IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

STATE'S ANSWERING BRIEF

John Williams
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19904-6750
(302) 739-4636
Bar I.D. # 365

DATE: September 14, 2012

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES **Page**

STATUTES AND OTHER AUTHORITIES

NATURE AND STAGE OF PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Steven W. Schwan's August 16, 2012 Opening Brief. This is the State's Answering Brief in opposition to Schwan's direct appeal of his Kent County Superior Court jury convictions for two counts of second degree unlawful sexual contact and his bench conviction for sex offender unlawful sexual conduct against a child.

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court Judge did not abuse his discretion in denying two defense trial requests to remove a juror for cause. (A-22-23, 29). The juror was the director of a daycare center where another prosecutor not participating in Steven Schwan's criminal trial brought her daughter. No personal, family, or social relationship existed between the juror and the nonparticipating Deputy Attorney General. This situation does not present such an egregious circumstance that a presumption of prejudice exists. Schwan has made no specific showing of prejudice, and the actual jury verdict is not suggestive of any denial of the right to a fair trial before an impartial jury.

STATEMENT OF FACTS

On Friday evening, June 3, 2011, three high school girlfriends (Lauren Bridgeman, Stephanie Schwan, and "A.P."[1]) gathered at 55 Brittney Lane, Hartly, Kent County, Delaware, the home of the accused, Steven W. Schwan. (A-30-31, 51-52, 79-80). The hostess, Stephanie Schwan, is the daughter of the defendant Steven W. Schwan. (A-51-52).

According to the February 21, 2012 Superior Court jury trial testimony of the then 17 year old complaining witness, A.P. (A-30), the three girls rented movies that evening (A-32), and Stephanie's father, Steven W. Schwan, bought vodka and hard lemonade at a liquor store. (A-33). A.P. testified that everyone was drinking alcohol when the group returned to the Schwan home that evening. (A-33-34). All three of the girls were underage for alcohol consumption. (A-30, 50, 79). In fact, Lauren Bridgeman was only 15 years old on June 3, 2011. (A-79).

A.P. recalled that the girls watched one movie in the Schwan living room (A-34), and then moved to Stephanie's bedroom to watch a second movie. (A-35). The three girls were lying on Stephanie's bed watching the movie, and Steven Schwan joined the trio on the bed. (A-35-36, 54-56, 62, 84-85). A.P., who was wearing boxer shorts and a camisole, felt awkward that Steven Schwan was on the bed behind her, and she tried to act like she was asleep. (A-36).

---

[1] "A.P." is a pseudonym selected in Appellant Steven Schwan's August 16, 2012 Opening Brief for the minor complaining witness.

The accused began rubbing A.P.'s back and legs, and when Steven Schwan stuck his fingers "inside of my vagina," A.P. said she became scared. (A-37). She was even more frightened when Mr. Schwan "stuck his tongue in my vagina." (A-38). Stephanie and Lauren fell asleep during the second movie, but A.P. said she was awake the entire time the second movie was playing in Stephanie's bedroom. (A-44). After the two sexual assaults, Stephanie woke up, turned on the bedroom lights, and Stephanie's father left the room. (A-39).

Lauren Bridgeman testified at the Superior Court jury trial and stated that her mother took her to the Schwan residence in Hartly on June 3, 2011. (A-81). Bridgeman said there was alcohol at the Schwan house, vodka and wine coolers, but she did not know who provided the beverages. (A-82-83). Bridgeman admitted consuming about seven shots of vodka and two hard lemonades while at Stephanie Schwan's home. (A-83). Bridgeman confirmed that there were four people in Stephanie's bedroom watching a movie, and that she was lying on Stephanie's bed between the other two girls. (A-84-85). After watching the movie previews, Bridgeman said that she fell asleep. (A-84). When Bridgeman awoke, the other two girls were talking and A.P. was crying. (A-86). A.P. said that Steven Schwan "touched with his fingers and his mouth on her private area." (A-86).

