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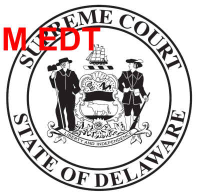

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JASON T. GALLAWAY, Defendant-Below, Appellant, v. **STATE OF DELAWARE,** Plaintiff-Below, Appellee.	)	No. 161, 2012

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

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

The appellant, Jason R. Gallaway, was arrested on December 5, 2010 and subsequently charged by information with murder by abuse in the first degree.[1] Gallaway was convicted after a seven-day jury trial in the Superior Court.[2] Gallaway was subsequently sentenced to life imprisonment.[3] He has appealed that conviction to this Court; this is the State's answering brief.

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[1] *See* A-1, Docket Item ("D.I.") 1, 2.

[2] *See* A-6, D.I. 49.

[3] *See State v. Gallaway*, Del. Super., ID No. 1012003724, Stokes, J. (Mar. 23, 2012) (Sentence Order) (Ex. B to Op. brf.).

SUMMARY OF THE ARGUMENTS

1. Gallaway's sole claim on appeal is DENIED. The video of Gallaway joking, engaging in lighthearted banter, and participating in a radio contest was relevant because he had placed his demeanor and mood after his infant daughter's murder squarely at issue in the case. And the probative value of the video, depicting no criminal conduct of any kind, was not outweighed by the danger of unfair prejudice. However, even if admission of the video was somehow improper, any error was entirely harmless because there was overwhelming evidence of Gallaway's guilt.

STATEMENT OF FACTS

At 2:34PM on December 2, 2010,[4] Seaford Police received an emergency call from Jason Gallaway that his three-month-old daughter Marissa was not breathing.[5] Sergeant Michael Rapa of the Seaford Police Department responded to the 9-1-1 call.[6] When he arrived, he found Gallaway standing in the doorway and Marissa lying on a nearby coffee table.[7] A video game was paused on the television.[8] Marissa was gray, with blue lips,[9] and had a bruise on her forehead.[10] She was not breathing.[11] Sgt. Rapa checked the child for a pulse, and found none. He immediately began administering CPR.[12] Sgt. Rapa, other officers, and an EMT were eventually able to resuscitate Marissa to the point where she had a pulse.[13] A short time later, an ambulance arrived to transport the baby to Nanticoke Hospital.[14]

After Marissa was taken away by ambulance, Sgt. Rapa asked Gallaway what had happened. Gallaway told him that he had been

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[4] B-17.

[5] B-79.

[6] B-55-56.

[7] B-57.

[8] B-63, 82.

[9] B-59.

[10] B-81.

[11] B-59.

[12] B-60.

[13] B-18.

[14] B-18.

playing a video game when his daughter began crying.[15] Gallaway then told the officer that he had brought the baby into the living room to perform back and neck exercises with her.[16] And it was during those exercises, according to Gallaway, that Marissa jerked out of his hands and fell to the floor.[17] Gallaway was then transported to the police station.[18] At the station, Gallaway told officers that he had performed the same "exercises" with his daughter the day before, and had also dropped her then.[19]

Dr. Robert Hill was working in the emergency room of Nanticoke Hospital on the afternoon of December 2nd.[20] By the time Marissa arrived at the hospital, she was not breathing, had no pulse, was "pale, dusky," and did not respond to light.[21] She did not respond to painful stimuli.[22] Dr. Hill and his team intubated the child, drilled a hole into her leg to deliver needed fluids, and began chest compressions.[23] Once Marissa's pulse had returned, Dr. Hill ordered a battery of tests to determine what was wrong with the child.[24]

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[15] B-62.

[16] B-62.

[17] B-62.

[18] B-64.

[19] B-65-66.

[20] B-22.

[21] B-25.

[22] B-25.

[23] B-26-27.

[24] B-29.

