



IN THE SUPREME COURT OF THE STATE OF DELAWARE

NICOLE HANSLEY,)
)
 Defendant Below,)
 Appellant,)
)
 v.) No. 586, 2013
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S REPLY BRIEF

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I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY RESTRICTING THE DEFENDANT'S CONSTITUTIONAL RIGHT TO PRESENT FAVORABLE EVIDENCE.

In its Answering Brief, the State argues that the Superior Court correctly ruled that testimony from a defense expert retired police officer that the Defendant was a cocaine addicted prostitute who would not be trusted by a drug dealer pimp to share control over his inventory of controlled substances was immaterial "because it did not negate her guilt to the offenses." Ans. Br. At 11.¹

By its argument, the State misidentifies the actual basis of the Superior Court's decision precluding the defense expert's testimony. The Superior Court ruled that:

...if the intent is to present that testimony without the defendant having to testify to establish what her defense is, I don't believe that can be done.

If the question were posed, is she provides through her own testimony certain foundation, there may be some questions that would be permitted of that other witness. But the Defendant herself is going to have provide that foundation. I can't allow that witness to testify.

A9-10. Thus, the Superior Court never reached the evidentiary ruling in this

¹ The State also notes that the defense expert in was "unrelated to the investigation." Ans. Br. at 6. If the State's point is that the defense expert was less "expert" because she did not physically participate in the investigation that led to the Defendant's arrest, the Defendant does not understand the point. The State's own expert who was permitted to testify at trial, Cpl. Dewey Stout, DSP, also did not participate in the investigation that led to the Defendant's arrest.

case which the State defends on appeal. Instead, the Superior Court ruled that it would not consider the proffer of the defense expert witness unless the Defendant herself first testified as a conditional foundation for that testimony, reiterating that it would only consider the admissibility and relevance of the defense expert's testimony "at the close of the presentation by the defense short of the [defendant's expert]. A10. As such, the Superior Court's ruling was not only incorrect but unconstitutional. *Brooks v. Tennessee*, 406 U.S. 605, 611 (1972) ("Pressuring the defendant to take the stand, by foreclosing later testimony if he refuses, is not a constitutionally permissible means of ensuring his honesty").

Moreover, the State contends as part of the crux of its case that: "Hansley could have testified, if she were willing to do so under oath and subject herself to cross-examination, but she chose not to do so, through no fault of the court." Ans. Br. at 13. By this argument, essentially contending that the Defendant has waived in this appeal her contention that she should have been permitted to introduce evidence favorable to her defense at trial because she did not testify herself at trial, the State only compounds the constitutional error at trial.

In addition, the State addresses the substance of the Defendant's argument by responding that "Hansley's proffer of Aman's testimony regarding her actions prior to these offenses was not material to her defense at trial

because it did not negate her guilt to the offenses.” Ans. Br. at 11. Through this argument the State shifts attention from the issue of relevance and admissibility to an issue of burden of proof and thereby improperly recasts to the Defendant the burden of proving that the evidence precluded at trial would have proven that she was not guilty. That burden meets neither the criteria of relevance nor the condition of admissibility at trial, however. Proffered defense evidence need not establish the defendant’s innocence as a condition precedent to its admissibility at trial. Relevant evidence is “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.” D.R.E. 401. The proffered defense evidence from an informed expert that the Defendant was known by law enforcement who knew her to be a prostitute addicted to cocaine in tandem with the State expert’s admissions that pimp drug dealers would not permit their prostitutes control over the dealer’s inventory of controlled substances could have caused the jury to have reasonable doubt that the Defendant “had the ability to exercise dominion and control over the drugs; and ... intended to guide the destiny of the drugs” found by police on the night that she was arrested. *White v. State*, 906 A.2d 82, 86 (Del. 2006). Therefore, it was relevant and material. The suppression by the State at trial of that evidence

violated the Defendant's right to due process and compulsory process.²

Likewise, the State's argument on appeal that the exclusion of the proffered exculpatory evidence did no harm to the Defendant because, as the Superior Court also stated, "not her stuff is not a defense," Ans. Br. at 12, does not comport with either the required proof of the elements of the charged offense or the burden of proof to establish guilt beyond reasonable doubt. *White*, 906 A.2d, at 86 ("mere proximity to, or awareness of drugs is not sufficient to establish constructive possession").

Also, the State's contention that even if the Defendant's evidence was relevant but was still excluded, there still was no harm at trial because "defense counsel's statements, although not evidence, made it abundantly clear that Hansley was a 'crack head' and a 'prostitute.'" Ans. Br. at 13.³ By this statement, the State indirectly concedes the Defendant's point that she was unfairly deprived of evidence to support her attorney's argument on her behalf. At trial, the prosecution would not concede and successfully opposed the introduction of any evidence she was a drug addict, which the Superior Court

² If the defendant's counsel had somehow not been aware of this exculpatory evidence before trial and the State had failed to disclose it, another violation of due process would have been shown. *Brady v. Maryland*, 373 U.S. 83 (1963).

³ If that was actually so, what was the harm in introducing evidence that actually supported that contention and why did the State's prosecutor strenuously oppose the introduction of that evidence at nearly every opportunity at trial? The opposition was not due to that it was cumulative or would have served judicial economy. The time expended by the prosecutor's opposition and the resolution of it was likely of greater duration than the admissibility of the proffered evidence would have required.

then characterized as a “supposition” not supported by the evidence. A100. The jury was later instructed that an attorney’s arguments are not evidence.⁴ Under these circumstances, while it’s predictable that a jury might reject an attorney’s contentions that there was a reasonable doubt his client had actual control over the controlled substances she was accused of possessing, it’s also still unconstitutional.

The State also argues that “the simple fact, even if true that Hansley was a cocaine addicted prostitute, does not by definition make her unable to be a heroin dealer on the date in question or make her any less in possession of the drugs as a seller or other conduit for a drug dealer.” Ans. Br. at 12. In this, the State falls short of the constitutional goal. Evidence need not establish conclusively or “by definition” that a defendant is not guilty of the offense in order to guarantee admissibility when offered by a defendant at trial. Defense evidence from an informed expert that the Defendant was known by law enforcement who knew her to be a prostitute addicted to cocaine in tandem with the State expert’s admissions that pimp drug dealers would not permit their prostitutes control over their inventory of controlled substances could have caused the jury to have reasonable doubt that the Defendant “had the ability to

⁴ A jury could therefore be expected to consider that a retired police officer’s personal knowledge about the Defendant gained through her expertise in law enforcement was more credible and reliable than a defense attorney’s bare assertions as to same.

exercise dominion and control over the drugs; and ... intended to guide the destiny of the drugs” found by police in the hotel room on the night of her arrest. *White v. State*, 906 A.2d, at 86 (Del. 2006).

Contrary to what is essentially the State’s argument, the Defendant’s entitlement to relief on appeal is not determined by whether this Court believes that the Defendant would have been found not guilty if the precluded evidence in question had been admitted at trial, but by whether the exclusion of that evidence could have possibly contributed to the verdict against her, in other words, had the excluded evidence been admitted, is it possible that the jury could have found her not guilty of the charged offense in question? Before a Constitutional error can be considered harmless, the State must demonstrate “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24 (1967). The State has not met that burden in this appeal.

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's conviction and sentences for drug dealing – aggravated possession of heroin should be reversed and those sentences vacated.

Respectfully submitted,

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