IN THE SUPREME COURT OF THE STATE OF DELAWARE

PARRIS HAMILTON	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 548, 2012
	)	COURT BELOW: In the Superior
v.	)	Court of Delaware, in and for
	)	New Castle County
STATE OF DELAWARE	)	I.D. No. 0910017490
	)	
Plaintiff-Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

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DATED: May 13, 2013

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NATURE OF PROCEEDINGS

On May 22, 2012, the jury trial of Parris Hamilton in Superior Court began. (A14 Docket Entry 83). The trial lasted from May 22, 2012 to June 8, 2012. (A14, Docket Entry 90). On June 8, 2012, a jury found Parris Hamilton ("Hamilton") guilty of two counts of Murder First Degree, two counts of Attempted Murder First Degree, two counts of Kidnapping First Degree, Burglary First Degree, and seven counts of Possession of a Firearm During the Commission of a Felony. (A14, Docket Entry 90).

On June 19, 2012 the Defense filed a Rule 29 Motion for Judgement of Acquittal. (A16, Docket Entry 97). On August 24, 2012, the Superior Court denied the Defendant's Motion for Judgment of Acquittal. (A16, Docket Entry 99, Exhibit A attached to Opening Brief).

On September 7, 2012, Hamilton was sentenced. (A16, Docket Entry 100). A corrected sentence was ordered on October 2, 2012. (A16, Docket Entry 102, Exhibit B attached to Opening Brief). A notice of appeal was filed on October 7, 2012. (A16, Docket Entry 101). This is the Defendant's Opening Brief on direct appeal in which Mr. Hamilton seeks to overturn all counts of conviction except for the two counts of Kidnapping First Degree.

SUMMARY OF ARGUMENT

1. Hamilton submits that the State's expert witness' testimony that intoxication prevented the defense of emotional distress was a misstatement of law and should not have been admitted for the jury's consideration, requiring reversal. Under Delaware Law a jury is not precluded from considering extreme emotional distress (here and after "EED") if there is evidence of voluntary intoxication.

2. The trial court failed to provide a curative instruction to correct the State's expert witness erroneous testimony on the affirmative defense of EED. This failure violates the Defendant's due process rights and warrants reversal.

3. The submitted jury instruction was inadequate in defining for the jury how to factor in a defendant's voluntary intoxication in deciding whether the defendant's affirmative defense of EED was established.

4. The evidence at trial was insufficient as a matter of law to sustain the conviction for Burglary First Degree and its linked offenses due to Mr. Hamilton having a privilege to remain in the residence. Thus, Mr. Hamilton's conviction of these offenses are in violation of his due process rights under U.S. Const. Amend. V, U.S. Const. Amend. XIV, and Del. Const. Art. I § 3.

STATEMENT OF FACTS

Parris Hamilton was arrested on October 23, 2009 after shooting His ex-girlfriend Crystal Moody ("Ms. Moody") and Christopher Moody ("Christopher") and killing Tyrone Moody ("Tyrone"). Ms. Moody and Hamilton had dated and lived together from 2006-2009. (A21, A24-25, A31). During this time period, Hamilton had lived in four different residences with the Moody family. (A21, A24-25, A31). At all times, Ms. Moody was the sole lessee on the properties in which they lived. (A32). However, the cable, internet, and land line phone service at the residence on West Fourth Street was in Hamilton's name. (A34, A46).

The Moody's and Hamilton moved to 1524 West Fourth Street in Wilmington, Delaware, in 2009. (A31). Ms. Moody classified her relationship with Hamilton as "rocky" as a result of Hamilton's inability to pay his share of the bills. Ms. Moody warned him several times that if the failure to pay continued he would have to leave. (A32). At the end of September 2009, following the death of Hamilton's Grandmother,[1] Ms. Moody told Hamilton

[1] Hamilton perceived Francis Collins, his paternal grandmother, as a surrogate mother and grandmother. "She was his rock. She was the one piece of stability in his life growing up. He was devastated by her death. This was the one person that he could count on, the one

to leave the residence. (A33). Hamilton complied with Ms. Moody's orders and moved out the following morning; however, he left there a lot of clothing and several personal items, including a Sony Playstation 3 which remained in Ms. Moody's bedroom. (A25-26, A33).

Hamilton made several attempts to reconcile the relationship with Ms. Moody and to move back "home." Ms. Moody testified that she told Hamilton that their relationship was over and that he could not return. (A34). Ms. Moody also testified that she told her children that Hamilton was not allowed in the residence and he needed Ms. Moody's consent before returning to collect his belongings. (A33-34). Despite these instructions, Tyrone allowed Hamilton several times to enter the home to collect his belongings. (A45).

