IN THE SUPREME COURT OF THE STATE OF DELAWARE

STANLEY TAYLOR,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 434, 2012
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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

STATE'S ANSWERING BRIEF

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DATE: December 28, 2012

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NATURE AND STAGE OF THE PROCEEDINGS

Delaware State Police arrested Stanley Taylor, a registered sex offender, on June 5, 2011 for sexually abusing two different child victims. (D.I. 1). A Sussex County grand jury indicted Taylor on August 8, 2011 on eighteen counts of Unlawful Sexual Conduct Against a Child by a Sex Offender,[1] one count of Attempted Unlawful Sexual Conduct Against a Child by a Sex Offender,[2] and two counts of Endangering the Welfare of a Child.[3] (D.I. 2).

Beginning on May 29, 2012, a four-day jury trial was held. (D.I. 23-31). To avoid prejudice to Taylor, the sex offender element of his crimes was redacted from the indictment and a separate bench trial was held on that element after the jury returned its verdict on June 4, 2012. (D.I. 31). The jury was ultimately left to consider the following predicate crimes: four counts of Rape in the First Degree,[4] four counts of Rape in the Second Degree,[5] seven counts of Sexual Exploitation of a Child,[6]

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[1] DEL. CODE ANN. tit. 11, § 777A

[2] DEL. CODE ANN. tit. 11, § 531

[3] DEL. CODE ANN. tit. 11, § 1102

[4] DEL. CODE ANN. tit. 11, § 773

[5] DEL. CODE ANN. tit. 11, § 772

[6] DEL. CODE ANN. tit. 11, § 1108

one count of Continuous Sexual Abuse of a Child,[7] and one count of Endangering the Welfare of a Child.[8] (A126-130). Five counts contained in the original indictment were dismissed by the State at the close of the evidence. (*See* B1-25). Taylor was found guilty of all of the predicate offenses presented to the jury. Thereafter, in a bench trial, the Court found he was a registered sex offender at the time of the offenses, resulting in guilty verdicts on all counts. (D.I. 31).

On July 27, 2012, Taylor was sentenced to eight life sentences, plus an additional 225 years of incarceration.[9]

Taylor filed a timely appeal and opening brief. This is the State's Answering brief.

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[7] DEL. CODE ANN. tit. 11, § 776

[8] DEL. CODE ANN. tit. 11, § 1102

[9] Taylor was sentenced as follows: On eight counts Unlawful Conduct with a Child by a Sex Offender with an underlying Rape charge: natural life; On seven counts of Unlawful Conduct with a Child by a Sex Offender with an underlying Exploitation charge: twenty-five years on each; On one count of Unlawful Conduct with a Child by a Sex Offender with an underlying Continuous Sexual Abuse charge: twenty-five years; and, on the Endangering the Welfare charge: two years. Ex. A.

SUMMARY OF THE ARGUMENT

I. Argument I is **denied.** The prosecutor's comment during closing argument that, due to the extensive corroborating evidence presented by the State, the jury did not need to exercise *extreme* caution when evaluating the out-of-court statement of M.H., was not plain error.

II. Argument II is **denied.** The trial court did not abuse its discretion when it refused to strike the testimony of Ashley Thompson-Hill, a Sexual Assault Nurse Examiner, who testified regarding her examination of victim E.H. because the testimony was relevant to the charged conduct of the defendant and was otherwise admissible.

III. Argument III is **denied.** The trial court did not abuse its discretion when it allowed the recording of M.H.'s out-of-court statement to be replayed for the jury during their deliberations.

IV. Argument IV is **denied.** There is no cumulative error.

STATEMENT OF FACTS

On June 4, 2011, twelve year-old E.H. and her eight year-old sister, M.H., disclosed to a neighbor that the defendant, Stanley Taylor, had been sexually abusing them. (A34-36). Both children then told their mother and step-father about the abuse. (B26-27). The children were immediately taken to Delaware State Police Troop 7 and then to Beebe Hospital for evaluation and treatment. (A34-36).

