



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MAURICE CRUZ-WEBSTER,)
 Defendant Below - Appellant,) **Supreme Court No.: 139, 2016**
)
v.)
)
THE STATE OF DELAWARE,) **On Appeal from the Superior**
 Plaintiff Below - Appellee.) **Court of the State of Delaware**
) **Superior Court I.D. No.:**
) **1501005498**

APPELLANT'S REPLY BRIEF

/s/ Michael W. Modica
MICHAEL W. MODICA, ESQUIRE
Bar ID # 2169
Attorney for Maurice Cruz-Webster
P.O. Box 437
Wilmington, DE 19899
(302) 425-3600

Date of filing: November 10, 2016

REPLY ARGUMENT I

DEFENDANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR ELICITED PATROLMAN BARNES' OPINION THAT HE DID NOT BELIEVE THAT THE VICTIM WAS BEING TRUTHFUL WHEN HE STATED HE DID NOT KNOW WHO SHOT HIM.

MERITS:

The State argues that Cruz-Webster's failure to ask for a mistrial operated to waive his claim that a mistrial was required. The State mischaracterizes/misunderstands this claim. Cruz-Webster contends that the prosecutor engaged in misconduct by eliciting a prejudicial comment on the victim's credibility which violated his constitutional right to a fair trial requiring a reversal of his convictions. Although counsel initially requested a curative instruction, the Trial Court preempted counsel's ability to subsequently move for a mistrial on misconduct grounds by ruling that "I don't think the prosecution intended to elicit that response. Let me make that perfectly clear." (A-23). In other words, there was no basis to move for a mistrial after the Court's ruling. Counsel was left with the default remedy of a curative instruction. Acquiescing to the curative instruction did not constitute an admission that it was sufficient to cure the prejudice, or that his right to a fair trial was not violated. The lack of a motion for mistrial on prosecutorial misconduct grounds, after the Court found that no misconduct

occurred, did not operate to waive this claim. Defendant's position is that his convictions should be reversed based upon prosecutorial conduct, and that the Trial Court abused its discretion by not finding misconduct.

The State denies that the prosecutor engaged in misconduct that deprived Cruz-Webster of his federal due process right to a fair trial by eliciting Patrolman Barnes's opinion that he did not believe the victim was being truthful when he stated he did not know who shot him. The State contends that the prosecutor did not intentionally elicit the testimony explaining that he anticipated that the officer would respond that he asked the question to get "more details." The State then argues that even if misconduct is demonstrated, there is no prejudice because of the overwhelming strength of its case.

A review of the prosecutor's representations at the final case review plea colloquy proceedings contradicts the State's claim that there was overwhelming evidence against the Defendant. (AR 11-12).

Defendant repeats and reemphasizes the reasons set forth in his opening brief why the prosecutor's explanation for his question actually reveals his improper motivation. A review of the final case review plea colloquy proceedings also establishes the prosecutor's view that the victim's inability to identify his shooter constituted a significant obstacle to the prosecution, and foreshadows the State's effort to overcome that obstacle. (AR 11-12).

When Cruz-Webster questioned the Court about why the case wasn't dismissed in light of the victim's failure to identify him as the shooter, the prosecutor explained:

The Court: Mr. Kriner, you have no obligation to respond, but do you wish to?

Mr. Kriner: I do not, Your Honor. That's the evidence that's going to be presented. And quite honestly, that's – as Your Honor probably knows, that's a large part of the reason for the plea.¹ We don't believe the victim was being honest because they were friends. We have independent evidence, including the inmate to whom he confessed, that's going to put him there as the shooter. We understand that it's a difficult – it makes the State's case more difficult when the victim won't honestly say who did it. However, we believe that we can overcome that statement and we've already thought that through. We don't believe that the victim was being truthful for a variety of reasons.

