



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JEREMY L. ROBINSON,

Defendant Below,
Appellant,

v.

No. 582, 2012

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: April 18, 2013

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- I. THE TRIAL COURT’S INSTRUCTION TO THE JURY THAT THE DEFENDANT WAS A CONVICTED FELON WHEN HE HAD ALREADY STIPULATED THAT HE WAS A PERSON PROHIBITED FROM POSSESSING A FIREARM, AND IN THE ABSENCE OF A LIMITING INSTRUCTION EXPLAINING ANY PROPER PURPOSE FOR INFORMING THE JURY THAT THE DEFENDANT WAS A CONVICTED FELON, INVITED AN UNNECESSARY RISK THAT THE JURY WOULD IMPERMISSIBLY INFER THAT THE DEFENDANT, AS A CONVICTED FELON, WOULD HAVE A CRIMINAL PROPENSITY TO COMMIT THE CHARGED OFFENSE, THEREBY DEPRIVING THE DEFENDANT OF A FAIR TRIAL.

Merits of Argument

In its answering brief, the State hails its prosecutrix at trial because she “went out of her way not to mention any prior felony convictions Robinson had.” Ans. Br. at 7. That statement is remarkable because the State’s concession about the Defendant being unfairly prejudiced at trial is inversely proportional to the State’s unconcern on appeal about the Defendant being prejudiced under those same circumstances. Likewise, the State mentions that “the prosecutor did not, even though she properly could have, cross-examined Robinson about the fact of his prior felony convictions,” Ans. Br. at 8, but fails to mention that she chose not to cross-examine Robinson about his prior felony convictions because she was concerned about unfair prejudice to him. In addition, had the prosecutrix risked cross-examining the Defendant about his prior felony convictions in order to impeach his credibility at trial, a limiting instruction

would have been required under D.R.E. 609, which the State fails to acknowledge the absence of throughout its answering brief in the context of the juror's knowledge of the Defendant's prior felony record and risk that the jury could draw a prohibited inference of criminal propensity from it. Similarly, the State contends that "Robinson's present argument ... is wholly inconsistent with the position he took before he subjected himself to cross-examination," Ans. Br. at 8, but fails to acknowledge that had Robinson been discredited by a prior felony conviction, his counsel should have expected that the Superior Court must instruct the jury that evidence of another crime was only to be considered by the jury for the purpose of impeaching his testimony and not inferring a criminal propensity with respect to the charged offense.

The State also argues that "Robinson's real argument appears to be that he should, by stipulation, be able to eliminate an element of a crime, in this case, PFBPP." Ans. Br. at 9. In fact, the Defendant does not need to make that argument because the prosecutrix at trial, out of concern for unfair prejudice to the Defendant, agreed that the jury need not be informed specifically of that element. The only argument that need be made in this appeal is that the Superior Court, not sharing the prosecutrix's concern, refused to give a limiting instruction on the permissible use of the prior crime element as it was required to do. Despite that State's contention to the contrary, a limiting instruction

about prior crime evidence is mandated even when the prior offense is an element of the charged offense at trial. *Weber v. State*, 547 A.2d 948, 956-957 (Del. 1988) (where prior crimes were elements of charged offense at trial, such evidence should have been accompanied by cautionary instruction which fully and carefully explained to jury limited purpose for which evidence was admitted, and trial judge's failure to give such an instruction was reversible error). Moreover, where a prior offense is an element of a charged offense at trial, the potential for unfair prejudice is so acute that a limiting instruction alone has more recently been found insufficient, and severance of offenses required. *Monceaux v. State*, 51 A.3d 474 (Del. 2012). In its answering brief, while the State obliquely acknowledges the importance of a limiting instruction, (which it did not oppose at trial but which the Superior Court refused to provide), “the best means of remedying any accompanying prejudice is a limiting instruction,” Ans. Br. at 11, it fails to address the significance of the absence of one at the Defendant’s trial. Instead, the State merely asserts that “the absence of such an instruction does not require does not require reversal of Robinson’s convictions.” Ans. Br. at 11. That contention is belied by numerous prior decisions of the Court.¹

¹ *Monroe v. State*, 28 A.3d 418 (Del. 2011); *Sanabria v. State*, 974 A.2d 107 (Del. 2009); *Joyes v. State*, 797 A.2d 673 (Del. 2002); *Deshields v. State*, 706 A.2d 502 (Del.

Finally, the State claims that error in permitting the jury to draw an inference of criminal propensity from the Defendant's felony record was harmless error. The State does not address that the Defendant adamantly denied at trial that he knew anything about the presence of the hidden firearm and admitted knowledge of it when questioned by police only because he felt coerced. The State also does not mention that no physical evidence connected the Defendant with the firearm. The State contends that harmless errors are errors that "do not constitute significant prejudice...." Ans. Br. at 12. The standard of harmless error is more demanding, however. The test is "not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Dawson v. State*, 608 A.2d 1201, 1204 (Del. 1992) (citing *Chapman v. California*, 386 U.S. 18, 24 (1967)). The Defendant's guilt of the firearm offense was intertwined with how the jury assessed his credibility. Despite's the State's strong evidence of a drug offense, the jury could have believed that the Defendant was being truthful when he testified that he did not know that a weapon was hidden in the kitchen oven, at least to

1998); *Baumann v. State*, 891 A.2d 146 (Del. 2005); *Milligan v. State*, 761 A.2d 6 (Del. 2000); *Snowden v. State*, 677 A.2d 33 (Del. 1996); *Pope v. State*, 632 A.2d 73 (Del. 1993).

establish a reasonable doubt. *Williams v. State*, 803 A.2d 927, 930 (Del. 2002)

(“Because this case hinged on credibility, we cannot say that the prosecutor's improper remarks were harmless beyond a reasonable doubt”).

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant submits that his conviction for possession of a firearm by a person prohibited should be reversed.

Respectfully submitted,

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DATED: April 18, 2013