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Case Number 680,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREW LLOYD,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 680, 2015
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On October 27, 2014, a New Castle County grand jury, in a thirty-five count indictment, charged the appellant, Andrew Lloyd, and numerous co-defendants, with criminal racketeering, conspiracy to commit criminal racketeering, drug dealing in heroin (tier 4), aggravated possession of heroin, second degree conspiracy and possession of drug paraphernalia. DI 1 (A3). On October 30, 2014, police arrested Lloyd. DI 5 (A3).

On November 24, 2014, and on December 22, 2014, the grand jury issued superseding indictments. DI 6, 8 (A4). The final 163-count, multiple defendant, indictment charged Lloyd with criminal racketeering (11 *Del. C.* § 1503(a)), conspiracy to commit criminal racketeering (11 *Del. C.* § 1503(d)), aggravated possession of heroin (16 *Del. C.* § 4752(3)) (12 counts), drug dealing in heroin (tier 4) (16 *Del. C.* § 4752(1)) (12 counts), second degree conspiracy (11 *Del. C.* § 512) (10 counts), and possession of drug paraphernalia (16 *Del. C.* § 4771) (5 counts).

Beginning on October 20, 2015, the Superior Court conducted an eight-day joint jury trial for co-defendants Lloyd and Antoine Miller. DI 60 (A12). On October 28, 2015, prior to closing arguments, Lloyd made an oral motion for judgment of acquittal for charges based on the September 10, 2014 incident with Brian Miller and Brian Palmer, and the October 12, 2014 incident with Jarrell

Brown. *See* A737-39. Lloyd also joined Miller's motion for judgment of acquittal based on jurisdiction related to charges based on incidents of alleged drug dealing on October 2 & 7, 2014. *See* A735-37. The Superior Court denied those motions. *See* A736-39. On October 30, 2015, the jury returned verdicts of guilty on all charges.[1] On November 18, 2015, the Superior Court trial judge sentenced Lloyd to an aggregate of 64 years in prison, followed by decreasing levels of supervision.[2] A13. On November 25, 2015, Lloyd moved for modification of his sentence. DI 69 (A13). On December 11, 2015, the Superior Court modified Lloyd's sentence to run all Level V time concurrently, thereby reducing Lloyd's sentence to 25 years in prison followed by 2 years at decreasing levels of supervision.[3] DI 71 (A13).

Lloyd filed a timely notice of appeal and an opening brief. This is the State's answering brief.

[1] The State entered a *nolle prosequi* without prejudice on 14 counts pretrial. *See* DI 60 (A12).

[2] *See* Sentence Order (Nov. 18, 2015) (attached to Op. Br.).

[3] *See* Modified Sentence Order (Dec. 11, 2015) (attached to Op. Br.).

SUMMARY OF THE ARGUMENTS

I. Appellant's arguments I and II are denied. The Superior Court properly instructed the jury regarding criminal racketeering and specifically the element requiring the existence of an enterprise. The instructions adequately informed the jury that in order to find Lloyd guilty of racketeering, the jury had to find beyond a reasonable doubt that Lloyd had a relationship with an enterprise (a group of people with a common purpose), and that enterprise had to have been in operation long enough to show a pattern of members committing felonies in pursuit of the enterprise's purpose.

II. Appellant's arguments III and IV are denied. There was no plain error in allowing the prosecutors to ask the testifying co-defendants about the terms of their plea agreements and whether they were testifying truthfully. Any errors in five co-defendants testifying primarily to the terms of their plea agreements and the lack of a specific limiting instruction regarding the plea agreements were harmless beyond a reasonable doubt, because the State presented overwhelming evidence of Lloyd's leadership of a criminal racketeering enterprise to distribute heroin.

STATEMENT OF FACTS

In late 2013 and early 2014, a series of shootings occurred in the City of Wilmington. Law enforcement attributed the rising violence to warring drug factions, one of which was led by Andrew Lloyd, Antoine Miller ("Miller") and Brian Palmer ("Palmer"). A197.

In January 2014, Wilmington Police and the FBI began investigating Andrew Lloyd after receiving information from a confidential informant ("CI") that Lloyd was selling large amounts of heroin in the City of Wilmington. As the investigation into Lloyd's network progressed, the Wilmington Police and FBI began sharing information with the Delaware State Police and the U.S. Drug Enforcement Agency ("DEA") who were simultaneously investigating Jarrell Brown ("Jarrell") regarding a heroin dealing ring in the Newark, Delaware, area. A286, 295, 427.

On January 9, 2014, Lloyd travelled to Delia's Gun Store in Philadelphia, accompanied by Galen Collins ("Collins"), Rakeem Mills ("Mills"), Wanda Lloyd ("Wanda"), Demetrius Brown ("Demetrius"), Blayton Palmer ("Blayton"), Zekeriah Lamont ("Lamont"), Latifa Jones ("Jones"), and William Anderson ("Anderson"). A147-8, 195, State's Ex. 6. Jones purchased a firearm with money provided by Lloyd. A151; A195.

On the same date, Demetrius, Blayton and Mills were all riding together when Demetrius saw a car pull abruptly out of Lloyd's development. A195. Collins, Lamont and Lloyd were in a van nearby. A195. Both vehicles followed the car out of the development. A196. When the car made a U-turn, the van's door slid open and someone fired two or three shots from inside the van. A196. Mills fired two shots from the car. A196. Afterwards, they all went to a motel for the night, paid for by Lloyd. A196. The next morning, they discovered that Lloyd's apartment had been burglarized. A196. The back window had been broken and the vents pulled out of the walls. A196.