At the hospital, eight year-old M.H. complained of significant pain to her vaginal area and told the Sexual Assault Nurse Examiner ("SANE") that her grandfather had sexual intercourse with her, digitally penetrated her both vaginally and anally, rubbed her breasts and took naked pictures of her. (B28-30; *See* B28-56). The examination revealed M.H. had "textbook" sexual assault injuries (B51) consistent with repeat penetration. (B54-56). Her injuries included irritation in the vaginal area, a healed scar at the posterior fourchette, an irregular hymenal ring, deep anal bruising and a dilated anus. (B28-56).

Twelve year-old E.H. was also examined by a SANE at Beebe Hospital and stated "Pop-Pop touched me in my breasts and in my butt three times in the last two weeks. He was in bed with my sister last night. He took pictures of me down there with his camera." (B57-59).

Both girls were then taken to the Child Advocacy Center ("CAC") where they were interviewed separately. A47-48; A92. M.H. disclosed that Taylor, her step-grandfather, had raped her vaginally, anally and orally. (CAC interview of M.H., Court Ex.1 at 21:31-21:53). She also disclosed that she saw Taylor digitally penetrate E.H. and that Taylor took naked photographs of both girls with a camera he kept in his truck. (*Id.*). M.H. stated that Taylor told them he put the pictures on the Internet to embarrass them. (*Id.* at 21:55-22:11).

Search warrants were executed and a camera was located in Taylor's truck. (B60). Although all of the images on the camera's memory card had been deleted, six were recovered. (B61). One image was of an unclothed vagina and two were of unclothed buttocks (State's Ex. 10, 12, 14). All of the pictures recovered from the camera were dated May 30, 2011. (A26-27). Two of Taylor's computers were also seized and forensic examinations revealed seventeen additional images of unclothed genitalia, some of which, but not all, were duplicates of images from the camera. (State's Ex. 19-55). One picture showed a vagina and a male penis. (State's Ex. 19). Additionally, there were two photographs of an unclothed torso which, based on the background, were taken in the bathroom of the victims' home. (State's Ex. 29 and 43).

Taylor was interviewed by the police and denied any wrongdoing. (Taylor's interview, State's Ex. 79).

I. THE STATE'S COMMENT DURING CLOSING ARGUMENT REGARDING HOW THE JURY SHOULD WEIGH AND CONSIDER THE VICTIM'S OUT-OF-COURT STATEMENT WAS NOT PLAIN ERROR.

Question Presented

Did the State's argument regarding the jury instruction pertaining to the victim's out-of-court statement constitute plain error?

Standard and Scope of Review

When no timely and pertinent objection is raised to arguments complained of on appeal, this Court reviews only for plain error.[10] The burden is on the defendant to demonstrate plain error.[11]

Merits of the Argument

Taylor alleges for the first time during this appeal that the State made comments during its closing argument to the jury that deprived him of a fair trial.[12] This Court's decision in *Baker v. State* sets forth the proper plain error analysis in such a case.[13] The first step requires the Court to "examine the record *de novo* to determine whether prosecutorial misconduct

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[10] *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

[11] *Stevenson v. State*, 709 A.2d 619, 633 (Del. 1998).

[12] *Op. Brf.* at 7-8.

[13] *Baker*, 906, A.2d at 150.

occurred."[14] If no misconduct is found, the inquiry ends.[15] If there was misconduct, the Court moves on to the second step of the analysis by applying the familiar *Wainwright*[16] standard to determine if the misconduct prejudicially affected the defendant's substantial rights.[17]

A. There was no misconduct in this case.

The question of misconduct under the first prong of the analysis, often "turn[s] on the nuances of the language and the context in which the statements were made."[18] In this case, the prosecutor's comment during closing argument regarding how the jury should consider M.H.'s out of court statement was not misconduct given the context in which it was made.

The interview of M.H. from the Child Advocacy Center ("CAC") was presented to the jury after she testified pursuant to § 3507 of Title 11 of the Delaware Code.[19] Although M.H. testified at trial to anal penetration by Taylor, she denied certain sexual

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[14] *Id.*

[15] *Id.; Williams v. State*, 34 A.3d 1096, 1099 (Del. 2011).

[16] *Wainwright v. State*, 504 A.2d 1096 (Del. 1986).

