



IN THE SUPREME COURT OF THE STATE OF DELAWARE

TRAVIS JONES,)
)
 Defendant-Below,)
 Appellant,)
)
 v.) No. 534, 2015
)
 STATE OF DELAWARE,)
)
 Plaintiff-Below,)
 Appellee.)

**ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE**

STATE'S REPLY BRIEF ON CROSS-APPEAL

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II. SUPERIOR COURT ABUSED ITS DISCRETION BY PROHIBITING THE STATE FROM IMPEACHING THE DEFENSE EXPERT WITNESS'S TESTIMONY.

Statutory basis for cross-appeal

In his answering brief to the State's cross-appeal, Jones argues that the "State failed to properly perfect its appeal in compliance with 10 Del. C. §9902(g)." *Cross-Appellee's Amended Ans. Brf.* at 14. Pursuant to 10 Del. C. § 9902(g), a cross-appeal "brought by the State pursuant to [subsection 9902(e)] shall be personally authorized by either the Attorney General or the Chief Deputy Attorney General." Jones contends that "[a]s of the filing of this Answering Brief, there is no record of either the Attorney General or the Chief Deputy Attorney General's personal authorization. Therefore, the State has yet to perfect its cross appeal and this Court lacks jurisdiction to consider the State's arguments." *Cross-Appellee's Amended Ans. Brf.* at 14. It is customary for the State's notice of cross-appeal to include a certification of this personal authorization and Jones correctly observes that, to date, the State's pleadings made no such affirmative representation. The State now includes in the appendix to this reply brief a certification of the Chief Deputy Attorney General personally authorizing the cross-appeal. BR1.

Improper limitations on cross-examination re: foundation of expert opinion

Jones acknowledges that the Superior Court limited the prosecutor's ability to cross-examine Jones' expert witness, Paul Bieber, about statements Jones made to

others about the fire. Jones contends that the Superior Court properly exercised its discretion in so limiting the prosecutor’s cross-examination because Bieber testified that he did not use Jones’ statements in “basing my opinions in my report.” *Cross-Appellee’s Amended Ans. Brf.* at 19. Jones concludes that “the State was not denied the opportunity to discredit Mr. Bieber’s theories merely because informant testimony was not regurgitated and re-hashed.” *Cross-Appellee’s Amended Ans. Brf.* at 20. The Superior Court abused its discretion by improperly limiting the State’s cross-examination of Bieber on the central issue of the trial—the cause of the fire that took the lives of Teyonna Watts, Breyonna Jones, and Jordan Jones.

It is a well-established proposition that a party may cross-examine an expert by asking that expert if a certain element in his hypothesis were not true, whether his conclusion would be the same.¹ An expert’s decision to consider, or not consider, information generally relied upon in his field of expertise may reflect on the expert’s credibility and bias, subjects best left to a jury’s evaluation in its role as factfinder.² Experts are permitted to base their opinions on disputed facts, and the jury accords appropriate weight to the expert’s opinion when a party tests that opinion through

¹ See, e.g., *Salkin v. Erie Railroad Co.*, 23 F.2d 677, 677 (3d Cir. 1927); *O’Riley v. Rogers*, 69 A.3d 1007, 1012 (Del. 2013).

² See *Cunningham v. McDonald*, 689 A.2d 1190, 1196 (Del. 1997) (error to limit cross-examination of expert on topic relevant to his credibility and potential bias).

cross-examination.³ “Generally, counsel should have wide discretion to cross-examine witnesses.”⁴ “However, that discretion does not include the right to probe into irrelevant matters.”⁵ The State sought to explore the strength of the foundation of Bieber’s opinion by probing relevant matters relied upon by experts in fire science.