On January 16, 2014, Wilmington Police began pursuing a black Chrysler Town and Country minivan after attempting a motor vehicle stop for traffic violations. A104-5; A177. Officers observed numerous individuals exit the van and flee from the scene after it was ditched in an alleyway. A108, 178. Police apprehended Mills and Collins. A109, 115, 178. A search of Collins yielded a quantity of heroin, as well as over $1,500 in cash. A116. In addition, police recovered a 9mm semi-automatic handgun from under a nearby van and another Glock 9mm semi-automatic handgun with an extended magazine from a nearby trashcan. A110, 118, 122, 124. The Glock was traced to Delia's Gun Store where records revealed that it had been purchased by Jones on January 9, 2014. A151,

195. Blayton had been operating the minivan during the pursuit, and the occupants also included Kimwayna Allen. A177. The van was owned by Wanda, Lloyd's cousin. A169.

After reports of shots fired on March 7, 2014, a police investigation resulted in the arrest of Demetrius and Zechariah Palmer ("Zechariah"). A witness identified Zechariah as the shooter, and Demetrius admitted to supplying the firearm. A198. At the time of his arrest, Zechariah possessed 23 plastic bags containing heroin.

On September 10, 2014 a CI met with Palmer. A249. Palmer told the CI that he did not have any heroin and that the CI should meet Lloyd at 24th and North Market Streets. The CI met Lloyd, and both responded to the East Side. The CI handed Lloyd money and a short time later Brian Miller ("Brian") arrived and delivered 260 bags containing 3.028 grams of heroin. A222; A250.

During September and October 2014, investigators frequently observed Lloyd in a Dodge Caravan registered to Felicia Pagan ("Pagan"), Miller's wife. A505-6. Pagan at one point also resided with Lloyd's girlfriend, Lakenya Howard ("Howard"), and the two women stored and packaged large quantities of heroin for Lloyd. A476-78.

During October 2014, as a result of authorized wiretaps and ongoing surveillance, police documented multiple drug transactions including: (1) on October 7, Lloyd delivered 500 to 600 bundles of heroin to Jarrell (State's Exs. 31-33); (2) on October 8, Lloyd, Jarrell and Sonia Dixon ("Dixon") conspired to deliver approximately 3900 bags containing 58.5 grams of heroin in the parking lot of the McDonalds in Bear, Delaware (A385-86; A718; State's Exs. 34-40); (3) on October 10, Lloyd, Brian and Howard arranged to deliver a "log" of heroin to an individual in the parking lot of the McDonalds in Wilmington (A481); (4) on October 12, Lloyd and Jarrell delivered 5 logs (9.75 grams) of heroin to Jarrell's residence (A717; State's Ex. 88); (5) on October 13, Lloyd, Jarrell and Palmer delivered heroin to Steven Roscoe ("Roscoe") and Leroy Ridgeway (A418-19; State's Exs. 45-47); (6) on October 16, Lloyd, Miller, Palmer and Roscoe attempted a heroin delivery, but terminated due to police presence (A419-20); (7) on October 17, Lloyd, Kareem Keyes and Pamela Keyes delivered 1556 bags containing 23.34 grams of heroin to Roscoe in the parking lot of a KFC in Dover (A420); and (8) on October 24, an unknown male contacted Lloyd and requested 50 bundles of heroin; Lloyd directed Palmer and Yasmeena Brown to facilitate delivery of the heroin to the Rashad Barber Shop in Wilmington. State's Ex. 52.

On October 30, 2014, police executed multiple search warrants. A690; A692. Police seized a total of $12,932 and a vehicle from Lloyd and Palmer's residence in Newark. A690. A search of Brian's residence yielded a .40 caliber handgun, magazines and ammunition. During the search of Miller and Pagan's residence, a detective observed Miller discard a handgun out the rear window of the bedroom that was subsequently located on the roof of the residence next door. A537; A649. A search of the residence yielded 1428 bags containing a total of 21.42 grams of heroin, 3 grams of marijuana and $2,933. A505.

On December 15, 2014, Sonia Dixon, who made money deposits for Lloyd, was taken into custody as she tried to withdraw funds from an account that had been frozen as a result of this investigation. A404, 718-9.

Lloyd used Jarrell, Wanda, Howard and Janelle Lloyd's homes to store, package and prepare heroin for distribution. A315-6. Some of Lloyd's associates referred to Wanda's Claymont residence as "The White House," to Lloyd as "Obama," Collins as "Biden," Howard as "Michelle," and Wanda as "Condaleeza." A169-70. Lloyd laundered his money by gambling. A172, 319-21, State's Ex 6. The Palmer men were the "muscle" of the organization. A197. Lloyd purchased cell phones and frequently changed numbers. A479. Lloyd directed others to facilitate drug transactions and, for the most part, distanced

himself from the drug dealing. A477. Lloyd then procured legal representation for his associates when they were arrested. *See* A91; State's Ex 18.

I. THE SUPERIOR COURT PROPERLY INSTRUCTED THE JURY ON THE LAW REGARDING THE ELEMENTS OF CRIMINAL RACKETEERING AND THE STATE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THE ENTERPRISE ELEMENT BEYOND A REASONABLE DOUBT.

Questions Presented[4]

Whether the Superior Court's jury instruction regarding criminal racketeering adequately provided the jury with the correct legal standards. Whether the State presented sufficient evidence that any rational trier of fact could have found the existence of an enterprise under the criminal racketeering statute beyond a reasonable doubt.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a requested jury instruction *de novo*.[5] "Under settled Delaware law, trial courts have wide latitude in framing jury instructions, and their choice of wording will not be disturbed as long as the instruction correctly states the law and is not so confusing or inaccurate as to undermine the jury's ability to reach a verdict."[6] "A trial court's jury instruction is not a ground for reversal if it is reasonably informative and not

[4] This argument responds to Arguments I and II of the Appellant's Opening Brief.

