IN THE SUPREME COURT FOR THE STATE OF DELAWARE

ISAIAH W. MR. MCCOY,	)	**Nos. 558, 2012 and 595, 2012**
Appellant,	)	**(CONSOLIDATED)**
	)	
	)	**Court Below: Superior Court**
V.	)	**of the State of Delaware, in and for**
	)	**Kent County**
	)	
	)	**Cr. ID. No. 1005008059A**
STATE OF DELAWARE,	)	
Appellee.	)	
	)	

APPELLANT'S REPLY BRIEF

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I. NOTWITHSTANDING THE STATE'S FAILURE TO MAKE A *BATSON* CHALLENGE, McCOY HAD A PROPER REASON TO STRIKE HICKEY.

The State contends that the trial court properly denied McCoy's peremptory challenge to juror David Hickey[1] because McCoy committed a reverse *Batson* violation by attempting to strike Hickey from the jury.[2] The State's argument is without merit for two independent reasons: (1) the court's denial of McCoy's peremptory strike was not pursuant to a reverse *Batson* challenge; and (2) in any event, McCoy had a substantial, race-neutral reason to strike Hickey.

First, the State incorrectly presents the trial court's denial of McCoy's peremptory strike as a reverse *Batson* issue. The problem with the State's position on appeal is that the State did not make a reverse *Batson* motion when McCoy exercised his peremptory challenge to Hickey. In fact, the State did not make any motion—perhaps because the State knew McCoy's strike of Hickey was legitimate and consistent with the defense position of striking jurors with close connections to the correctional facility where McCoy was (and still is) housed. Furthermore, the court did not even mention *Batson* or race when it demanded that McCoy explain

[1] In McCoy's opening brief, McCoy did not identify the juror by name; however, because the State has done so in its Answering brief, McCoy will refer to the juror by his name in this Reply.

[2] The State's Answering Brief does not dispute that under *Schwan v. State*, 65 A.3d 582 (Del. 2013) and *Knox v. State*, 29 A.3d 217 (Del. 2011), a defendant's conviction should be reversed where the defendant was improperly deprived of a peremptory challenge to a particular juror.

his reason for wanting to strike Hickey, or when it rejected McCoy's rationale for striking Hickey. The court did not give any reasons for its actions. Thus, the court's unilateral and arbitrary demand is completely at odds with the very essence of a peremptory challenge and constitutes a clear error that denied McCoy his "fundamental right to a fair trial by an impartial jury." *See Knox v. State*, 29 A.3d 217, 223-24 (Del. 2011); *see also Batson v. Kentucky*, 476 U.S. 79, 89 (1985) (noting that a peremptory challenge allows a party or counsel to remove a juror "'for any reason at all, as long as the reason is related to his view concerning the outcome of the case to be tried'" (quoting *United States v. Robinson*, 421 F. Supp. 467, 473 (D. Conn. 1976))).

Second, even if the State had made a reverse *Batson* challenge to McCoy's peremptory strike, McCoy presented a "clear and reasonably specific explanation of legitimate reasons for his use of the challenge[]." *See Dixon v. State*, 673 A.2d 1220, 1224 (Del. 1996). McCoy's reason for the strike was not only legitimate, it was substantial. Hickey's wife was a retired counselor at Department of Corrections, Smyrna—where McCoy is an inmate. McCoy's reasons for not wanting Hickey on the jury should be so obvious as to not warrant further explanation; however, the *pro se* McCoy offered the court further explanation anyway:

> I'm familiar with how inmates treat these counselors at times, some of the issues that went down.

> As he said, about five years ago, that's around the time when the lady was raped, the counselor lady, was raped in Smyrna. So I'm pretty sure he probably heard about that. His wife probably heard about that. So the counselors get an outlook that they have and their spouses, it may trickle onto their spouses' things that they may have heard and for that it doesn't sit right.
> . . . .
> I know on a day-to-day basis being back at the prison how people treat these counselors and very disrespectful way, throwing things on them like feces and things of that nature.
> . . . .

A2151.

The court's statement that Hickey's wife is retired, *Id.*, and the State's continued emphasis of that fact, Ans. Br. at 17, has no relevancy to McCoy's serious and legitimate concern over Hickey's potential bias. In fact, neither the court in its arbitrary ruling, nor the State in its Answering Brief, offer any reason why it matters that Hickey's wife is retired. McCoy articulated to the court how counselors are treated by inmates, and he did not want that potential bias spilling over into the juror's deliberation in this capital murder case. As explained in McCoy's opening Brief, McCoy's fears that the State would capitalize on Hickey's background—and the bias Mr. McCoy hoped to avoid—were well-founded. Indeed, when cross-examining defense witness Thomas Gordon, an inmate at the facility where Mr. McCoy is housed and where the juror's wife worked just five years before, the State asked Gordon: "Okay. How is it, then, you've been

convicted of assault in a detention facility, haven't you?" A01419 at 153. Mr. McCoy objected and the question was withdrawn, but the damage was done. *Id.* at 153-56.

