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Case Number 271,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK BARTELL,	)	
	)	
Defendant Below-Appellant,	)	**No. 271, 2017**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

STATE'S ANSWERING BRIEF

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DATE: September 28, 2017

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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings contained in Appellant Mark Bartell's August 31, 2017 Opening Brief. This is the State's Answering Brief in opposition to Bartell's direct appeal of his Kent County Superior Court jury convictions for five offenses.

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion in denying a defense pretrial motion to sever two allegations of first degree criminal solicitation added in a reindictment occurring over 8 months before trial. State v. Bartell, 2017 WL 384314 (Del. Super. Jan. 25, 2017). The ultimate jury verdict acquitting the accused of two of the original five allegations and finding him guilty of lesser included offenses for two of the other original allegations (A-178) does not demonstrate any unfair prejudice occurring to the accused as a result of the joinder of two additional charges.

II. DENIED. There was no manifest necessity for the trial judge sua sponte to declare a mistrial in response to three statements of inadmissible evidence. (A-64, 115, 118). The trial judge proposed remedial action in each instance that was sufficient and there was no reason for the civil judge to second guess defense counsel's strategy in not requesting a mistrial. No plain error has been demonstrated here, and there has been no showing of an abuse of discretion by the trial judge.

STATEMENT OF FACTS

In November 2015, Michelle and Mark A. Bartell had been married for 15 years. (A-41). The couple lived at 67 Humpsman Drive, Cheswold, Delaware. (A-34, 41). Michelle was 60 years old at the time of the March 2017 Kent County Superior Court jury trial of her husband, Mark A. Bartell. (A-41). Michelle Bartell worked as a server at the Olive Garden restaurant in Dover for 14 years. (A-41, 51). Mark "barely worked" and was employed for only about 4 years during the marriage. (A-57). In November 2015, Mark was working as an over-the-road truck driver. (A-55).

Michelle Bartell is 5 feet 2 inches tall and weighs less than a hundred pounds. (A-47). In contrast, her husband Mark is 6 feet 1 inch tall and in November 2015, he weighed over 300 pounds. (A-47, 66).

On the evening of November 2, 2015, Michelle and Mark Bartell were at home watching television when Mark asked about ordering a pizza. (A-41). Michelle said he could order a pizza, but when Mark also wanted to purchase soda, his wife told him "that it was too expensive." (A-41).

The 2015 dinner order dispute sparked an argument between the couple. (A-41-42, 51). Enraged over not being able to order a 2-liter bottle of soda (A-51), Mark Bartell punched the refrigerator, screamed at his wife, and threw a coffee table. (A-42, 51). According to complaining witness Michelle Bartell, her husband

Mark ". . . grabbed me and was shaking me and tossed me aside, and he was telling me he was going to kill me and make it a slow, painful death, and I'm evil." (A-42).

Michelle was startled by Mark's outburst, and after letting their dog out, she went into her bedroom and went to bed about 9:30 or 10 P.M. (A-42). Michelle slept on a water bed, but Mark had his own bedroom because, according to his wife, "He couldn't sleep in a water bed and he snored pretty loud and I needed my sleep." (A-41).

At 8:30 A.M. on November 3, 2015, Michelle awakened, let the dog Dakota outside, and made herself a cup of tea. (A-43, 52). Returning to her bedroom, Michelle sat in a chair drinking her tea and watching the Today show. (A-43, 52). That morning Mark Bartell ". . . was in the living room playing on the PlayStation." (A-43, 52).

About a half hour later Mark Bartell entered Michelle's bedroom. (A-43, 52). Mark grabbed Michelle and threw her on the bed. (A-43, 52). He then announced that he intended to sodomize Michelle, who said, "Don't, Mark." (A-43, 52). At that point Michelle was lying on her stomach on her bed, and Mark pulled off her sweatpants. (A-43, 52).

After removing Michelle's sweatpants, Mark stuck his fingers in Michelle's rectum while she was ". . . begging him to stop." (A-43, 52). At trial in March 2017, then 60 year old Michelle Bartlett testified:

> And then he turned me over and put his fingers in my vagina. Then he managed to get his penis in my vagina. And he pulled me off the bed and bent me over the bed and put his fingers in my butt again, and tried to put his penis in my butt, but he couldn't get it in. So he went and grabbed the lotion, which was right over there. He told me not to move.