[5] *Perkins v. State*, 920 A.2d 391, 399 (Del. 2007) (quoting *Gutierrez v. State*, 842 A.2d 650, 651 (Del. 2004) (citing *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998))); *Keyser v. State*, 893 A.2d 956, 960 (Del.2006); *Ayers v. State*, 844 A.2d 304, 309 (Del. 2004).

[6] *Cabrera v. State*, 747 A.2d 543, 543 (Del. 2000).

misleading, judged by common practices and standards of verbal communication."[7]

"This Court ordinarily reviews a claim of insufficiency of the evidence 'to determine "whether any rational trier of fact, viewing the evidence in the light most favorable to the [prosecution], could have found the essential elements of the charged offense beyond a reasonable doubt."'"[8] Lloyd failed to raise this issue in a motion for judgment of acquittal in the Superior Court. Lloyd's insufficiency of the evidence claim, therefore, has been waived.[9]

Merits

Prior to trial, the State submitted proposed draft jury instructions for criminal racketeering. *See* A798. The State submitted one proposed instruction (A792-96), but then submitted another version which was included in the court's draft instructions. *See* A797. The day prior to closing arguments, Lloyd endorsed and joined in requesting the State's initially proposed instruction. *See* A797-98. The trial judge, over defense objections, gave the second version included in the

[7] *Floray v. State*, 720 A.2d 1132, 1137 (Del. 1998) (quoting *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947), quoted in *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983); and citing *Chance v. State*, 685 A.2d 351, 354 (Del. 1996) and *Probst v. State*, 547 A.2d 114, 119 (Del. 1988)).

[8] *Hardin v. State*, 844 A.2d 982, 990 (Del. 2004) (citations omitted).

[9] *See Monroe v. State*, 652 A.2d 560, 563 (Del. 1995) ("A claim of insufficiency of evidence is reviewable only if the defendant first presented it to the trial court, either in a motion for a directed verdict or a Rule 29 motion for judgment of acquittal. Absent any such motion, the claim is waived."); Del. Supr. Ct. R. 8.

court's draft instructions. A768-69. Lloyd asserts that the Superior Court's instruction was erroneous and requires reversal. Lloyd is incorrect.

Specifically, Lloyd objects to the explanation of the elements of the offense and the definition of enterprise provided to the jury. *See* Op. Br. at 32-33. Lloyd complains that the jurors were not instructed that, in order to prove the existence of an enterprise, the State was required to prove that the enterprise had "a decision-making framework; that the members function[ed] as a continuing unit; [and] the enterprise exist[ed] separate and apart from its pattern of racketeering." Op. Br. at 32. This list of sub-elements is not required, because the law does not require proof of those factors.

Interpreting the federal RICO statute upon which Delaware's statute is based,[10] the United States Supreme Court, in *United States v. Turkette*, explained:

> In order to secure a conviction under RICO, the Government must prove both the existence of an "enterprise" and the connected "pattern of racketeering activity." **The enterprise is an entity, for present purposes, a group of persons associated together for a common purpose of engaging in a course of conduct.** The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former **is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit**. The latter is proved by evidence of the requisite number of acts of racketeering

[10] *Stroik v. State*, 671 A.2d 1335, 1340 (Del. 1996) ("the most persuasive definitions of these terms ["enterprise" and "pattern of racketeering activity" in 11 *Del. C.* §§ 1502(3) and (5)] are ... provided by the various federal courts.").

committed by the participants in the enterprise.[11]

After *Turkette*, the federal circuits split regarding how much "structure" an association-in-fact enterprise must display to distinguish it from a RICO "pattern of racketeering." Some courts, like the Third Circuit in *United States v. Riccobene*,[12] required more proof of an enterprise's structure than others.[13] In *Stroik*, this Court approved the trial judge's reliance on the Third Circuit's interpretation of *Turkette* in *Riccobene* to determine whether the requisite showing of an association-in-fact enterprise had been made.[14] The Court, however, limited that approval "strictly to the facts of" *Stroik*.[15] Lloyd's reliance on *Stroik* is unavailing here.

Not only was this Court's decision in *Stroik* expressly limited to that case, but the case law interpreting the federal RICO statute has since been clarified, rendering reliance on *Riccobene* misplaced. The United States Supreme Court, in *Boyle v. United States*, listed structural elements the government need *not* prove to establish an association-in-fact enterprise:

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[11] 452 U.S. 576, 583 (1981) (citing 18 U.S.C. § 1961(1) (1976 ed., Supp. III)) (emphasis added).

[12] 709 F.2d 214, 222 (3d Cir. 1983).

[13] *See United States v. Hutchinson*, 573 F.3d 1011, 1020-22 (10th Cir. 2009) (explaining circuit split).

[14] *Stroik*, 671 A.2d at 1341.

[15] *Id*.