On October 23, 2009, while at the residence at West Fourth Street, Ms. Moody received phone calls from Hamilton requesting to come over, to which she responded no. (A37-38). Several hours later, Tyrone informed Ms. Moody that Hamilton was downstairs. (A38). Christopher testified that he answered the door and let Hamilton in the home, stating that he thought that Hamilton and his Mother were going to get back together. (A22, A23, A26, A27). Ms.

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person that he could talk to, that he could open up to." (A53-54).

Moody testified that she told Hamilton, several times, that he had to leave, to which he responded he wanted his Playstation. (A28, A38). Christopher was instructed to go get the Playstation. (A40).

When Christopher returned from upstairs, without the game system, Tyrone told Hamilton he had to leave after he pushed Ms. Moody down on to the front steps. (A41). Ms. Moody testified that she tried to navigate Hamilton away from her two sons as he appeared to grow very agitated. However, when she did so, she felt a burning feeling and saw blood. She then remembered being on the steps and being shot again. She watched Hamilton shoot Tyrone and Christopher. Ms. Moody questioned Hamilton as to why he was doing this and instructed Christopher to pretend that he was dead. She watched Hamilton walk over to Tyrone and shoot him again. (A41-42). Hamilton let Christopher exit the residence and then eventually lead himself out the door where he was apprehended by law enforcement. (A43).

A jury trial was held in the Superior Court from May 22, 2012 to June 7, 2012. During the Defense's case, the Defense presented the expert witness testimony of Dr. Abraham J. Mensch. Dr. Mensch, on January 30, 2012, February 1, 2012 and February 27, 2012, evaluated Hamilton while he was

incarcerated at Howard R. Young Correctional Institution. (A52). Through his evaluations, he determined that Hamilton had abandonment issues, Post Traumatic Stress Disorder, and suicidal tendencies. (A54-58). Dr. Mensch opined that:

> "at the time of the offenses with which Mr. Hamilton is currently, charged, he was experiencing a major depressive episode related to the end of his relationship with Ms. Moody, complicated by unrelenting grief over the loss of his grandmother, who was the woman he was closest to in his life. Mr. Hamilton had a long history of impaired relationships with women and persisted feelings of abandonment by them. In addition, he had longstanding and untreated post traumatic stress disorder. These factors all contributed to his suicidal ideation, feelings of hopelessness and loss and intense desire to end his suffering. These factors also impaired his ability to think rationally, such that Mr. Hamilton's actions were the product of extreme emotional distress." (A63).

Dr. Mensch further testified that despite Hamilton's consumption of alcohol, the other factors (Abandonment issues, PTSD) were sufficient to still find the

existence of EED. (A66).

During rebuttal, the State presented expert witness testimony of Dr. David E. Raskin. Dr. Raskin conducted a state of the mind exam of Hamilton. (A87). The State inquired as to Dr. Raskin's understanding of the affirmative defense of EED. Dr. Raskin testified that:

> "... this concept, extreme emotional distress, applies in a very limited situation when there's a homicide and it has many pieces to it, so it's sort of complicated. As I understand it, I'm going to give you an example because I think that's the easiest way to talk about it. If I as a father came home early one night from seeing a movie and I had a sitter at my house and unbeknownst to the sitter I was coming home early and walked in the door to the bedroom and there was the sitter beating my young infant son, what would happen under those circumstances to any reasonable person is a state of mind which is often described as a flagrant, angry, enraged sort of state of mind and I might, under those circumstances, any reasonable person might under those circumstances with that frenzied state of mind act because of a control issue and because of what they had seen and killed the babysitter... So, the people

for whom that is a legitimate explanation, in my opinion, are people who witness a terrible situation, a provocative situation which is horrible, who then reach a state of mind which is frenzied and then act out." (A82).

Dr. Raskin testified that Hamilton did not exhibit symptoms of EED at the time of the incident, but instead showed a depersonalized state of mind.[2] (A83). In response to the State's question as to the limits of EED, Dr Raskin testified that "voluntary intoxication does not permit this defense. If someone is drinking heavily, of course it's going to affect their state of mind and their control systems and their judgment and all that sort of stuff, so if that's on board, it's not possible." (A82). At which point, the Defense requested a side bar. The Court refused, stating that the Jury would later be given "what the law is on extreme emotional distress." (A82-83).