The State's Answering Brief argues that McCoy's explanation for striking Hickey was "illogical and not credible" because, when he was represented by counsel, the defense did not challenge Kevin Michael Gerardi—a white male with "two relatives" employed by the Department Corrections—or Rodney Abrams, a black male whose wife was a retired correctional officer. Ans. Br. at 17. Rather, it is the State's argument that is illogical and not credible. First, Gerardi had "two relatives" who worked in corrections—hardly comparable to having a spouse who works in corrections. Second, the fact that defense counsel had recommended striking Abrams, whose wife was a retired corrections employee, only highlights the legitimate reason to strike Hickey, whose wife also is a retired corrections employee.

Furthermore, the State's Answering Brief completely ignores the other overwhelming evidence that McCoy had a legitimate and substantial, and race-neutral, basis to strike Hickey. Specifically, the State's Brief ignores that, when McCoy was represented by counsel, the court struck four jurors *for cause* because they worked at the facility where McCoy was, and is, held. *See* A00053-54 (juror struck for cause because brother-in-law is a correctional officer at James T.

Vaughn); A00056 (juror struck for cause because son-in-law is a correctional officer at James T. Vaughn); A00067 (juror struck for cause because husband is a correctional officer at James T. Vaughn); A00182-83 (juror struck for cause because husband works at James T. Vaughn and McCoy believed he knew the juror's husband)).

The State's Brief also ignores the fact that the court never demanded explanations from the State when the State exercised peremptory strikes. In fact, in one instance, the State even argued—when it suited the State—that it "stra[ins] credulity" that a juror whose uncle was a retired prison guard would have no biases. A00275. Thus, it is especially concerning that the trial court summarily dismissed McCoy's similar claim about the potential biases of a retired prison counselor's spouse.

The court's refusal to accept McCoy's legitimate and properly exercised peremptory challenge to a juror whose wife is a retired counselor from James T. Vaughn was arbitrary and fundamentally unfair to the *pro se* McCoy. Notwithstanding the State's contention that the trial court's factual finding that McCoy's explanation was not credible is entitled to deference on appeal, Ans. Br. at 17, the trial did not set forth any finding of facts or other rationale for its decision to reject McCoy's explanation; rather the court summarily rejected McCoy's explanation for his peremptory challenge. Hickey should have been

struck for cause, given the court's striking of jurors with connections to James T. Vaughn when McCoy was represented by counsel; the court's refusal to even permit the exercise of a peremptory strike under the circumstances can only be attributed to McCoy's pro se status.

Accordingly, the court erred by denying McCoy's peremptory challenge to Hickey, and McCoy's convictions must be reversed.

II. THE STATE'S CASE ESTABLISHED BISHOP AS AN ACCOMPLICE WHICH REQUIRED THE TRIAL COURT TO GIVE A MODIFIED *BLAND* INSTRUCTION

The State argues that: (1) Mr. McCoy waived any complaint that the trial court failed to give the required modified Bland instruction; (2) the trial court's general credibility instruction at the end of Mr. McCoy's trial satisfied the requirements outlined in *Brooks v. State*, 40 A.3d 346 (Del. 2012), for a special accomplice instruction; and (3) an individual who steals a firearm, gives it to someone who uses it to commit a murder, and admits to lying to police to help the alleged murderer evade capture, is not an accomplice. Each of these arguments lacks merit.

First, a modified *Bland* instruction is required and cannot be waived. "Trial judges *must* give a modified version of the instruction from *Bland v. State* whenever the State offers accomplice testimony against the accused." *Brooks*, 40 A.3d at 350 (internal footnote and citations omitted) (emphasis added). Defendants are not required to claim that a witness is an accomplice at closing, or any other time during trial, before a trial judge is required to give a modified *Bland* instruction. "If independent evidence supports accomplice testimony, then [the Court] will not find a defendant prejudiced by counsel's failure to ask for the *Bland* instruction." *Id.* at 354. Therefore, the State incorrectly asserts that a "*pro se* defendant's failure to note any exceptions to the guilt phase jury instructions

constitutes a waiver of any objection to the accomplice credibility instruction given." State's Ans. Br. at 18. Likewise, any failure by Mr. McCoy during closing argument to claim Bishop is an accomplice is irrelevant.