[17] *Baker*, 906 A.2d at 150; *Small v. State*, 51 A.3d 452, 459 (Del. 2012).

[18] *Kurzmann v. State*, 903 A.2d 702, 710, n.8 (Del. 2006).

[19] DEL. CODE ANN. tit. 11, § 3507 (governing the admission of voluntary, out-of-court statements of a witness as substantive evidence).

acts and said she forgot others. (B62-85). However, in her CAC interview, which took place within twenty-four hours of Taylor's last rape of her, M.H. was able to provide significantly more detail about the abuse. (Court Ex. 1).

The trial court, after reading § 3507 to the jury, gave the following *Acosta*[20] instruction:

> "With regard to this provision, caution must be exercised by you, as the jury, when a conflict exists between the out-of-court statements and the in-court testimony, or when a conflict exists among the out-of-court statements themselves. You, as the jury, should be particularly careful if there is no evidence to corroborate an inconsistent out-of-court statement. Nevertheless, you as the jury, may convict on such statement if you are satisfied beyond a reasonable doubt that the statement is true."

(A104-05). While the court elected to give this instruction, it was not required to do so in this case, because there was significant corroborating evidence of the crimes.[21] Regardless, it is the trial judge who determines the proper law to be presented to the jury and counsel may not make arguments to the

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[20] *Acosta v. State*, 417 A.2d 373 (1980)(holding that in the rare case when a victim denied a crime was committed and the only evidence of the crime was the victim's inconsistent out-of-court statement, a cautionary instruction should be given).

[21] *Russell v. State*, 1996 WL 539823, *2-3 (Del. Sept. 18, 1996)(holding that *Acosta* instruction was not required even though victim's out-of-court statement was inconsistent because corroborating evidence of anal injury was presented).

jury inconsistent with that law.[22] However, the prosecutor in this case made a proper argument.

When addressing the CAC interview of M.H., the prosecutor argued:

> ***
> But the judge has also instructed you that her prior out-of-court statement at the Children's Advocacy Center is legitimate evidence. If you find it to be credible, you can consider it, just like the testimony you heard in this court. Judge Bradley also cautioned you that if you these out-of-court statements are contradicting to what you heard in court, you should view them with caution if they are not supported by additional evidence. Well, that's skepticism. That extreme caution isn't warranted in this case, because what [M.H.] talked about at the CAC is supported, is corroborated by additional evidence.

(B86). The prosecutor then went on to detail the corroborating evidence: the testimony of E.H. who witnessed Taylor's abuse of M.H.; the testimony of the SANE who described, documented and photographed the physical evidence of the abuse of M.H.'s body and of her injuries; and finally, the pictures Taylor took of M.H. and E.H. naked. (B86-89). The sentiment of the prosecutor's argument was clear and consistent with the instruction: *heightened* scrutiny was not required in these particular circumstances because the State had presented significant evidence corroborating M.H.'s out-of-court statement. This argument was proper given the relevant law and the facts of the case.

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[22] *Money v. State*, 2008 WL 3892777, at *3 (Del. Aug. 22, 2008).

The cautionary instruction, used in rare cases, conveys that any inconsistent out-of-court statement requires caution, but one that is inconsistent *and* lacking any corroboration requires even greater caution, or "particular caution" as the judge put it. The prosecutor never told the jury to put aside *all* caution when considering the statement. In fact, the prosecutor was careful to emphasize that she was referring specifically to the "extreme caution," that is required when there is no corroboration. It is that heightened or "particular" caution to which the prosecutor was referring. While she used the word "extreme" instead of the word "particular," it is clear from the context of her argument that she was focusing on the corroboration portion of the instruction. If anything, the prosecutor implied an even higher level of scrutiny was required by law - "extreme" - but argued to the jury it was not necessary in this case based on the corroborating evidence.

The amount of corroboration in this case was overwhelming and therefore the "particular" caution the judge urged should be used in cases without corroboration, was not warranted in this case. The prosecutor's argument was proper.

B. There was no plain error in this case.

Because there was no misconduct, the Court need go no further in its inquiry. If the Court did, however, relief is

only warranted if plain error is found. Plain error is "limited to material defects which are apparent on the face of the record. . . and which clearly deprive [a criminal defendant] of a substantial right, or which clearly show manifest injustice."[23] To meet this standard, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[24]

There was no plain error in this case.

