IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF SUSSEX COUNTY

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It is telling that the State never attempts to justify the opinion expressed to the jury by the prosecutor that the instruction at issue[1] amounts to "skepticism." The State does acknowledge that "it is the trial judge who determines the proper law to be presented to the jury and counsel may not make arguments to the jury inconsistent with the law." Resp.Br. at 9-10 (*citing Money v. State*, 2008 WL 389277 (Del.)). Yet, it claims that in our case the prosecutor's misstatement of the law, which included an opinion that the jury instruction was "skepticism," was proper. *See* Resp.Br. at 10.

The ordinary definition of "skepticism" includes: "an attitude of doubt or a disposition to incredulity either in general or toward a particular object" and "the doctrine that true knowledge or knowledge in a particular area is uncertain."

[1] The trial court quoted 11 *Del.C.* § 3507 for the jury then instructed it as follows:

> With regard to this provision, caution must be exercised by you, the jury, when a conflict exists between 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.

A-104-105.

http://www.merriam-webster.com/dictionary/skepticism(visited 1/8/13). Thus, the prosecutor expressed an opinion to the jury that the instruction itself was incredulous or uncertain. This was an improper denigration of the law not an argument as to the application of one portion of the instruction to the facts of the case as the State erroneously claims. "As officers of the court, counsel are bound to respect the law, as embodied in the instructions, not to impugn it." *State v. Schnabel*, 279 P.3d 1237, 1258 (Haw. 2012). Here, because it was "improper, […], to argue that instructions are in error or to disagree with them either directly or inferentially" the prosecutor's opinion in this case was improper. Frank J. McGarr, *Prosecution Summations*, 6 Am. Jur. Trials 873 (Originally published in 1967).

The State appears to claim that the prosecutor's comments refer only to the second portion of the instruction which requires the jury to be "particularly careful [in considering an out-of-court statement] if there is no evidence to corroborate an out-of-court statement." This claim is simply wrong. The prosecutor's articulation of the instruction was that caution was not required when considering an inconsistent out-of-court statement if it is supported by additional evidence. This is a misstatement of the law. The instruction required the jury to exercise caution if it found the statements, as did the judge

and the prosecutor, to be inconsistent regardless of whether there was any additional evidence. The second portion of the instruction that tells the jury to be "particularly careful" if there is no evidence corroborating the out-of-court statement is above the initial requirement that the jury exercise caution when the statements are inconsistent.

Here, the prosecutor's erroneous statement of the law militates against the "prudent, disinterested evaluation of the evidence" which "our system demands of jurors." *Delaware Olds, Inc. v. Dixon,* 367 A.2d 178, 179 (Del. 1976). *See DeAngelis v. Harrison*, 628 A.2d 77, 80 (Del. 1993) (*citing Shively v. Klein*, 551 A.2d 41, 44-45 (Del. 1988)). Due to the significance of M.H.'s out-of-court statement and the fact that, at best, the State could argue the forensic nurse's testimony supported only a few of the several counts of criminal conduct against M.H. this Court must reverse Taylor's convictions. A-108-113.

II. TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED TAYLOR'S RIGHT TO A FAIR TRIAL WHEN, DESPITE TAYLOR'S REQUEST, IT REFUSED TO STRIKE IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE AND REFUSED TO ISSUE A CURATIVE INSTRUCTION TO THE JURY.

The State fails to establish the relevance of Thompson-Hill's testimony regarding her examination of E.H. It tries to do so when, for the first time, it claims that the testimony was relevant to the charges that Taylor sexually exploited E.H. Those charges alleged that Taylor took nude photographs of E.H. for his sexual gratification. The State now claims that Thompson-Hill's testimony regarding E.H.'s developmental stage was relevant to establishing that E.H. was of the age of the individual in the photographs. *See* Resp.Br. at 16-17. However, despite many opportunities to do so, the trial prosecutor never made any such argument. Perhaps that is because she recognized that such an argument is attenuated.

When opposing Taylor's request to have the testimony stricken from the record and a curative instruction given, the prosecutor argued only that the relevant portions were E.H.'s statements to Thompson-Hill that "the defendant was in bed with [her] sister last night and that he took pictures of [E.H.] down there with his camera[.]" A-101-102. The prosecutor never mentioned the possibility that the testimony of the examination itself was relevant to the exploitation charges.

In his closing argument, Taylor argued extensively that the State failed to prove, as required, that the individuals in the photographs were under the age of 18. Transcript of June 4, 2012 at pp. 62-65, 71. The prosecutor did not rely in any way on Thompson-Hill's testimony regarding E.H.'s development in responding to Taylor's argument. Transcript of June 4, 2012 at pp. 62-65, 68, 71, 75-76.