Second, a modified *Bland* instruction is required prior to any accomplice testimony and a general instruction is insufficient. "A general credibility instruction is not an acceptable substitute for a specific accomplice credibility instruction." *Smith v. State*, 991 A.2d 1169, 1179 (Del. 2010). The judge must give a modified *Bland* instruction "[a]ny time a witness who claims to be an accomplice testifies." *Brooks*, 40 A.3d at 350. Therefore, the State's argument that a credibility instruction was provided in the guilt phase jury instructions is without merit.

Finally, Talon Bishop's own testimony defines him as an accomplice. Under the Delaware Code, an accomplice is one who "[a]ids, counsels or agrees or attempts to aid the other person in planning or committing it." 11 *Del. C.* § 271(2)(b). "An accomplice is guilty of an offense committed by another person when intending to promote or facilitate the commission of the offense the accomplice aids or attempts to aid the other person in committing it." *Erskine v. State*, 4 A.3d 391, 394 (Del. 2010) (internal quotations omitted) (punctuation omitted). An accomplice "need not have specifically intended the crime, so long as "'the result was a foreseeable consequence'" of the wrongful conduct. *Claudio*

v. State, 585 A.2d 1278, 1282 (Del. 1991) (citing *Hooks v. State*, 416 A.2d 189, 197 (Del. 1980)).

Thus, according to the State's own theory and evidence, Bishop stole the alleged murder weapon, gave it to Mr. McCoy, and lied several times to give Mr. McCoy time to evade police. *See* A00947; A00956-57; A00962. This evidence, from Bishop's own mouth, provides at least a reasonable inference that he is an accomplice. The State's emphasis on Mr. McCoy's testimony is misplaced and irrelevant to the issue of whether a special accomplice instruction should have been given to the jury during the State's case in chief. Under *Brooks*, failure to give the modified Bland instruction under these circumstances was plain error.

III. THE STATE HAS FAILED TO OVERCOME THE STANDARD SET FORTH IN *WASHINGTON V. STATE*.

The State argues that this case is not a "rare case" like *Washington v. State*, but offers no reason why this is not such a case. As stated in Appellant's opening brief, *Washington* set forth the requirements for granting a motion for judgment on the acquittal when the State's case relies entirely on accomplice testimony. A motion for judgment of acquittal must be granted where: (1) "the conflict exists in the State's evidence;" (2) "the only evidence of defendant's guilt" is "uncorroborated testimony" of accomplices; and (3) the inconsistencies are "material to a finding of guilt." *Washington v. State*, 4 A.3d 375, 378 (Del. 2010).

The State's case relies solely on conflicting accomplice testimony. Despite the State's bold claim that this is not the "rare case" like *Washington*, the State's case at trial, and the lower court's opinion denying Mr. McCoy's motion for judgment of acquittal,[3] demonstrate that the sole evidence against Mr. McCoy was the contradicting uncorroborated testimony of two accomplices. This testimony was the only evidence of Mr. McCoy's guilt, and the inconsistencies in the accomplices' accounts were material to the State's case.

[3] *See State v. McCoy*, 2012 WL 2835052 (Del. Super. Ct. June 26, 2012) (basing its opinion heavily on the conflicting testimony of Williams and White).

There are numerous conflicts between the testimony of Williams and White, which include: (1) what Mr. McCoy was wearing on May 4; (2) where the victim was shot; (3) whether Williams was even at the scene of the crime; and (4) when the alleged robbery occurred.[4] Without this testimony, the State cannot even prove that Mr. McCoy was at the scene of the crime. Indeed, the State was unable to produce any independent eyewitnesses or any forensic evidence that placed Mr. McCoy at the scene.

While Mr. McCoy agrees that credibility is generally for the jury to decide, it is cases like this where the *Washington* standard should apply. The State could not convict Mr. McCoy without the testimony of accomplices, Williams and White, and their testimony is riddled with contradictions. For these reasons, Mr. McCoy's motion for judgment of acquittal should have been granted.

[4] The numerous conflicts are more fully set forth in Mr. McCoy's Opening Brief. *See* Appellant's Opening Brief at 32-38.

IV. THE CUMULATIVE EFFECT OF THE PROSECUTOR'S MISCONDUCT WARRANTS REVERSAL.

The prosecutor's cumulative misconduct, which occurred throughout the judicial process, requires reversal of Mr. McCoy's convictions. Reversal is warranted when doubt is cast on the judicial process due to the repetitive errors made by the prosecutor. *Hunter v. State*, 815 A.2d 730, 738 (Del. 2002). In this case, the repetitive and disrespectful conduct of the prosecutors warrants the reversal of Mr. McCoy's convictions.

The State has separated the numerous instances of misconduct in an attempt to downplay the prejudicial effect to Mr. McCoy. In so doing, the State has disregarded the effect of the misconduct on the judicial process. As set forth thoroughly in Mr. McCoy's opening brief, the prosecutor repeatedly engaged in conduct that is known to be prohibited.