(A-43-44).

Mark applied the lotion to Michelle's posterior, placed his fingers again in her rectum, and tried to lift Michelle up. (A-44, 53). Michelle attempted to crawl away, and she testified: "And that's when he threw me down on my back and he threw my legs up. And he put his penis in my vagina, and then he put it in my butt with me being with my legs up like that." (A-44). Michelle added that Mark Bartell put his penis in her anus, and he "Ejaculated in my anus." (A-44).

Michelle Bartell testified at trial that she did not consent to any of the sexual contact with her husband on the morning of November 3, 2015. (A-45). She described the penetration of her rectum as very "painful." (A-45).

Although Michelle Bartell was supposed to go to work on November 3, 2015, she went to the Cheswold Police Department and reported the sexual assaults to Corporal Louis Simms. (A-30, 46, 54). Officer Simms took Michelle Bartell to

the Bayhealth Medical Center that morning. (A-30, 46, 60-61). At the hospital, Dawn Culp, a sexual assault nurse examiner (SANE), examined Michelle Bartell and photographed her physical injuries as part of the rape kit protocol. (A-30-31, 61-68). During the hospital examination, Michelle Bartell described the sexual assault she experienced that morning to nurse Culp. (A-66-67).

In addition to evidence about the November 3, 2015 sexual assault, the State presented two prison inmate witnesses (Fahante Robertson and James Hammond). (A-98-108, 126-28). Both inmates Robertson and Hammond testified that fellow inmate Mark A. Bartell offered them money to murder Michelle Bartell so that she could not testify. (A-100, 127). In a recorded prison telephone call to his sister Mary Davis, Mark Bartell said that he wanted his wife dead. (A-145).

Defendant Mark A. Bartell elected not to testify at his 2017 Superior Court jury trial. (A-152-53).

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING A PRETRIAL SEVERANCE OF CHARGES MOTION

QUESTION PRESENTED

Did the Superior Court abuse its discretion in denying a defense pretrial motion to sever two charges of first degree criminal solicitation from the other five counts of the reindictment?

STANDARD AND SCOPE OF REVIEW

This Court reviews the trial court's denial of a pretrial motion for severance of charges for an abuse of discretion. See Ashley v. State, 85 A.3d 81, 84 (Del. 2014); Monroe v. State, 28 A.3d 418, 425 (Del. 2011). A trial court's denial of a motion for severance of charges will only be reversed if the defendant establishes a "reasonable probability" that a joint trial resulted in "substantial injustice." Jackson v. State, 990 A.2d 1281, 1285 (Del. 2009) (quoting Winer v. State, 950 A.2d 642, 648 (Del. 2008)).

MERITS OF THE ARGUMENT

Following his November 3, 2015 arrest (A-1), defendant Mark A. Bartell was indicted by the Kent County Grand Jury on January 4, 2016 for 5 offenses (two counts of first degree rape, fourth degree rape, terroristic threatening, and offensive touching). (A-1). On July 5, 2016 (A-2), over 8 months before trial commenced on March 20, 2017, Bartell was reindicted to add two counts of first degree criminal

solicitation. (A-9-11). The two new counts of criminal solicitation alleged that Mark A. Bartell solicited two prison inmates (Fchante Robertson and James Hammond) to murder the complaining witness, Michelle J. Bartell, so that she could not testify against the accused at trial. (A-10-11). 11 Del. C. § 503.

In response to the July 2016 reindictment, the defense on December 14, 2016 (A-3) filed a pretrial motion to sever Counts 6 and 7 alleging two counts of first degree criminal solicitation. (A-12-15). The defense pretrial motion for severance of charges was presented to the Superior Court on January 13, 2017. (A-16-24). The Superior Court denied the defense pretrial severance of charges motion on January 25, 2017. State v. Bartell, 2017 WL 384314 (Del. Super. Jan. 25, 2017). The case proceeded to a jury trial on March 20, 2017 (A-6), and after a 6 day trial, Mark A. Bartell was found guilty of two counts of second degree rape as lesser included offenses of first degree rape, fourth degree rape, and two counts of first degree criminal solicitation. (A-6, 178). The jury found the accused not guilty of terroristic threatening and offensive touching. (A-6, 178).