The tests performed on Marissa showed that she had suffered a number of injuries over a period of time. She had suffered a skull fracture and was bleeding in her skull. Medical personnel also noted bruising underneath the child's chin, on her jaw, and on her forehead.[25] Dr. Hill later discovered that Marissa had a healing fractured rib.[26] After stabilizing Marissa, she was transferred to A.I. DuPont Hospital.[27]

Marissa was admitted to the pediatric intensive care unit at A.I. DuPont Hospital.[28] When she arrived, Marissa was dependent on a ventilator to survive, and showed only minimal neurological function.[29] And, she only deteriorated from there.[30] The three-month-old had suffered a severe injury to the upper part of her brain and brainstem, several skull fractures, and bleeding was found in several areas around her brain.[31] She required a ventilator.[32] And when doctors examined her, Marissa was found to have suffered retinal and vitreous hemorrhages, an injury to her left forearm, and had previously

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[25] B-3, 4-10, 54.

[26] B-29.

[27] B-33.

[28] B-42.

[29] B-43.

[30] B-43.

[31] B-1, B-46.

[32] B-1.

suffered a fractured shoulder.[33] Inside the child's abdomen, doctors found a milky-colored fluid that was indicative of trauma to her lymphatic system.[34] Her diagnosis was "suspected non-accidental trauma."[35] Marissa died at 7:13PM on December 5, 2010.[36] Multiple experts concluded that Marissa's injuries were inconsistent with even several short falls.[37] Instead, Marissa's injuries were caused by non-accidental trauma.[38] And the medical examiner confirmed that Marissa ultimately died from blunt-force trauma to the head.[39]

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[33] B-46-48.

[34] B-2, 49.

[35] B-1.

[36] B-50, 52.

[37] B-87, 90-91. Indeed, Dr. Cindy Christian testified that Marissa had suffered multiple injuries that "are not commonly seen in any baby."

[38] B-88, E-90.

[39] B-89.

I. THE SUPERIOR COURT DID NOT ERR BY PERMITTING THE STATE TO IMPEACH GALLAWAY'S TESTIMONY BY PLAYING A VIDEO THAT HE CREATED AND PUBLICLY POSTED ON YOUTUBE WHILE RELEASED ON BOND.

QUESTION PRESENTED

Was a video that Gallaway created and publicly posted on YouTube depicting him laughing, joking, and participating in a radio contest properly introduced at trial as impeachment evidence?

STANDARD AND SCOPE OF REVIEW

"Determination of relevancy under D.R.E. 401 and unfair prejudice under D.R.E. 403 are matters within the sound discretion of the trial court, and will not be reversed in the absence of clear abuse of discretion."[40] "'An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice.'"[41]

MERITS

Jason Gallaway was arrested in December 2010 and held until March 2011, when his wife posted his bail.[42] On July 1, 2011 - seven months after the death of his daughter and while released on bail - Gallaway participated in an online radio contest.[43] As part of that contest, Gallaway posted a video - entitled "When idiots try to win a contest."

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[40] *Mercedes-Benz of N. Am. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358 (Del. 1991). *See also Weddington v. State*, 2007 WL 760571, at ¶9 n. 5 (Del. Mar. 14, 2007); *Smith v. State*, 913 A.2d 1197, 1232 (Del. 2006); *Lampkins v. State*, 465 A.2d 785, 790 (Del. 1983).

[41] *Harper v. State,* 970 A.2d 199, 201 (Del. 2009).

[42] A-02, D.I. 9.

[43] A-107-118.

– depicting himself swabbing his nostrils and gargling with Listerine to YouTube. In the video, Gallaway is seen laughing, joking with others in the room, and swearing.[44]

At trial, Gallaway repeatedly testified that he became suicidal after his daughter's death. On direct examination, Gallaway testified that he was placed on "suicide watch" for several weeks after his arrest and initial incarceration at the Sussex Correctional Institution.[45] And on cross-examination, Galloway repeatedly mentioned that he was "on suicide watch" while incarcerated.[46] When specifically asked whether he had actually attempted suicide, Gallaway responded that "the thought [had been] running through [his] mind" but that there were limited means in the prison environment.[47] Finally, Gallaway testified that "every day [he] think[s] about killing [himself]."[48]

In response to that remark, the prosecutrix asked Gallaway if he was familiar with, and had posted videos to, YouTube.[49] Gallaway responded that he was and had. Defense counsel then objected.[50]

Defense counsel first argued that the video was not relevant. The State responded by arguing that the tape was relevant because it

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[44] *See* Ex. C to Op. brf.

