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Case Number 548,2012

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.	)	

REPLY BRIEF OF APPELLANT PARRIS HAMILTON

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DATED: August 19, 2013

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I. Hamilton suffered prejudice as a result of the State's expert witness' misstatement of the law which was not adequately corrected by the Trial Court.

Contrary to the assertions of the State,[1] Hamilton suffered prejudice as a result of the State's expert testifying that voluntary intoxication precludes from consideration the defense of Extreme Emotional Distress (hereinafter referred to as "EED"). This statement was plainly incorrect as Del. Code Ann. tit 11 § 641 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. Code Ann. tit. 11 § 641. The prejudice suffered by Hamilton, at trial, became even greater due to the Trial Court's failure to issue a curative instruction and failure to provide an adequate jury instruction.[2]

The State contends that Hamilton failed to articulate any prejudice he suffered as a result of Dr. Raskin's testimony.[3] However, it appears that the State has essentially conceded that Dr. Raskin's testimony at trial was contrary to the law and required a curative instruction.[4] Despite the clear language of § 641, the State's

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[1] (See Answering Br. 8, 14).

[2] In order to properly address the prejudice suffered by Mr. Hamilton at trial, argument I in the Reply Brief is in response to the State's Answering Brief arguments I and II.

[3] (See Answering Br. 8, 12).

[4] (See Answering Br. 12, 13).

expert testified that voluntary consumption of alcohol precluded the defense of EED (A82, A84, A90). Hamilton asserts that prejudice was sustained as a result of the expert's misstatement being admitted to the jury, as it was never corrected by the Trial Court. (Opening Br. 22).

The Expert's incorrect statement of the law, went directly to the critical issue of Mr. Hamilton's use of alcohol on the night in question and how that factors into Hamilton meeting his burden of demonstrating EED. (Opening Br. 25). Therefore, Hamilton sustained prejudice as a result of the Dr. Raskin's incorrect statement of the law being admitted to the jury.

The State also contends that the Trial Judge's characterization of the expert testimony as an "opinion" and statements that a correct instruction would be given later was a sufficient curative instruction.[5] "As a general rule, a curative instruction is usually sufficient to remedy any prejudice." *Zimmerman v. State*, 628 A.2d 62, 66 (Del. 1993) (citing *Edwards v. State*, 320 A.2d 701, 703 (Del. 1974) (finding that errors are typically cured by the judge striking the testimony and an instruction for the jury to disregard)). "Even when prejudicial evidence is admitted, its prompt excision followed by a cautionary instruction will usually preclude a finding of reversible error." *Sawyer v. State*, 634 A.2d 377, 380 (Del. 1993) (citing *Pennell v.*

[5] (Answering Br. 14-16).

State, 602 A.2d 48, 52 (Del. 1991)).

In *Sawyer v. State*, this Court found that "the trial judge's prompt and effective instruction cured any prejudice resulting from the improper questioning of the witness." *Id*. at 380. In response to the State's questioning, the State's witness testified that she was fearful of testifying against the defendant, which prompted the defense to request a sidebar. *Id*. at 379. At sidebar, the defense objected to the testimony as it inferred that the witness was threatened by the defendant. *Id*. The court questioned the prosecutor as to why he elicited such testimony. In response, the prosecutor stated he was only seeking an explanation as to why the witness appeared upset and apologized for the adverse inference. *Id*. Outside the presence of the jury, the trial court determined that no threats were made against the witness by the defendant, which prompted the defendant to move for a mistrial. *Id*. The trial court denied the motion and issued a curative instruction where it explained that no threats were made against the witness and directed the jury to strike any impression that the witness was threatened by the defendant. *Id*.

This Court found "that the trial court's effort to mitigate the effect of the improper testimony were immediate and forceful." *Id*. at 380. "Even when prejudicial evidence is admitted, its prompt excision followed by a cautionary instruction will usually preclude a finding of reversible error." *Id.* (citing *Pennell v.*

State, 602 A.2d 48, 52 (Del. 1991). As such this Court found that the instruction cured any prejudice. *Id.*

In *Revel v. State*, this Court found that the trail court did not abuse its discretion in denying the defense's motion for mistrial. *Revel v. State*, 956 A.2d 23, 30 (Del. 2008). The defense moved for a mistrial after the detective's testimony impermissible commented on the defendant's right to remain silent. *Id.* at 26-27. The trial judge denied the motion but immediately instructed the jury that the defendant had a right to remain silent and that the jury should not draw any inference from the fact that the defendant asserted this right. *Id.* at 27. In upholding the trial courts decision, this Court found that the prompt and complete curative instruction adequately addressed the concern of prejudice resulting from the witness' testimony. *Id.* at 30.