"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."[25] Even if the prosecutor had improperly interpreted the cautionary instruction, the judge properly instructed the jury both verbally and in writing regarding the § 3507 statement. (B90-94). Additionally, the judge twice told the jury that they must follow the law as *he* instructed them. (B91-92). It is presumed that the jury followed the judge's instructions.[26] In *Money*, this Court held that even when a prosecutor misstated substantive law in a

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[23] *Baker*, 906 A.2d at 150 (quoting *Wainwright*).

[24] *Id.*

[25] *Money*, 2008 WL 3892777, at *2.

[26] *Id.* at *3.

closing argument, but the trial judge properly instructed the jury on that substantive law, there was no error. This was so despite the fact that no contemporaneous curative instruction was given.[27] The judge's instruction on the § 3507 statement was specific and detailed about how the jury should consider it. Any alleged misstatement by the prosecutor regarding that standard did not rise to plain error in light of the judge's clear and specific instruction.

Taylor can demonstrate no error so clear and so egregious that it jeopardized the fairness and integrity of the trial process. First, any potential error was minor and likely unappreciated by the jury. Second, the judge's actual instructions were plain and clear and the jury presumably followed them, as instructed. And finally, this was not a close case. In addition to the in-court testimony of both victims who witnessed some of each other's abuse, there were nude photographs, and expert testimony regarding the physical injury M.H. sustained as the result of sexual assault. Any error on the

[27] *Money*, 2008 WL 3892777, at *2-3. *Compare Kirkley v. State*, 41 A.3d 372, 380-81 (Del. 2012)(citing *DeAngelis v. Harrison*, 628 A.2d 77 (Del. 1993), for the proposition that pattern jury instructions do not cure misconduct in closing arguments). *See, also Eley v. State*, 2010 WL 5395787 (Del. Dec. 28, 2010)(not harmless error when judge overruled defense objection and thereby tacitly approved prosecutor's misstatement of law that clearly and directly contradicted the jury instructions).

part of the prosecutor during closing argument did not rise to the level of plain error.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT REFUSED TO STRIKE THE TESTIMONY OF E.H.'S SEXUAL ASSAULT NURSE EXAMINER AFTER CERTAIN CHARGES RELATING TO E.H. WERE DISMISSED BY THE STATE.

Question Presented

Did the court abuse its discretion by refusing to strike the testimony of E.H.'s SANE after some of the charges relating to E.H. were dismissed?

Standard and Scope of Review

When a trial judge determines that evidence is relevant and admissible, that decision is given deference and reviewed for an abuse of discretion.[28]

Merits of the Argument

The testimony of SANE Ashley Thompson-Hill was properly submitted to the jury despite the attempted rape charge pertaining to E.H. being dismissed by the State at the close of the evidence. The testimony was direct evidence of other charged conduct and therefore it was properly admitted without a need for analysis under Delaware Rule of Evidence 404(b).[29]

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[28] *Middlebrook v. State*, 815 A.2d 739, 745 (2003).

[29] Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Del. Crim. Rule Ev. 404(b).

A trial judge abuses his discretion when he makes an evidentiary ruling that exceeds the bounds of reason or ignores the rules of law or practice in a way that results in prejudice to a defendant.[30] No such abuse occurred in this case. As part of her treatment of E.H., Thompson-Hill testified that when she asked E.H. what happened to her, E.H. responded:

> My Pop-Pop touched me in my breasts and in my butt three times in the last two weeks. He was in bed with my sister last night. He took pictures of me down there with his camera.

(B59). Thompson-Hill also testified that E.H. was a "Tanner Stage III" meaning she was "start[ing] to have pubic hair." (B95). While she noted E.H. had some abnormalities in her vaginal and anal area, she specifically stated those things could occur "completely naturally." (B95-96).