> We see no basis in the language of RICO for the structural requirements that petitioner asks us to recognize. As we said in *Turkette,* an association-in-fact enterprise is simply a continuing unit that functions with a common purpose. **Such a group need not have a hierarchical structure or a "chain of command"; decisions may be made on an ad hoc basis and by any number of methods—by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies.** While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.[16]

After *Boyle*, Lloyd's complaints that the jury instruction made no mention of "a decision-making framework" or that "the enterprise exist[ed] separate and apart from its pattern of racketeering" cannot be sustained. As the Tenth Circuit noted in *Hutchinson*:

> [T]he Supreme Court announced a new test for determining whether a group has sufficient structure to qualify as an association-in-fact enterprise. Under this test, a group must have "[1] a purpose, [2] relationships among those associated with the enterprise, and [3] longevity sufficient to permit these associates to pursue the enterprise's purpose." The Court explained the statutorily pertinent "purpose" by reference to its decision in *Turkette*, commenting that

[16] *Boyle v. United States*, 556 U.S. 938, 948 (2009) (citing *Turkette*, 452 U.S. at 580) (emphasis added).

> members of the group must share the "common purpose of engaging in a course of conduct." As to the relevant "relationship," the Court explained that not only must members of the group only share a common purpose, there also must be evidence of "interpersonal relationships" aimed at effecting that purpose—evidence that the members of the group have "joined together" to advance "a certain object" or "engag[e] in a course of conduct." As to longevity, the Court held that the group must associate on the basis of its shared purpose for a "sufficient duration to permit an association to 'participate' in [the affairs of the enterprise] through 'a pattern of racketeering activity,'" though "nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence[.]" The Court acknowledged that its structural requirements for an enterprise are modest, certainly far more modest than *Riccobene*'s ..., but stressed that this result is compelled by the plain language of Congress's statute: "This enumeration of included enterprises is obviously broad, encompassing [in RICO's plain language terms] '*any* ... group of individuals associated in fact.'" "The term 'any' ensures that the definition has a wide reach, ... and the very concept of an association in fact is expansive. In addition, the RICO statute provides that its terms are to be 'liberally construed to effectuate its remedial purposes.'"[17]

Thus, the Superior Court's decision to use the less complex and more clear jury instructions was proper. "Simply put, after *Boyle*, an association-in-fact enterprise need have no formal hierarchy or means for decision-making, and no purpose or economic significance beyond or independent of the group's pattern of racketeering activity."[18]

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[17] 573 F.3d at 1019-20 (internal citations omitted).

[18] *Id*. at 1021 (citing *Boyle*, 556 U.S. at 947 (rejecting a proposed requirement that the jury be told an enterprise's structure must be "ascertainable" on the ground that such an instruction is "redundant and potentially misleading")). *See United States v. Hewes*, 729 F.2d 1302, 1311

"A defendant has no right to have the jury instructed in a particular form. However, a defendant is entitled to have the jury instructed with a correct statement of the substantive law."[19] "A jury instruction must give a correct statement of the substance of the law,[20] and it must be "reasonably informative and not misleading, judged by common practices."[21] Even where there are some inaccuracies in an instruction, this Court will reverse only if the deficiency undermined the jury's ability "to intelligently perform its duty in returning a verdict."[22] Here, the trial judge correctly instructed the jury as to the substance of the law regarding criminal racketeering:

> In Delaware[,] it is unlawful for a person associated with an enterprise to conduct the enterprise's affairs [through] a pattern of racketeering activity[,] or to participate in the enterprise's affairs through a pattern of racketeering activity. To find the defendant guilty of criminal racketeering, you must find that each of the following elements has been proven beyond a reasonable doubt:
>
> One, defendant was associated with an enterprise; and, two,

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(11th Cir. 1984) (concluding that an enterprise includes any group of persons associating formally or informally for the purpose of conducting illegal activity and finding sufficient proof of an enterprise based on the evidence also offered to prove the pattern of racketeering activity); *United States v. Bagaric*, 706 F.2d 42, 56 (2nd Cir. 1983) ("it is logical to characterize any associative group in terms of what it *does*, rather than abstract analysis of its structure.").

[19] *Claudio v. State*, 585 A.2d 1278, 1282 (Del. 1991).

[20] *Miller v. State*, 224 A.2d 592, 596 (Del. 1966).

[21] *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947).

[22] *Storey v. Castner*, 314 A.2d 187, 194 (Del. 1973).

> defendant conducted the enterprise through a pattern of racketeering activity or defendant participated in the enterprise's affairs through a pattern of racketeering activity; and, three, defendant's conduct or participation in the pattern [of] racketeering activity was intentional.
>
> Under the law, an enterprise includes a group of people associated in fact for a common purpose. Pattern of racketeering activity shall mean two or more felonies including, but not limited to, felony aggravated possession or drug dealing which are closely related to the enterprise's affairs but are not so closely related to each other as connected in time and place to constitute a single act, yet the felonies were not more than ten years apart. The underlying felonies are sometimes referred to, as I said, as predicate offenses.
>
> Conduct or participate in an enterprise's affairs means acting in a way that is necessary or helpful in carrying out the enterprise's business or operations, including predicate offenses. Intentionally as used in the criminal racketeering law means it was the defendant's conscious object and purpose to do the acts that constitute the alleged pattern of racketeering activity. (A769).

These instructions adequately informed the jury that an enterprise was a group of people with a purpose, that Lloyd must have a relationship with the enterprise, and the enterprise had to be in operation long enough to show a pattern of members committing felonies in pursuit of the enterprise's purpose.[23] In contrast, the jury instruction sought by Lloyd, relying on pre-*Boyle* cases, included elements the State was not required to prove. In fact, the Third Circuit has acknowledged that

[23] *See Boyle*, 556 U.S. at 946 ("From the terms of RICO, it is apparent that an association-in-fact enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.").