Stephanie Schwan, the accused's daughter (A-51-52), was 18 years old at the time of her father's Kent County Superior Court

---

Del. Supr. Ct. R. 7(d).

jury trial. (A-50). She gave a different account of what occurred at her Hartly home on the evening of June 3, 2011, and the early morning of June 4. (A-50-74). According to Stephanie, A.P. brought the alcohol to her home (A-66), and both A.P. and Bridgeman were drinking, but she did not drink. (A-53). Stephanie added that her father was not drinking. (A-54).

Stephanie Schwan confirmed that the three girls were watching a movie in her room and that her father was also sitting on the bed. (A-54-56). Both A.P. and Bridgeman fell asleep during the movie according to Stephanie. (A-56). Although Stephanie noticed that A.P.'s shorts were raised up (A-56), she did not see her father sexually assault A.P. (A-68). A.P. seemed upset and scared (A-57), and "she said that he had went down on her and that he had fingered her." (A-68). Stephanie observed that A.P. appeared intoxicated (A-67), and half the bottle of blue sky vodka A.P. brought was gone. (A-66, 74).

The accused, Steven W. Schwan, elected not to testify at his Superior Court jury trial.

I. IT WAS NOT AN ABUSE OF DISCRETION TO DECLINE TO REMOVE FOR CAUSE A JUROR ACQUAINTED WITH ANOTHER PROSECUTOR NOT PARTICIPATING IN THE TRIAL

QUESTION PRESENTED

Should the Superior Court trial judge have removed for cause a juror who was acquainted with another prosecutor who was not participating in the trial?

STANDARD AND SCOPE OF REVIEW

A trial judge's determination not to remove a juror for cause (A-22-23, 29) is reviewed on appeal for an abuse of discretion. See Knox v. State, 29 A.3d 217, 220 (Del. 2011).

MERITS OF ARGUMENT

During the February 21, 2012 Kent County Superior Court jury selection in the prosecution of Steven W. Schwan the jury venire was asked: "Do you know the attorneys in this case, or any other attorney or employee in the offices of the Attorney General or defense counsel?" (A-8). The following day after a jury had been selected in Schwan's trial, the prosecutor advised the presiding Superior Court Judge that Juror No. 11[2] "may also know Nicole Hartman from my office...." (A-13). After a discussion with counsel (A-13-17), the trial judge brought Juror No. 11 into

[2] Schwan in his August 16, 2012 Opening Brief in this appeal identifies the juror in question as "Juror Number 4" (Opening Brief at 6), but the trial transcript identifies the individual

the courtroom for questioning. (A-17-21). When the trial judge repeated the voir dire question about acquaintanceship with "any other attorney or employee in the offices of the Attorney General or defense counsel," Juror No. 11 responded: "I know an attorney that works for the State." (A-18). The trial judge then pointed out to the juror that "You did not come forward yesterday," and Juror No. 11 answered, "I thought it just said the attorney in this case." (A-18). The juror also agreed with the trial judge that she had "Misinterpreted the question." (A-18).

When next asked who she knew in the Attorney General's office, Juror No. 11 answered: "I work at a childcare center, and one of the attorney's child comes to my center and her name is - her child's name is Allison. I don't know the mother's last name." (A-18). The juror also responded that the only basis for her acquaintanceship with the attorney was the fact that the attorney's child was enrolled at the childcare center where the juror was the director. (A-20). Juror No. 11 said she had not told the attorney that she was called as a juror (A-20), and she also disclosed that she knew the court reporter. (A-21).

After Juror No. 11 exited the courtroom (A-21), Schwan's defense counsel asked "to have the juror removed." (A-21). Defense counsel added, "...it's a little troubling to me that a pretty clear jury voir dire question was read, and it appears she had been instructed beforehand to come forward, and she didn't,

---

as "Juror No. 11." (A-13).

and upon questioning by the Court, she denied being instructed to do that." (A-22).