The State further questioned Dr. Raskin as to what he meant by voluntary intoxication being a limit. Dr. Raskin testified that:

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[2] Dr. Raskin testified that Parris Hamilton's state of mind was "one of distance, of the world moving slowly, of things sort of being at slow motion, more of sort of being outside one's self, but not the state of frenzy." Rasking noted that Hamilton did not exhibit "rage, anger, frenzy" that Dr. Raskin believed were common emotions associated with extreme emotional distress, as relayed by the "literature." (A83).

"Well, voluntary intoxication cannot be used as an excuse for committing a crime, it can't be used as a piece of your extreme emotional distress defense. In addition, I spent some time talking with him on both occasions about his drinking history, which is extreme, and his drinking after his grandmother's death, which was even more extreme. So, if you take the effect of alcohol has at any level in terms of judgment, insight, control, rationality, impulse control, alcohol in a situation like that is poison. If you add to that the stress of losing your girlfriend and your grandmother, now you've set up a really dangerous situation. But the voluntary intoxication is not something that sort of happened to him, he allowed that to happen and permitted it to happen and participated in it. And in my understanding of this area, extreme emotional distress, that's not something that can happen to be able to be successful with that defense." (A84).

On cross examination, Dr. Raskin took the position that any alcohol in an individual's system precludes the affirmative defense of EED.

"BY MR. KOYSTE:

Q. If you had someone who is an angry drunk, is it your testimony that

an angry drunk would not be able to qualify for extreme emotional distress if they were drinking on an evening where something horrible happened?

A. My understanding is if voluntary intoxication is on board, that that is not, that you have negated the opportunity for an extreme emotional distress defense.

Q. So it's your testimony, then if there's any alcohol within someone's system, that they can't possibly qualify for extreme emotional distress.

A. If at the time the event happened there's evidence for drinking, we're not talking about, you know, I had a drink last Saturday, but continuous drinking, and if there's evidence for an alcoholic sort of drinking history, and I don't believe – now, this is, of course, the Court system, I'm uncomfortable even saying this because I'm not knowledgeable enough to say it, but I'll say it, In my opinion you have negated the ability to use that defense if there is evidence that alcohol of any significance is on board." (A90).

The Defense then used the doctor's own hypothetical for further explanation on his statement of what the law is in relation to EED.

"BY MR. KOYSTE:

Q. Doctor, you gave an example during your direct examination of what a scenario is in which there's extreme emotional distress, and you gave an example of coming home and the babysitter is doing something untoward. If I put you in a scenario where there's four people and someone else is the driver and that person is the designated driver, as you put yourself in the scenario, if you walked into your house and you had half a bottle of a very fine Napa Cabernet with your dinner and that all happened, would that mean that the horrendous result of a confrontation with that babysitter would preclude you from having extreme emotional distress?

A. That would be a decision that the Court would have to make, that's too complicated for me.

Q. I'm asking you and I know the Court's going to instruct it, but I'm asking you under your understanding of the statute, would that preclude you from qualifying for extreme emotional distress?

A. Under the statue, the way I understand it, voluntary intoxication and an event that happens around that precludes your being able to use that

as a defense, that's my understanding." (A90).

The Defense attempted to read Dr. Raskin the last sentence of Del. Code tit. 11 § 641 extreme emotional distress. However, the Court agreed with the State's objection and denied the defense the ability to read the applicable section of the statute.[3] (A90-91).

At the prayer conference, it was the Defense's position that the expert opinion of Dr. Raskin in relation to the consumption of alcohol preventing the use of EED was a misstatement of law. (A72-73). The Defense submitted to the court that the language of § 641 does not prevent a defense of EED when there is voluntary intoxication. (A72). The Defense reasoned that the expert opinion of Dr. Raskin left an impression on the jury that despite the Defense meeting its burden of proof for EED, the defense could not be used as a result of the jury believing that Hamilton was intoxicated. (A72). The Defense asserted that the true issue was whether the mental disturbance was caused by being intoxicated or by EED. The Court acknowledged the argument but declined to add anything more to the instruction. (A72). The Defense

[3] "THE COURT: I do find the objection appropriate, the whole statute has to be considered as a whole, and again, I will give the jury the complete instruction and the Doctor is only presenting what he believes is his interpretation and jury should take it that way regarding what the statute is." (A91).

submitted:

"MR. JOHNSON: I think when the expert expressed his opinion that alcohol consumption precluded a finding of EED, our assertion is that that is a misstatement of law. If a lawyer would have made that statement in a closing argument--

THE COURT: "No, what I think he is saying is that, really, he acted the way he did because he was drunk, not because of extreme emotional distress, to put it in a kind of a vernacular, simplistic form. Anyway your point's been made let's move on." (A73).

The Defense further submitted to the Court for consideration a curative instruction in regards to the expert witness' opinions.