On appeal, Mark A. Bartell argues that the Superior Court Judge abused his discretion in not severing for a separate trial the two counts of first degree criminal solicitation added in the July 5, 2016 reindictment. (A-11). There was no abuse of discretion in the Superior Court's pretrial ruling. State v. Bartell, 2017 WL 384314 (Del. Super. Jan. 25, 2017).

Del. Super. Ct. Crim. R. 8(a) permits the joinder of two or more offenses in the same indictment, if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." See Massey v. State, 953 A.2d 210, 217 (Del. 2008); Caldwell v. State, 780 A.2d 1037, 1054-55 (Del. 2001); Skinner v. State, 575 A.2d 1108, 1117 (Del. 1990). Nonetheless, under Del. Super. Ct. Crim. R. 14, a court may still grant a severance if the defendant is prejudiced by the joinder. See Ashley v. State, 85 A.3d 81, 84 (Del. 2014); Wood v. State, 956 A.2d 1228, 1231 (Del. 2008).

Prejudice arises in this context where: "(1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; (2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes; and (3) the defendant may be subject to embarrassment or confusion in presenting different and separate defenses to different charges." Caldwell, 780 A.2d at 1055 (quoting Wiest v. State, 542 A.2d 1193, 1195 (Del. 1988)). In addition, "a crucial factor to be considered in making a final determination on the motion should be whether the evidence of one crime would be admissible in the trial of the other crime." Kemske v. State, 2007 WL 3777, at * 3 (Del. Jan. 2, 2007). This latter factor was specifically recognized by

the Superior Court in denying Mark Bartell's pretrial severance of charges motion. The Superior Court pointed out that "The witnesses on which the State will rely to prove the original charges could also be used to show motive and intent in a trial on the later-indicted charges. If the charges are severed, the State will have to retry the initial rape, terroristic threatening, and offensive touching case in order to show Mr. Bartell's motive and intent to commit the later-charged crime." State v. Bartell, 2017 WL 384314, at * 2 (Del. Super. Jan. 25, 2017).

Having to present evidence of Mark Bartell's November 3, 2015 crimes against his wife at a separate trial on the two criminal solicitation allegations is not in the interest of judicial economy. "The rule of joinder 'is designed to promote judicial economy and efficiency, provided that the realization of those objectives is consistent with the rights of the accused.'" Wiest v. State, 542 A.2d 1193, 1195 (Del. 1988) (quoting Mayer v. State, 320 A.2d 713, 717 (Del. 1974)).

To alleviate potential prejudice to the accused, the trial judge proposed a jury instruction on the first day of trial (March 20, 2017) concerning the defendant's incarceration status. (A-39-40). In the final jury instructions a week later, the trial judge repeated to the jury the instruction about the defendant's incarceration not being evidence that Bartell was "a bad person" or that he is "more likely to have committed the crimes for which he has been accused." (A-165).

The jury was twice instructed to draw no inferences from the evidence of the

defendant's incarceration status. (A-40, 165). The use of this limiting instruction at both the beginning (A-40) and end of the trial (A-165) is a well recognized method to alleviate potential prejudice to an accused when charges accruing at different times are joined for a single trial. As a general rule, jurors are presumed to have followed the trial court's instructions. See Hendricks v. State, 871 A.2d 1118, 1123 (Del. 2005); McNair v. State, 990 A.2d 398, 403 (Del. 2010). Here, the limiting instruction was given twice (A-40, 165), and there is no basis to conclude that the jury did not heed the admonition.

Given the ultimate jury verdict (A-178), there is no basis to conclude that the jury used evidence presented as to the two criminal solicitation allegations to cumulate the evidence or infer any general criminal disposition. Likewise, trying the seven allegations together did not impede the presentation of the defense offered.

The jury completely acquitted Mark Bartell of two allegations (terroristic threatening and offensive touching) and found him guilty of two of the other alleged crimes only as lesser included offenses. (A-178). If the jury was utilizing the criminal solicitation evidence to infer a general criminal disposition, the more likely jury verdict would have been convictions on all the offenses as charged. By convicting Mark Bartell of two counts of second degree rape, rather than the charged offenses of first degree rape, the jury must have concluded that the victim

did not suffer physical injury. (A-162-63). See 11 Del. C. §§ 773(a)(1) and 772(a)(1). Similarly, the jury found the accused not guilty of two of the original five charges. (A-178).

