IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

SHANNON A. THOMPSON, II,	:	Def. ID# 0503015897
Appellant/Defendant Below,	:	
v.	:	
STATE OF DELAWARE,	:	
Appellee.	:	

MEMORANDUM OPINION

DATE SUBMITTED: April 4, 2006

DATE DECIDED: July 27, 2006

Edward C. Gill, Esquire, P.O. Box 824, Georgetown, DE 19947, Attorney for Appellant/Defendant below

Carole E.L. Davis, Esquire, Department of Justice, 114 E. Market Street, Georgetown, Delaware 19947, attorney for Appellee

Bradley, J.

Defendant Shannon A. Thompson, II ("defendant") has filed an appeal from the Court of Common Pleas in and for Sussex County ("CCP") of a jury conviction on the charge of violation of privacy.[1] The parties have briefed the issues, and this is my decision denying the appeal.

FACTS

The crime took place in the Brew-HaHa coffee shop, Rehoboth Beach, Delaware, on March 19, 2005. The jury found that, during the time several women and a young girl used the women's restroom, defendant peered from the men's restroom into the women's restroom from above the ceiling and over the wall separating those restrooms. Upon his conviction of the crime, CCP sentenced defendant to one (1) year at Level 5, with credit for time served, followed by six (6) months at Level 4, Work Release.

Defendant bases his grounds of appeal on several legal issues which arose during the trial.

The first matter concerns defendant's motion for judgment of acquittal on the ground that the women's restroom was not a "private place" as defined in 11 Del. C. §1337[2] because it was open to the public. The Court below denied that motion, ruling the definition in 11 Del. C. §1337 did not apply to the term used in 11 Del. C. §1335.

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[1]In 11 Del. C. §1335, Violation of Privacy, it is provided in pertinent part:

> (a) A person is guilty of violation of privacy when, except as authorized by law, the person:
>
> (1) Trespasses on property intending to subject anyone to eavesdropping or other surveillance in a private place....

[2]In 11 Del. C. §1337, "private place" is defined as follows:

> (b) "Private place" means a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group thereof has access.

The next issue pertains to the erasing of a recording of a call to the Rehoboth Beach Police Department ("RBPD"). Joseph Andrews was the person who witnessed the defendant's legs hanging from the ceiling in the men's room and who initiated the criminal complaint. Corporal Brad Hudson was the first police officer on the scene. He concluded that defendant had not committed any crime. Mr. Andrews was upset at this conclusion. On March 19, 2005, Mr. Andrews and his wife called Corporal Hudson at the RBPD. Mr. Andrews complained about Corporal Hudson's conclusion and expressed his opinion that an idiot would have concluded a crime was committed. The conversation was recorded.

On August 26, 2005, after receiving a subpoena, Officer Hudson made a request for the recording. In a memorandum dated August 30, 2005, Chief Banks then instructed Dawn N. Lynch, RBPD Communications Supervisor, to transcribe the tape. She did not attempt to transcribe the tapes until the morning of trial, September 20, 2005. It was then that she learned that the recording of the phone call was missing.

Ms. Lynch explained the following about the system. The system automatically records calls as they come to the RBPD and every five minutes the calls are backed up onto a DVR. In this case, the RBPD knows that the original call was recorded because Corporal Hudson listened to it. The system was upgraded on March 28, 2006. The hard drive recording was eliminated at that time. However, the call should have been backed up onto the DVR. The DVR cannot be erased for a whole year.

There have been situations where some calls the RBPD thinks should be there are not there. The calls are lost during the recording process or the archiving process. In this case, as noted earlier, the call was lost during the archiving process.

Defendant argued as follows. Mr. Andrews, a witness for the State of Delaware ("the State"), had made a recorded statement. CCP Criminal Rule 26.2 requires production of the statement. Since the State destroyed the tape, defendant asked that Mr. Andrews' testimony be stricken or a mistrial declared. He also argued that since the destruction of the tape was intentional, then the sanction of dismissal should be imposed.

The Court below ruled as follows. The State could not produce the recording of the phone call. CCP Criminal Rule 26.2 did not apply because the recording was not missing due to any fault of the State nor was the State in a position to make an election as to whether to produce the tape. The Court then performed a Deberry[3] analysis, and it ruled as follows. First, the State had a duty to preserve the tape. The State breached this duty by not ensuring, when it performed the upgrade, that the call was preserved. The State was not negligent; the loss was an accident. The State did not act in bad faith nor did it act with any disregard for the interest of the accused. Officer Hudson's police report reflects that Mr. Andrews was adamant about what he had seen and questioned the officer's investigation of the matter. The Court went on to rule as follows:

