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Case Number 454,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON THOMPSON, Defendant Below, Appellant.	:	
v.	:	No. 454, 2017
STATE OF DELAWARE Plaintiff Below, Appellee.	:	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE I.D. NO. 1602016732

APPELLANT'S REPLY BRIEF

FILING ID 62348641

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Dated: August 14, 2018

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I. THE PROSECUTOR MISREPRESENTED THE EVIDENCE AND IMPROPERLY ASKED THE JURY TO SYMPATHIZE WITH A CO-DEFENDANT WHO COOPERATED IN THE INVESTIGATION, DEPRIVING THOMPSON OF HIS RIGHT TO DUE PROCESS AND REQUIRING REVERSAL.

A. Argument

The State denies that the prosecutor committed prosecutorial misconduct in rebuttal closing argument.[1] But its rejection is not supported by the record.

1. Misrepresented the evidence

First, the State suggests that Thompson did not object to the prosecutor's comment concerning Bey's phone contact with Rollins on September 26, 2013. Therefore, this Court should review "only for plain error."[2] Although Thompson complained that argument about the events of September 26, 2013 exceeded the scope of rebuttal (A304), his objection sufficiently preserved the issue.[3] Sandbagging, like misleading the jury about the inferences it may draw, is a form of prosecutorial misconduct that infringes upon a defendant's right to a fair trial.[4] Thompson raised the issue of prosecutorial misconduct in closing argument, thereby triggering a harmless error review.

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[1] Answ. Brf. at 3.

[2] Answ. Brf. at 22.

[3] *Nance v. State*, 903 A.2d 283, 285 (Del. 2006) ("To preserve an issue for appeal, however, it must be raised in the trial court.").

[4] See *Bailey v. State*, 440 A.2d 997, 1003 (Del. 1982) (holding that a trial court's discretion "is not so broad as to permit a Trial Judge to oversee a blow to a defendant's right to a fair trial via the State's sandbagging").

But this Court "need not quibble over whether defense counsel's misfocused objection triggered harmless or plain error review."[5] Even assuming that Thompson's objection was misfocused, the prosecutor's comment amounts to plain error and warrants a reversal.[6]

On cross-examination, Bey denied that he had ever called Rollins and denied that Rollins had ever called him. (A195, A200). Yet cell phone records proved that Bey and Rollins communicated around the time of the murders. To minimize the sting of Bey's denials, the prosecutor told the jury that Bey "says [] the person he is talking to is Dominique Benson." (A304). It is apparent from the record that Bey said no such thing.

Nevertheless, the State argues that the prosecutor "asked the jury to draw inferences that were supported by the record regarding Bey's communication with Rollins' phone."[7] It points to testimony showing that "[d]uring the day, Benson did not have access to [his girlfriend's] cell phone so he used the *house's landline* (B108-

[5] *Baker v. State*, 906 A.2d 139, 151–152 (Del. 2006) (referring to a "misfocused objection" as falling somewhere between failing to "raise *any* objection" and raising a "pertinent, specific, and timely objection").

[6] *Williams v. State*, 796 A.2d 1281, 1284 (Del. 2002) (plain error occurs when an error, which is apparent on the face of the record, is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process") (internal citations omitted).

[7] Answ. Brf. at 3.

11), or other cell phones."[8] This evidence, according to the State, permits the inference that Benson used Rollins' cell phone to contact Bey.

But the State fails to cite any testimony that suggests Benson ever used Rollins' cell phone. At best, the record establishes that Benson used his home landline during the day and his girlfriend's cell phone at night. (B99–102). Neither of those facts could reasonably lead the jury to conclude that Benson used Rollins' cell phone to contact Bey. In a close case such as this, where credibility is the central issue, insinuations designed to assuage crucial witness testimony undermine the integrity of the trial. For these reasons, the prosecutor's misconduct is not harmless, amounts to plain error, and requires reversal.