And we are aware of the DNA on the shell casings. That's not an issue either. But, obviously, those things are the reason for the, what we believe, very generous plea offer that we are making. (AR11-12)

The prosecutor acknowledged that the victim's statement was a significant obstacle to overcome in its case and the reason for the State's generous plea offer. The prosecutor revealed his belief that the victim was being dishonest, that his statement was a significant obstacle, and that he had already thought about how to overcome that obstacle.

¹ The State made a plea offer to Manslaughter and to recommend a sentence of 2-5 years incarceration pursuant to sentencing guidelines. (AR-2-3)

Eliciting the patrolman's belief that the victim was not being truthful fit with the prosecutor's belief about the victim's dishonesty and his need to overcome that statement. It was the prosecutor's only method of conveying to the jury that the victim was not being honest, consistent with his stated belief, and consistent with his stated need to overcome that obstacle.

The State argues that the victim consistently responded to Officer Barnes' multiple questions about "what happened" (by describing the subjects as two black males wearing all black, without providing any additional details) as a reason for asking the officer why he continued to ask Lewis for details. It argues that the "prosecutor properly anticipated that, on redirect questioning, the officer would respond that he was attempting to learn additional details."

That argument rings hollow since the prosecutor exhausted the "no additional details" aspect of the victim's interview on direct examination. On cross examination, defense counsel did not develop any new material about the victim's interview, but merely confirmed the information elicited on direct. The cross examination did not open the door to the question about *why* the officer asked the victim multiple times about what happened. The fact that the prosecutor waited until after cross examination to ask the improper question, instead of on direct, fit with the prosecutor's purpose to counter defense counsel's anticipated argument. This was not an unresponsive answer to an innocent question, but the anticipated

answer to a calculated question. The prejudicial answer accomplished the prosecutor's objective to overcome the most significant obstacle to the prosecution. The improper response effectively destroyed the foundation of the defense.

The curative instruction given by the trial court in this case was insufficient to eliminate the impact of Barnes' statement that Kyrell Lewis was being dishonest.

The prosecutorial misconduct caused prejudice to the Defendant.

Defendant rejects the State's argument that the prosecutorial misconduct did not cause prejudice to Cruz-Webster because it claimed a "very strong case based on circumstantial evidence." The State's claim of a very strong case based upon circumstantial evidence is contrary to its explanation why it was offering a very generous plea offer to the Defendant at the final case review. The State's position in this appeal cannot be reconciled with its representations to the Court explaining the reasons for the generous plea offer.

The circumstantial evidence in this case was far from strong. There was no identification of Maurice Cruz Webster as the shooter. Kyrell Lewis had the best opportunity to see the shooter but did not identify Cruz Webster as his assailant. He identified an unknown perpetrator(s). While there were people who claim to have witnessed significant portions of the interaction between the victim and the young men whom were present, no one identified Cruz Webster as the shooter.

None of the witnesses, except for Phyllis Shaw, identified the Defendant as being present. Shaw did not see the shooting, did not see Cruz Webster possess a weapon, and did not see when an unidentified person came to the location where the shooting occurred. On the 911 call, Shaw stated that “they” shot him. She did not state that “Mersey” shot him. Shaw testified that Cruz Webster was wearing a purple hoodie and gray sweatpants, contrary to what Nora Luevano described.

No gun was recovered. There was no attempt to lift fingerprints from the shells found at the scene. The result of the DNA analysis of the shells located at the scene was favorable to Cruz-Webster. Paul Gilbert performed a DNA analysis and testified that it excluded Maurice Cruz Webster as being a major contributor to the DNA that was on the shells. The balance of the analysis was inconclusive.

There was no fingerprint evidence linking Cruz-Webster to the crime. No clothing matching the description worn by the shooter was recovered. The white pants, purple hoodie or jacket were not recovered. There was no gun powder residue testing of either Cruz-Webster, or any of his clothing. Even though there was a claim by one of the witnesses that the shooter was wearing a jacket, the jacket worn by Cruz-Webster when he was arrested was not tested for gun residue.