> In deciding how prejudicial this is to the defendant to not have that conversation to cross-examine and perhaps impeach the primary witness of the State in this matter with, we look at the centrality of the evidence and its importance in establishing the elements or motives in this case. As well as its probative value and its reliability of any possible substitute evidence.
>
> I've considered the fact that this phone call recording is a phone call between two witnesses who will be present in court. Granted, one is a primary witness for the State and the other witness is Officer Hudson of the Rehoboth Beach Police Department, but Officer Hudson was the officer who initially investigated this matter and it's been represented, declined to file charges.
>
> So I do find that there is some other evidence that the defense can use at trial. Therefore, I do not think that a dismissal is an appropriate sanction, after balancing the State's very slight misconduct. And some prejudice to the defense,

[3] Deberry v. State, 457 A.2d 744 (Del. 1983).

in their cross-examination of this potential witness, I think a Deberry instruction is appropriate as a remedy for the defense and a sanction against the State.

Trial Transcript of September 20, 2005, Proceedings at 70-71.

At trial, Mr. Andrews testified that during his call to Officer Hudson, he stated: "[Y]ou'd have to be an idiot to think he was doing anything other than peering into the ladies' room." Id. at 102, 116. Defendant called Corporal Hudson as a witness. Consequently, defendant had Corporal Hudson available to him to advise him of the entire contents of the telephone call. Corporal Hudson testified that during the phone call, Mr. Andrews' tone was demeaning, he called the officer an idiot, and he questioned the officer's years of experience. Trial Transcript of September 26, 2005, Proceedings at 41.

At the end of the trial, the Court included the following instruction:

> ... [I]n this case the Court has determined that the State accidentally did not preserve certain evidence, which is material to the defense. Namely, a recorded March 19, 2005 telephone conversation between the witness, Mr. Andrews and Miss Andrews, and Officer Hudson of the Rehoboth Beach Police Department.
>
> The State's non-preservation of such evidence entitles the defendant to an inference that if such evidence were available at trial it would be exculpatory. This means that, for the purposes of deciding this case, the jury shall assume that the missing evidence, had it been preserved, would not have incriminated the defendant and would have tended to prove the defendant not guilty.
>
> The inference does not necessarily establish the defendant's innocence, however. If there is other evidence presented which establishes the fact or resolves the issue to which the missing evidence was material, the jury must weigh that evidence along with the inference.
>
> Nevertheless, despite the inference concerning missing evidence, if the jury concludes after trial, after examining all the evidence, that the State has proven beyond a reasonable doubt the elements of the offense charged, the jury may return a verdict of guilty.

Trial Transcript of September 26, 2005, Proceedings at 115-16.

Another issue arising at trial concerned the trial preparation of Carole E.L. Davis,

Esquire, the prosecutor. The arresting officer, Detective Scott A. O'Bier, testified that his investigation involved using a ladder to reach the restroom ceiling and hanging over the drywall to see if it would support his weight. The following colloquy on cross-examination took place:

> Q. ... Did you try to step on the toilet or step on the handicapped bar and jump up to where the drywall was?
>
> A. No, sir, I didn't attempt to do that. I had on my dress clothes, a weapon, other items and I did not do that.
>
> Q. But, between March and today did you try to do that?
>
> A. No.
>
> Q. Has anybody else tried to do that?
>
> A. I observed Mrs. Davis do that.
>
> Q. Miss Davis? Carole Davis?
>
> A. Yes.
>
> Q. She tried to jump up on there?
>
> A. Yes.
>
> Q. What happened?
>
> A. She could touch the top of the -- up into the ceiling.
>
> Q. She was able to touch that?
>
> A. Yes.
>
> Q. Did she pull herself up on there?
>
> A. No.
>
> Q. So she attempted to go ahead and recreate this and failed in doing that?
>
> A. Made somewhat of an attempt. She was in a skirt and high heels so.

Trial Transcript of September 20, 2005, Proceedings at 152-53.

Defense counsel then made various motions regarding this information. There was extensive argument about whether Mrs. Davis' efforts constituted exculpatory evidence which should have been turned over to the defense. In the midst of the arguing, the following information came out. The day before trial, Mrs. Davis had gone to the crime scene and, in an attempt for her to better understand the facts of the case, had attempted to get from the toilet seat to the top of the tank using the paper towel dispenser and the handicap bar. She was successful. She had not done this as any test. She is 5'2'' tall and weighs 120 pounds. The defendant was 5'10'' tall and weighs between 150 and 175 pounds. As they were discussing this issue, Detective O'Bier clarified that he was mistaken in thinking the episode he witnessed took place in Brew-HaHa. It turns out that Mrs. Davis had tried to get to the ceiling in the restroom of the Attorney General's office and Detective O'Bier witnessed that event. The day before the trial, Mrs. Davis had tried to get up to the ceiling at Brew-HaHa. Detective O'Bier did not witness that episode, another officer did.