Thompson-Hill's brief testimony regarding her examination of E.H. was relevant to the sexual exploitation charges which were based on photographs. Based on her examination of E.H., Thompson-Hill was able to describe the appearance of E.H.'s vaginal area (Tanner Stage III) which was directly relevant to those charges. As argued by defense counsel, the State had the burden to prove the subjects of the photographs were under the age of 18. (B97-98). In determining the age of the victims in the photographs, the knowledge that E.H. was Tanner Stage III

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[30] *Collins v. State*, 2012 WL 5828598, *4 (Del. Nov. 15, 2012)(Ex. A to Op. Brf.)

(had pubic hair) and was only 12 years old could assist the jury in determining the age of the individuals in the photographs. Thompson-Hill in no way implied that E.H. was injured or that she had any physical signs of sexual abuse. In fact, she testified she would not expect any such findings on a child like E.H. who did not disclose any penetration. (B96). In actuality, Thompson-Hill's testimony was helpful to the jury in clarifying certain issues. For instance, because one of the photographs depicted a vagina and a penis, a jury could have inferred that penetration did occur with E.H. if they believed she was the child in that particular photograph. Instead, the SANE testimony made clear she was not sexually penetrated - a fact beneficial to Taylor.

In addition to Thompson-Hill's physical examination and findings, all of E.H.'s statements during the examination were properly admitted. E.H.'s statement regarding Taylor being in bed with M.H. the night before is the statement of an eyewitness. The statement was direct evidence of charged conduct: Taylor's rape of M.H. the previous day. Similarly, E.H.'s statement regarding Taylor taking photographs of her "down there" goes directly to the exploitation charges and is therefore relevant and probative of that charged conduct. The only statement Taylor can argue did not *directly* correspond to remaining charges that went to the jury is E.H.'s statement

regarding the touching of her breasts and buttocks. Even that particular testimony, however, is indirect evidence of charged conduct and therefore, was properly admitted.

As defense counsel noted repeatedly in his closing (B98-99), the State had an obligation to prove as part of the sexual exploitation charges that the nudity depicted in the photos was for the purpose of sexual stimulation or gratification.[31] E.H.'s statement to Thompson-Hill that Taylor touched her buttocks and breasts - as well as taking a picture of her "down there" - is evidence of Taylor's intent when he took those pictures. Because the statement is evidence of an element of charged conduct, the court properly admitted it. There was no 404(b) analysis required.

Even so, any 404(b) analysis would have let to the statement's admission. In *Getz v. State*,[32] this Court set out the test for admitting evidence of *prior uncharged* conduct under 404(b).[33] The *Getz* analysis requires the court to determine the following:

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[31] DEL. CODE ANN. tit. 11, § 1108 (sexual exploitation requires proof that depiction was of prohibited sexual act); and, DEL. CODE ANN. tit. 11, § 1103(e)(9) (defines prohibited sexual act as nudity depicted for the purpose of sexual stimulation or gratification).

[32] 538 A.2d 726, 734 (Del. 1988).

[33] *Id.*; *Trump v. State*, 753 A.2d 963, 971 (Del. 2000).

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.
>
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
>
> (3) The other crimes must be proved by evidence which is "plain, clear and conclusive."
>
> (4) The other crimes must not be too remote in time from the charged offense.
>
> (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.
>
> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.[34]

The evidence at issue is E.H.'s statement that her "Pop-Pop touched [her] in [her] breasts and in [her] butt three times in the last two weeks." (B59). The statement provides evidence of material issues in the case: Taylor's intent (sexual stimulation) and motive (sexual gratification) to take the nude photographs. Because the touching occurred during the "last two weeks" and photos were also taken during that time frame, remoteness is not an issue. In fact, the jury could infer based on the photographs recovered that the touching occurred

[34] Getz, 538 A.2d at 734 (citations omitted).

simultaneously with the photographing of E.H. Finally, the probative value of the statement outweighs any prejudice to the Taylor. He stood accused of multiple rapes and sexual exploitation charges for which there was substantial evidence. The statement provided the intent and motive for the nude photographs - sexual gratification or stimulation. The statement alleged far less serious conduct than that for which there was significant evidence. Therefore, any prejudice from evidence of Taylor's touching of E.H. on her breasts or buttocks was minimal compared to its probative value and the serious nature of the other charges against him for which there was substantial evidence.

