N THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN SCHWAN, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee,	No. 246, 2012

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

APPELLANT'S OPENING BRIEF

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DATED: August 16, 2012

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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was charged by indictment with rape second degree, unlawful sexual conduct (rape second degree) by a sex offender against a child, rape fourth degree, and providing alcohol to a minor (two counts). The unlawful sexual conduct by a sex offender against a child was severed before trial for a bench trial based on the evidence presented at trial. After a jury trial, the Defendant was acquitted of rape second degree, rape fourth degree, and the two alcohol offenses, but convicted by the jury of two included offenses of unlawful sexual contact second degree, and by the trial judge of unlawful sexual conduct by a sex offender against a child.

The Defendant was sentenced on the first unlawful sexual contact second degree offense to three years imprisonment at Level 5 suspended after one year for probation. On the second unlawful sexual contact second degree offense, he was sentenced to three years Level 5 imprisonment suspended after six months for probation. On the unlawful sexual conduct against a child offense, he was sentenced to five years imprisonment at Level 5 suspended after six months for probation. He was also ordered to pay $4,812.05 restitution, and adjudicated a Tier 3 Sex Offender for sex offender registration purposes.

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

SUMMARY OF THE ARGUMENT

1. The Superior Court erred by not excluding for cause a juror who did not disclose that she knew a prosecutor in the Department of Justice although she was advised by that prosecutor to disclose to the court before she was selected as a juror that she knew the prosecutor.

STATEMENT OF FACTS

"A.P."[1] testified that on Friday, June 3, 2011, she was seventeen years old at the time of the alleged offenses. She had driven to her friend, Stephanie Schwan's house to stay over that night with Stephanie and their other friend Lauren Bridgeman. She testified that they had watched a DVD movie that night in the living room and then went into Stephanie's bedroom to watch another movie. A.P. admitted that she had been drinking with her friends. A.P. testified that while the three friends were watching the movie on Stephanie's bed, Stephanie's father entered the bedroom and also lay down on the bed with them to watch the movie. A.P. testified that Lauren and Stephanie fell asleep during the movie and that she was trying to sleep. They were to her left and the Defendant was to her right. As she was trying to fall asleep, she testified that the Defendant, who was next to her, moved closer to her and then stuck his fingers in her vagina and performed fellatio on her. She testified that she was scared and pretended to still be asleep but still tried to arouse Lauren, who was next to her. She testified that the Defendant said something like, "Don't act like your mad at me," to her. A.P. testified that Stephanie woke up, turned on the lights, and the Defendant left the bedroom. After that, she told Stephanie and Lauren what had happened to her. She admitted that the

[1] The Complainant's initials are used with the expectation that the Court will assign a pseudonym under Rule 7.

Defendant did not threaten or harm her. She also admitted that she could have tried to stop the Defendant or left but that she did not because she was scared. A (D.I. 46, 2/22/12, pp. 33-63).

Stephanie Schwan, the Defendant's daughter, testified that she was also seventeen years old at that time and that she and her friends were watching a movie in her bedroom when they fell asleep. Her father had been watching also. Neither she nor her father had been drinking. She testified that her father turned off the television, took the movie out and left the bedroom. When she awakened later, she testified that A.P. said that her father had done stuff to her. She noticed that A.P.'s shorts seemed high. She testified that A.P. seemed groggy, upset, and scared. She said that A.P. told her that her father had fingered her and ate her out. A.P. and the others then fell back asleep. A (D.I. 46, 2/22/12, pp. 65-87).

Lauren Bridgemen testified that she was almost sixteen years old at the time of the alleged offense. They watched a movie, were drinking alcohol, and had fallen asleep on Stephanie's bed. She admitted that she and A.P. were drinking alcohol and Vodka shots that were in Stephanie's bedroom. Stephanie's father had been in the bed next to A.P. when she had fallen asleep. When she awakened, A.P. and Stephanie were talking and A.P. was crying. She testified that A.P. told them that the Defendant had put his fingers and mouth in the A.P.'s private area. She testified that A.P. told them she had pretended to be asleep. A (D.I. 46,

2/22/12, pp. 93-103).

I. THE SUPERIOR COURT ERRED BY NOT EXCLUDING FOR CAUSE A JUROR WHO DID NOT DISCLOSE THAT SHE KNEW A PROSECUTOR IN THE DEPARTMENT OF JUSTICE ALTHOUGH SHE WAS ADVISED BY THAT PROSECUTOR TO DISCLOSE TO THE COURT BEFORE SHE WAS SELECTED AS A JUROR THAT SHE KNEW THE PROSECUTOR.

