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IN THE SUPREME COURT OF THE STATE OF DELAWARE

ABDUL WHITE,	:	
Defendant Below, Appellant,	:	
v.	:	Case No. 210, 2018
STATE OF DELAWARE,	:	
Appellee.		

DEFENDANT APPELLANT'S REPLY BRIEF ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

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B. THE STANDARD AND SCOPE OF REVIEW IS THIS COURT REVIEWS A TRIAL COURT'S EVIDENTIARY RULINGS FOR AN ABUSE OF DISCRETION. *HORSEY V. STATE*, 2006 WL 196438 (DEL. JAN. 24, 2006).

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ARGUMENT I

A. QUESTION PRESENTED: DID THE TRIAL COURT ERR IN NOT GRANTING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE STATE WRONGFULLY WITHHELD A VIDEO TAPED RECORDED STATEMENT OF A CO-DEFENDANT WHICH SUPPORTED THE DEFENSE AND ATTEMPTED TO HIDE THE EXISTENCE OF THAT STATEMENT TO THE DEFENSE, WHEN THE STATE WITHHELD A WARRANT FOR TAKING THE DNA OF THE CO-DEFENDANT AND THE TRIAL COURT EVEN AT TRIAL REFUSED TO ORDER THE STATE TO PRODUCE THAT WARRANT, THE STATE WAS ALLOWED TO WITHHOLD FROM THE DEFENSE THE DETAILS OF THREATS MADE BY A CO-DEFENDANT ON THE DEFENDANT AT BAR WHICH WERE CONSISTENT WITH THE DEFENSE PRESENTED IN THIS CASE, AND THE STATE WAS PERMITTED TO WITHHOLD FROM THE DEFENSE EVIDENCE THAT ITS BALLISTICS INVESTIGATOR IN THE CASE AT BAR ALLEGEDLY COMMITTED CRIMES INVOLVING DISHONESTY IN THE COURSE OF HIS EMPLOYMENT? THE DEFENDANT APPELLANT PRESERVED THESE ISSUES BY MAKING A MOTION FOR MISTRIAL ON THE CO-DEFENDANTS STATEMENT AT THE

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The State in its Answering Brief essentially argues that what occurred at the Trial Court level simply constituted harmless error. It does not seek in any way to defend the prosecutions intentional decision to withhold a detailed audio and videotaped statement of a co-defendant from the defendant.

The State is incorrect when it argues that the defense knew of the video and taped recorded statement prior to trial. The only knowledge that the defense had was of the letter sent from the prosecution to co-defendant's

counsel on April 6, 2017. Prior to trial defense counsel had no knowledge as to whether Mr. Baines had actually made a statement or whether this letter was simply sent in an effort to bluff Ms. Gonzales into cooperating with the prosecution. The tenor of that letter certainly seems to indicate that that was what the State was seeking to accomplish.

That letter in no way indicated that there was Brady information contained in Mr. Baines' statement. That letter in no way indicates that there was any sort of audio or videotaped statement.

This letter is to be read in concert with the discovery response given by the State in this case. On August 24, 2016 (prior to the time that Mr. Baines gave the statement) the State supplied its discovery response to the defense. (Exhibit A) In it there is obviously no mention of Mr. Baines' statement.

The State's discovery and Brady obligations remain in effect all the way through the trial. Despite that the State made no effort to provide to this defendant any information regarding Khalil Baines' arrest or lengthy statement regarding this incident.

It is also absolutely clear that this was done intentionally as both the trial prosecutors were actually present at the police department for Mr. Baines' statement. (A82-A83) Thus, this deception perpetrated on not only the defense but the Court and the jury had only been done for purposes of deception.

The State somehow argues that the defendant did not identify in his Opening Brief Brady material in existence in the statement. It is respectfully disagreed but for the purposes of clarity it will be repeated here.