"MR. KOYSTE: Your Honor, the second paragraph of page 32, the second sentence in the second paragraph, you may give expert testimony the weight you consider appropriate. I wrote a comma in here, however, you must regard any expert opinion that is contrary to my instructions – disregard any expert.

THE COURT: I don't think that that's necessary. That's not necessary. I've explained what it is and whatever, you may disagree. I think Dr.

Raskin properly explained it.

MR. KOYSTE: I understand, Your Honor.

THE COURT: Certainly, as he was given the repeated opportunity to further explain his explanation.

MR. KOYSTE: I understand that was a jury instruction issue, we're now at jury instructions. I am asking the Court to consider a curative instruction in relation to what I'm arguing.

THE COURT: That's the problem with that, Mr. Koyste and what you are suggesting is what you were suggesting yesterday or implying with Dr. Raskin that there was some ethical violation. I'm sorry, that's how I view it, I'm not going to add that sentence. What else are you proposing?

MR. KOYSTE: Your Honor, that's a completely separate issue. That's an issue in relation to whether he should have been taking notes. This is an issue in relation to his statement that in his opinion an individual with alcohol in his system is precluded from qualifying for extreme emotional distress.

THE COURT: I think you oversimplified his statement because he was talking, he qualified that in terms of degree.

MR. KOYSTE: Your Honor, I don't think – well–

THE COURT: He did, okay, no.

MR. KOYSTE: I understand, no curative." (A75).

Prior to closing argument the Court gave one part of the jury instructions, which included the instruction for EED. The instruction read:

"THE COURT: If you conclude beyond a reasonable doubt that the defendant intentionally caused the death of Tyrone Moody, you should next consider whether or not he did so under the influence of extreme emotional distress. The fact that the defendant intentionally caused the death of another person while under the influence of extreme emotional distress is a mitigating circumstance which reduces the crime of murder in the first degree to the crime of manslaughter. The defendant has the burden of proving, by preponderance of the evidence, that he acted under the influence of extreme emotional distress. The defendant must also prove by a preponderance of the evidence that there is a reasonable explanation or excuse for the existence of extreme emotional distress. The reasonableness of the explanation or excuse must be determined from the view point of a reasonable person in the defendant's situation under the circumstances as he believed them to be. In order to be a

> reasonable explanation, the event that triggered the emotional disturbance must be something external from the defendant and cannot be something for which the defendant was responsible, such as involvement in a crime. If the defendant intentionally knowingly or recklessly or negligently brought about his own mental disturbance, extreme emotional distress is not applicable. Further, if the defendant's mental state was caused by voluntary intoxication, extreme emotional distress is not applicable. The fact that a person consumed alcohol does not necessarily preclude a finding of extreme emotional distress." (A97).

An identical instruction was given regarding Counts VII and IX of the indictment, attempted murder in the first degree. (A99-100).

During closing argument, the State reiterated the testimony of Dr. Raskin, specifically "if there's intoxication involved that produces the mental state that brings about the problem, extreme emotional distress does not apply" and "voluntary alcohol intoxication, that - if that's the mental state, negates EED." (A104, A105). The Defense argued that the fact that there is alcohol in an individual's system does not preclude a finding of EED but is a factor to consider in the overall EED analysis. (A108-09).

I. The expert witness' testimony of Dr. Raskin that intoxication prevented the defense of extreme emotional distress was a misstatement of law that was not cured by the court and requires reversal.

Question Presented

Whether the testimony of the State's expert witness that any consumption of alcohol precludes a jury from considering the affirmative defense of extreme emotional distress was a misstatement of law. The Defense preserved this issue at trial by requesting a sidebar to fully address, which was denied by the Trial Judge. (A82-83).

Standard of Review

The scope of review for determining whether the experts testimony was a misstatement of law should be de novo due to counsel's raised disagreement. *See Money v. State*, 957 A.2d 2, 2 (Del. 2008); *See also Perkins v. State*, 920 A.2d 391, 396 (Del. 2007).

Argument

A. Delaware law does not preclude a jury from considering the affirmative defense of extreme emotional distress if a defendant has some degree of intoxication, although the evidence of voluntary intoxication is not admissible to prove if the defendant has met their burden to establish the defense of extreme emotional distress.