The Trial Court's characterization of the expert's testimony as "his understanding" is not an adequate curative instruction and failed to cure the prejudice created by the expert's misstatement of law. Unlike *Sawyer* and *Revel*, where the trial court promptly pointed out that the statements and questioning were improper, the Trial Court here merely stated that the expert's misstatement was "his understanding" and "his interpretation." (A82-83, A91). Further, rather than instruct the jury to disregard the incorrect statement of the law and immediately inform the jury of the

correct application of EEC when factoring in a person's voluntary consumption of alcohol, the Trial Court simply stated that it would later provide instruction on the law of EED. (See A82, A91). Raskin's "opinion," contrary to the language of § 641, incorrectly implied that despite the Defense presenting evidence to meet its burden, that the defense of EED was not applicable due to Hamilton's consumption of alcohol. (A82, A84, A90). The Trial Court's actions were not prompt and complete due to the Trial Court's belief that it was proper to wait to give the EED instruction.

Counsel's further questioning of Dr. Raskin was performed with the understandable belief that the Trial Court would, at a later point in time, issue a proper and comprehensive curative instruction if the expert witness continue to express opinions contrary to Delaware law. Thus, the fact that Defense Counsel asked questions of Dr. Raskin and solicited his responses which were contrary to Delaware law, in now way provides an excuse for the Trial Court failure to ever issue an appropriate curative instruction. Defense Counsel's strategy clearly did not work to the benefit of the Defense, but this was caused by the Trial Court's failure to adequately correct a misstatement of law and permitting such testimony of the expert to go to the jury. The Trial Court's eventual instruction on EED, which did not inform the jury to ignore Dr. Raskin's expressed opinion that a defendant cannot have EED if they voluntarily consumed alcohol, was not adequate to cure the prejudice

caused by Dr. Raskin's misstatement of law.

The prejudice sustained by Hamilton at trial was further complicated by the fact that the jury instructions were inadequate. (See A72-73). Despite, the Trial Court stating that the jury would be provided adequate instruction later, the jury instructions contained no language instructing the jury on how to factor in evidence of the Defendant's voluntary intoxication. (A82-83, A91). Thus, the failure to provide an adequate curative instruction for the misstatement was a much more sever type of error.

The State attempts to undermine Mr. Hamilton's contention that the expert's misstatement requires corrections by the court by pointing to the deciding cases of *Eustice v. Rupert*,[6] *Shively v. Klein*,[7] and *Money v. State*,[8] all which involve an attorney's misstatement in closing arguments.[9] Although an attorney's misstatement of law in a closing argument is certainly something that requires immediate attention and correction by the trial judge, it is not as critical of an error as allowing an expert witness to misstate the law during the evidentiary phase of the trial without an

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[6] *Eustice v. Rupert*, 460 A.2d 507, 511 (Del. 1983).

[7] *Shively v. Klein*, 551 A.2d 41, 44 (Del. 1988).

[8] *Money v. State*, 2008 WL 3892777, at *2 (Del. Aug. 22, 2008).

[9] (Answering Br. 11).

immediate and complete curative instruction. Additionally, making an attorney's misstatement of law less severe than an expert's misstatement of law, in closing instructions the jury is additionally informed that an attorney's statements are argument which helps to limit any potential error caused by counsel's misstatements.[10]

The State further argues that Hamilton has failed to provide any authority that would support the proposition that a misstatement of law made by an expert witness requires reversal. (Answering Br. 11-12). As this case may be a case of first impression, the State's lack of case law in support of their contention demonstrates how critically important the resolution of this issue is to the administration of justice.

[10] It is noteworthy that Hamilton's Counsel sought the Trial Court to provide a curative instruction for the Expert's misstatement of law during the prayer conference. Counsel noted, "I think that when the expert expressed his opinion that alcohol consumption precluded a finding of EED, our assertion is that is a misstatement of law. If a lawyer would have made that statement in a closing argument -" at which time Hamilton's Counsel was interrupted by the Trial Judge disagreeing with Counsel. (A72)

II. The Trial Court's failure to cure the State's expert's misstatement of law should be reviewed under a *de novo* standard.

The State asserts that the Trial Court's failure to cure the expert's misstatement of the law should be reviewed under an abuse of discretion standard.[11] The State cites *Sammons v. Doctors for Emergency Servs*,[12] *Bush v. HMO of Del.*,[13] and *Pinkett v. Brittingham*[14] in support of its position.[15] This Court held that it will "review the Superior Court's evidentiary rulings restricting or allowing expert testimony under an abuse of discretion standard. *Sammons*, 913 A.2d at 528 (citing *Bush*, 702 A.2d at 923; *Pinkett*, 567 A.2d at 860).