Mr. Baines in his statement stated that he was present in preparation for the robbery when Kevin McDonald, Sr., supplied the guns. He admitted to being present with Abdul White when Abdul White drove him home after the crime occurred. (A71, A75, A76)

Mr. Baines admitted that his DNA could be in the Harmon home. (A77-A78) He asked how the people in the home would know it was him if he had a mask on. (A77)

Mr. Baines confirmed that Kevin McDonald, Sr., was the person who ordered things to occur. (A76) He refused to voluntarily provide a buccal swab for DNA testing. (A79) He corroborated that the plan was to steal drugs from the home. (A81)

The state agents in the interrogation, the police officers, pointed out that they knew that he was in the home. They pointed out that he lied about any claims to not being in the home and having any limited involvement. (A71-A74) They pointed out that Abdul White was telling the truth when he had told the police previously about Mr. Baines' involvement. (A80)

All of this evidence clearly supported Mr. White's testimony and the duress offense which was presented to the jury.

The State in its Answering Brief makes absolutely no attempt to deal with the false testimony by the chief investigating officer. The State in its Answering Brief makes absolutely no attempt to deal with the fact that the prosecutors who were present for Mr. Baines' statement made no attempt to cure or point out to the jury the false testimony from the officer. Thus, the defendant's cross examination left the jury completely in the dark as to what had actually occurred with regards to Mr. Baines and left a false impression.

The State does argue that there is no relevance to later threats made by Kevin McDonald, Sr., against the defendant. It is respectfully disagreed as that is entirely consistent with the duress offense which was presented.

With regards to the information from the State's ballistic expert the State's response echoes the broken record of misconduct by State employees being withheld from the defense in the very recent past. Misconduct of Carl Rone predated the trial in this case. If the defense had known of this it could have chosen to have an independent ballistic examination done and presented to the jury or point out the flaws in the State's exam. The defense was not presented with these choices since the information had been withheld from it by the State.

The State asks what the defense would have done differently if it had known of this information. Certainly, as pointed out in the Opening Brief Mr. White would have had the DNA taken from Khalil Baines tested against the DNA found underneath Mr. Harmon's fingernails. The defendant would have had an opportunity to conduct a more appropriate cross examination having known the truth of what had occurred with Khalil Baines. The defendant would have had the opportunity to choose what witnesses to call including actually presenting the real killer, Khalil Baines, to the jury. The defendant could not explore whether going through Mr. Baines led to additional witnesses or identification of the other person who went into the Harmon home that fatal evening. The defendant could have used the corroboration information regarding Mr. McDonald's drug operation and threats against Mr. White to support his duress defense. The defense would have also used the fact that Mr. McDonald supplied the guns and did the planning to support that defense. Further, the corroboration present in Mr. Baines' statement for Mr. White's defense would have been extremely helpful and presented another piece of evidence other than simply the defendant indicating that was what occurred.

Thus, the defendant respectfully submits that the Trial Court erred in its evidentiary rulings at trial and failure to grant the Motion for Mistrial.

ARGUMENT II

A. QUESTION PRESENTED: DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRETION IN GRANTING THE STATE'S PRETRIAL MOTION IN LIMINE TO ADMIT INTO EVIDENCE AT TRIAL A PICTURE OF A TATTOO READING "DUCT TAPE BANDIT" LOCATED ON MR. WHITE'S PERSON? THIS QUESTION WAS PRESERVED THROUGH MR. WHITE'S WRITTEN RESPONSE IN OPPOSITION (A175-A179), MR WHITE'S ARGUMENT IN OPPOSITION DURING A PRE-TRIAL HEARING, (A118-A166), AND THE TRIAL COURT'S MEMORANDUM OPINION AND ORDER OF JULY 20, 2017, GRANTING THE STATE'S MOTION (EXHIBIT D - *STATE V. WHITE*, 2017 DEL. SUPER. LEXIS 356 (DEL. SUPER. CT., JULY 20, 2017)].

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C. MERITS OF ARGUMENT: THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION *IN LIMINE* TO ADMIT EVIDENCE OF A TATTOO READING "DUCT TAPE BANDIT" LOCATED ON MR. WHITE'S PERSON.