The General Assembly of Delaware created Del. C. tit. 11 § 641 in order to lessen the degree of culpability if a defendant intentionally caused the death of another person, at a time that a defendant's a state of mind was under extreme emotional distress. If this state of mind is proven by a preponderance of the evidence, the crime is reduced from murder in the first degree as defined by § 636 of this title to the crime of manslaughter. Del. C. tit. 11 § 641. Furthermore, the statute provides that "evidence of voluntary intoxication shall not be admissible for the purpose of showing that the accused was acting under the influence of extreme emotional distress." Del C. tit. 11 §641. It is apparent that the statutory language does not preclude the fact finder from considering the affirmative defense of EED, even if the actor was voluntarily intoxicated; provided that the voluntary intoxication was not the cause of the EED.

Delaware case law further supports the proposition that despite evidence of voluntary intoxication, a fact finder may still consider and find EED. The Delaware Supreme Court found that "extreme emotional distress is available only when there is a reasonable explanation for the existence of the extreme emotional distress determined from the viewpoint of a reasonable person in the accused situation under the circumstances." *Moore v. State*, 456 A.2d 1223,

1225 (Del. 1983). This Court further reasoned that "implicit within the concept of a reasonable explanation is the idea that the event which triggers the emotional disturbance must be something external from the accused and cannot have been brought about by the accused." *Id*. at 1226. In *Moore*, the Court found that EED was not applicable in the felony murder context, because the emotional disturbance was brought on by the defendant's involvement in the underlying felony. *Id*.

In *State v. Hodges*, the defendant offered expert testimony that the defendant was under EED as a result of steroid use, pre-existing paranoia, and financial distress. *State v. Hodges*, 1996 WL 33655975, at *1 (Del. Supr. Ct. Sept. 10, 1996).[4] This Court understandably found that the defendant's steroid use and pre-existing paranoia were "inapplicable in examining the existence of any extreme emotional distress," as these conditions had no external cause. *Id.* at 1-2. The Court further found that financial distress was relevant to the determination of EED as it was caused by external factors. *Id.* at 2.

In *State v. Magner*, the Superior Court adhered to this Court's rationale in *Moore*, finding that alcohol and drug use are "not relevant to the trier's of

[4] Exhibit C9 attached to Opening Brief.

fact determination of whether defendant acted under the influence of extreme emotional distress." *State v. Magner*, 732 A.2d 234, 242 (Del. Supr. Ct. 1997). The Superior Court, however did find that the defendant's psychiatric condition was relevant to the EED determination. *Id*. at 243.

Hamilton advances that the statutory language of Del. C. tit. 11 § 641, and Delaware case law, establish that the consumption of alcohol does not preclude a fact finder from considering the affirmative defense of EED. Similar to *Hodges* and *Magner*, the Defense at trial introduced evidence of external factors that brought about the extreme emotional distress of Parris Hamilton. (A54, A55, A63). While the voluntary intoxication of Parris Hamilton at the time of the incident is not linked in any way to this emotional outburst, evidence of his non-violent nature while drinking, his grandmother's passing, being laid off, and the ending of a romantic relationship are all external factors that are relevant to the determination of his EED. (A66).

B. The State's expert witness testified that alcohol consumption precludes the jury from considering extreme emotional distress. This statement is contrary to the current state of the law in Delaware and as such should not have been presented to the jury.

The testimony of the State's expert that voluntary intoxication precludes the fact finder from considering the existence of EED is a misstatement of law

and should not have been presented to the jury. Although, this Court has not specifically ruled on an expert's trial testimony as a misstatement of law, this Court has addressed misstatements of law by attorneys.

In *Eustice v. Rupert*, the plaintiff argued that misstatement of law in the defendant's summation to the jury in regards to the definition of "wanton conduct." *Eustice v. Rupert*, 460 A.2d 507, 511 (Del. 1983). The Court denied relief on three grounds: (1) the defendant's summation included similar language to that found in the definition of "wanton"; (2) the plaintiff failed to object and/or request a curative instruction; (3) the trial judge cured any potential prejudice by defining "wanton" twice. *Id.* Similarly, in *Shively v. Klein*, this Court found that the trial judge's curative instruction coupled with the final jury instruction cured any potential prejudice that was caused by the defense's misstatement. *Shively v. Klein*, 551 A.2d 41, 45 (Del. 1988).

In *Money v. State*, the defendant challenged his conviction on the grounds that the prosecutor, during summation misstated law and did not correct his mistake following correction by the trial judge. *Money v. State*, 957 A.2d 2, 2 (Del. 2008). The defendant did not object, did not request a curative instruction, nor request that the prosecutor acknowledge his mistake. *Id.* "When counsel invades the judge's province and incorrectly advises the jury

on the law as opposed to the facts, that error does not necessarily undermine the jury's ability to perform its duty in returning a verdict." *Id*. This Court found that there is a presumption that the juror's will follow the final instruction and as such there was no error. *Id*. at 3.