Mark Bartell has the burden of demonstrating a reasonable probability of prejudice as a result of the joinder of the two criminal solicitation charges to the original five counts relating to the November 3, 2015 conduct at the marital home. See Ashley v. State, 85 A.3d 81, 84 (Del. 2014); Winer v. State, 950 A.2d 642, 648 (Del. 2008). The jury verdict where the defendant was only convicted of one of the five original offenses as charged is evidence that the jury exercised its independent judgment in assessing the respective trial evidence as to each of the allegations. Mark Bartell has failed to carry his burden of proof in demonstrating any unfair prejudice resulting from the joinder of two additional offenses. As noted, the actual verdict of the jury (A-178) does not reveal any prejudice in this circumstance.

"Mere hypothetical prejudice is not sufficient." Skinner v. State, 575 A.2d 1108, 1118 (Del. 1990) (citing Bates v. States, 386 A.2d 1139, 1142 (Del. 1978)). As occurred in Ashley, 85 A.3d at 85, the jury acquittals "on several counts shows that the jury followed the trial court's instructions." See also Wainer v. State, 2005 WL 535010, at * 2 (Del. Feb. 15, 2005). Like Bartell's criminal solicitation additional charges, the allegations in Ashley also dealt with the addition of new charges relating to the accused's attempt to undermine the upcoming trial by

bribing a witness and interfering with a child witness. Ashley, 85 A.3d at 83-84. Mark Bartell, like Isiah Ashley, has not demonstrated any prejudice from the joinder of additional charges in a reindictment. Bartell's first appellate complaint is unavailing.

II. THERE WAS NO MANIFEST NECESSITY TO REQUIRE THE TRIAL JUDGE SUA SPONTE TO DECLARE A MISTRIAL

QUESTION PRESENTED

Should the trial judge sua sponte have declared a mistrial based upon references to inadmissible evidence?

STANDARD AND SCOPE OF REVIEW

When a trial judge denies a defense mistrial motion, the decision is reviewed on appeal for an abuse of discretion. See Copper v. State, 85 A.3d 689, 692 (Del. 2014); Michaels v. State, 970 A.2d 223, 229 (Del. 2009). In the absence of an explicit defense mistrial motion, the contention is waived and may only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; Whittle v. State, 77 A.3d 239, 243 (Del. 2013); Damiani-Melendez v. State, 55 A.3d 357, 359 (Del. 2012).

MERITS OF ARGUMENT

Although there was never any defense motion for a mistrial during the March 2017 Superior Court jury trial, Mark Bartell argues on direct appeal that "The trial court should have sua sponte declared a mistrial . . . ." (Opening Brief at 11). The basis for this never presented mistrial motion is three brief references in the trial evidence to alleged prior bad conduct of the accused that the jury was specifically instructed "to disregard" (A-64-65), and two statements that a protection from abuse (PFA) order against the accused was issued where the defense declined the

trial judge's offer to give "a curative instruction." (A-115, 118).

Whether a mistrial should be granted lies within the trial judge's discretion. See Gomez v. State, 25 A.3d 786, 793 (Del. 2011); McNair v. State, 990 A.2d 398, 403 (Del. 2010). This grant of discretion recognizes the fact that the trial judge is in the best position to assess the risk of any prejudice resulting from trial events. See Sykes v. State, 953 A.2d 261, 267 (Del. 2008); Justice v. State, 947 A.2d 1097, 1100 (Del. 2008). Although, Bartell now argues that the trial judge should sua sponte have declared a mistrial even though defense counsel never made that request, the absence of such a mistrial ruling was not an abuse of discretion here.

A trial judge normally does not wish to second guess defense trial strategy by short circuiting the regular test process with a premature mistrial declaration. In this regard, it must be remembered that the ultimate jury verdict did acquit Bartell outright on two charges and convict him of lesser included offenses for two of the other most serious allegations. Defense counsel's not requesting a mistrial appears to be quite sound trial strategy given the ultimate jury verdict. (A-178).