In *Sammons*, the plaintiff's expert was precluded from presenting opinion testimony but permitted the defense to proffer expert testimony. 913 A.2d at 527. Under an abuse of discretion standard, this Court upheld the trial court's preclusion because the plaintiff had not properly disclosed the expert's opinion to the defense. *Id*. at 530-31. Further, this Court upheld the trial court's finding permitting the

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[11] This argument addresses only the State's assertion that the standard of review for the prejudice suffered as a result of the Expert's misstatement of law is abuse of discretion. (Answering Br. 8).

[12] *Sammons v. Doctors for Emergency Servs., P.A.*, 913 A.2d 519, 528 (Del. 2006).

[13] *Bush v. HMO of Del.*, 702 A.2d 921, 923 (Del. 1997).

[14] *Pinkett v. Brittingham*, 567 A.2d 858, 860 (Del. 1989).

[15] (Answering Br. 8).

defense expert because the plaintiff had sufficient notice of the intent to call the expert. *Id*. at 532-33. Similarly, in *Bush v. HMO of Del.*, this Court upheld the trial court's holding that prevented the plaintiff's expert from testifying to opinions that were not disclosed. 702. A.2d at 923. Furthermore, this Court has permitted a plaintiff to call an expert, that was retained by the defense but was not called, to testify to a report the expert prepared. *Pinkett*, 567 A.2d at 860-61.

The present case is distinguishable from the cases cited by the State. Here, the prejudice was not sustained as a result of the Court permitting Dr. Raskin to take the stand, but rather from the substance of his testimony. As such, it is more akin to *Perkins v. State*, where the prejudice arose from the prosecutor's closing remarks. *Perkins v. State*, 920 A.2d 391, 396 (Del. 2007) resulting in this Court finding that it "reviews *de novo* properly raised claims of impermissible prosecutorial remarks." *Id*. This Court reviews under plain error if the issue was not preserved at trial. *Id*. Here, the Defense properly preserved the issue at trial, by requesting a side bar following the objectionable testimony of Dr. Raskin which was refused by the Trial Court.[16] (A82-83). Thus, a *de novo* standard of review is required.

[16] On direct examination the State's Expert issued a misstatement of law by noting that "[t]he second thing, which is very important, is that voluntarily 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". (A82-83).

III. The EED jury instruction inadequately advised the jury on how to factor in Hamilton's voluntary consumption of alcohol, and did not cure the expert's misstatement of law.

This Court had found that "(a)s a general rule, a defendant is not entitled to a particular instruction, but he does have the unqualified right to a correct statement of the substance of the law." *Flamer v. State*, 490 A.2d 104, 128 (Del. 1982). But it is essential that a "[j]ury instruction(s) must be adapted to the factual situations of each case." *Probst v. State*, 547 A.2d 114, 120 (Del. 1988) (citing *Wiggins v. State*, 210 A.2d 314, 316 (Del. 1965); *Bantum v. State*, 85 A.2d 741, 752 (Del. 1952)). Here, the jury instruction was not adapted to the factual situation as it lacked language to inform the jury how to factor in evidence of the Defendant's voluntary use of alcohol while determining if Defendant's actions were caused by EED. For this reason, the EED jury instruction was inadequate, not reasonably informative, and misleading, requiring reversal of all counts affected by the instruction.

In *Probst v. State*, this Court found that the jury instruction was not reasonably informative and misleading. 547 A.2d at 119-20. Probst and her brother were arrested for shooting Frank Walla. *Id.* at 116. During the trial the jury instruction on accomplice liability used incorrect masculine pronouns to describe the female defendant. *Id.* at 118. This Court, in reviewing the instruction as a whole, found "that the incorrect use of masculine gender pronouns in an accomplice liability

instruction, where the alleged principal is a male and the alleged accomplice is a female, made it likely that the jury would be confused." *Id*. at 120. This Court further found that confusion was likely due to the placement of the defendant's felony weapon charge after Probst's brother's instruction for justification. *Id*. This Court stated "[a]s a result of this placement, the jury may have been left with the impression that Probst was also charged with the weapon's offense as an accomplice when, in fact she was only charged with this offense as a principal." *Id*. This Court reversed Probst's convictions, finding that as a whole the jury instruction failed to be reasonably informative and not misleading. *Id*.