The Defense asserts that the State's expert witness' testimony that alcohol consumption precludes the jury from considering EED is contrary to the state of the law in Delaware and as such should not have been presented to the jury. During the trial, State's expert witness, in varying degrees, erroneously testified that alcohol consumption precludes EED from consideration. On direct, the expert first testified that "voluntary intoxication does not permit this defense." (A82). The expert only moments later testified that "voluntary intoxication ... it can't be used as a piece of your extreme emotional distress defense" and then "in my understanding of this area, extreme emotional distress that's not something that can happen (voluntary intoxication) to be successful with that defense." (A84). On cross , when questioned about his misstatement, the expert witness again took the position that any alcohol in the individual's system precludes EED from being considered. (A90). The repeated misstatements by the State's expert witness should have been corrected and not admitted for consideration by the jury.

II. The trial judge failed to provide a curative instruction to correct Dr. Raskin's erroneous testimony on the affirmative defense of EED. Failing to correct the expert's misstatement of law violates the Defendant's due process rights and warrants reversal.

Question Presented

Whether the trial court's failure to provide a curative instruction to correct the State's expert's misstatement of law constitutes a violation of the Defendant's due process rights. The Defense preserved this issue by requesting a curative instruction at the final prayer conference. (A75).

Standard of Review

The scope of review for determining whether it was proper to deny the defense's request for a curative instruction is reviewed for abuse of discretion. *Sammons v. Doctors for Emergency Servs.*, 913 A.2d 519, 539 (Del. 2006).

Argument

Under Delaware law, the timing and nature of curative instructions to the jury is a matter for the trial judge, who after having presided over the entire trial, is in a better position to determine whether a curative instruction should be given. *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519 (Del. 2006)(citing *Jardel Co. v. Hughes*, 523 A.2d 518, 533 (Del. 1987)). To establish abuse of discretion the appellants must show that the misstatements

were "significantly prejudicial so as to deny them a fair trial." *Shively*, 551 A.2d at 44.

In *Shively v. Klein*, the appellant contended that the trial court abused its discretion by not providing a curative instruction for a defense counsel's misstatement during closing argument. This Court found no abuse of discretion because any prejudice created was eliminated by a cautionary instruction at side bar coupled with the jury instruction that clearly stated the applicable law. 551 A.2d at 44-45. In *Money v. State*, this Court found that no curative was appropriate because the final jury instruction "correctly stated the applicable law." 957 A.2d at 2.

In *Rhodes v. State*, this Court found no abuse of discretion where no curative instruction was given to disregard law enforcement's testimony that he was familiar with the defendant. *Rhodes v. State*, 825 A.2d 239, 2 (Del. 2003). This Court noted that law enforcement's knowledge of the defendant could be based on something other than criminal activity; that the testimony did not allege uncharged crimes; and the attorney's question invited the response; therefore the defendant had not shown any prejudice as result of the testimony. *Id*.

Hamilton asserts that the misstatement of law by the State's expert

witness, that consumption of alcohol precludes from consideration EED (A82, A84, A90) was significantly prejudicial so as to deny him his due process rights under the United States Constitution and Art. I, § 3 of the Delaware Constitution. At the prayer conference, the Defense moved for a curative instruction in relation to the Expert's opinion that "an individual with alcohol in his system is precluded from qualifying for extreme emotional distress." (A75). The Court refused to issue a curative reasoning that Defense counsel was oversimplifying his testimony and that he had already "qualified that in terms." (A75).

Here, there was no cautionary instruction nor was there a final jury instruction that correctly stated the applicable law. The State's expert was permitted to erroneously testify, in varying degrees, that evidence of consumption of alcohol negates the ability to raise EED. (A82, A84, A90) This erroneous testimony, that went uncorrected and was admitted to the jury, inferred that regardless of the Defense meeting its burden for EED, evidence of alcohol consumption negates the ability to raise the defense. The misstatement of law by the expert witness hindered the Defendant from being able to raise a valid defense and therefore caused significant prejudice and denied him a fair trial.

III. The submitted jury instruction was inadequate in defining for the jury how to factor in a defendant's voluntary intoxication in deciding whether Mr. Hamilton's affirmative defense of EED was established.

Question Presented

Whether the trial court's denial of the Defendant's suggested jury instruction was error, requiring reversal. The Defense preserved this issue at trial by raising the issue during the final prayer conference and suggesting alternative jury instruction language to directly address this issue. (A72-73).