"[t]o the extent that this holding [in *Riccobene*] is inconsistent with *Boyle*, it is no longer good law." [24]

Sufficiency of the evidence

Should this Court review his claim of insufficient evidence, Lloyd is not entitled to relief. The evidence overwhelmingly demonstrated that Lloyd participated as a member (the leader) of a group with a common purpose (an enterprise) to illegally distribute heroin and to hide the proceeds of that illegal activity. The racketeering instruction provided sufficient guidance that a reasonable jury could find that Lloyd and his associates had a common purpose, relationships, and longevity, as required for an associate-in-fact enterprise.[25] The State submitted ample evidence of qualifying predicate offenses to establish a pattern of racketeering.

Even if this Court accepted the sub-elements listed by Lloyd as essential elements of criminal racketeering, the State still met its burden. The State presented evidence that Lloyd was associated with numerous other people with the common purpose of dealing heroin in Delaware. Witnesses testified that they acted at the direction of Lloyd. Cars and weapons were procured by associates for

[24] *United States v. Bergrin*, 650 F.3d 257, 266 n.5 (3d Cir. 2011).

[25] *See, e.g.*, *United States v. Kamahele*, 748 F.3d 984, 1003 (10th Cir. 2014) (applying the *Boyle* analysis to claims of deficient jury instructions in a criminal RICO case).

use by the group. Association members' homes were used to package heroin for sale. The State presented evidence of a hierarchy and relationships that went beyond the pattern of criminal racketeering. The predicate offenses occurred over time, demonstrating the continuing nature of the enterprise. In addition, the evidence showed the enterprise existed apart from the listed offenses that established the pattern of racketeering. Regardless of the standard used (*Riccobene* or *Boyle*), considered in the light most favorable to the State, the evidence presented at trial was such that a rational trier of fact could have found all the elements of criminal racketeering beyond a reasonable doubt.

II. THERE WAS NO PLAIN ERROR AFFECTING LLOYD'S SUBSTANTIAL RIGHTS WHEN THE PROSECUTORS ASKED TESTIFYING CO-DEFENDANTS ABOUT THE TERMS OF THEIR PLEA AGREEMENTS.

Question Presented[26]

Whether a prosecutor asking a testifying co-defendant about the terms of his plea agreement constitutes plain error.

Standard and Scope of Review

Where defense counsel failed to object at trial, this Court reviews claims of prosecutorial misconduct only for plain error.[27] The Court first examines the record *de novo* to determine whether prosecutorial misconduct occurred.[28] If the Court determines that no misconduct occurred, the analysis ends. If the trial prosecutor engaged in misconduct, the Court applies the *Wainwright* plain error standard.[29] Under *Wainwright*, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[30] Plain error "is limited to material defects which are apparent on

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[26] This argument responds to Arguments III and IV of the Appellant's Opening Brief.

[27] *Baker v. State*, 906 A.2d 139, 150 (Del. 2006) (citing *Kurzmann v. State*, 903 A.2d 702, 709 (Del. 2006)).

[28] *Id.*

[29] *Id.* (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

[30] *Wainwright*, 504 A.2d at 1100.

the face of the record, which are basic, serious, and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[31]

If the Court concludes that the misconduct would not warrant reversal under the *Wainwright* standard, the Court considers whether the prosecutor's errors are repetitive such that they require reversal because they cast doubt on the integrity of the judicial process.[32]

Merits

Lloyd asserts that four testifying co-defendants were asked during their direct examination at trial whether they had testified truthfully. Op. Br. at 49. Neither Lloyd nor Miller objected to the prosecutor's questions; Miller objected to the State calling witnesses to testify only to the fact that they had pleaded guilty to criminal racketeering, based on lack of relevance. A96-97. The trial judge overruled the objection, finding that someone pleading guilty to racketeering with another person did not "prove the racketeering by itself," but that the fact was "a piece of that picture." A97. Lloyd joined when Miller's counsel later renewed this objection. A174. Ultimately, the trial judge explained his reasoning for allowing the testimony as follows:

[31] *Id.*

[32] *See Hunter v. State*, 815 A.2d 730, 732 (Del. 2002).

> [T]o the extent that somebody came in and said I pled guilty to doing racketeering with Lloyd, that has some probative value in terms of whether the two of them were doing racketeering together. The guy took a felony and probably a prison sentence as result of that admission. If you want to cross-examine him about it to suggest, as you have, that he had ulterior motives, that's fine.... (A503).

Truthfulness

Lloyd complains that the prosecutor asked "many" witnesses on direct examination if they were testifying truthfully in compliance with their plea agreements. Op. Br. at 49. Lloyd identifies the four witnesses addressed below as those who were asked on direct examination whether they had testified truthfully. Lloyd does not specify how the prosecutors erred in asking these witnesses about the veracity of their testimony.

On direct examination, Demetrius Brown ("Demetrius") testified about his plea agreement without any reference to truthfulness. A194-95. During cross-examination, Lloyd's counsel questioned Demetrius about a prior statement Demetrius had made to police in April 2014, pointing out the information Demetrius had failed to tell police in his interview but to which he was now testifying. A199-200. Counsel intimated that Demetrius's testimony was suspect because Demetrius was getting "the deal of the century." A200. After a lengthy cross-examination attacking Demetrius's credibility, the prosecutor asked Demetrius whether he had been locked up after speaking to the police and then,

"when you testified here today were you telling the truth?" A202. The trial court overruled Lloyd's objection to the prosecutor's question. A202.

Jarrell Brown ("Jarrell") testified the next day. After extensive testimony on direct examination, the prosecutor asked Jarrell about the terms of his plea and cooperation agreements. A368-73. The prosecutor, without objection, asked: "As part of your plea agreement, did you agree that you were going to tell the truth?" A373. Lloyd's counsel cross-examined Jarrell about his motivation for cooperating with the police, noting that he was originally the main target of a DEA and Delaware State Police heroin distribution investigation. B-3. Counsel elicited testimony that Jarrell, at the time of Lloyd's trial, had already been sentenced to six years pursuant to his cooperation agreement. B-17.

