



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JASON R. GALLAWAY,

Defendant Below,
Appellant,

v.

No. 161, 2012

STATE OF DELAWARE,

Plaintiff Below,
Appellee,

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

APPELLANT'S REVISED OPENING BRIEF

BERNARD J. O'DONNELL
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801
(302) 577-5119

Attorney for Appellant

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NATURE AND STAGE OF THE PROCEEDINGS

In February 2011, the Defendant was charged by information with murder by abuse or neglect first degree. 11 Del. C. § 634(a)(1).

He was tried and convicted of the offense in January 2012.

He was sentenced to life imprisonment without the possibility of probation or parole. (Sentence order attached as Exhibit B).

A notice of appeal was thereafter docketed. This is the Defendant's opening brief on direct appeal.

SUMMARY OF THE ARGUMENT

1. The admission into evidence of an internet YouTube video depicting both inane, clownish behavior and vulgar, offensive language by the defendant and his wife that had been videotaped more than seven months after their infant daughter's death was irrelevant, inflammatory, and unfairly prejudicial under D.R.E. 401 and 403 where the Defendant's acts and state of mind prior to his infant daughter's death, not his character, were the only relevant facts to be decided by the jury.

STATEMENT OF FACTS

Jason R. Gallaway, the Defendant, called 911 when his three month old infant daughter, Marissa, stopped breathing. Seaford police officers and an EMT from the Fire Department arrived shortly thereafter, a pulse was restored, and Marissa was transported to Nanticoke Hospital and then to A.I. DuPont Hospital for Children due to her critical condition and where she later died. At various times, the Defendant told police officers that Marissa had jerked out of his grasp while he was holding her and the back of her head fell on the hard floor. She had also fallen onto the hard floor the previous day because she startled when he seized while she was on his lap, but she seemed to recover from that injury. (D.I. 83, 1/24/12, pp. 16-41, 105-110, 125, 148-149).

Treating physicians from Nanticoke and A.I. DuPont Hospital testified that Marissa had two recent skull fractures and internal brain hemorrhages. In addition to visible bruises on her head, she also had a healing fracture of a rib and her shoulder blade. (D.I. 83, 1/24/12, pp. 50-54, 65-83; D.I. 68, 1/26/12, pp. 80-87). Two days after her admission to A.I. DuPont, physicians could find no brain activity. She was pronounced on December 5, and one of her treating physicians described her death as caused by brain swelling causing lack of blood flow to the brain resulting in brain death. (D.I. 83, 1/24/12, p. 71).

The State retained and presented the testimony of two physicians from the Children's Hospital of Philadelphia familiar with pediatric neurological trauma. Each reviewed Marissa' medical history from the available records. Robert Zimmerman, M.D., a pediatric neuro-radiologist, testified that the cause of Marissa's death were two acute skull fractures resulting in traumatic brain injuries. He testified that based on her history and his review of Marissa's medical records, her injuries were inconsistent with accidental falls. (D.I. 84, 1/25/12, pp. 37-72). Cindy Christian, M.D., board certified in pediatrics and child abuse pediatrics, and on the staffs on the Children's Hospital of Philadelphia and the University of Pennsylvania School of Medicine, also reviewed the infant's history and medical records. She opined that to a reasonable degree of medical certainty, Marissa's injuries were inconsistent with accident. She testified that Marissa's death resulted from abusive head trauma based on the totality of injuries, history, and findings of multiple injuries, multiple times. (D.I. 77, 1/30/12, pp. 37-72).

- I. THE ADMISSION INTO EVIDENCE OF AN INTERNET YOUTUBE VIDEO DEPICTING BOTH INANE, CLOWNISH BEHAVIOR AND VULGAR, OFFENSIVE LANGUAGE BY THE DEFENDANT AND HIS WIFE THAT HAD BEEN VIDEOTAPED MORE THAN SEVEN MONTHS AFTER THEIR INFANT DAUGHTER'S DEATH WAS IRRELEVANT, INFLAMMATORY, AND UNFAIRLY PREJUDICIAL UNDER D.R.E. 401 AND 403 WHERE THE DEFENDANT'S ACTS AND STATE OF MIND PRIOR TO HIS INFANT DAUGHTER'S DEATH, NOT HIS CHARACTER, WERE THE ONLY RELEVANT FACTS TO BE DECIDED BY THE JURY.