[45] A-47, 61.

[46] A-75, 90.

[47] A-90.

[48] A-107.

[49] A-107.

[50] A-107.

directly contradicted Gallaway's repeated assertions that he was suicidal as a result of Marissa's death.[51] The Court then ruled that the video was admissible and permitted the State to question Gallaway about it. However, prior to the tape being published to the jury, the trial court reviewed it.[52] After watching the video, the Court again entertained argument on its admissibility.[53] Gallaway argued that the tape was irrelevant and, even if relevant, was inadmissible because the probative value of the recording was outweighed by the substantial danger of prejudice.[54] In response, the prosecutrix argued:

> 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.[55]

The trial court then denied the Gallaway's objection, ruling that the tape was relevant because Gallaway had placed his state of mind "into play" by testifying that he was suicidal. The court also ruled that the probative value of the video was not outweighed by the danger of

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[51] A-108.

[52] A-112.

[53] A-114.

[54] A-114-15.

[55] A-115-16.

substantial prejudice.[56] Now, as his sole claim on appeal, Gallaway renews his argument that the video was inadmissible under Rules of Evidence 401 and 403. He now appears to argue that the Superior Court's alleged error in admitting the video was so unfairly prejudicial as to deprive him of a fair trial. For the following reasons, those arguments should be rejected.

A. THE VIDEO WAS RELEVANT.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[57] As this Court recently explained, "the definition of relevance encompasses materiality and probative value. Evidence is material if the fact it is offered to prove is 'of consequence' to the action. Evidence has probative value if it 'advances the probability' that the fact is as the party offering the evidence asserts it to be."[58] Had the State sought to admit the video during its case-in-chief, Gallaway would have been correct in arguing that the video was not relevant at that point in the action. However, Gallaway made the recording relevant by repeatedly placing his state of mind after the murder of his daughter - i.e. claiming his constant state of mourning was inconsistent with one who could have the requisite state of mind to cause Marissa harm - at issue. The State had a right to challenge that contention.

[56] A-117.

[57] D.R.E. 401.

[58] *Watkins v. State*, 23 A.3d 151, 155 (Del. 2011) (internal citations omitted).

Rule of Evidence 607 permitted the State to attack Gallaway's credibility on that point. "Through cross examination, 'the believability of a witness and the truth of his testimony are tested.'"[59] "On cross-examination of a witness, every permissible type of impeachment may be employed[,] for cross-examination has as one of its purposes [testing] the credibility of the witness."[60] So long as "the matter is not collateral, extrinsic evidence may be introduced disputing the witness' testimony on direct examination or denial of truth of the facts asserted in a question propounded on cross-examination."[61]

Here, impeaching Gallaway's credibility was not collateral - it was he who provided the only alternative theory as to how Marissa suffered her injuries.[62] Gallaway repeatedly testified that he was depressed and suicidal as a result of the death of his daughter. The clear import of that testimony was to imply that he could not have intentionally or recklessly abused his daughter. And the video that Gallaway produced and publicly posted during this supposed period of depression and suicidal ideation clearly contradicted that testimony.

B. THE PROBATIVE VALUE OF THE VIDEO OUTWEIGHED THE DANGER THAT GALLAWAY WOULD SUFFER UNFAIR PREJUDICE.

Nor did the Superior Court err by concluding that the probative value of the video was not substantially outweighed by any danger of

[59] *Wilkerson v. State*, 953 A.2d 152, 156 (Del. 2008).