Lakenya Howard testified the next week. During direct examination, the prosecutor asked Howard about her plea agreement and established that Howard had not been sentenced. A474. The prosecutor, without objection, asked, "Is it your understanding that as part of this plea agreement you are required to testify truthfully?" A474-75. On cross, both counsel for Lloyd and Miller elicited that Howard anticipated getting out of jail after she testified. A482; A484.

Yasmeena Brown ("Yasmeena") testified the following day. Yasmeena failed to recall significant information she had provided the police in her prior

statement, even after the prosecutor repeatedly attempted to refresh the witness's recollection with a transcript of her police interview. *See* A597-98. The prosecutor informed the trial judge that if the efforts to refresh the witness's recollection failed, the State might seek to admit her prior statement under 11 *Del. C.* § 3507. A598. After a lengthy and difficult direct examination, the prosecutor, without objection, asked, "And you agreed as part of your plea down in the condition section to testify truthfully here today? and "Ms. Brown, did you testify truthfully here today?" A608. Lloyd's counsel only asked Yasmeena about her plea, noting that she had received a misdemeanor conviction with probation. A609.

Prosecutors are prohibited from vouching for the credibility of a witness by stating or implying personal knowledge of the truth of the testimony, beyond that which can be logically deduced from the witness's trial testimony.[33] "Improper vouching occurs when the prosecutor implies some personal superior knowledge ... that the witness has testified truthfully."[34] Here, none of the questions asked by the prosecutors in examining the four witnesses referenced by Lloyd on appeal was objectionable. The prosecutors gave no indication that they had some superior

[33] *Torres v. State*, 979 A.2d 1087, 1096 (Del. 2009); *Caldwell v. State*, 770 A.2d 522, 530 (Del. 2001); *Weber v. State*, 547 A.2d 948, 960 (Del. 1988).

[34] *White v. State*, 816 A.2d 766, 779 (Del. 2003) (citation omitted); *see also Clayton v. State*, 765 A.2d 940, 942-43 (Del. 2001).

knowledge regarding the credibility of the witnesses. The prosecutors did not argue that these witnesses were telling the truth as required by their plea agreements. Nor did the prosecutors suggest that the witnesses would be punished if they failed to testify truthfully. The prosecutors were simply referring to the terms of the plea agreements.[35] Further, the underlying offenses to which the witnesses had pleaded guilty were corroborated by other witnesses. In cases where the State has sought the admission of prior witness statements, this Court has encouraged prosecutors to elicit testimony as to the truthfulness of a witness's in-court testimony and out-of-court statements.[36] As explained in *People v. Bahoda*, "admissibility of such an agreement is not necessarily error unless it is used by the prosecution to suggest that the government had some special knowledge, not known to the jury, that the witness was testifying truthfully."[37] That was not the case here. Moreover, Lloyd suffered no prejudice because Lloyd's counsel

[35] *See United States v. Trujillo*, 376 F.3d 593, 608-09 (6th Cir. 2004) (finding no improper vouching where "the prosecutor did not offer any personal observations or opinions as to the veracity of either [of the witnesses] .... Rather, the prosecutor's questions and comments merely encompassed the terms of [their] plea agreements which this Court has held to be permissible." (citing *United States v. Francis*, 170 F.3d 546, 550 (6th Cir. 1999))). *Accord United States v. Thornton*, 197 F.3d 241, 252 (7th Cir. 1999) ("Just as defense counsel have every right to attack the credibility of witnesses who get deals, the prosecution is entitled to get into evidence the fact that the deals are conditioned upon truthful testimony.").

[36] *See Purnell v. State*, 106 A.3d 337, 353 (Del. 2014).

[37] 531 N.W.2d 659, 667 (Mich. 1995) (quoting *People v. Buschard*, 311 N.W.2d 759 (1981)).

vigorously cross examined and argued the witnesses' motives for lying.[38]

Alleged bolstering

Lloyd alleges that the State "improperly bolstered the racketeering charge by putting witnesses before the jury to testify only to having pled guilty to racketeering without introducing further evidence." Op. Br. at 50. Lloyd cites to Miller's objection to the testimony of Davonte Lewis to support this proposition.[39] But Lewis testified to more than the fact that he pleaded guilty to racketeering. Lewis testified that: "Stemp" identified him as the person who shot someone (A87); he was in "Gilly's" [Collins'] car when he was arrested on January 14, 2014 (A91); and Lloyd suggested Joseph Benson as an attorney when Lewis called him after getting arrested (A91). In fact, Lewis's limited testimony tied him to both Galen Collins and Lloyd, as well as to a predicate offense alleged as a part of the pattern of racketeering.

Zechariah Palmer's testimony was limited almost exclusively to his plea agreement. A165. He identified his plea agreement and acknowledged that the charges to which he pleaded, first degree reckless endangerment and possession of

[38] *See United States v. Beaty*, 722 F.2d 1090, 1096 (3d Cir. 1983) (finding that error, if there was error, in the admission of a promise of truthfulness on direct examination was not reversible where defense counsel interrogated witnesses about motives for lying).

[39] Lloyd has not specified which co-defendants' testimony was objectionable, and thus the State has addressed testimony of co-defendants listed in a similar claim by Antoine Miller in his opening brief on appeal.

a firearm, stemmed from a shooting at 118 West 26th Street. A165. Zechariah also testified that he pleaded guilty to commit criminal racketeering and that he had not agreed to testify. A165. On cross-examination, Zechariah agreed that he took a plea just to resolve his two pending cases. A165.

