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Case Number 115,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KYRAN JONES,	)	
	)	No. 115, 2015
Defendant Below-Appellant,	)	
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 1307021270A
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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DATED: August 11, 2015

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CLAIM I. EVEN UNDER A PLAIN ERROR STANDARD OF REVIEW, ADMITTING EVIDENCE OF PRIOR DRUG DEALS WAS ERRONEOUS AND REQUIRES REVERSAL.

This direct appeal claim is in a posture for plain error.

Inexplicably, the State recasts this claim as a postconviction claim and asserts it should not be considered on appeal.[1] This is not an ineffective assistance claim, and the State correctly cites to case law confirming that ineffective assistance claims are not generally heard on direct appeal. Rather, this is a claim that prior bad acts evidence was improperly admitted; the claim must be considered for plain error because counsel withdrew his objection. There is no indication whatsoever that the defense lawyer withdrew the objection for tactical reasons, as the State now argues.[2]

Moreover, it is difficult to see how *Roy v. State* applies.[3] In that case, the trial lawyer agreed to admission of drug use if the State would agree to not introduce evidence of drug dealing. Contrary to the State's assertion, this Court *did* review for plain error:

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[1] *Ans. Br.* at 7.

[2] *Id.*

[3] *Id.* at 9-10.

> In this case, Roy stipulated that the State could present evidence to the jury of his drug use. To the extent that the State presented such evidence at trial in a manner that exceeded the scope of the stipulation, Roy did not object. Without a specific objection at trial, Roy must rely on the doctrine of plain error to argue the misuse of that evidence on appeal. The record reflects no plain error.[4]

The State seems to be confusing reviewing for plain error and finding plain error. Here, all Mr. Jones seeks is for this Court to review the claim to determine if the error was so clearly prejudicial that it jeopardized the fairness and integrity of the trial process.

The Court erred in admitting the evidence without conducting a* Getz *hearing.

The State sprung the prior drug deal evidence request on the Court and defense at the last minute—in fact, the jury was on their way into the courtroom. The Court, unfortunately, had little time to conduct a proper hearing to determine admissibility of the prior drug deals. Had there been any analysis, it would have revealed that there was plenty of identity evidence. The State admits as much in its Answering Brief.[5]

As such, the evidence of prior drug deals was of miniscule probative value given the other identity evidence, and was unfairly prejudicial. Such evidence

[4] *Roy v. State*, 62 A.3d 1183, 1191-1192 (Del. 2012).

[5] *Ans. Br.* at 11-12.

leads to the inevitable consideration of this evidence to determine if he was probably guilty of the charged offenses.

Moreover, the jury instruction was generic and did not even to what evidence the instruction applied. And it was ill-timed. The instruction came after the direct testimony but before the 3507 statement, leaving the jury flummoxed as to how to apply the judge's words about "acts in addition to the alleged acts which form the basis of the crimes for which the defendant is now on trial."[6] Given the timing and tortured syntax of that instruction, there is little chance the instruction protected Mr. Jones' due process rights.

Mr. Jones respectfully asserts that this Court should make a finding of plain error and reverse.

[6] A105. The Opening Brief at 8 has a typographical error: it quotes this passage as …not on trial rather than …now on trial. Appellate Counsel apologizes for the error.

CLAIM II. THE PROSECUTOR'S RAISING THE SPECTRE OF RETRIBUTIVE GUN VIOLENCE IN CLOSING ARGUMENT WAS WHOLLY UNSUPPORTED BY THE EVIDENCE, AND THE TRIAL COURT'S DECISION TO NOT ATTEMPT TO CURE IT WAS REVERSIBLE ERROR.

Prosecutor: Mr. Mayne, would it be fair to say you are not happy to be here today?

Mayne: Yes.

Prosecutor: You're here under subpoena?

Mayne: Yes.[7]

That exchange was the entire basis of the prosecutor's assertion in closing that Mr. Mayne was afraid to point out Kyran Jones in the courtroom. *The prosecutor never asked Mr. Mayne to point out anyone.*

On that flimsy foundation, the prosecutor argued to the jury that Mr. Mayne had "fear" of pointing out Mr. Jones, because "there was another person out there" and "he knows these people have guns. He knows the hard way they use those guns."[8]

The obvious inference the prosecutor meant to draw was that Mr. Mayne did not make an in-court identification because he was afraid of getting shot. There is

[7] A97.

[8] A148.

absolutely nothing in the record to support this fictitious assertion, and the State, understandably, has not been able to find anything either.

The error the judge made was in stating that the jury could draw reasonable inferences from the evidence. That is true as far as it goes, but the point of the objection was that this was an impermissible inference that the jury should not be allowed to make. The misconduct was timely objected to and should have been cured. The judge's admonition to the prosecutor to "pull back on making too much of that particular point"[9] was made at sidebar, was too late, and was done outside the presence of the jury.

The misconduct is reversible under the *Hughes* test. The prosecutor's case had a hole in it. He did not elicit an in-court identification. He sought to fill that hole by spinning a tale of possible retribution by gunfire at the hands of unnamed people in Riverside. That is the centrality of the error. For any juror wondering why Mayne was not asked to identify his assailant, the answer was provided. All this fear of getting shot is based on two "yes" answers to the prosecutor's questions. The State should not have been allowed to create a fiction in which the prosecutor persuades the jury that but for Mayne's fear of getting shot, he would have pointed out the defendant—especially when it is the prosecutor who declined to ask Mayne to identify anyone.

[9] A148.

This was misconduct that should have been addressed by the trial judge, but was not. Mr. Jones respectfully seeks reversal of his conviction and sentence.

CONCLUSION

Based on the foregoing and the Opening Brief, Appellant Kyran Jones respectfully requests that this Court grant him a new trial and any other relief the Court deems appropriate.

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