The trial judge denied the defense request to remove the juror, and ruled:

> All right. The Court notes that this juror does acknowledge the fact that she did have a discussion telling the mother of her child who goes to the same daycare center for which she's the director of which she's aware works for the office of the Department of Justice, although she doesn't recall the name, but she indicates it's an impersonal relationship and probably one only developed by virtue of the fact she's the director of the childcare center for which Ms. Hartman drops her child off.
>
> She had a conversation, not about anything about this case, per se, but about the fact that she was called as a juror. She hasn't had any conversations since then, so she's abided by the admonitions that the Court gave to her and all the other jurors when they were sworn in. She was not sworn as a juror when she had the conversation.
>
> It is true that she did not respond and came forward when the Court asked the question whether she knew the attorneys in this case or any other attorney or employee in the offices of the Attorney General or defense counsel, but it is understandable how she could have not considered the fact that this applied to attorneys who were not present in court but yet work for the offices of the Attorney General or office of defense counsel.
>
> So the Court does not believe that there's a basis for cause to remove the juror, so the application is denied.

(A-22-23).

Following the trial judge's refusal to remove Juror No. 11 for cause (A-22-23), defense counsel next suggested that "Perhaps it might be appropriate to ask Ms. Hartman if she remembers having a conversation with that juror or with someone who works

at the daycare facility about that." (A-24). Defense counsel added: "The defense still has preemptory challenges left if the Court will be willing to consider one of those being used to remove this juror and replace with an alternate." (A-25). After the prosecutor objected to the proposal, the trial judge next ruled: "That's not proper, Mr. Funk. You indicated you were content with the jury." (A-25).

Deputy Attorney General Nicole Hartman, who was not involved in the Superior Court prosecution of Steven Schwan, was located in Courthouse and she was then questioned about her prior interaction with a juror in the Schwan case. (a-26-28). Hartman stated: "The director where my daughter goes to daycare told me a week or so ago that she was coming in for jury duty in passing, and I told her that if she were called up, she should mention that she knows me because I know that's generally one of the Court's questions in a criminal trial, and I know that sometimes that confuses people when the questions are asked." (A-26-27). Hartman added that she had had no further conversation with the daycare director about jury service, and "I didn't know that she had been selected for anything." (A-27).

Attorney Hartman was then excused from the proceeding (A-28), and defense counsel renewed his application to remove the juror. (A-29). Defense counsel argued:

> Well, Your Honor, I don't think the issue is whether the juror is well acquainted with Ms. Hartman or not. I think it's pretty clear she is not. The issue is whether the juror was told/informed by Ms. Hartman that when you're called for jury duty, you need to tell the Court that you know me. She was told that.

> I happen to believe Ms. Hartman's recollection of the events. The juror plainly stated that never happened. That's an issue for the defense. Defense renews the application for removal.

(A-29). The trial judge denied this second defense application to remove the juror for cause, and ruled: "Based upon the comments that Ms. Hartman made to help clarify the issue, I'm confident that my earlier decision is correct. The motion is denied. This juror will not be removed for cause." (A-29).

On direct appeal, Schwan argues that the trial judge abused his discretion in not excusing the juror acquainted with another prosecutor not involved in the case and substituting an available alternate juror. (Opening Brief at 6-9). A trial judge's determination that a juror can fairly and objectively render a verdict (A-22-23, 29) is reviewed on appeal for an abuse of discretion. See Knox v. State, 29 A.3d 217, 220 (Del. 2011). Trial judges also have discretion to make credibility determinations limited by the essential demands of fairness. See Knox, 29 A.3d at 220 (quoting Hughes v. State, 490 A.2d 1034, 1041 (Del. 1985)). Likewise, "...juror impartiality must be maintained not only in the interest of fairness to the accused but also to assure the integrity of the judicial process." Knox, 29 A.3d at 223 (citing Jackson v. State, 374 A.2d 1, 2 (Del. 1977)). See also Banther v. State, 823 A.2d 467, 482 (Del. 2003) ("jury bias, either actual or apparent, undermines society's confidence in its judicial system."); Caldwell v. State, 780 A.2d 1037, 1058 (Del. 2001). "The United States Supreme Court has

held that the presence of a biased juror introduces a structural defect that is not subject to a harmless error analysis." Hall v. State, 12 A.3d 1123, 1127 (Del. 2010). See Arizona v. Fulminante, 499 U.S. 279, 307-10 (1991); Reid v. United States, 2012 WL 2541904 at * 11 (D. Del. June 27, 2012).