Blayton Palmer's direct testimony was similarly limited. *See* A174-75. Blayton agreed that he pleaded no contest to possession of a firearm by a person prohibited and guilty to drug dealing in heroin, disregarding a police officer, second degree conspiracy and conspiracy to commit racketeering. The prosecutor elicited from Blayton that: on New Year's Day Blayton was with Rakeem Miller on 27th Street; and, on January 16, 2014, Blayton was the driver in the car chase. A174-75. On cross-examination, Blayton testified that Lloyd was not involved in the conduct for which Blayton was charged and that he received the minimum mandatory amount of jail time for the weapons charge (5 years) to resolve all his cases. A175.

Rakeem Miller's direct testimony was the most limited of the group. A183. Rakeem simply testified that State's Exhibit 12 was his plea agreement, he signed it in the presence of his attorney, and he pleaded guilty to one count of conspiracy to commit racketeering. A183. On cross-examination, Lloyd's counsel elicited that Rakeem took the plea "to what I did" and not just "to avoid being habit and get

15 years." A183. When asked if he was affiliated with Mr. Lloyd, Rakeem stated, "It's my family." A183. Because the more prejudicial testimony was elicited by Lloyd's counsel, Lloyd cannot establish prejudice from the State as to this witness's testimony.

Brian Palmer, who pleaded guilty to criminal racketeering and five counts of drug dealing (heroin), only testified about his plea agreement on direct examination (A503-04), but on cross-examination he testified that "it could have said three murder charges on [the plea agreement] that I knew I was not there for, I'd have took my time, read it, pled to it, because I didn't want life in jail." A504. On re-direct, Brian stated that "I didn't do racketeering either." A504. Thus, Lloyd cannot establish prejudice from Brian's testimony about his plea agreement.

Neither Lloyd nor Miller objected to the admission into evidence of the co-defendants' plea agreements. Neither requested limiting instructions. At the close of evidence, the trial judge instructed the jury on accomplice testimony followed immediately by impeachment by prior conviction:

> You have heard accomplice testimony. For obvious reasons, an alleged accomplice's testimony should be examined by you with suspicion and great caution. This rule becomes particularly important when there is nothing in the evidence, direct or circumstantial, to corroborate the alleged accomplice's accusations that a defendant participated in a crime.
>
> Without corroboration, you should not find defendant guilty unless, after careful examination of the alleged accomplice's

> testimony, you are satisfied beyond a reasonable doubt that it is true and that you may safely rely upon it. Of course, if you are satisfied you would be justified in relying upon it, despite the lack of corroboration, and in finding defendant guilty.
>
> You may consider evidence that a witness was previously convicted of a felony or a crime involving dishonesty for the sole purpose of judging that witness' credibility or believability. Evidence of a prior conviction does not necessarily destroy or damage the witness' credibility. And it does not mean that the witness has testified falsely. It simply is one of the circumstances you may consider in weighing the testimony of that witness. (A779).

The trial court did not instruct the jury regarding the proper limited purposes for admission of the plea agreements and how to consider that evidence.[40]

This Court, in *Allen v. State*, held: "During the direct examination of a co-defendant, a prosecutor may elicit testimony regarding that co-defendant's plea agreement and may actually introduce that agreement into evidence."[41] The Court restricted the admission of the plea agreement itself into evidence "for the limited purpose of allowing the jury to accurately assess the credibility of the co-defendant witness, to address the jury's possible concern of selective prosecution or to explain how the co-defendant witness has first-hand knowledge of the events about which he or she is testifying."[42] *Allen* did not address any limitations on the

[40] *See Purnell v. State*, 106 A.3d 337, 350 (Del. 2014) (explaining the requirement of a limiting instruction regarding plea agreements).

[41] 878 A.2d 447, 450-51 (Del. 2005).

[42] *Id.* at 451.

testimony of the co-defendant, but suggested that a limiting instruction is appropriate. However, in *Purnell*, the Court found that if a co-defendant testifies and is subject to cross-examination, but the plea agreement itself is not offered into evidence, his counsel is not required to request a cautionary instruction.[43]

Here, the trial judge found the limited testimony regarding the co-defendants' plea agreements relevant to establish that they were connected to the criminal racketeering enterprise with Lloyd and Miller.[44] A503. Although courts have consistently found that plea agreements cannot be used as substantive evidence to prove the guilt of another,[45] the prosecutors here did not simply enter the plea agreements into evidence. Instead, the co-defendants were called as witnesses and made available for cross-examination. In cross-examining the witnesses, Lloyd elicited testimony from several of the co-defendants that they would have pleaded guilty to anything to obtain the benefit of the agreements.[46] The State presented evidence of the substantive crimes committed by the co-defendants through other witnesses, video surveillance and wiretap evidence. By

[43] *Purnell*, 106 A.3d at 351.

[44] *Cf. State v. Phillips*, 2015 WL 516815, at *2-3 (Del. Super. Ct. Sept. 2, 2015) (finding certifications of convictions and guilty pleas of other gang members admissible in prosecution for gang participation to prove a pattern of criminal gang activity).

[45] *See Allen*, 878 A.2d 450 & n.4 (citing *Kirby v. United States*, 174 U.S. 47, 55-56 (1899)).