Defendant’s cell phone was never recovered. There are assumptions that he possessed his cell phone on the night of the offense, but there was no eyewitness testimony that he actually possessed the phone. Any calls or texts to or from that

phone will note “Mersey” as the source because it’s his phone. However, it is an assumption to believe that any communication involving Defendant’s phone was initiated by him. There are endless explanations for why one may possess another person’s cell phone.

Jorge Lujan, a neighbor, originally tried to mislead the police to believe that he saw the shooting because he wanted to prevent his girlfriend from being involved, therefore his credibility was suspect. He couldn’t identify the shooter because it was too dark to see faces. His girlfriend, Nora Luevano, saw the shooting but could not see the face of the perpetrator as it was dark and she had to see through a tree. She described the shooter as wearing white pants, not sweatpants as described by Shaw. Luevano gave a mistaken description of what the victim was wearing calling into question the reliability of her observations.

Another witness, Douglas Pressley, said that there were four to five males, and then five to six males present at the time of the argument. He described one of the individuals as a white guy with a red beard. He did not identify Cruz Webster as being present.

The State presented the video from the Newcastle Market purportedly showing Cruz Webster in the store buying minutes for his phone on the date of the offense wearing pants matching Luevano’s description of the shooter. However, the time on the receipt for the minutes Cruz Webster allegedly purchased did not

correspond to the time on the video. Fawwaz Mohammad, the clerk and manager, testified that the date and time on the video is not accurate. Furthermore, the clothing worn by Cruz Webster in the video is more consistent with baggy sweatpants with a drawstring as opposed to fitted white pants as described by Luevano.

While the State established that the cellphone in question was registered to Maurice Webster, they cannot state that the text and phone calls were from the Defendant, only his phone. With respect to the cell tower analysis, the only conclusion that could be made was that the cell phone was located within a broadly defined general area. Cell tower analysis cannot provide a precise location. So the results of the analysis cannot lead to a conclusion that the cell phone was located at the time and location of the shooting.

Additionally, the evidence that the activity on Defendant's cell phone stopped shortly after the shooting is misleading. It only has meaning if the evidence showed that Cruz Webster possessed the phone at that time of the shooting and during the period of inactivity.

The testimony of Donald Cooper, a convicted felon and admitted addict, was suspect and unreliable. He testified that he was seeking a benefit in return for his testimony when he originally offered his assistance. Thus, he was motivated by self-interest. He obtained a benefit for his assistance by a promise to seek a

sentence modification so that he could leave the State, and financial assistance to establish a new residence.

The State's claim that Cooper could not have known about the details of the shooting because only limited information was released to the public is misleading. First, Cooper made the objectionable statement that "Well, before I got arrested I heard that Bub died. And somebody said that he [Cruz Webster] did it. (A-28). His statement shows that he had communicated with someone about the murder *before* he was arrested.

Next, a preliminary hearing in this case was held on January 26, 2015. Details of the homicide were disclosed during the course of the hearing. The preliminary hearing is open to the public. Anyone present during the course of the preliminary hearing would have learned of the details of the shooting and would be able to convey that information to other members of the public. Cooper could have learned about details revealed at the preliminary hearing through visits or phone calls with anyone who became aware of the details after the preliminary hearing. Furthermore, nothing prevented witnesses and family members from discussing the details of the shooting with other members of the public.

The circumstantial evidence in this case was not overwhelming. The State improperly skewed the evidence in its favor by improperly eliciting Barnes' opinion that Tyrell Lewis was not telling the truth when he repeatedly stated that

he did not know who shot him. Prejudice is demonstrated by the fact that the improper statement allowed the prosecutor to overcome his acknowledged obstacle to his case – the victim’s repeated statement that he did not know the identity of the person who shot him.

REPLY ARGUMENT II

DEFENDANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY PATROLMAN BARNES' OPINION THAT HE DID NOT BELIEVE THAT THE VICTIM WAS BEING TRUTHFUL WHEN HE STATED HE DID NOT KNOW WHO SHOT HIM.