Question Presented

Did the Superior Court abuse its discretion by not replacing with an alternate a juror who had inaccurately responded to the court's *voir dire* intended to identify potential juror bias about whether she knew a prosecutor in the Department of Justice?

Standard and Scope of Review

The standard and scope of review is abuse of discretion. The question was preserved by the Defendant's motion request to replace the juror and replace her with an available alternate. A29.

Merits of Argument

Shortly after the jury was struck and sworn, the trial prosecutor informed the Superior Court that he had learned that one of the jurors, Juror Number 4, knew one of his fellow prosecutors in the Kent County Office, Nicole Hartman, although she had responded negatively to the question of whether she knew any of the Department of Justice prosecutors during jury *voir dire.* A13. The specific question had been: "The State is represented by Jason Cohee, a Deputy Attorney General … Do you know the attorneys in this case, or any other

attorney or employee in the offices of the Attorney General or defense counsel? A8.

When Juror #4 was asked by the Superior Court why she did acknowledge that she knew one of the Department of Justice attorneys, she said that she thought that the court only meant whether she knew the attorneys in this particular case. A18. She acknowledged that she knew one of the other prosecutors because she was the director at the day care center where that prosecutor's child attended. A18. In addition, although Juror #4 admitted that she had spoken with the other prosecutor before because the child attended the day care center, she specifically denied that she had spoken with Ms. Hartman about being called as a juror in this case, "I did not," and had not spoken with Ms. Hartman that week. A19-20. After Juror #4 was questioned, the defense moved that she be excused and replace with an alternate her denial that she had been told by Ms. Hartman to come forward and inform the court that she knew Ms. Hartman was contradicted by what the trial prosecutor represented had occurred. A21-22.

The Superior Court remarked that it appeared that she had misinterpreted the original *voir dire* question in good faith and that she had only had a conversation with Ms. Hartman about being called as a juror. A23. That was incorrect because she denied having a conversation with Ms. Hartman about the case. A20. The Defense asked that Ms. Hartman relate to the

Superior Court what had occurred if she was available. A24. Ms. Hartman subsequently advised the Superior Court that about a week before Juror #4 had informed her that she was summoned for jury duty and that Ms. Hartman advised her that if she was called as a juror, she should inform the trial judge that she knows Ms. Hartman because tht is one of the court's questions: "So I said make sure that you tell them that you know me if you get called and you're asked that question." A26-27.

The Defendant's counsel advised the Superior Court that the clear inconsistency between Juror #4's account of what happened – that she had never spoken with Ms. Hartman about being summoned as a juror and Ms. Hartman's account – that Juror #4 had been advised by Ms. Hartman to come forward if she was called and advise the court that she knew Ms. Hartman was "an issue for the defense." A29. Nonetheless, the Superior Court found that concern not to have merit based on its earlier remarks and denied the Defendant's request to excuse Juror #4 and substitute an available alternate. A29.

Where a juror's impartiality was previously examined, the Court has previously observed that:

> *Voir dire* is the historic method used to identify bias in prospective jurors and is critical to protecting a defendant's right to a fair trial by an impartial jury The purpose of *voir dire* examination is to provide the court and the parties with sufficient information to decide whether prospective jurors can render an impartial verdict based on the evidence developed at trial in

> accordance with the applicable law. One of the primary safeguards for impaneling a fair and impartial jury is a defendant's right to challenge prospective jurors, either peremptorily or for cause. That right to challenge is seriously impaired by a juror's denial or nondisclosure of material information in response to a *voir dire* question.

Banther v. State, 823 A.2d 467, 482 (Del. 2003). Juror #4's denial that she had been advised to come forward and inform the trial court that she knew Ms. Hartman if she was called by the juror was contradicted in the record by the State's own representative. It was undisputed that she had not informed the Superior Court that she knew another prosecutor with whom she had a business client relationship and also that she apparently lacked candor when she denied being advised by Ms. Hartman to come forward and advise the court that she knew Ms. Hartman if she was called as a juror. If this had been known before she was selected as a juror, it would have provided a basis for a challenge for cause or a peremptory challenge. *Id.* at 484. Accordingly, the Superior Court abused its discretion by failing to excuse Juror #4 under these circumstances when an alternate juror was available.

CONCLUSION

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

Respectfully submitted,

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