Further, in *Flamer v. State*, this Court found that the jury instruction was adequate despite not specifically stating that the jurors could still recommend a life sentence. 490 A.2d at 128. The defendant appealed his conviction and death sentence, alleging that the jury instruction did not adequately inform the jury that they could still recommend a life sentence, even if they found aggravating factors. *Id*. at 127-28. This Court held that the jury charge adequately informed the jury of their ability to still recommend a life sentence. The jury instruction informed the jury to consider all of the aggravating and mitigating factors. Furthermore, the instruction informed the jury to only recommend a death sentence if they found beyond a reasonable doubt the existence of an aggravating factor and they unanimously

recommended a death sentence. *Id.*

This Court has held that a defendant is not entitled to challenge a jury instruction if the defendant "offered no prayers or objection to the charge given. *Edwards v. State*, 285 A.2d 805,806 (Del. 1971). In *Edwards*, the defendant was found guilty of disregarding a police officer's signal. *Id*. at 805. The defendant alleged that the trial court's jury instruction was misleading and inadequate because the trial judge did not read the exact words of the applicable statute. This Court found that the defendant was barred from complaining about the instruction because the defendant did not object to the instruction nor did he submit prayers. *Id*. at 806.

Here, the inadequacy of the jury instruction goes beyond the use of wrong pronouns or improperly placing the instruction. The Hamilton EED jury instruction lacked a major component, in that it did not instruct the jury on how to factor in Mr. Hamilton's use of alcohol at the time of the offense while determining if EED was established. As such, the Hamilton EED jury instruction is distinguishable from the instruction in *Flamer*.

This case is also distinguishable from *Edwards* because Hamilton attempted to prevent any problems with the EED instruction. During the prayer conference Hamilton argued that additional language was essential in this case because it provided instruction on how to factor in the evidence of Mr. Hamilton's voluntary

consumption of alcohol and that a correction for the expert's misstatement of law was needed.[17] (A72-73). Without an adequate language to direct the jury how to consider the evidence of voluntary consumption of alcohol and the failure to correct the expert's misstatement of law, resulting in an EED jury instruction that was misleading and contrary to the cited case law of this Court. As such, the EED jury instruction was inadequate.

[17] The Defense vigorously argued for a curative instruction due to the expert's misstatement of law, and for language to inform the jury that, contrary to the testimony of the State's expert, that voluntary use of alcohol does not mean that a person cannot have EED. (A72-73). The Defense asserted that the additional language was required because "the concern is that if the jury determines from the evidence presented that he was intoxicated at the time of this, that they could conclude that even though we've satisfied our burden of showing EED, they can't find it because they think he was intoxicated." (A72). The Trial Court noted that the Defense was free to make the argument but refused to add any additional language. (A72-73). The Defense further asserted that State's Expert testimony that consumption of alcohol precludes the defense of EED was a misstatement of law, further requiring the additional language. (A73). The Trial Court stated that the Defense preserved the record but refused to add any more language to the instruction. (A73).

IV. The inadequacy of the EEC jury instruction should be reviewed under a de novo standard.

The State asserts that the inadequacy of the jury instruction on EED should be reviewed under an abuse of discretion standard.[18] In support, the State cites to *Hankins v. State* and *Wright v. State*.[19] In *Wright*, this Court held that the "Court will review *de novo* a refusal to instruct on a defense theory (in any form); and it will review a refusal to give a 'particular' instruction (that is, an instruction is given but not with the exact form, content, or language requested) for an abuse of discretion." *Wright v. State*, 953 A.2d 144, 148 (Del. 2008).

In *Wright*, this Court reviewed the jury instruction under a *de novo* standard. *Id.* at 149. This Court found *de novo* was the appropriate standard due to the fact that the trial court in no way instructed the jury on the defense's theory of accident. *Id.* at 149. However in *Hankins v. State*, this Court reviewed the jury instruction under an abuse of discretion standard of review. *Hankins v. State*, 976 A.2d 839, 840 (Del. 2009). In *Hankins*, the defense requested the trial court to give an instruction on extreme emotional distress. *Id.* The trial court gave an instruction but did not give the instruction in the form that was requested by the defendant. *Id.* Adhering to the

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[18] This argument addresses only the State's assertion that the standard of review for the inadequacy of the jury instruction is abuse of discretion. (Answering Br. 17).

[19] (Answering Br. 17).

rational of *Wright*, this Court found that "because the trial judge instructed the jury on Extreme Emotional Distress, but not in the form requested by Hankins, we review for abuse of discretion." *Id*.