Question Presented

Was the admission into evidence of an internet YouTube video filmed seven months after his infant daughter's death unfairly prejudicial to the Defendant because of its tendency to inflame the jury concerning the Defendant's character?

Standard and Scope of Review

The standard and scope of review is abuse of discretion. The question was preserved by the Defendant's objection to testimony about the video or to the playing of the video to the jury. [A107-108].

Merits of Argument

During his testimony, the Defendant maintained that he did not intend to cause the injuries to Marissa that preceded her death. He consistently maintained that the two most recent head injuries to his daughter several days prior to her death resulted when she fell from his grasp while on his lap resulting in her head hitting the hard floor both times. A37-47. He testified that he never intended to harm Marissa. A62.

A principal theme of the State's cross-examination of the Defendant was that he did not care for his daughter. The State cross-examined the Defendant extensively about his playing video games while watching Marissa during the day attempting to suggest that he was frustrated and lost his temper because Marissa's crying interrupted him. A68, 75-89, 93-104. After prolonged and persistent goading on cross-examination challenging whether he loved video games more than caring for his daughter, the Defendant responded that, "And I miss her every day. And every day I think about killing myself, but I can't leave Heather. I miss my daughter. You have no idea how much I miss my daughter." A107.

The State, having discovered that the Defendant and his wife had posted an immature and dim-witted video on YouTube seven months after their daughter's death, and sensing the opportunity to portray the Defendant before the jury as insensitive and crude, immediately asked him whether he was familiar with YouTube. A107. The Defendant's counsel promptly objected, "[b]ecause it is some stupid prank. It doesn't talk about Marissa. It's not state of mind. It's got nothing to do with anything." A107-108.

The prosecutor advised the trial court that the Defendant, while home on bail seven months after his daughter's death, "participated in some Internet radio contest for a stupid trick and he's on camera twice rubbing Listerine

in his nostrils." She further described:

Taking a cotton swab and rubbing Listerine in his nostrils. He is gargling. Is it a prolong period of time. The first time he does it in the video and the recording didn't work. He does it again. The whole time he is laughing and having a good time. The wife is laughing in the background. The whole point he is making it sound like a suicidal individual. The video shows very much the opposite of that." A108.

The Defendant's counsel countered that, "It's a five-minute video in an eight-month period of time." A108. The Superior Court ruled that:

I am finding that the proffer is relevant under Rule 401. It is probative. There is testimony in the record from the Defendant with respect to his state of mind, which is a critical issue. So having put that in play, I think it is relevant under 401. And I'm finding the probative value it not outweighed by the danger of substantial prejudice under 403. So the objection is noted and overruled.

A109. The State sought to not only question the Defendant about the video but to introduce the video into evidence. The Defendant's counsel, responding to the trial court's observation that the Defendant put his state of mind "in play," responded that, "he didn't testify that he was suicidal 24 hours a day, seven days a week. A110.

When the jury returned, the Defendant explained the contest on cross-examination: "There was a contest going on for some home remedies and the winner was going to get web space. So the contest was who would actually post a video of themselves using Listerine as a decongestant." A110-111. The

prosecutor characterized the video for the Defendant as "sort of stupid human tricks," and he did not disagree. A112.

Before the prosecutor attempted to play the video for the jury, the trial court decided to view the video first. A112-113. The Defendant's counsel reiterated his objection, explaining that:

It's not probative to anything that was elicited on cross-examination. In addition to that, I think it is highly prejudicial. They are not introducing it for any other purpose than to make him look bad. It's been out for a long period of time. This is a five-minute period in a ten-month stretch or eight month stretch. I don't think it is relevant. It is off point. [] It is just being stupid and using curse words and there is no reason to play the video other than to make him look bad.