The trial judge did not abuse his discretion in denying the two defense requests to remove a juror for cause. (A-22-23, 29). There was also no abuse of discretion in the trial judge's determination that the juror misinterpreted the jury voir dire question concerning knowledge of other persons employed in the Attorney General's office. (A-22-23). The trial judge correctly found that there was no personal relationship between Deputy Attorney General Nicole Hartman and the juror in question and that the juror merely was the director of the daycare where Hartman's daughter attends. (A-22-23). These factual findings are supported by the record (A-17-21), and they are not clearly erroneous. See DeJesus v. State, 655 A.2d 1180, 1191 (Del. 1995); Marine v. State, 607 A.2d 1185, 1194 (Del.), cert. dism'd., 505 U.S. 1247 (1992); Albury v. State, 551 A.2d 53, 60 (Del. 1988).

In the absence of any personal acquaintanceship between the juror and attorney Hartman, the defense challenge for cause centers upon the juror's employment as the director of a daycare where an attorney employed by the Attorney General, but not otherwise involved in the prosecution of Schwan, leaves her child. "The United States Supreme Court has not excluded persons

from serving as jurors based upon employment." Hall v. State, 12 A.3d at 1126. See United States v. Wood, 299 U.S. 123, 149 (1936) (juror's federal government employment, without more, not sufficient to establish juror bias). Even "...law enforcement officers are not automatically disqualified from serving as jurors in criminal cases." Hall, 12 A.3d at 1127. Although Schwan's Opening Brief only cites this Court's 2003 decision in Banther, several other Delaware cases have discussed the question of juror disqualification. Some of those decisions will now be reviewed.

Juror No. 11's employment as a daycare center director (A-20), and her impersonal business relationship with attorney Hartman is a different circumstance than either the Brice Hall or Bruce Banther prosecutions and is more akin to what occurred in Fred T. Caldwell's case. In Hall v. State, 12 A.3d 1123 (Del. 2010), Juror Number 11 disclosed his employment as a correctional officer, but during voir dire he did not indicate that he knew inmate defendant Brice Hall. When it was later revealed on remand that the officer did have contact with the accused at the prison prior to trial on a charge of assault in a detention facility [Hall, 12 A.3d at 1125-26], this Court concluded that "The circumstances of this case and the relationship between Juror Number 11 and Hall, as acknowledged by the juror, establish an impermissible probability of unfairness because of the juror's interest in the outcome of the case." Hall, 12 A.3d at 1127. No such "impermissible probability of unfairness" exists in Schwan's

prosecution. Schwan's Juror No. 11 had no personal relationship with attorney Hartman. In fact, the juror could not even recall Hartman's last name. (A-18). Schwan's Juror No. 11 also had no personal interest in the outcome of the accused's sexual assault prosecution, and attorney Hartman was not the prosecutor in Schwan's trial.

Likewise, Schwan's case is factually and legally distinguishable from the Bruce Banther first degree murder prosecution. In Banther, the jury forelady failed to disclose that she had been the victim in two prior sexual assaults. This Court found again after remand that Banther's right to a fair and impartial jury was violated by the juror's nondisclosure at voir dire in an ax murder prosecution, and that such a disclosure would have been a basis for challenge of the forelady for cause. Banther, 823 A.2d at 481-84. Schwan's Juror No. 11 was not a violent crimae victim nor was she under investigation in any other criminal matter. Schwan's prosecution is materially different than the circumstance in Banther.