Standard of Review

The Scope of review for determining whether the trial court properly denied the Defense's requested instruction is *de novo*. *Ayers v. State*, 844 A.2d 304, 309 (Del. 2004)(citing *Yocum v. State*, 777 A.2d 782, 784 (Del. 2002)).

Argument

Del. Super. Ct. Crim. R. 30 provides that "no party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before or at a time set by the court immediately after the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection." Del. Super. Ct. Crim. R. 30. An appellant may not claim error in a jury instruction if no objection had been raised of if no

prayers were submitted to try to change the instruction. *Edwards v. State*, 285 A.2d 805 (Del. 1971); *see also Lane v. State*, 222 A.2d 263, 268 (Del. 1966).

Delaware law holds that "a trial court's instruction will not be the basis for reversible error if they [correctly state the law and] 'are reasonably informative and not misleading, judged by common practices and standards of verbal communications.'" *Haas v. United Technologies Corp.*, 450 A.2d 1173, 1179 (Del. 1982)(quoting *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947)). A trial court's failure to give an appropriate instruction is reversible only if the instruction "undermined the jury's ability to 'intelligently perform its duty in returning a verdict.'" *Sirmans v. Penn*, 588 A.2d 1103, 1104 (Del. 1991)(quoting *Newman v. Swetland*, 338 A.2d 560, 562 (Del. 1975)). The appellant does have the right "to have the jury instructed with a correct statement of the substance of the law." *Culver v. Bennet*, 588 A.2d 1096, 1096 (Del. 1991). Further, jury instructions must be adapted to the factual situation of each case. *See Wiggins v. State*,210 A.2d 314, 316 (Del. 1965); *Bantum v. Sate*, 85 A.2d 741, 752 (Del. 1952).

On appeal, the court, in viewing the instruction as a whole, must determine whether there is potential for juror confusion. *Probst v. State*, 547 A.2d 114, 119-20 (Del. 1988); *Flamer v. State*, 490 A.2d 104, 128 (Del. 1984).

In *Flamer v. State*, this Court found that a jury instruction containing a correct statement of the substance of the law and was not deficient enough to rise to the level of reversible error. This Court reasoned that in looking at the instruction as a whole, it "adequately apprised the jurors." *Flamer*, 490 A.2d at 128. Similarly, in *Manlove v. State*, this Court found no error in the trial court's denial of a mere presence instruction, when the instruction conveyed that the defendant was presumptively innocent and the state must prove all material elements. *Manlove v. State*, 867 A.2d 902, at *1 (Del.2005). [5] In *Probst v. State*, however, this Court found reversible error where the instruction was likely to create confusion. The defendant claimed reversible error in the jury instruction which incorrectly used masculine gender pronouns where the defendant was female. This Court reasoned that "the applicable principals of law and the identity of the persons involved must not be confused." *Probst*, 547 A.2d at 120 (citing *Wiggins v. State*, 210 A.2d at 316).

Hamilton asserts that the jury instruction used by the trial court (A97) failed to properly advise the jury on how to factor in Mr. Hamilton's voluntary use of alcohol when determining whether the affirmative defense of EED has

[5] Exhibit C1 attached to Opening Brief.

been proven. As required by *Edwards* and *Lane*, Hamilton submitted prayers in proposing alternative wording for the jury instruction. (A72). Specifically, the Defense sought to have a jury instruction that made it clear that the language of § 641 does not preclude the jury from considering EED if there is evidence of voluntary intoxication. (A72). Despite the Defense's argument, the trial court acknowledged the argument but did not add additional language to the instruction, and by failing to do so, magnified the expert's misstatement of law. (A72).

The instruction that was submitted to the jury does not clarify for the jury how to factor in the defendant's voluntary intoxication when determining whether the Defendant's mental state rose to the level of EED. The Defense's proffered clarifying language was necessary to cure this confusion. The Defense submits that the repeated misstatements of law by the State's expert, Dr. Raskin, created an overall environment in which the jury instruction for EED required more language to guide the jury on how to weigh and consider the effect that alcohol may have had on Mr. Hamilton's state of mind. The trial judge essentially ignored Dr. Raskin's misstatements, failed to consider the record as a whole, and in so doing gave what is essential an incomplete and unfair jury instruction for EED. This constitutes reversible error.

IV. The evidence presented at trial was insufficient as a matter of law to sustain the conviction for Burglary First Degree and its linked offenses due to Mr. Hamilton having a privilege to remain in the residence.

Question Presented

Whether the Defendant had a privilege to remain in the residence, to at least retrieve the remainder of his personal belongings, and thereby could not be convicted of Burglary First Degree and its linked offenses. The Defense preserved this issue by filing a Rule 29 Motion for Judgement of Acquittal prior to sentencing. (A16, Docket Entry 97).