Defense counsel asked to call Mrs. Davis to the stand in order to impeach the Detective's statement on the stand that he had witnessed the episode which indicated it occurred in Brew-HaHa and not in the Attorney General's Office. Defense counsel then argued that a mistrial was required because Mrs. Davis could not be a witness where she was the prosecutor.

The trial was continued in order for the parties to submit written arguments on the various issues. The Court below issued a written decision, State v. Thompson, Del. C.P., C.R. No. 05031801, Clark, J. (Sept. 26, 2005), ruling as follows regarding whether the episodes involving Mrs. Davis should have been disclosed to the defense. Detective O'Bier testified that Mrs. Davis

failed in her first attempt to climb to the ceiling in the Attorney General Office's restroom. This episode, which did not occur at the crime scene and which involved someone of completely different physical stature from the defendant, could not have had any impact on the jury and was immaterial under Brady.[4] The episode constituted attorney work-product and should not have been disclosed to the defense. The State had no duty to disclose the second attempt, either. Mrs. Davis was successful at the second attempt. Thus, the evidence was inculpatory, not exculpatory. The Court also ruled that the episodes were not tests or experiments under CCP Criminal Rule 16(a)(1)(D), and thus, not discoverable thereunder.

The Court ruled as follows regarding the mistrial motion:

> ... Inasmuch as the attempt the officer observed was at a facility as set forth above, and was inadmissible attorney work-product, the Court finds that the Detective's testimony regarding this attempt is both irrelevant and privileged. To avoid confusion of the jury, the Court shall strike from the record the Detective's testimony regarding the DAG's attempt he observed, and shall instruct the jury to disregard the testimony and give it no consideration in its deliberations. The Court shall not permit the Defendant to call the DAG to the stand to examine her about her attorney work-product trial preparation attempts to recreate her theory of the case. For these reasons, the Court finds that the DAG will not be a necessary witness. Accordingly mistrial is inappropriate.

State v. Thompson, supra at 8-9.

When the jury returned, the Court gave the following instruction.

> You will recall, ladies and gentlemen, that at the close of testimony last Tuesday, near the close of testimony, the defense elicited certain testimony from Detective O'Bier regarding an attempt, that he was testifying about, by Miss Davis to enter the ceiling of the men's room at the Brew Ha Ha Restaurant, in the way that the State alleges that the defendant did in this action.
>
> Ladies and gentlemen of the jury, you are hereby instructed to disregard that part of the detective's testimony and not to consider it in any way for the truth of the matter stated regarding that claimed attempt. The Court hereby instructs you that

[4] Brady v. Maryland, 373 U.S. 83 (1963).

that portion of the detective's testimony was indeed incorrect.

Ladies and gentlemen of the jury, you may consider the fact that that portion of his testimony was incorrect in weighing the credibility of the detective's overall testimony. But otherwise, you are to disregard that portion of the testimony for the truth of the matter stated.

Trial Transcript of September 26, 2005, Proceedings at 20-21.

The Court repeated this instruction at the end of the evidence:

Ladies and gentlemen, near the close of testimony last Tuesday the defense elicited certain testimony from Detective O'Bier, as I've instructed you previously, regarding an attempt by Mrs. Davis to enter the ceiling of Brew Ha Ha men's room at the State alleges the defendant did. You were and you are instructed to disregard that part of the detective's testimony and not to consider it for the truth of the matter stated regarding that claimed attempt.

The Court has determined, however, and instructs you, that the detective's testimony was incorrect in that particular portion. And you may consider that in weighing the credibility of his overall testimony.

Id. at 115.

Another jury instruction is pertinent to this appeal. The Court below instructed as follows:

Ladies and gentlemen, if you should find the evidence in this case to be in conflict, then it is your duty to reconcile the conflicts, if reasonably possible, so as to make one harmonious story of it all. But if you cannot do this, then it is your duty to give credit to that portion of the testimony which, in your judgment, is most worthy of credit and to disregard any portion of the testimony which, again in your judgment, is unworthy of credit.

Id. at 110. Defendant objected to this instruction, arguing it is an incorrect statement of the law. He contended as follows in support of this argument. The jury's duty is to determine if the State has proven its case beyond a reasonable doubt. The given instruction says it is the jury's duty to reconcile conflicts in testimony and such action impinges on the defendant's right to be found criminally guilty beyond a reasonable doubt and upon a defendant's right to jury trial. Id. at 104.