Schwan's sexual assault prosecution and Juror No. 11's presence on his jury is more analogous to the factual circumstances in Caldwell, 780 A.2d at 1057-59, where the trial prosecutor belatedly discovered that a juror in Caldwell's cocaine trafficking prosecution "was a close personal friend of the wife of Dennis Kelleher, a lawyer in the Attorney General's office, and (2) that the juror socializes regularly with Kelleher." Caldwell, 780 A.2d at 1057-58. Kelleher was not a

prosecutor in Caldwell's case, similar to the noninvolvement of Hartman in Schwan's trial. Furthermore, the jury voir dire in Caldwell only asked, "'Do you know any of the attorneys in this case....'," and did not specifically inquire about other nonparticipating attorneys in the Attorney General's office like Kelleher. Caldwell, 780 A.2d at 1058-59.

While Caldwell's drug convictions were reversed on another basis, the juror acquaintanceship with a nonparticipating prosecutor was not a basis for the reversal. This Court in Caldwell ruled: "Because Caldwell cannot 'show that the circumstances surrounding the [juror] misconduct were so egregious and inherently prejudicial so as to support a presumption of prejudice to defendant,' he must prove that the juror's presence on the panel prejudiced him." Caldwell, 780 A.2d at 1059 (quoting Massey v. State, 541 A.2d 1254, 1255 (Del. 1988)). In finding that Caldwell had made no showing of prejudice from the juror's presence in his case, this Court added that "There is no prejudice in this case that rises to the magnitude of that addressed in Hughes v. State," Caldwell, 780 A.2d at 1059 (citing Hughes v. State, 490 A.2d 1034, 1043-44 (Del. 1985)).

Finally, this Court in Caldwell, 780 A.2d at 1059, pointed out that the juror issue presented there was not of the magnitude of what occurred in Flonnory v. State, 778 A.2d 1044 (Del. 2001), where a juror was told outside the courtroom that Flonnory had participated in another murder. Caldwell, 780 A.2d at 1059 n.

78. In Schwan's case there is no indication that Juror No. 11 received any impermissible information about the prosecution as occurred in both Flonnory and Hughes (A-17-21), and there was no social relationship between the juror and nonparticipating prosecutor Hartman. (A-18-20, 26-28). A trial judge's assessment of a juror's honesty during voir dire questioning is entitled to "special deference." State v. Cooke, 2012 WL 3060956 (Del. Super. July 25, 2012)(OPINION AND ORDER) * 8 (citing Patton v. Yount, 467 U.S. 1025, 1038 (1984)). No appearance of bias in Juror No. 11 exists in Schwan's case that would undermine public confidence in the verdict. Caldwell, 780 A.2d at 1058. See also Jackson v. State, 374 A.2d 1, 2 (Del. 1977).

There is certainly no prejudice apparent in the ultimate jury verdict. Schwan was completely acquitted of the two allegations of providing alcohol to minors, and as to the original charges of second degree and fourth degree rape, Schwan was found guilty of two lesser included offenses of second degree unlawful sexual contact. If Schwan's jury was infected with impermissible juror prejudice, a different result would be expected.

Schwan's trial is also dissimilar from the circumstances in Jackson v. State, 374 A.2d 1, 2 (Del. 1977), where a juror in a robbery prosecution failed to disclose that his nephew was a Deputy Attorney General despite specific voir dire questioning as to whether any jury panel member was related to any of the attorneys or their associates. Although the nephew was not

involved in Jackson's prosecution, the undisclosed family relationship was "deliberate," and the impartiality of the proceeding was affected. No such undisclosed family relationship exists in Schwan's case.

Schwan's prosecution is more akin to the factual circumstance in Weber v. State, 547 A.2d 948, 954 (Del. 1988), where during the criminal trial it was disclosed that a female juror employed in the criminal division of the Prothonotary's office also knew one of the secretaries who worked for the prosecutor in the courthouse witness room. "The juror stated that she did not know the secretary very well and that her acquaintance with the secretary would not affect her in judging Weber's case." Id. at 954. Since neither the prosecutor nor defense counsel asked to have the juror excused, Weber had the burden of demonstrating plain error in the trial judge not sua sponte discharging the juror. Id. at 954. Given the juror's responses to the trial judge's questions, this Court found no plain error, and also noted that "a casual acquaintance with a witness is not a basis for automatic disqualification." Id. at 954 (citing Holmes v. State, 422 A.2d 338, 342 (Del. 1980)).