Standard of Review

The Court reviews the Superior Court's denial of a Motion for Judgement of Acquittal *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt of all the elements of the crime. *Priest v. State*, 879 A.2d 575, 580 (Del. 2005).

Argument

Hamilton submits that the State has failed to present at trial sufficient evidence to prove all the material elements of Burglary in the First Degree as defined by Del. C. tit 11 §826 and Del. C. tit. 11 § 829. For this reason,

Hamilton's conviction of Burglary in the First Degree and its linked offenses and Felony Murder in the First Degree violates his due process rights under the United States Constitution and the Delaware Constitution, as such convictions violate Hamilton's right to due process of law.

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *In re Winship*, 397 U.S. 358, 364 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S Const. Amend. V; U.S. Const. Amend. XIV; Del. Const. Art. I, § 3. On appeal, evidence will be found sufficient only if "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318 (1970).

Hamilton submits that the State failed to present at trial sufficient evidence to prove all the materials element of Burglary in the First degree, specifically that he remained unlawfully in the Moody residence. The totality of the circumstances presented at trial indicate that Hamilton was permitted to enter the residence. (A33, A46). The testimony elicited at trial is unclear as to whether or not Hamilton was instructed to leave the residence and whether

such instruction was reversed based on the fact that Hamilton was waiting for his Sony Playstation. The Defense at trial, through Title 11 Delaware Code § 3507, admitted the out of court statement of Crystal Moody to Det. Flaherty. (A48, Ex. A13). In this statement, Ms. Moody did not state that she ever asked Hamilton to leave the residence. (A48, Ex. A13). Further, the elicited testimony of Ms. Moody also established that Hamilton had possessory interests with the residence based on the personal belongings still in the residence and the fact that the television and telephone services were in his name. (A33).

Furthermore, Hamilton submits that based on the totality of the circumstances, a privilege to remain in the premise, at the very least to retrieve his Sony Playstation, was established at trial based upon the totality of the evidence. The term of "privilege to enter or remain in a building" is undefined by the General Assembly within Del. C. tit. 11 § 829 (c). Although there was testimony that Mr. Hamilton was told to leave the property, the Defense asserts that the facts presented at trial establish that Hamilton has a reasonable basis to assert a privilege to remain in the property. (A23, A38, A41).

Ms. Moody testified that when she moved to her residence street she permitted Mr. Hamilton to reside there with her and her children. (A31-32).

Mr. Hamilton was supposed to contribute more money to Ms. Moody, but did supply personal property in the residence such as a Sony Playstation and also established telephone and television service for the property under his own name. Thus, Mr. Hamilton's status was initially that of a lawful resident with an oral lease with Ms. Moody pursuant to Del. C. tit. 25 § 5141(21), which was never terminated under law.

Although Mr. Hamilton voluntarily departed the residence, he still had a privilege in relation to the residence due to the fact that no legal termination of his status ever took place, and because he still had services for the residence under his name and personal property within the residence. Ms. Moody derived the benefit of receiving television and telephone services within the residence that Mr. Hamilton was legally obligated to pay for, and took no steps to take over the liability for these services that Mr. Hamilton provided for the property. Therefore, as the concept of privilege as it is used in Del. C. tit. 11 § 829(c) must be defined as a criminal statute, the rule of lenity mused be used to define the term privilege as well as, the unlawfully remains component of the statute.

The rule of lenity requires that a statute be construed strictly against the

State and in favor of the accused. *State v. Boston*, 1992 Del. Super. LEXIS 161 (Del. Super. Apr. 16, 1992)[6]; *See also State v. Haskins*, 525 A.2d 573, 576 (Del. Super. 1987) *rev'd on other grounds*, 540 A.2d 1088 (1988)(stating that when a penal statute is ambiguous, the ambiguity must be resolved in the defendant's favor). Applying the rule of lenity to the term "privilege to enter or remain in a building", it is apparent that the Mr. Hamilton continued to have a privilege to remain in a building facts presented at trial were insufficient to prove that Hamilton unlawfully remained in the residence. Thus, Mr. Hamilton's Burglary conviction and its linked offenses must be reversed. Furthermore, Hamilton's conviction of Felony Murder in the First Degree must be reversed as the State failed to prove the underlying felony, Burglary in the First Degree.

[6] Exhibit. C3 attached to Opening Brief.

Conclusion

Based on Arguments I through IV as raised herein, it is respectfully submitted that the Court must overturn all counts of conviction except for the two counts of Kidnapping First Degree.

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