In its Answering Brief, the State asserts that evidence of the "Duct Tape Bandit" tattoo was admissible at trial, during the State's case-in-chief, under D.R.E. 801(d)(2), as the tattoo constituted a non-hearsay admission by Mr. White. Further, the State asserts that the tattoo was admissible at trial as a non-hearsay adopted statement by Mr. White.

Notably, the State made these assertions without citing or referring to a single case or authority in support of these conclusions. The sole case cited by the State, *Swan v. State*, 820 A.2d 342 (Del. 2003), is distinguishable from the instant matter, and not helpful to the State's position.

In *Swan*, the defendant was arrested and charged with the murder of Kenneth Warren. *Id*., at 347. During the State's case-in-chief, the State presented evidence of out-of-court statements made by Swan and his co-defendant, Adam Norcross. *Id*. The State presented the testimony of Bridget Phillips, who testified that Norcross admitted to Phillips that Norcross and Swan were involved in the murder, and that Norcross, with Swan present, told Phillips that Swan was shot in the shoulder during the incident. *Id*., at 353. In addition, Phillips testified that Norcross, with Swan present, pointed to a scar on Swan's shoulder, and told Phillips that the scar was from a gunshot wound Swan suffered during the incident. *Id*. Phillips further testified that Swan, present at the time Norcross made these statements to Phillips,

confirmed Norcross' statements, and stated that the bullet was still in his shoulder, and gestured toward the scar. *Id*.

The trial judge ruled that Norcross' and Swan's statements were admissible at trial against Swan as adopted admissions under D.R.E. 801(d)(2)(A) & (B). *Id*.

In upholding the trial judge's ruling, this Court recounted the above facts, including Swan's statements and gestures that demonstrated "Swan's adoption of belief of the truth of Norcross' statements made while Phillips was present." *Id.*

Applying the facts, and this Court's analysis, in the *Swan* case to Mr. White's case renders the "Duct Tape Bandit" tattoo not admissible as an adopted admission under D.R.E. 801.

In *Swan*, there was live testimony, from an eye-witness (Phillips), as to the statements and actions of Swan that "manifested Swan's adoption of belief of the truth of [the hearsay] statements." *Id.* In other words, the State presented tangible, concrete evidence and facts to support the conclusion that Norcross' statements were admissible against Swan as Swan's adopted admissions pursuant to D.R.E. 801.

In contrast, in the instant matter, the State presented no facts to support the conclusion that the "Duct Tape Bandit" tattoo was admissible at trial

against Mr. White as an adopted statement. There was no evidence presented to establish that Mr. White inked the tattoo himself, or directed someone else to do so for him (D.R.E. 801(d)(2)A)), or that Mr. White specifically adopted the words of the tattoo as his own statement (D.R.E. 801(d)(2)(B)).

Further, as there was no evidence presented as to when the tattoo was inked, the identity of the person that performed the inking, that person's state of mind or intent at the time of the inking, the purpose of the inking, or the meaning of the inking, it was an abuse of discretion for the Trial Court to rule that the tattoo was an admission by Mr. White and admissible non-hearsay under D.R.E. 801.

In an attempt to address this defect, in its Answering Brief, the State refers to Mr. White's testimony during the defense case-in-chief regarding receiving the "Duct Tape Bandit" tattoo in 2009, and his prior experience robbing drug dealers.

However, the State's argument ignores the plain fact that the Trial Court's erroneous decision granting the State's Motion *in limine,* and allowing the State to introduce evidence of the tattoo during the State's case-in-chief, presented Mr. White with the ultimate "Hobson's choice" of having to testify in his own defense "in order to deflect the impact of the bad act evidence" prejudicially admitted during the State's case-in-chief. *Taylor v. State*, 777

A.2d 759, 766 (Del. 2001)(admitting prior convictions during State's case-in-chief, in order to rebut anticipated affirmative defense of entrapment, unfairly prejudiced the defense); *Milligan v. State*, 761 A.2d 6 (Del. 2000)(allowing State to admit evidence of uncharged bad act during State's case-in-chief to rebut defendant's anticipated defense was prejudicial to the defense).