The State's claim that the prosecutor was not improperly vouching for Williams holds no merit. In *Brokenbrough v. State*, this Court stated:

> [T]hat expressions of personal beliefs by a prosecutor are a form of unsworn, unchecked testimony intended to exploit the influence of his office and undermine the *objective detachment* which should *separate* a lawyer from the cause which he argues. "Such argument is expressly forbidden."

Brokenbrough v. State, 522 A.2d 851, 858 (Del. 1987).

The prosecutor stated, "She *obviously* hasn't spoken to the defendant since he shot her boyfriend." A00429. The prosecutor's remark was not only his personal belief but irrelevant to his objection. *See* A00428. The line of questioning was in regards to DaShaun White and had nothing to do with Mr. McCoy. *Id.* Despite this subject matter, the prosecutor decided to blurt out that Mr. McCoy had shot Munford, which had nothing to do with his objection.

The State claims that this was accurate and based upon Williams' testimony. *See* Ans. Br. at 36. Williams' testified that she spent two days at Mr. McCoy's residence after the shooting as well as speaking with Mr. McCoy during this time frame. A00372-73. The Prosecutor's statement was neither accurate nor based on Williams' testimony. The only possible explanation for the statement was to "impl[y] personal superior knowledge beyond what [could be] logically inferred from the evidence at trial." *Kirkley v. State*, 41 A.3d 372, 377 (Del. 2012). There was nothing *obvious* about Williams' contact with Mr. McCoy, whether Munford was actually Williams' boyfriend, or Mr. McCoy's role in the crime.

This improper vouching taken together with the numerous disparaging remarks[5]—whether in front of the jury or not—as well as the threat, whether direct or indirect, amounts to repetitive misconduct that could cast doubt on the judicial

[5] Mr. McCoy's counsel apologizes for the inaccurate citation in the Opening Brief regarding the statement, "I have been to law school, Your Honor. I understand the rules." This statement can be found at A00985 at 214.

process. Mr. McCoy deserved to be treated the same way that the prosecutor would have treated Mr. McCoy's standby counsel. For these reasons, Mr. McCoy's convictions should be reversed.

V. THE DEATH PENALTY STATUTE VIOLATES THE DUE PROCESS CLAUSE AND THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Here, the State's argues that the holding in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), does not apply because it is not a capital case. This distinction is meritless. The principles that drove the United States Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Alleyne* illuminate the defects within Delaware's capital sentencing scheme.

To recap, in *Apprendi*, the Court held that the Sixth Amendment does not permit a defendant to be "expose[d]…to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 483 (emphasis deleted). When "a State makes an increase in a defendant's authorized punishment contingent on the finding of fact," the Court explained, "that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." *Ring*, 536 U. S. at 602 (citing *Apprendi*, 530 U.S. at 482-83); *see also id.* at 499 (Scalia, J., concurring) ("[A]ll the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury").

Later, the Court applied the *Apprendi* ruling in *Ring v. Arizona* to invalidate Arizona's capital sentencing scheme, which permitted the trial judge to determine the presence of aggravating factors required for imposition of the death penalty. 536 U.S. at 609. The Court made clear that "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Id.* at 589 (emphasis added).

The Court overruled its earlier decision in *Walton v. Arizona*, 497 U.S. 639 (1990), by holding that the jury must find an aggravating circumstance that is necessary for the imposition of the death penalty. *Ring*, 536 U.S. at 609. "Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'" the Court explained, "the Sixth Amendment requires that they be found by a jury." *Id.* (quoting *Apprendi*, 530 U.S. at 494 n.19). The *Alleyne* Court further overruled "distinction[s] between facts that increase the statutory maximum and facts that increase only the mandatory minimum" explaining that "[i]t is impossible to dissociate the floor of a sentencing range from the penalty affixed to the crime." *Id.* at 2160.

The facts of this case underscore why Delaware's statute runs afoul of *Apprendi*, *Ring*, and *Alleyne*. The court below reviewed McCoy's mitigation notebook without the jury having a chance to see it. In reviewing the notebook, the

court concluded that the aggravating circumstances found to exist outweighed the mitigating circumstances found to exist. In other words, the judge imposed the death penalty on McCoy based on his own, not the jury's, assessment of the facts. Under the United States Supreme Court's *Apprendi*, *Ring*, and *Alleyne* jurisprudence a sentencing scheme that permits such a result is unconstitutional—the jury's role in our system of criminal justice is sacred.

CONCLUSION

Therefore, for the reasons set forth in Mr. McCoy's Opening Brief and above, this Court should reverse Mr. McCoy's convictions and sentence and remand the case for further proceedings.

Respectfully submitted,

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