In Holmes, 422 A.2d at 342, a juror after trial commenced recognized the victim as someone he had previously seen and spoken with at Delaware State College where the juror was employed and the victim attended classes. This Court in Holmes, 422 A.2d at 342, found no abuse of discretion in not removing the juror because "of a nodding acquaintance within a school

community." Unlike Holmes, prosecutor Hartman was not a witness or participant in Schwan's jury trial.

No egregious circumstances exist in Schwan's case that are so inherently prejudicial that a presumption of prejudice in favor of the accused arises. See Massey v. State, 541 A.2d 1254, 1257 (Del. 1988). The allegation of juror misconduct in Massey, 541 A.2d at 1255, was that one of the jurors during the murder trial "was under the influence of drugs and alcohol." The juror in Massey two years after the trial told defense counsel about his condition and even executed an affidavit. Massey, 541 A.2d at 1255 n. 1. When an evidentiary hearing was convened to inquire about the juror's use of alcohol, marijuana, and methamphetamines during Massey's three week trial, "the complaining juror then invoked his Fifth Amendment right against self-incrimination and refused to testify." Id. at 1255. When other jurors deposed by written interrogatories indicated no evidence of the claimed juror misconduct, the new trial motion was denied in Massey, 541 A.2d at 1255. On appeal, this Court found no abuse of discretion in denying the defense new trial motion based on alleged juror misconduct. Id. at 1259.

Even a defendant's own misconduct in struggling with guards in the jury panel's presence is "not so prejudicial as to require that the entire jury panel be replaced...." Allison v. State, 2008 WL 308230 (Del. January 31, 2008)(ORDER) * 2. In Allison, this Court found no abuse of discretion by the trial judge in

denying the defense request to replace the entire jury panel. Id. at * 2.

In summary, the Superior Court Judge did not abuse his discretion in denying the two defense requests to remove a juror for cause (A-22-23, 29, because the juror was the director of a daycare center where another prosecutor not participating in Schwan's trial brought her daughter. There was no family or social relationship between the juror and the other Deputy Attorney General. No egregious circumstance existed requiring the juror's removal for cause based upon a presumption of prejudice to the accused. See generally ANNOT., "Relationship to prosecutor or witness for prosecution as disqualifying juror in criminal case," 18 A.L.R. 375 (1922) (collecting cases).

In the absence of any presumption of prejudice applicable in this case, Schwan has failed to carry his burden of persuasion in demonstrating any actual prejudice in his Superior Court prosecution. Only if Juror No. 11 was disqualified for cause as a result of impermissible bias would a structural defect exist in Schwan's trial. Allowing Juror No. 11 to remain on Schwan's jury did not render his criminal trial fundamentally unfair or make the Superior Court proceeding "an unreliable vehicle for determining guilt or innocence." Reid v. United States, 2012 WL 2541904 at * 11 (D. Del. June 27, 2012)(MEMORANDUM OPINION). See Washington v. Recuenco, 548 U.S. 212, 218-19 (2006). The list of structural errors requiring automatic reversal is quite limited and does not include the juror issue raised on direct appeal by

Schwan. Reid, supra at * 11 (quoting Palmer v. Hendricks, 592 F.3d 386, 397 (3d Cir. 2010)).

CONCLUSION

The judgment of the Kent County Superior Court should be affirmed.

John Williams
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
(302) 739-4636
Bar I.D. # 365

Dated: September 14, 2012

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CERTIFICATE OF SERVICE

BE IT REMEMBERED that on this 14th day of September 2012, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on September 14, 2012, she did deposit in the mail two copies of the attached State's Answering Brief properly addressed to:

Bernard J. O'Donnell, Esquire
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801

Mary T. Corkell
Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Janice R. Malmberg
Notary Public