This Court in *Vanderhoff v. State*[35] found that there was no abuse of discretion when the trial court admitted evidence that four years prior to the charged sexual conduct, Vanderhoff had looked at the same 8 year-old victim's vagina with a flashlight.[36] Like in this case, the prior uncharged conduct which was admitted during trial was minor in comparison to the charges and went to the defendant's intent to commit the other charged conduct. In *Vanderoff*, as in this case, given the

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[35] 684 A.2d 1232 (Del. 1996).

[36] *Compare Gomez v. State*, 25 A.3d 786 (Del. 2011)(evidence of defendant's prior sexual abuse of a different victim in an unrelated, uncharged matter inadmissible).

nature of the evidence admitted, the slight risk of prejudice was outweighed by the probative value.

Taylor relies on *State v. Babcock*[37], a Washington Court of Appeals case, to support his claim, but that case is distinguishable in many respects. First, while there were two victims in the *Babcock* case, neither was a direct witness to the other's abuse as M.H. and E.H. were in this case. Second, unlike this case, there was no physical evidence or corroboration of any of the allegations in *Babcock*. Third, "substantial" hearsay testimony had been admitted regarding the dismissed charges in *Babcock*, as compared to the one sentence statement at issue in this case. Fourth, the victim whose charges were not dismissed in *Babcock* was extremely inconsistent and unreliable in her in-court testimony. And finally, and most importantly, the evidence admitted in the *Babcock* case was not relevant to any element of any of the remaining charges, unlike the evidence here which directly supports the exploitation charges. Here, the acts of touching described by E.H., the charges for which were no longer before the jury, occurred contemporaneously with and were part of the course of conduct charged in the multiple counts of exploitation - charges for which the jury was still required to render a verdict.

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[37] *State v. Babcock*, 185 P.3d 1213 (Wash. App. 2008).

This was not a close case. Even if this Court finds that evidence was erroneously admitted, the error was harmless. This Court has held that in the face of overwhelming evidence of guilt, erroneously admitted evidence of prior similar uncharged conduct was not reversible error.[38] For instance, in *Hawkins v. State*[39] this Court held that although it was error for the trial court to admit evidence of the defendant's prior abuse of his wife and excessive alcohol usage during the domestic abuse trial, the error was harmless due to the overwhelming corroborating evidence of his wife's testimony. Any error in this case was equally harmless.[40]

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[38] *Wilson v. State*, 950 A.2d 634 (Del. 2008)(references to defendant's prior drug usage and involvement in prior robbery during a robbery trial were not plain error in light of the evidence against him); *Trump*, 753 A.2d 963 (holding that admitting evidence of defendant's prior uncharged sexual acts with the victim in a rape trial was not plain error, noting parenthetically, that the Federal Rules of Evidence specifically address the admission of prior similar crimes in sex crimes cases).

[39] 2006 WL 1932668 (Del. July 11, 2006).

[40] Defense counsel did not request a curative instruction regarding the SANE testimony nor did the prosecutor refer to the testimony in her closing statement; therefore, the jury was never reminded of that testimony.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE JURY, UPON REQUEST, TO REPLAY M.H.'S RECORDED OUT-OF-COURT STATEMENT DURING DELIBERATIONS.

Question Presented

Did the Superior Court abuse its discretion by permitting the jury to rehear M.H.'s recorded out-of-court statement during deliberations?

Standard and scope of Review

A trial court's decision to provide a recorded out-of-court statement to the jury during deliberations is reviewed for an abuse of discretion.[41]

Argument

Taylor's argument that Superior Court abused its discretion by allowing M.H.'s recorded § 3507 statement to be replayed for the jury is without merit. It is well-settled that under normal circumstances, the recording of a § 3507 statement played during trial should not be entered into evidence as a separate trial exhibit for the jury to examine during deliberations.[42] However, there are two exceptions to that default rule: 1) when the parties agree the recording should be admitted; or 2) when during deliberations, the jury requests the recording.[43] Because

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[41] *Lewis v. State*, 21 A.3d 8, 13, 14 (Del. 2011).