DISCUSSION

Each of defendant's arguments on appeal asserts legal error by the Court below. This Court reviews, *de novo,* legal determinations made in CCP. State v. High, Del. Super., C.A. No. 90-09-0243, Toliver, J. (March 7, 1995).

The first argument is that defendant could not be convicted under the statute[5] because Brew-HaHa's women's restroom was accessible to the public and, consequently, not a "private place."[6] I follow the rationale of the decision in People v. Abate, 306 N.W.2d 476 (Mich. App. 1981), in concluding that at the time the crime was committed, the women's restroom was a "private place" as defined by 11 Del. C. §1337. As that Court stated at page 279 in addressing an argument identical to defendant's here:

> The word "access" has been defined as the "ability or permission to approach, enter, speak with, or use; admittance." [Citation omitted.] The testimony below indicated that once a person enters the public restroom stall and closes and latches the door, any "access" which the public might have had is cut off. Under this interpretation, the enclosed stall is again a private place under the statute, during the period in which it is used. [Footnote omitted.]

Thus, I conclude as a matter of law that during the time the females were in the women's restroom, the public did not have access. During that period of time, the women's restroom was a "private place" as defined by §1337.[7]

This ground of appeal fails.

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[5]See footnote 1, supra, for text of 11 Del. C. §1335(a)(1).

[6]See footnote 2, supra, for definition of "private place" contained in 11 Del. C. §1337.

[7]Defendant's argument that 11 Del. C. §1335(a)(6) includes a bathroom is not persuasive. This subsection was added in 1999. 72 Del. Laws, c. 180 (1999). It is irrelevant for interpreting the previously enacted "private place" as applied to the previously enacted §1335(a)(1).

In his second argument, defendant contends the Court below erred with regard to the situation involving the prosecutor's attempts to climb to the ceiling of various restrooms. First, he argues the episodes should have been disclosed to the defense and since they were not, the Court below should have dismissed the case or, alternatively, declared a mistrial. Additionally, he argues that defendant should have been allowed to call the prosecutor as a witness to testify about these "tests" she performed.[8]

The Court below rendered a thoughtful, well-reasoned decision on these issues. This Court affirms that decision. This ground of appeal fails.

Defendant's third argument concerns the lost tape recording. He argues that the sanction imposed, giving a lost evidence instruction, was not sufficient. His argument is based on the contention that the loss of the tape recording had a "severely prejudicial effect on the accused" because his ability to cross-examine Mr. Andrews "was severely prejudiced."

The Court below found "some prejudice" to defendant regarding cross-examination. It noted the availability at trial of the participants in the call. Both participants also testified. In fact, Corporal Hudson, who received the phone call from Mr. Andrews, was a witness for the defense. Corporal Hudson was available to provide the details of the conversation to the defense so that defendant could cross-examine Mr. Andrews regarding the call.

The record supports the conclusion of the Court below that the absence of the recording caused minimal prejudice to the defense. In fact, had the Court below found there was no

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[8]In his reply brief, defendant advances a different argument regarding the calling of Mrs. Davis to testify. He argues Mrs. Davis got Detective O'Bier to change his testimony and that "fact" should have been submitted to the jury. Defendant should have raised this argument in his opening brief. The Court ignores the argument advanced in the reply brief.

prejudice and, therefore, no need for a Deberry instruction, that decision would have been upheld. With the availability of Corporal Hudson to the defense, the Court below could have concluded defendant was not prejudiced in any cross-examination. Furthermore, the recording was cumulative of Mr. Andrews and Corporal Hudson's testimony of the telephone conversation between them. The testimony of Corporal Hudson and Mr. Andrews "was sufficient secondary evidence to overcome any arguable prejudice to ... [defendant] from the ... [phone call] having been erased." Warren v. State, Del. Supr., No. 218, 1992, Horsey, J. (April 8, 1993), at 9. Thus, I conclude the issuance of the instruction was a sufficient sanction. This ground of appeal fails.

Defendant's final argument is that the Court below erred in issuing the instruction that where conflicts existed, then the jury's duty was to reconcile the conflicts to make a harmonious story.

In the case of Thompson v. State, 2005 Del. LEXIS 423 (order), the Delaware Supreme Court ruled that a jury cannot be told to disregard reasonable doubt as the standard of proof. However, telling the jury "to `reconcile the conflicts' in the evidence `to make one harmonious story' of the events by giving credit to testimony worthy of credit and disregarding that which is not," does not constitute telling the jury to disregard reasonable doubt as the standard of proof. Smith v. State, 2006 Del. LEXIS 218 at *36. This argument fails.

For the foregoing reasons, I deny each ground of appeal and affirm the judgment of the Court of Common Pleas.

IT IS SO ORDERED.