2. Appealed to the Emotions of the Jury

The State suggests that it was "entitled in rebuttal to respond to Thompson's remarks focusing upon Bey's credibility, and that he would be 'laughing all the way to his freedom.' (A296)."[9] In essence, the State contends that Thompson invited its response.[10] But in Delaware, "prosecutors are not invited to respond to improper remarks by defense counsel with improper remarks."[11] Thus, it is irrelevant what

[8] Answ. Brf. at 24 (emphasis added).
[9] Answ. Brf. at 26.
[10] See *United States v. Young*, 470 U.S. 1, 12 (1985) (noting that "the issue is not the prosecutor's license to make otherwise improper arguments, but whether the prosecutor's invited response, taken in context, unfairly prejudiced the defendant")
[11] *Miller v. State*, 750 A.2d 530, *4 (Del. 2000) (Table).

prompted the prosecutor to invoke sympathy for Bey. The State was not entitled to appeal to the jury's emotions by asking "what will happen" to him after being released from prison. (A306).

Next, the State attempts to shift blame onto Thompson for the trial court's failure to call the parties to sidebar. It is, indeed, true that "Thompson did not ask for a sidebar, but instead said 'I will address that later.' (A306)."[12] Yet the State acknowledges, as it must, that Thompson moved for a mistrial "[a]fter the jury was excused."[13] It would not have been appropriate for defense counsel to make that request in the presence of the jury.[14] Once the prosecutor concluded her rebuttal and the jury was removed from the courtroom, Thompson promptly addressed his grounds for a mistrial. Because the trial court specifically instructed Thompson to let the prosecutor "finish her point" (A307), he cannot be faulted for the absence of a sidebar conference.

Finally, the State maintains that the prosecutor's comment was "neutral at best; the comment did not suggest Bey would be harmed by Thompson."[15] But it did not foreclose that possibility either. As the trial judge noted, "if there was some

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[12] Answ. Brf. at 25.

[13] Answ. Brf. at 25.

[14] See *Snowden v. State*, 672 A.2d 1017, 1022 (Del. 1996) (standby counsel correctly argued that a *pro se* defendant "must be allowed to come to sidebar and present his views or the jury must be removed from the courtroom in order to have these sidebars").

[15] Answ. Brf. at 25–26.

other point that was more benign to make, not making it almost makes it worse because . . . the implication was that something untoward is going to happen to Bey because he is a rat." (A308). And while Thompson declined a curative instruction, he did it for the same reason that the prosecutor chose not to "close that loop." (A308). Both hoped to avoid calling any further attention to the improper comment. A curative instruction would have only compounded the problem.

3. The *Hughes* Factors

In its Answer, the State does not challenge Thompson's weighing of the *Hughes* factors.[16] As such, it waives any argument on that issue.

[16] Answ. Brf. at 26.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE COOPERATING CO-DEFENDANT'S STATEMENT TO BE ADMITTED AS A PRIOR CONSISTENT STATEMENT.

A. Argument

At the outset, the State fails to properly cite to the portions of the record that contain Thompson's motion to exclude Bey's September 5, 2014 statement.[17] Thompson will endeavor to provide this Court with correct citations.

Thompson does not deny that he questioned Bey about prior inconsistent statements. (A322). But the major thrust of defense counsel's cross-examination indicated protracted, rather than recent, fabrication. For example, Bey was questioned at great length about the lies he told Detective Leonard prior to September 5, 2014. (A185–187, A191–193, A196). Thompson later portrayed Bey as a habitual liar in his closing argument. (A293–294). However, he did not argue that Bey recently fabricated his testimony.

Nevertheless, the State points to three cross-examination questions that, in its view, imply recent fabrication.[18] Those three questions include: "when in your previous statement have you talked about laptops," "when did you meet the prosecutors" and "did you meet the prosecutors to go over this?" (A201–202). But

[17] Answ. Brf. at 27–30 (citing to A161–167, which encompasses a portion of Bey's direct examination, not the oral argument).
[18] Answ. Brf. at 29.

the State ignores the testimony that followed. Bey responded that he had not recently met with prosecutors and could not remember if he was ever questioned about laptops prior to trial. (A202). The record establishes that this fleeting line of inquiry did not give rise to an accusation of recent fabrication.

Still, the State (like the court below) claims that *Adams v. State*[19] and *Stevenson v. State*[20] support the admission of Bey's statement under DRE 801(d)(1)(B). Both cases are easily distinguished on their facts.