[42] *Flonnory v. State*, 893 A.2d 507, 526 (Del. 2006); *Burns v. State*, 968 A.2d 1012, 1021-22 (Del. 2009).

[43] *Id.*

this case fits squarely into the second recognized exception, the trial court did not abuse its discretion by allowing the recording to be replayed for the jury during deliberations.

During trial, when the court was initially faced with the question of whether or not M.H.'s CAC interview would be sent back to the jury room during deliberations, the trial judge properly determined it would not and marked it as a court exhibit. (B100). Later, during deliberations, the jury specifically requested M.H.'s recorded CAC interview. (Jury note, Court Ex. 7). It was then that the judge determined, after hearing argument by counsel, that he would allow the jury to "listen to it again." (B101-103). The judge ordered the bailiff to set up the recording and play it for the jury. (B104). The court recessed for that to occur and for deliberations to continue and thereafter, the jury returned its verdict. (B105). The judge, based on the jury's request during deliberations, properly exercised his discretion and allowed them to view the recording again. There was no abuse of discretion.

Were this Court to find error, in light of the strength of the State's case, the error was harmless.[44] This was a short

[44] *See Waterman v. State*, 956 A.2d 1261, 1265 (Del. 2008)(where court erroneously permitted jury to have CAC recording error was harmless because there was strong evidence of guilt and it was a

trial with strong evidence against the Taylor, exclusive of the CAC interview. Additionally, this was not a case where the jury had unfettered, lengthy access to a recording.[45] After ruling on the jury's notes, the court recessed and the tape was played for the jury with the assistance of the bailiff. (B104-5). This is the very procedure that this Court has suggested should occur in these circumstances. And there is no evidence they were deviated from. Thus, if error occurred in following the prescribed course for review of a § 3507 statement, given the totality of the evidence and circumstances here, the error is harmless beyond a reasonable doubt.

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short trial and therefore the substance of the recording would have been fresh in the jury's mind, regardless).

[45] Compare *Lewis,* 21 A.3d at 14-15 (not harmless error when § 3507 recording admitted and given to jury when jury did not request it, nor did parties agree, and court allowed the jury to have unfettered access to it for an extended time period in a very close case).

IV. BECAUSE THERE WERE NO ACTUAL ERRORS, THERE CAN BE NO CUMULATIVE ERROR.

Question Presented

Was there actual prejudice to Taylor as the result of multiple errors at trial?

Standard and Scope

A cumulative error argument presented for the first time on appeal is reviewed for plain error.[46]

Argument

Even where appropriate, reversal based on "cumulative errors" must be based on multiple actual errors that cause actual prejudice to a criminal defendant.[47] Taylor has failed to establish a single error, let alone multiple errors to be cumulated. A cumulative error argument cannot stand alone and depends entirely on multiple, established errors. Thus, Taylor's argument warrants no further consideration.

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[46] *Torres v. State*, 979 A.2d 1087, 1101 (Del. 2009).

[47] *See Michaels v. State*, 970 A.2d 223, 231 (Del. 2009).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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DATE: December 28, 2012

EXHIBIT

A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE

VS.

STANLEY O TAYLOR

Alias: No Aliases

DOB: 07/30/1955
SBI: 00282836

CASE NUMBER:
1106004204

CRIMINAL ACTION NUMBER:
IS11-06-0527
USC/CHILD(F)
IS11-08-0414
USC/CHILD(F)
IS11-08-0415
USC/CHILD(F)
IS11-08-0416
USC/CHILD(F)
IS11-08-0418
USC/CHILD(F)
IS11-08-0419
USC/CHILD(F)
IS11-08-0420
USC/CHILD(F)
IS11-08-0421
USC/CHILD(F)
IS11-08-0423
USC/CHILD(F)
IS11-08-0426
USC/CHILD(F)
IS11-08-0427
USC/CHILD(F)
IS11-08-0428
USC/CHILD(F)
IS11-08-0429
USC/CHILD(F)
IS11-08-0430
USC/CHILD(F)
IS11-08-0431
USC/CHILD(F)
IS11-08-0432
USC/CHILD(F)
IS11-06-0536
ENDANG. CHILD(F)