[60] *Id.* at 156 (quoting Michael H. Graham, Handbook of Federal Evidence § 607:2 (6th ed. 2006)).

[61] *Id.*

[62] *See id.* at 157.

unfair prejudice. Delaware Rule of Evidence 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. "The determination of whether the probative value of a particular piece of evidence is substantially outweighed by the danger of unfair prejudice is a matter which falls particularly within the discretion of the trial judge, who has the first-hand opportunity to evaluate relevant factors."[63] "[S]uch rulings will be consistently upheld unless 'it is shown that a ruling was a clear abuse of discretion or that it affected the substantial rights of the defendant.'"[64] Here, the trial judge reviewed the video and concluded that its probative value outweighed the danger of unfair prejudice. That conclusion was not an abuse of discretion.

C. EVEN IF IMPROPER, ANY ERROR IN ADMITTING THE YOUTUBE VIDEO WAS HARMLESS.

But even if this Court finds that the Superior Court abused its discretion by admitting Gallaway's YouTube video at trial, any error arising therefrom was harmless as the admission of that video cannot be said to have been the principal factor in his conviction.[65] Once a court has determined that evidence has been admitted in error, the burden rests with the State to demonstrate, beyond a reasonable doubt,

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[63] *Williams v. State*, 494 A.2d 1237, 1241 (Del. 1985) (citing *Rush v. State,* 491 A.2d 439 (Del. 1985)).

[64] *Ciccaglione v. State*, 474 A.2d 126, 130 (Del. 1984) (quoting *United States v. Golden*, 671 F.2d 369, 371 (10th Cir. 1982)).

[65] *See Sanabria v. State*, 974 A.2d 107, 120 (Del. 2009).

that the erroneously admitted evidence was a harmless error.[66] "Harmless errors are those that do not constitute significant prejudice to the adversely affected party that would operate to deny that party a fair trial."[67] Harmless error analysis is a "case-specific, fact-intensive exercise."[68]

This Court has provided guidance in how harmless error should be measured. "An error in admitting evidence is harmless only when the properly admitted evidence, taken alone, is sufficient to support a conviction."[69] In this instance, the evidence of Gallaway's guilt was overwhelming. The medical testimony proffered by the State alone conclusively established that the injuries suffered by three-month-old Marissa could not have been sustained in a sixteen-inch fall. Gallaway offered no contradictory medical opinion. And the State offered the testimony of Gallaway's cell-mate, who testified that Gallaway had confessed that he killed the child because she had interrupted his video game playing.

Gallaway's implausible story that his daughter was killed by two short, accidental, falls was directly contradicted by the voluminous evidence admitted against him. Multiple doctors testified that Marissa could not have suffered the injuries she did from a fall –

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[66] *See Van Arsdall v. State*, 524 A.2d 3, 11 (Del. 1987); *Dawson v. State*, 608 A.2d 1201, 1204-05 (Del. 1992), *citing Chapman v. California*, 386 U.S. 18, 24 (1967).

[67] *See Mills v. State*, 2007 WL 4245464, at ¶ 20 (Del. Dec. 3, 2007).

[68] *Czech v. State*, 945 A.2d 1088, 1098 (Del. 2008); *Trump v. State*, 753 A.2d 963, 970 (Del. 2000).

[69] *Gordon v. State*, 1997 WL 812630, at ¶6 (Del. Dec. 23, 1997)(quoted by *Seward v. State*, 723 A.2d 365, 373 n.27 (Del. 1999)).

even multiple falls – of sixteen inches. Indeed, the prevailing medical opinion was that the injuries to that young child were deliberately caused.[70] In light of the fact that the evidence against him was so overwhelming, Gallaway cannot establish that his jury was misled by any allegedly improper evidence. Thus, it cannot be said that any error was anything but harmless. Consequently, this Court should affirm Gallaway's conviction.

[70] *See* A-152-53.

CONCLUSION

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

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