 (Del. 2013).

Also contrary to the State's argument, the Defendant's alleged "gang activity" would not have been independently relevant and reciprocally admissible to the Defendant's prosecution for the Eden Park homicides. They did not occur at the same time or place. Moreover, the alleged gang participation would not have been independently and logically relevant and

admissible because other crimes evidence must, *inter alia*, be proved by evidence which is 'plain, clear and conclusive." *Campbell v. State*, 974 A.2d 156, 161 (Del. 2009). The State failed to do so because the jury acquitted the Defendant of the premised gang participation activity. Under these circumstances, the jury could still have cumulated the evidence against him as well as cumulate the criminality of others and impermissibly infer a general disposition to crime on his part. *Wiest v. State*, 542 A.2d at 495. The Defendant was substantially prejudiced as a result.

IV. THERE WAS INSUFFICIENT EVIDENCE THAT JEFFREY PHILLIPS WAS GUILTY OF GANG PARTICIPATION.

In its Answering Brief, the State fails to provide any case law to substantiate its claims that there was sufficient evidence to convict Jeffrey Phillips of gang participation. In a circular fashion, the State cites Delaware's gang participation statute, 11 *Del. C.* §616, and then describes the evidence that purportedly meets that statute. The State fails to respond to Jeffrey Phillips' jurisprudence or provide any additional case law that the State met its burden.

Furthermore, the State mentions that Jeffrey Phillips was convicted of disorderly conduct, not riot, from a 2012 incident at a Royal Farms in Bridgeville. Ans. Br. at 37. However, the State fails to note that disorderly conduct is not a predicate act under the gang participation statute. *See* 11 *Del C.* §616(a)(2). The State's description of Jeffrey Phillips' participatory conduct is misleading in its Answering Brief, and further shows that the State is attempting to circumvent the *mens rea* requirements of the gang participation statute. First, Kelmar Allen did not allege that Jeffrey Phillips said he assaulted anyone. Ans. Br. at 37; B99. Second, the State's Answering Brief goes further than the State's closing arguments in describing Jeffrey Phillips' role. In its closing argument, the State told the jury to "infer" from Jeffrey Phillips' actions and that Jeffrey Phillips "jumps out of the car

with all of the others, he goes to the door, he bum-rushes in, he raises his arm, he comes down." C3 (D.I. 143, 11/18/14, pp. 39).

V. THE GANG PARTICIPATION JURY INSTRUCTIONS READ TO THE JURY UNDERMINED THE MEMBERS' ABILITY TO RETURN A VERDICT.

In its Opening Brief, Jeffrey Phillips contends that the trial court failed to properly instruct the jury as to the gang participation charge as well as provide any limiting instruction regarding the gang participation charge. The jury instruction provided to the jury was largely pulled directly from the statute without further guidance. Additionally, a limiting instruction to prevent the jury from cumulating the evidence regarding the gang participation claims with the other allegations would have been a simple remedy used in other jurisdictions.[2]

And finally, the court gave a limiting instruction, telling the jury evidence of separate criminal acts by gang members could not be considered to prove defendant was a person of bad character or had a disposition to commit crimes

However, the trial court rejected the defense's request even for that. (D.I. 164, 10/28/14, pp. 109-10).

[2] *See, e.g., Jackson v. State*, 817 N.W.2d 717, 723 (Minn. 2012) ("Further, the district court provided a limiting instruction directing the jury to use the allegedly prejudicial evidence only for a permissible purpose—to determine whether Jackson committed the charged offenses for the benefit of a gang."); *People v. Tran*, 253 P.3d 239, 246-247 (Cal. 2011) (no error where trial court gave a limiting instruction, "telling the jury evidence of separate criminal acts by gang members could not be considered to prove defendant was a person of bad character or had a disposition to commit crimes.").

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's convictions and sentences should be reversed.

Respectfully submitted,

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