COMMITMENT
LIFE SENTENCE
SEX OFFENDER NOTIFICATION IS REQUIRED
TIER 3
Nolle Prosequi on all remaining charges in this case

APPROVED ORDER 1 December 11, 2012 14:12

STATE OF DELAWARE
VS.
STANLEY O TAYLOR
DOB: 07/30/1955
SBI: 00282836

SENTENCE ORDER

NOW THIS 27TH DAY OF JULY, 2012, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IS11-06-0527- : TIS
USC/CHILD

Effective July 27, 2012 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5 with credit for 419 day(s) previously served

AS TO IS11-08-0414- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IS11-08-0415- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IS11-08-0416- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IS11-08-0418- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

STATE OF DELAWARE
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STANLEY O TAYLOR
DOB: 07/30/1955
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AS TO IS11-08-0419- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IS11-08-0420- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IS11-08-0421- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IS11-08-0423- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- No probation to follow.

AS TO IS11-08-0426- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- No probation to follow.

AS TO IS11-08-0427- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- No probation to follow.

AS TO IS11-08-0428- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

STATE OF DELAWARE
VS.
STANLEY O TAYLOR
DOB: 07/30/1955
SBI: 00282836

- No probation to follow.

AS TO IS11-08-0429- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- No probation to follow.

AS TO IS11-08-0430- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- No probation to follow.

AS TO IS11-08-0431- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- No probation to follow.

AS TO IS11-08-0432- : TIS
USC/CHILD

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5

- No probation to follow.

AS TO IS11-06-0536- : TIS
ENDANG. CHILD

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

- No probation to follow.

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
STANLEY O TAYLOR
DOB: 07/30/1955
SBI: 00282836

CASE NUMBER:
1106004204

Have no contact with Mackenze Harris

Have no contact with Elizabeth Harris

Have no contact with the victim, victim's family, residence or property.

Have no contact with any minor under the age of 18 years.

Pursuant to 29 Del.C. 4713(b)(1), the defendant having been convicted of a sex offense, it is a condition of the defendants probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

A civil judgement shall be entered for all monetary assessments owed.

Pursuant to 11 Del.C. 3912, the defendant shall undergo HIV testing under the direction of the Division of Public Health and the results shall be made available to the state, pursuant to statute.

The provisions of 11 Del. C. Sections 4120, 4121 and 4336 - Sex Offender Registration and Community Notification - apply to this case. NOTE: Victim is under 16 years of age.

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Defendant shall complete Sexual Disorders counseling treatment program.

The defendant is to register as sex offender pursuant to

statute.

Forfeit all items seized

NOTES

JUDGE E. SCOTT BRADLEY

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
STANLEY O TAYLOR
DOB: 07/30/1955
SBI: 00282836

CASE NUMBER:
1106004204

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	1600.00
RESTITUTION ORDERED	
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	105.00
SHERIFF, SUSSEX ORDERED	585.00
PUBLIC DEF, FEE ORDERED	100.00
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	17.00
DELJIS FEE ORDERED	17.00
SECURITY FEE ORDERED	170.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	240.00
TOTAL	2,934.00

AGGRAVATING-MITIGATING

STATE OF DELAWARE
VS.
STANLEY O TAYLOR
DOB: 07/30/1955
SBI: 00282836

CASE NUMBER:
1106004204

AGGRAVATING

PRIOR VIOLENT CRIM. ACTIVITY
CHILD DOMESTIC VIOLENCE VICTIM
NEED FOR CORRECTIONAL TREATMENT
STATUTORY AGGRAVATION
LACK OF REMORSE
REPETITIVE CRIMINAL CONDUCT
UNDUE DEPRECIATION OF OFFENSE
VULNERABILITY OF VICTIM
OFFENSE AGAINST A CHILD
LACK OF REMORSE

NOTICE OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on December 28, 2012, she caused the attached ***STATE'S ANSWERING BRIEF*** to be served by Lexis-Nexis File and Serve upon:

NICOLE WALKER, ESQUIRE
Office of the Public Defender
Attorney for the Appellant

/s/Josette D. Manning
ID No. 3943
Deputy Attorney General
Department of Justice
State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

DATE: December 28, 2012