A114-115. The State responded that,

He was very emotional on the stand, saying he was crying, saying he was suicidal, he thought about killing himself every day; he did this trick because he was in pain, he wanted to hurt himself. All of that is shown to be extremely not true from this video. He and his wife are in a very flippant mood. It's not anywhere near the year anniversary of the death of his daughter. Clearly, it is not something I could have even played in my case in chief, didn't even try. I had stumbled across this a few weeks ago. I provided it to the defense when I became aware of the video that he and his wife posted for the world to see. He is going to get up there and boo-hoo about how much he thought about his daughter, how much she meant to him, how much she is on my mind everyday, suicidal everyday. The jury has a right to see on July 1st, he wasn't.

A116. The Defendant's counsel replied that,

The State seems to be introducing evidence about the grief process, I think that will open a whole new can of worms that aren't related. There are two people that are home. They had a daughter die six months previously, seven months, six months, and how people react with grief in different ways. So what if they took a couple of minutes and did something stupid? But I think it is highly prejudicial.

A116. The Superior Court ruled that the YouTube video download could be played for the jury and said,

I'm finding under Rule 401, it is, in fact, relevant. I realized this is a broad statement. He put his state of mind into play. He said he was suicidal. That is probative with respect to the relationship that he shares with his wife and the mother of his child. It shows a glimpse into the kind of relationship they have. So it is relevant as to that. This is very much at issue here in this case as to what happened to that child. I am finding that the probative value is not outweighed by substantial prejudice.

A117. The YouTube video was then played for the jury:

<http://www.youtube.com/watch?v=PJu9Jn1PWQE&context=C3cc935dADOEgsToPDsKJtXX9Cd8BvWnUP7T6wLIFt>, (last viewed September 17, 2012), and admitted into evidence. A118, 123. Exhibit D attached.

The Superior Court abused its discretion by admitting the YouTube video into evidence for the jury's consideration. Even assuming, *arguendo*, that the YouTube had some marginal relevance, that does not make it relevant and admissible. *Floudiotis v. State*, 726 A.2d 1196, 1205 (Del. 1999) ("the test required by D.R.E. 403 does not render inadmissible only

evidence that has no relevance. Rather, the D.R.E. 403¹ balancing test specifically contemplates the inadmissibility of otherwise relevant evidence that is 'substantially' outweighed by prejudicial impact").² That some human beings do something stupid or childish for a few minutes in one day in a year does not prove that they must be childish or insensitive during the surrounding months. That a person thinks of taking their own life and tells a joke two weeks later does little, if anything, to disprove that they genuinely considered taking their own life beforehand. The Superior Court also observed that the YouTube video is probative of the Defendant's relationship with his wife, "a glimpse into the kind of relationship that they have," but does not explain its relevance. Jurors would find that the Defendant and his wife are immature but that is not relevant. If the couple enjoyed sexual relations two weeks after their daughter's death does not prove that the Defendant was insensitive to or not

¹ D.R.E. 403 requires the exclusion of relevant evidence when its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury..."

² *Folks v. State*, 872 A.2d 959 (Del. 2005) (in robbery prosecution, any probative value of defendant's post-arrest statement that he went to bank to panhandle money to buy drugs was substantially outweighed by danger of unfair prejudice); *Timblin v. Kent General Hospital Inc.*, 640 A.2d 1021 (in malpractice action, statistical evidence of bad outcomes, like propensity or bad character evidence, has minimal relevance and any probative value is substantially outweighed by its prejudicial effect).

depressed about the loss of his daughter. The prosecutor relied on a timeline that this incident was “not anywhere near the year anniversary of the death of his daughter,” A115, but, as guilt should not be determined by character, the relevance of this type of human behavior should not be measured by timelines or etiquette benchmarks.