Even when a trial judge directly rules upon a mistrial application, that decision will be reversed on appeal only if it is based upon unreasonable or capricious grounds. See Revel v. State, 956 A.2d 23, 27 (Del. 2008); Zimmerman v. State, 628 A.2d 62, 65 (Del. 1993). The trial judge's refraining from sua sponte declaring a mistrial after minor and limited extraneous references was neither

unreasonable nor capricious in the context of the entirety of the trial evidence, especially the graphic and compelling trial testimony of the 60 year old complaining witness.

"A trial judge should grant a mistrial only where there is a 'manifest necessity' or the 'ends of public justice would be otherwise defeated.'" Steckel v. State, 711 A.2d 5, 11 (Del. 1998) (quoting Fanning v. Superior Court, 320 A.2d 343, 345 (Del. 1974)). Accord Banther v. State, 977 A.2d 870, 890 (Del. 2009); Guy v. State, 913 A.2d 558, 565 (Del. 2006). The draconian remedy of a mistrial is "appropriate only when there are no meaningful or practical alternatives to that remedy . . . ." Justice, 947 A.2d at 1100. See Gomez, 25 A.3d at 793-94 (citing Banther, 977 A.2d at 890); Dawson v. State, 627 A.2d 57, 62 (Del. 1994).

There was no "manifest necessity" to sua sponte declare a mistrial in Mark A. Bartell's prosecution. The jury was promptly instructed "to disregard" the SANE nurse's statement that "this happened before," and the defense objection to the reference was sustained by the Superior Court Judge. (A-64). Similarly, the other two brief references to a protective order in the prison telephone call (A-118), and the trial testimony of the accused's sister Mary Davis (A-115) were not of such magnitude that the trial judge abused his discretion in not sua sponte declaring a mistrial.

Had a mistrial been ordered, as Bartell argues in this direct appeal, the

defendant would now be facing a retrial on all seven original charges, including the two allegations of first degree rape, a Class A felony with a potential life sentence, for which Bartell was found not guilty. (A-178). 11 Del. C. §§ 773, 4205(b)(1). The trial judge offered to give "a curative instruction" to the jury after the two PFA references, but defense counsel made a strategic decision not to re-emphasize the passing references and declined the trial judge's offer of "a curative instruction." (A-115, 118). The trial judge's conduct in deferring to defense counsel's judgment was appropriate, and Bartell has demonstrated no plain error and no abuse of discretion.

Since there was no request for a mistrial by defense counsel at trial, this second appellate contention has been waived and may now only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; Whittle v. State, 77 A.3d 239, 243 (Del. 2013); Dougherty v. State, 21 A.3d 1, 3 (Del. 2011). To be plain, the error must affect substantial rights, generally meaning that it affected the outcome of the trial. United States v. Olano, 507 U.S. 725, 732-34 (1993); Wainwright v. State, 504 A.2d 1096, 1100 (Del.), cert. denied, 479 U.S. 869 (1986).

Error is plain when it is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." Damiani-Melendez v. State, 55 A.3d 357, 359 (Del. 2012) (quoting Wainwright, 504 A.2d at 1100). See also Dougherty, 21 A.3d at 3. In demonstrating that a forfeited error is prejudicial,

the burden of persuasion is on the defendant. Olano, 507 U.S. at 734; Brown v. State, 897 A.2d 748, 753 (Del. 2006); Stevenson v. State, 709 A.2d 619, 633 (Del. 1998).

Bartell has not carried his burden of persuasion in demonstrating any plain error. The three brief trial references to "this has happened before" (A-64), and the existence of a PFA are not of such magnitude that the trial process or result were distorted. Bartell was convicted because the jury believed the testimony of the complaining witness, although the jury did not find physical injury sufficient to convict Bartell of the two original allegations of first degree rape. There was no plain error or any abuse of discretion in the trial judge not sua sponte ordering a mistrial.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Dated: September 28, 2017

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Defendant Below-	)	**No. 271, 2017**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 28th day of September 2017, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on September 28, 2017, she did serve electronically the attached State's Answering Brief properly addressed to:

Santino Ceccotti, Esquire
Office of the Public Defender
Carvel State Building
820 North French Street
Wilmington, DE 19801

Mary T. Corkell

Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Devera B. Scott

Notary Public

Devera B. Scott, Esquire
NOTARIAL OFFICER
Pursuant to 29 Del.C. § 4323(a)(3)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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Plaintiff Below-	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times Roman 14-point typeface using Micrsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 3789 words, which were counted by Microsoft Word 2016.

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