In *Taylor v. State*, 777 A.2d 759, the defendant asserted the affirmative defense of entrapment. During its case-in-chief, and prior to the defendant presenting his affirmative defense, the trial court allowed the State to introduce evidence of two prior drug-related convictions to rebut the defendant's anticipated entrapment defense. *Id*. On appeal, this Court reversed the trial court's decision, and held that allowing the State to prematurely rebut the defendant's anticipated entrapment defense unfairly prejudiced the defendant's defense. *Id*., at 766. This Court further held that the State may introduce evidence of other bad acts by the defendant in its case-in-chief "only where that evidence is independently relevant to an issue or fact that the State must prove as part of its *prima facie* case." *Id*. Moreover, this Court noted that allowing the State to introduce evidence of a defendant's other bad acts during the State's case-in-chief is "particularly damaging to the defense where, as here, the affirmative defense requires that Taylor admit to the conduct that constitutes the offense." *Id*., at 767. As the defendant in

Taylor admitted to the charged criminal conduct, "his entire case rested on a fair opportunity to be heard on his affirmative defense…", and allowing the State to introduce prior bad act evidence during the State's case-in-chief "unfairly weakened Taylor's only opportunity to be heard by a jury with an open mind and raises serious concerns about the fairness of his trial." *Id*.

In the instant matter, the State was allowed to prematurely admit evidence of Mr. White's prior bad acts (the "Duct Tape Bandit" tattoo) during the State's case-in-chief. This evidence was not independently relevant to an issue or fact that the State had to prove as part of its *prima facie* case. Moreover, the admission of the tattoo into evidence, prior to Mr. White being able to present his affirmative defense of duress, presented Mr. White with the "Hobson's choice" of having to testify in his own defense "in order to deflect the impact of the bad act evidence" prejudicially admitted during the State's case-in-chief. This damaged Mr. White's affirmative defense of duress, as it unfairly weakened Mr. White's only opportunity to be heard by a jury with an open mind, and it raises serious doubts about the fairness of Mr. White's trial.

Finally, in its Answering Brief, the State referred to a series of California decisions (*People v. Ochoa*, 28 P.3d 73 (Cal. 2001); *People v. Prieto*, 66 P.3d 1123 (Cal. 2003); *People v. Sendezas*, 2018 WL 3583754 (Cal.

App. July 26, 2018); and *People v. Guevara*, 2016 WL 879997 (Cal. App. Mar. 8, 2016) addressing the admissibility of gang related tattoos.

These decisions are distinguishable, inapplicable, and, ultimately, not helpful to the State's position. By way of example, in *People v. Ochoa*, 28 P.3d 73 (Cal. 2001), the California Supreme Court upheld the trial court's decision to allow the State to introduce evidence and expert testimony with regard to the tattoo of "187" on the defendant's forehead. In *Ochoa*, the defendant was a member of a gang and was charged with the murder of a member of a rival gang. *Id.* Prior to being arrested for the murder, the defendant had tattoos – all related to his membership in the gang. *Id*. After being arrested for the murder, the defendant had "187" tattooed on his forehead. *Id.* The police officer that interviewed the defendant prior to the arrest, and prior to the defendant branding himself with "187," testified as an expert witness on gang investigations, and testified as an expert with regard to the meaning of the defendant's gang tattoos. *Id*. The police officer also testified as to the meaning, and, importantly, the timing (post arrest) of the "187" tattoo. *Id*.

In *Ochoa*, there was specific, direct evidence to establish the relevance of the "187" tattoo, especially when viewed in the context of the on-going gang war between the two rival gangs, the amount of gang-related tattoos on

defendant's person (indicating the defendant was a committed member), and the timing of the inking of the "187" tattoo (after the defendant was arrested for the murder of a member of a rival gang). *Id*. In contrast, in the instant case, none of those circumstances were present at Mr. White's trial, and the State's reliance on *Ochoa*, and similar decisions, is misplaced.

The defendant respectfully submits that the Trial Court erred in granting the State's Motion *in limine* allowing the State to introduce evidence of the "Duct Tape Bandit" tattoo during its case-in-chief.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that the Defendant's convictions at bar be set aside.

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