Bieber testified that the NFPA 921 “is the document that is used across the country for fire investigation.” B-43. “Interviewing witnesses is an accepted method of acquiring information during a fire investigation.”⁶ The NFPA 921 provides “The purpose of any [witness] interview is to gather both useful and accurate information. Witnesses can provide such information about the fire and explosion incident *even if they were not eyewitnesses to the incident.*”⁷ The NFPA 921 requires investigators to consider witness statements at every step of the investigation, and provides that witness interviews are a necessary component of fire investigations.⁸ When parties seek to exclude fire investigation experts for failure to adhere to various aspects of the NFPA 921, courts generally decline to do so and,

³ *Walker v. Gordon*, 46 F. App’x 691, 696 (3d Cir. 2002) (if jury rejects factual premises of expert’s report, it may also reject expert’s opinion).

⁴ *Casalvera v. State*, 410 1369, 1374 (Del. 1980).

⁵ *Id.*

⁶ *People v. Carter*, 2015 WL 302693, at *7 (Mich. Ct. App. Jan. 22, 2015).

⁷ *Id.* (quoting NFPA 921 § 14.4.1) (emphasis in quotation).

⁸ *See State v. McLeod*, 66 A.3d 1221, 1225 (N.H. 2013).

instead, emphasize that the adversary system provides for scrutiny of the foundation of the opinion through cross-examination.⁹ Jones discounts the statements of persons to whom he made admissions regarding the fire and claims that cross-examination of his expert with these statements would have “opened a Pandora’s box of other issues.” *Cross-Appellee’s Amended Ans. Brf.* at 17. “It is up to the jury to evaluate his reasons for discounting such testimony.”¹⁰ “The established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury.”¹¹ The Superior Court unduly limited the State’s ability to show the jury that: (1) Bieber formulated his opinion on the cause of the fire without considering statements Jones made to others about his role in the cause of the fire; and (2) Bieber’s opinion may have changed had he considered the substance of Jones’ admissions to other witnesses.

Here, the prosecutor made the following proffer:

If you had information that the defendant placed himself at the scene before the fire, would that play a part in your determination? If he says yes, if he says it did, then that means he made his determination

⁹ *Erie Ins. Co. v. Sunbeam Products, Inc.*, 2015 WL 127894, at *8 (S.D. Ohio, Jan. 8, 2015); *Metropolitan Property and Casualty Ins. Co. v. Clayco Constr. Group, LLC*, 2010 WL 200009, at *5 (S.D. Miss. Jan. 14, 2010); *Allstate Ins. Co. v. Gonyo*, 2009 WL 1212481, at *7 (N.D. N.Y. Apr. 30, 2009).

¹⁰ *Travelers Cas. Ins. Co. of America v. Vol. of America Kentucky*, 2012 WL 3610250, at *5 (E.D. Ky. Aug. 21, 2012).

¹¹ *Hoffa v. United States*, 385 U.S. 293, 311 (1966).

including that fact. If he says it didn't, that means he disregarded that fact, and his disregard of that is relevant. The same thing with Jamie Kokotaylo and Robert Valentine. Hypothetically, if it were a fact that the defendant told another person that he set this fire, would that be a fact that you would consider, and, if so, would it change your opinion. That is standard proper cross-examination.

AR-33-34. When the prosecutor inquired whether she could ask whether Bieber considered Jones' statements to Kokotaylo and Valentine, Jones' counsel objected.

AR-35. The prosecutor then asked, "So, the State never gets to know what he [Bieber] relied on?" AR-35. The Superior Court ruled, "If he says no, it's no." AR-35. The Superior Court's ruling improperly limited the State's cross-examination of Jones' expert, depriving the jury of its chance to weigh the significance of Bieber's decision not to consider statements regarding the cause of the fire and to assess whether consideration of these statements would alter his opinion on the cause of the fire.

Carman's Rebuttal Testimony

The State withdraws its challenge to the Superior Court's exercise of discretion in prohibiting the State from calling Steve Carman as a rebuttal witness.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed; the evidentiary ruling of the court limiting the scope of the State's cross examination of Jones' expert witness should be reversed.

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CERTIFICATE OF SERVICE

I, Sean P. Lugg, Esq., do hereby certify that on July 27, 2016, I caused a copy of the STATE'S REPLY BRIEF ON CROSS-APPEAL to be served electronically upon the following:

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