In *Adams*, the trial court refused to admit into evidence an affidavit executed by the defendant's brother, Javan Cale.[21] The defendant argued that the affidavit supported Cale's exculpatory testimony at trial and was admissible as a prior consistent statement under DRE 801(d)(1)(B).[22] The affidavit read:

> I, Javan Cale, clearly state that on October 8, 2013 the weapons found in my trunk by the Dover Police Department belong to me. Furthermore, the other people in the vehicle (Irvan F. Adams, Jr. and Erick Morton) had no knowledge that the weapons were in the vehicle.[23]

The defendant in *Adams* offered this two-sentence affidavit to rebut the suggestion that "Cale was telling a new story now that he faced no jeopardy to

[19] 124 A.3d 38 (Del. 2015).
[20] 149 A.3d 505 (Del. 2016).
[21] *Adams*, 124 A.3d at 42–43.
[22] *Id*.
[23] *Id*. at 42.

himself."[24] Here, the State offered Bey's nearly two-hour long interview to rebut the suggestion that he is a "pathological liar who would say anything to . . . enhance his own legal situation." (A207). It does not follow that Bey must be "telling a new story" because he is a "pathological liar." On the contrary, it supports Thompson's position that Bey was motived to lie from the beginning.

In *Stevenson*, the State did not initially seek to introduce the child witnesses' out-of-court statements pursuant to either 11 *Del. C.* § 3507 or DRE 801(d)(1)(B).[25] However, once defense counsel began to challenge the witnesses' testimony on cross-examination, this Court found it "entirely appropriate for the State to admit the child's videotaped statements in rebuttal to show that the children were not coached."[26]

Justice Holland, writing for the majority, listed four reasons the trial court correctly ruled that the videotaped statements were admissible under DRE 801(d)(1)(B): (1) the defendant argued that the children's "fallible memories were improperly influenced by the State"; (2) at sidebar, defendant confirmed his strategy was to attack the testimony as having been "improperly influenced"; (3) defendant's cross-examination "attempted to exploit the 'events and processes' used by the

[24] *Id*. at 43.
[25] *Stevenson*, 149 A.3d at 507.
[26] *Id*.

State" to prepare its witnesses; and (4) defendant "continued to pursue the improper influence strategy in his closing argument."[27]

Here, defense counsel's questions did not reasonably imply a charge of improper influence, recent fabrication, or witness coaching. Rather, Thompson's strategy was to show that Bey is not credible because he is a habitual liar. Bey has lied to his girlfriend (A184, A215), to the police (A185–186), to judges (A203–205), and even to his own co-defendant (A190–191). This is general impeachment that did not transform Bey's videotaped statement into admissible evidence.

In a footnote, the State acknowledges that DRE 801(d)(1)(B) was amended on November 28, 2017. However, it contends that "the amendment is not applicable to this case."[28] Not so. This Court recently reaffirmed that it judges "whether an error is apparent from the vantage point of the appellate court in reviewing the trial record, not whether it was apparent to the trial court in light of then-existing law."[29] The 2017 amendment to DRE 801, which incorporated a change to FRE 801, is relevant, instructive, and should be given due consideration.

Although the trial court correctly noted that "Delaware's response to the 2014 amendment to the FRE 801 is found in 3507," it illogically reasoned that Bey's prior

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[27] *Id*. at 512–514.

[28] Answ. Brf. at 33, fn. 27.

[29] *Buckham v. State*, 2018 WL 1802645 at *19 (Del. April 17, 2018) (internal citations and quotations omitted).

statement was admissible pursuant to DRE "801(d)(1)(B) *and equally admissible* pursuant to 11 *Del. C.* § 3507." (A208–209) (emphasis added). If Delaware's response is, indeed, found at § 3507, then that is the proper statute to assess the admissibility of a witness's out-of-court statement in criminal cases. But this Court cannot consider whether Bey's statement was admissible under 11 *Del. C.* § 3507 because the prosecutor waived that argument at trial. (A210).

In short, the Superior Court erred in allowing the State to avoid the protections of § 3507 by introducing Bey's statement pursuant to DRE 801(d)(1)(B).

CONCLUSION

For these reasons, Appellant Aaron Thompson respectfully requests that this Court reverse his convictions and remand for a new trial.

Respectfully submitted,

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Dated: August 14, 2018

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Plaintiff Below,	:	I.D. NO. 1602016732
Appellee.	:	

CERTIFICATE OF COMPLIANCE WITH
TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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