Furthermore, despite the trial court’s statement that “the probative value is not outweighed by substantial prejudice,” that bare conclusion was hardly supported by the YouTube video in question. Marissa, the Defendant’s and Mrs. Galloway’s daughter, or her death, are never mentioned in the video. Had they, specifically the Defendant, spoken about either their feelings about Marissa’s death seven months beforehand during that YouTube video or the manner of her death, there arguably would have been probative value to this video in order to rebut the Defendant’s state of mind, introduced by the State, concerning her death.³ Absent that probative value, the video was nothing more than unalloyed bad character evidence previously calculated to tarnish the

³ *State v. McIntyre*, 284 P.3d 1284 (Ore. 2012) (Where defendant was being prosecuted for promoting prostitution, rap music videos in which defendant made general statements about his involvement in the prostitution trade were not relevant to show intent); *Joyne v. State*, 797 A.2d 673, 677 (Del. 2002) (lyrics to rap song were admissible because defendant specifically referenced animosity towards victim of assault which showed his intent and state of mind).

Defendant's character before the jury.⁴ In no manner did it address the original offense or his state of mind about his daughter's death and showed nothing other than an appetite for gross humor as indicia of general character, however.⁵ In that respect, based on only the video itself, it could not have helped but succeed. The Defendant, goaded by the State on cross-examination that he was not affected by his daughter's death, responded that he was upset and depressed about her death. The State, its trap set, countered with evidence that no jury could fail to overlook - a YouTube video that showed the Defendant as a foolish, obnoxious, unfunny, and unlikeable clown. *United States v. Loughry*, 660 F.3d at 972 (video

⁴ Prior to trial, the State anticipated that its video was not relevant but was able to "foresee certain scenarios at trial where the court might allow me to play this video"). Exhibit C attached. See *United States v. Loughry*, 660 F.3d at 973 ("a backdoor attempt" to bring in the [unfairly prejudicial evidence] by manufacturing a relevant purpose for it"); see also *Tucker v. State*, 515 A.2d 398 (Del. 1986) ("the doctrine of opening the door is limited to testimony that might explain or contradict the testimony offered by the opposing party on direct examination; it cannot be 'subverted into a rule for injection of prejudice'" (internal citation omitted)).

⁵ *United States v. Loughry*, 660 F.3rd 965, 974 (7th Cir. 2011) ("Evidence is unduly prejudicial if it creates a genuine risk that the emotions of the jury will be excited to irrational behavior, and the risk is disproportionate to the probative value of the offered evidence"); see also *United States v. Cunningham*, 694 F.3d 372 (3d Cir. 2012) (probative value of video excerpts of child pornography was substantially outweighed by the danger of unfair prejudice); *United States v. Hands*, 184 F.3d 1322 (11th Cir. 1999) (in drug prosecution, defendant's physical abuse of his wife did not contradict her testimony on his behalf because she did not testify about their relationship).

excerpts included "the kind of highly reprehensible and offensive content that might lead a jury to convict because it thinks that the defendant is a bad person and deserves punishment, regardless of whether the defendant committed the charged crime"); see also *United States v. Cunningham*, 694 A.2d at 372 ("this is a case where we can confidently say that the probative value of some of the video excerpts was 'so minimal that it [was] obvious ... that the potential prejudice to the defendant substantially outweigh[ed] any probative value that [they] might have'" (quoting *Loughry*, 660 F.3d at 971))).

If no other evidence had been presented at this trial, it was inescapable that any jury would draw very unfavorable inferences about the character of the creators of this video solely from their video. That independently inflammatory nature of this video is why the Defendant's counsel vigorously maintained that, "This is a five-minute period in a ten month stretch or eight month stretch ... It is just being stupid and using curse words and there is no reason to play the video other than to make him look bad." A115. Due to that highly inflammatory nature, which the Superior Court did not discuss or weigh, if the video had any probative value at all, which is highly questionable, "its probative value [was] substantially outweighed by the danger of unfair prejudice," D.R.E. 403, and it should not have been admitted into

evidence. *United States v. Gamory*, 635 F.3^d 480, 493 (11th Cir. 2011) (“Based on our independent review of the rap video and the totality of the record, we conclude that it was error under Fed. R. Evid. 403 to play this rap video to the jury”).

CONCLUSION

For the reasons and upon the authorities cited herein,
the Defendant submits that his conviction and sentence should
be reversed.

Respectfully submitted,

/s/ Bernard J. O'Donnell
BERNARD J. O'DONNELL [#252]
Office of Public Defender
Carvel State Building
820 N. French Street
Wilmington, DE 19808
(302) 577-5119

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