MERITS:

The curative instruction in this case was not sufficient to mitigate the high risk of prejudice resulting from the improper comment elicited by the prosecutor. A curative instruction is not always sufficient to remedy any prejudice resulting from the introduction of inadmissible evidence.²

Defendant repeats and reemphasizes the inconsistent and/or conflicting circumstantial evidence relied upon by the State in this prosecution to support his claim that this was a close case.

Notwithstanding the ineffective curative instruction, the Defendant's right to present a defense was thwarted by the prejudicial statement essentially labeling the Lewis exculpatory statement as not true. The trial hinged, in large part, on the credibility of the witnesses. The prejudicial comment inevitably forced the jurors

² See, e.g., *Weddington v. State*, 545 A.2d 607, 612-15 (Del. 1988) (prosecutor's improper injection of racial issues into trial not mitigated by curative instruction); *State v. Yoder*, 541 A.2d 141,144 (Del. Super. 1987). (prosecutor's comment on a criminal defendant's failure to testify not mitigated by curative instruction) See also, *State v. Reed*, 1992 Del. Super. Lexis 295 (Del. Super. June 26, 1992). *United States v. Davenport*, 753 F.2d 1460, 1463 (9th Cir. 1985) (a limiting instruction may be ineffective in preventing an unjustified innuendo from coming to the jury's attention).

to choose which of the conflicting versions they believed. The response interfered with the jurors' evaluation of the credibility of the testimony and was so prejudicial that it compromised the fairness of the trial.

REPLY ARGUMENT III

DEFENDANT'S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BY PROSECUTORIAL MISCONDUCT WHEN THE PROSECUTOR IMPERMISSIBLY BOLSTERED DONALD COOPER'S TESTIMONY BY ELICITING THAT A CONDITION OF HIS PROTECTION AGREEMENT WAS THAT HE TESTIFY TRUTHFULLY.

MERITS:

Defendant raised this issue in limine and the Court issued a ruling. ("I don't think that's unfair for them to ask, depending on what you ask." (A-25). Therefore, the issue was preserved for appeal. Defendant's position is that the reference to the provisions of the "testify truthfully" language of Cooper's Witness Protection Services Agreement is unfairly prejudicial per se, regardless of whether it is mentioned on direct, or on redirect. Defendant preserved his ability to contest any mention of the "testify truthfully" portion of the agreement by raising this objection in limine.

Defendant did not need to repeat his objection when the prosecutor asked Cooper to read the provision of the agreement that required him "[to] cooperate fully and truthfully with the investigation or the prosecution of the State of Delaware versus Maurice Cruz Webster and to testify truthfully if called [as] a witness by any part[y] during the trial or any part involving these matters." (B51).³

³ The State erroneously wrote that Cruz Webster read the provision of that agreement when it meant that Cooper read the agreement. (Op. Br. p. 31).

Since the issue was raised in limine, the objection was preserved and it would have been redundant to repeat the objection when the Court had already issued a ruling.

Defendant did not “open the door” to admission of the “testify truthfully” provisions of the agreement by questioning Cooper about his expectations for assisting the State, and for clarifying the extent of the benefits he was receiving for his testimony. Those benefits included a promise for a motion for sentence modification to allow him to leave the State, and financial assistance for his relocation.

At no time during cross examination did counsel make a frontal attack on Cooper’s credibility but merely brought out facts relating to his involvement in this case. Since there was no direct attack on Cooper’s credibility, counsel did not open the door to admission of the “testify truthfully” agreement.

The cross examination of Cooper did not support the admission of the “testify truthfully” provisions of the agreement. The cross examination illuminated the reasons and circumstances why Cooper provided assistance to the State so that the jury could properly evaluate his credibility. While the Court explained that if counsel opened the door, “I’m going to allow the State to explain what’s going on,” it was erroneous to authorize the admission of the “testify truthfully” provision because it was not necessary to explain “what was going on”. (A-25).

The essential terms of the agreement could be divulged without explaining the gratuitous and misleading “testify truthfully” provision.