Here, the proposed changes to the EED instruction went beyond the mere form, content, and/or language of the instruction and therefore the issue warrants review under a *de novo* standard. As raised in the Mr. Hamilton's Opening Brief, the Defense proposed changes to the EED instruction in order to clarify how the jury should factor in the Defendant's voluntary intoxication when determining whether Hamilton actions were under an Extreme Emotional Distress. (Opening Br. 29, A72). The reasoning behind the proposed corrections was to alleviate the confusion created by Expert's misstatement of the law that consumption of alcohol precludes a finding of Extreme Emotional Distress. (A72-73). While the proposed changes were within the EED instruction, the Defense essentially requested an instruction on it's theory, that the language of § 641 does not preclude the jury from considering EED even if there if Mr. Hamilton is voluntarily intoxicated at the time of the commission of the offense. As the Trial Court refused to instruct the jury on the Defense's theory, this issue warrants review under a *de novo* standard pursuant to this Court's holding in *Wright*.

V. The application of the Rule of Lenity in defining the word "privilege" as used in the phrase "privilege to enter or remain", supports the conclusion that the evidence presented at trial was insufficient to find Mr. Hamilton guilty of Burglary First Degree.

The State's Answering Brief did not respond to the main component of the argument raised by Mr. Hamilton in Argument IV of his Opening Brief. That is, that the Rule of Lenity should be applied when defining the word "privilege" as it is used in Title 11 Delaware Code Section 829(d)[20] in the phrase "privilege to enter or remain" in a building. When determining if Mr. Hamilton committed the crime of Burglary First Degree, Mr. Hamilton agrees with the State's position that the term "enter or remain unlawfully" is unambiguous[21]. However, the issue is not the definition of the words "enter or remain unlawfully". The debate is over the definition and application of the word "privilege" as used in 829(d) which affects whether a person could arguably commit the offense of Burglary First Degree by remaining in a building and then thereafter, committing a crime.[22]

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[20] In Mr. Hamilton's Opening Brief, 11 Delaware Code Section 829(c) was cited on pages 32 and 33, rather than the correct citation, Section 829(d). Title 11 Section 829 was changed on July 3, 2008 with no modification to the previous wording of 829(c) as it was merely re-numbered to 829(d). A new version of 829 was issued on June 1, 2012 with no changes to Section 829(d).

[21] (Answering Br. 8, footnote 34).

[22] Mr. Hamilton recognizes that a person with a privilege to remain in a building still has liability for criminal acts committed while that person remains in a building. The act of remaining in a building when one has a privilege, even when one is desired by others with the same privilege to leave the building, is not in itself a criminal act. However, with additional facts

It is an unarguable fact that the word "privilege" is not defined within 829(d). From a semantic point, it is important to note that the concept being examined is a privilege to remain in a building to retrieve one's property that is within that building, rather than a more substantial "right" to remain in a premises. Mr. Hamilton asserts that the undefined term of "privilege" is ambiguous in the context that it is attempted to used by the State to potentially give rise to felony murder criminal liability via Delaware's Burglary First Degree statute. The facts demonstrate that Mr. Hamilton was permitted to enter the residence (A33, A46) and that while within the building, he sought the return of his property. (A23, A38, A41). In light of the facts in this case and the lack of any definition of the word privilege , the application of the Rule of Lenity when defining privilege as it applies to Delaware's Burglary First Degree statute must lead to the conclusion that Mr. Hamilton had a privilege to remain in the building in order to retrieve his property.

Although the State correctly points to facts demonstrated during the trial that indicate that Mr. Hamilton no longer had an arguable right to live in the premises, the State neglects to consider the malleable concept of privilege which is undefined by Delaware's General Assembly. To define privilege in a manner that would preclude

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such conduct could become a violation of other statutes, such as Disorderly Conduct which would not give rise to the application of the felony murder rule.

its application to Mr. Hamilton in this case would constitute judicial legislation which is contrary to the Rule of Lenity. Therefore, the State has failed to meet its burden to prove each element of the crime charged beyond a reasonable doubt as is required by Delaware's Constitution and the 5th and 14th Amendments to the United States Constitution. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); *In re Winship*, 397 U.S. 358, 364 (1970). Thus, Mr. Hamilton's conviction for Burglary First Degree and Felony Murder, Count III of the indictment must be overturned. (See Exhibit to the Opening Brief A2, A48, B1, B2)

CONCLUSION

For the reasons set forth within the Appellant's Reply Brief and Opening Brief, it is respectfully submitted that this Court overturn all counts of conviction except for the two counts of Kidnaping First Degree.

/S/

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