[46] *Cf. United States v. Tocco*, 200 F.3d 401, 418 (6th Cir. 2000) (finding admission of certified convictions of co-defendants permissible in re-trial because "Tocco's co-defendants ... had the opportunity to show the jury that he was not involved in their crimes").

presenting the jury with live witnesses who informed the court that they conspired with Lloyd and Miller and participated in the racketeering, the State provided Lloyd the opportunity to ask the witnesses about their relationship with him and to explain or deny any participation with him in criminal activities.

No cumulative error

Lloyd argues that the State's repeated bolstering of the co-defendants' testimony without a curative instruction, in conjunction with a faulty jury instruction defining a racketeering enterprise, amassed sufficient prejudice to require reversal of Lloyd's convictions. He is wrong.

Any error at Lloyd's trial was harmless beyond a reasonable doubt and Lloyd is not entitled to relief. Although the trial court failed to *sua sponte* give a cautionary instruction regarding the admission of the plea agreements, the jury heard the cautionary instruction regarding accomplice testimony and the relevance of prior convictions of witnesses. "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."[47]

But most importantly, the State presented overwhelming evidence that Lloyd

[47] *Hoffa v. United States*, 385 U.S. 293, 311 (1966).

managed a large heroin distribution ring in Delaware. The co-defendants' testimony was corroborated by physical evidence, police testimony, video surveillance, recorded telephone calls, and Lloyd's own statement to police. As the prosecutor reminded the jury in rebuttal argument,

> Talk about the codefendants. And [Lloyd's counsel] says you can't convict because everyone else pled. He's absolutely right. But ask yourselves is that all the State has presented? Over 60 witnesses, over 170 pieces of evidence, over a week and a half. That's not all. (A765).

The State presented overwhelming evidence, independent of any of the co-defendants' testimony, to establish Lloyd's guilt of criminal racketeering:

- Lloyd's statement (State's Ex. 191) in which he admitted: procuring heroin in Philadelphia and distributing more than 1600 bundles of heroin a week in Delaware; conducting counter surveillance of police to avoid detection (corroborated by police who observed Lloyd in the back lot of the Wilmington Police Department, sizing up the undercover cars); and providing heroin to others to sell. During the course of the interview, Lloyd named Brian Palmer, Blayton Palmer, Davonte Lewis, Demetrius Brown, Jarrell Brown, Antoine Miller, Tomeika Gross, Lakenya Howard and Felicia Pagan as associates.

- Police surveillance: On October 13, 2014, police watched Jarrell Brown meeting with Roscoe after hearing about a scheduled heroin transaction. A418; State's Ex. 55. Police then conducted a traffic stop recovered several bundles of heroin on Roscoe's person. A418; A431.

- Physical evidence: cash in Lloyd's freezer and in the trunk of one of his cars (A690-91); a security system set up outside of Lloyd's bedroom (A694); numerous cell phones in Lloyd's home (A693, 695-97); and vents knocked out in Lloyd's home during a burglary on January 9, 2014, a location where drug dealers often stash drugs, guns or cash. (A166; A202-03).

- Surveillance video: Lloyd was at the gun store in Philadelphia on January 9, 2014 with Galen Collins, Demetrius Brown, William Anderson and Latifa Jones.[48] State's Ex. 6 (A147); A148; A164. The gun purchased that day by Latifa Jones (A146) was recovered in the car chase on January 16, 2014, in which Blayton Palmer was the driver of Wanda Lloyd's black minivan. A80; State's Ex. 2; A121-22; A145. Rakeem Mills, Galen Collins and William Anderson were all in the minivan during the police pursuit. A109. Collins had heroin and $1500 in his possession when he was caught after the car chase. A116. The State presented video evidence showing Jarrell Brown at Delaware Park with Lloyd where Brown hands Lloyd a large wad of cash. State's Ex. 29

- Controlled buys: On January 10, 2014, police set up a controlled buy of heroin from Brian Miller, who was with Lloyd at or near the meet location. A221-25. Delaware State Police made direct buys of heroin and a gun from Jarrell Brown. A292-94. Police, acting undercover, drove Roscoe to meet with Lloyd on October 16, 2014. A419. Lloyd arrived at the designated location in the company of Miller. Lloyd directs Roscoe to follow him while watching for police vehicles. A420. Lloyd identified an undercover police vehicle. A420.

- Prison calls: Calls from Galen Collins to Wanda Lloyd and others after his arrest in March 2014 revealed that Lloyd assisted his associates with bail and obtaining counsel; Lloyd was referred to as "Obama" while Collins was called "Biden." State's Exs. 15, 18-22; A220.

- Wiretaps: Jarrell Brown and Lloyd arranged multiple heroin deliveries. Lloyd paid for cell phones used by associates. State's Ex. 71. Lloyd discussed the number of bags he wanted in bundles in order to not have to sell "cheap." State's Ex. 73. Lloyd discussed being shorted on cash. State's Ex. 107. Lloyd identifies police vehicles and warns others. State's Exs. 64, 65. Lloyd and Jarrell Brown discuss drug delivery issues. State's Ex. 64. Janelle Lloyd stored heroin for her brother, Lloyd. *See* State's Ex. 52.

In light of the extensive evidence presented by the State, and especially in

[48] Latifa Jones and Galen Collins have a child together. A153.

light of Lloyd's admissions, any failure to give a cautionary instruction regarding the admission of his co-defendants' plea agreements was harmless beyond a reasonable doubt. There was no error in the racketeering jury instruction, and the State proffered ample evidence to establish that Lloyd participated in an ongoing enterprise to distribute heroin and launder the proceeds. The prosecutors, by offering the testimony of uncooperative co-defendants, addressed any concerns the jury may have had about selective prosecution and allowed Lloyd to argue that none of the co-defendants' testimony was credible based on the beneficial plea deals.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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