Since Cooper already took the oath and swore to tell the truth when he testified, the admission of the “testify truthfully” provision of the agreement only served to unfairly bolster his credibility. It sent the message to the jury that the prosecution was vouching for his testimony because Cooper’s promise to “testify truthfully” was a condition of the agreement. The prosecution’s emphasis of this provision of the agreement was a not so subtle message to the jury that it had vetted Cooper’s testimony, and it was truthful.

The prosecutors’ committed misconduct in closing argument.

The prosecutor’s argument that Cooper “was **told he had to** cooperate fully and truthfully with the investigation or prosecution and to testify truthfully if called as a witness” is vouching. (Emphasis added). First, the claim that Cooper was “told he had to cooperate fully and truthfully” is outside the record. The testimony is that Cooper read the agreement. (A-32). There is no testimony that anyone told Cooper what he had to do.

Therefore, the prosecutor was essentially testifying to the jury in a way that was meant to bolster Cooper’s credibility by suggesting that he had taken steps (“was told”) to ensure that Cooper would testify truthfully. By telling the jury that Cooper “was told” he had to testify truthfully, it likely interpreted that to mean that

the prosecution had taken safeguards to assure that his testimony was truthful and therefore the jury could rely upon it. The prosecutor's statement that Cooper was "told" indicates to the jury that he had superior knowledge that his testimony was truthful. The prosecutor's "was told" statement meets the definition of vouching, especially since the record does not support the claim that Cooper "was told" he had to testify truthfully.

REPLY ARGUMENT IV

DEFENDANT’S FEDERAL DUE PROCESS RIGHT TO A FAIR TRIAL WAS VIOLATED BECAUSE COOPER’S PRETRIAL VIDEO STATEMENT SHOULD HAVE BEEN EXCLUDED AS CUMULATIVE AS IT ONLY SERVED TO BOLSTER HIS IN COURT TESTIMONY.

MERITS:

Defense counsel concedes that he “dropped the ball” by not objecting to the admission of the 3507 statement, and that plain error analysis applies. The State misleads by suggesting that it was counsel’s strategy to waive the objection because of an intent to use the 3507 statement. As indicated, counsel’s concern was that there was no sound for the beginning portion of the taped interview, and expressed that he intended to explore the substance of that portion of the interview. There was a need to determine if the beginning of Cooper’s interview included any promises to him in return for his cooperation. On cross examination, the officer denied that any promises were discussed during the silent portion of the taped interview. There is no indication of any other strategy with respect to the taped statement.⁴

This is not a strategic waiver but a forfeiture. There is a distinction between “waiver” and “forfeiture” for appellate review purposes. “[W]aiver is

⁴ Procedurally, counsel acknowledges that he should have requested a *voir dire* opportunity to explore the substance of the soundless portion of the videotaped interview.

accomplished by intent, [but] forfeiture comes through neglect.”⁵ Waiver is the “intentional relinquishment or abandonment of a known right.”⁶ Counsel’s failure to object constitutes a forfeiture, subject to plain error review.⁷

Defendant’s strategy to attack Cooper’s credibility does not trump the well-established law precluding the admission of a 3507 statement for the sole purpose of bolstering the witness’s credibility. Since this was not a turncoat situation, there was no basis for the admission of the statement. The admission of the statement served the improper purpose of bolstering Cooper’s credibility and constitutes plain error.

⁵ *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2000), quoting *United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000).

⁶ *United States v. Olano*, 507 U.S. 725, 733 (1993).

⁷ See *Teague*, 443 F.3d at 1314 (holding that in cases of forfeiture, the defendant may obtain appellate review on a plain error standard).

CONCLUSION

Defendant contends that the constitutional errors complained of herein deprived him of a fair trial.

WHEREFORE, Defendant asks that the Court grant him all relief to which he may be entitled in this proceeding. Defendant is seeking an Order reversing his convictions and ordering a new trial.

By: /s/ Michael W. Modica
MICHAEL W. MODICA, ESQUIRE
Bar ID # 2169
Attorney for Maurice Cruz-Webster
P.O. Box 437
Wilmington, DE 19899
(302) 425-3600