The State's next attenuated claim on appeal is that E.H.'s statement to Thompson-Hill that Taylor touched E.H.'s breasts and buttocks supported a conclusion that he took nude pictures of her. This claim is erroneous and the prosecutor below never made any such argument.

The State also claims that Thompson-Hill's testimony that her examination of E.H. did not reveal any injuries or physical signs of sexual abuse was actually beneficial to Taylor. *See* Resp.Br. at 17. The State fails to recognize that the statement was not beneficial as Taylor was no longer charged with crimes involving physical sexual abuse of E.H. Nor would such testimony be required had the examiner not provided the irrelevant and unduly prejudicial testimony that: E.H. was examined as she had given some indication of touching of a sexual nature; during the examination "E.H. was very withdrawn […s]he was very scared to really talk or let us look at her anywhere;" and that Thompson-Hill discovered bruising in E.H.'s rectum and redness in her

vaginal area. A-68-70. The State has failed to establish the relevance of any of this unduly prejudicial testimony.

Contrary to the State's assertion, the trial court's failure to strike the testimony from the record and give a curative instruction was reversible error. Assuming, *arguendo*, that there was some evidence at trial that corroborated the testimony of the complainants, there were several charges based solely on the bare assertions of the complainants. The credibility of the complainants was central. Thus, the trial court's denial of Taylor's request to have the evidence struck and to have the jury instructed to disregard that evidence was an abuse of discretion and a violation of Taylor's right to a fair trial. U.S.Const., Amend.V. His convictions and sentences must be reversed.

III. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED TAYLOR HIS RIGHT TO A FAIR TRIAL WHEN IT ALLOWED THE JURY TO VIEW, DURING DELIBERATIONS, M.H.'S OUT-OF-COURT STATEMENT WHEN HER STATEMENT AND HER IN-COURT TESTIMONY WERE ORIGINALLY PRESENTED TO THE JURY 4 DAYS PREVIOUS AND WHEN THERE WERE SIGNIFICANT INCONSISTENCIES WITHIN HER TESTIMONY AND GAPS BETWEEN HER STATEMENT AND HER TESTIMONY.

The State fails to explain how the judge properly exercised his discretion when he sent M.H.'s out-of-court statement to the jury during deliberations. It simply notes that the jury requested the statement, the judge listened to argument and, then, the judge gave the statement to the jury. *See* Resp.Br. at 24. Even though the judge had discretion in this case, he was still required to "make factual determinations and supply a legal rationale for a judicial decision as a matter of law." *Holden v. State*, 23 A.3d 843, 846 (Del. 2011). Here, the prosecutor did not disagree with Taylor's objection and the only rationale the judge gave for his decision was that there were inconsistencies in the unsworn statement. A-125. That reasoning is precisely what this Court sought to guard against when it created the default rule in *Flonnory*.[2] The fact that there were internal inconsistencies in M.H.'s testimony and gaps between her testimony and statement required the jury to consider both the testimony and the statement on an equal playing field.

[2] *Flonnory v. State* 893 A.2d 507 (Del. 2006).

The judge's abuse of discretion in our case amounts to reversible error because the majority of the evidence regarding the number of times Taylor allegedly touched M.H. came directly from her 3507[3] statement. While the jury got to review the allegations in the unsworn statement, it did not have the same opportunity to review the in-court testimony where M.H. denied the vast majority of those claims. Thus, the trial court abused its discretion to such a degree as it denied Taylor his right to a fair trial. Therefore, his convictions and sentences must be reversed.

[3] 11 *Del.C.* § 3507.

IV. EVEN IF THIS COURT WERE TO CONCLUDE THAT EACH INDIVIDUAL ERROR, STANDING ALONE, DOES NOT WARRANT REVERSAL, THE CUMULATIVE IMPACT OF ALL OF THE ERRORS AMOUNTS TO PLAIN ERROR.

The State erroneously claims that there was not "a single error let alone multiple errors to be cumulated." Resp.Br. at 26. However, Taylor has established multiple errors in arguments I-III, *supra*, and the analysis as set forth in Taylor's Opening Brief applies. *See* Op.Br. at 27-28. Thus, Taylor's convictions and sentences must be reversed.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that each of Taylor's convictions and sentences must be reversed.

\s\ Nicole M. Walker
Nicole M. Walker, Esquire

DATE: January 8, 2013