



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANTHONY E. MORRIS, :
Defendant Below, : No. 394,2018
Appellant, :
 :
 : COURT BELOW
v. : The Superior Court
 : of the State of Delaware,
 : in and for Sussex County
STATE OF DELAWARE, : Case #s 1702013025 and
Plaintiff Below, :
Appellee. : 1702012586

APPELLANT'S REPLY BRIEF

FUQUA, WILLARD, STEVENS &
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A handwritten signature in blue ink, appearing to read "Tasha Marie Stevens".

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TABLE OF CONTENTS

Table of Citations	iii
Summary of Argument	1
Argument	2
I. THE DEFENDANT’S CONVICTION FOR HOME INVASION CAN NOT STAND WHERE A) THE JURY WAS HUNG ON THE PREDICATE OFFENSE OF RAPE, AND THE FACTS WERE NOT SUFFICIENT TO SUPPORT A FINDING OF ATTEMPTED RAPE BEYOND A REASONABLE DOUBT AND B) THE JURY WAS NOT PROPERLY INSTRUCTED ON THE ELEMENTS OF ATTEMPT IN ORDER TO MAKE SUCH A FINDING.....	2
A. THE TRIAL COURT ERRED WHEN IT FAILED TO VACATE THE DEFENDANT’S CONVICTION FOR HOME INVASION WHERE THE JURY WAS UNABLE TO REACH A VERDICT AS TO THE PREDICATE CHARGE OF RAPE AND THE STATE’S EVIDENCE AT TRIAL WAS INSUFFICIENT TO FIND THAT DEFENDANT ATTEMPTED A RAPE BEYOND A REASONABLE DOUBT.....	2
B. ALTERNATIVELY, THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT A MISTRIAL ON THE HOME INVASION CHARGE WHERE THE JURY INSTRUCTION DID NOT PROVIDE ADEQUATE LEGAL GUIDANCE AS TO THE ELEMENTS OF ATTEMPT.....	3
II. THE COURT ERRED BY DENYING DEFENDANT A PROOF POSITIVE HEARING AT THE STATE’S REQUEST WHEN MATERIALLY PREJUDICED HIS DEFENSE OF THE RAPE AND HOME INVASION CHARGES.....	4

TABLE OF CONTENTS (cont'd)

III. THE TRIAL COURT ERRED BY NOT SUPPRESSING THE DEFENDANT’S RECORDED PRISON CONVERSATIONS WHERE THE ATTORNEY GENERAL SUBPOENA USED TO OBTAIN THEM VIOLATED THE DEFENDANT’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS IN THAT IT REQUIRED THE PRODUCTION OF MATERIALS THAT WERE NOT RELEVANT TO THE INVESTIGATION AND COVERED AN UNREASONABLE PERIOD OF TIME..... 5

IV. THE TRIAL COURT ERRED BY ADMITTING THE PHONE CALLS INTO EVIDENCE ABSENT PROPER FOUNDATION AND AUTHENTICATION..... 6

V. THE TRIAL COURT ERRED BY DENYING THE MISTRIAL WHERE DELAYED DISCLOSURE OF BRADY INFORMATION MATERIAL PREJUDICED THE DEFENSE OF THE CASE..... 7

Conclusion 9

TABLE OF CITATIONS

CASES

Cabrera v. State, 747 A.2d 543 (Del. 2000).....3
Deberry v. State, 457 A.2d 744 (Del. 1983).....8
Tilden v. State, 513 A.2d 1302 (Del. 1986).....3

OTHER AUTHORITY

11 Del. C. § 531.....3
11 Del. C. § 532.....3
11 Del. C. § 2116.....4
Del. Const. art. I § 6.....5
U.S. Const. Amend. IV.....5
U.S. Const. Amend. V.....4
U.S. Const. Amend. XIV.....4

SUMMARY OF ARGUMENT

- I. THE DEFENDANT'S CONVICTION FOR HOME INVASION CAN NOT STAND WHERE A) THE JURY WAS HUNG ON THE PREDICATE OFFENSE OF RAPE, AND THE FACTS WERE NOT SUFFICIENT TO SUPPORT A FINDING OF ATTEMPTED RAPE BEYOND A REASONABLE DOUBT AND B) THE JURY WAS NOT PROPERLY INSTRUCTED ON THE ELEMENTS OF ATTEMPT IN ORDER TO MAKE SUCH A FINDING.

- II. THE TRIAL COURT ERRED BY DENYING DEFENDANT A PROOF POSITIVE HEARING AT THE STATE'S REQUEST WHICH MATERIALLY PREJUDICED HIS DEFENSE OF THE RAPE, AND HOME INVASION CHARGES.

- III. THE TRIAL COURT ERRED BY NOT SUPPRESSING THE DEFENDANT'S RECORDED PRISON CONVERSATIONS WHERE THE ATTORNEY GENERAL SUBPOENA USED TO OBTAIN THEM VIOLATED THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS IN THAT IT REQUIRED THE PRODUCTION OF MATERIALS THAT WERE NOT RELEVANT TO THE INVESTIGATION AND COVERED AN UNREASONABLE PERIOD OF TIME.

- IV. THE COURT ERRED BY ADMITTING THE PHONE CALLS INTO EVIDENCE ABSENT PROPER AUTHENTICATION AND FOUNDATION.

- V. THE TRIAL COURT ERRED BY DENYING THE MISTRIAL WHERE DELAYED DISCLOSURE OF BRADY INFORMATION MATERIALLY PREJUDICED THE DEFENSE OF THE CASE.

ARGUMENT

I. THE DEFENDANT'S CONVICTION FOR HOME INVASION CAN NOT STAND WHERE A) THE JURY WAS HUNG ON THE PREDICATE OFFENSE OF RAPE, AND THE FACTS WERE NOT SUFFICIENT TO SUPPORT A FINDING OF ATTEMPTED RAPE BEYOND A REASONABLE DOUBT AND B) THE JURY WAS NOT PROPERLY INSTRUCTED ON THE ELEMENTS OF ATTEMPT IN ORDER TO MAKE SUCH A FINDING.

A. The trial court erred when it failed to vacate the Defendant's conviction for home invasion where the jury was unable to reach a verdict as to the predicate charge of Rape and the State's evidence at trial was insufficient to find that Defendant attempted a rape beyond a reasonable doubt.

The home invasion verdict must be reversed because the jury failed to come to an agreement as to the rape charge, which was an element of the home invasion. Now, the State argues that the jury could have found that Morris was guilty of attempted rape to satisfy the violent felony element of a home invasion charge. However, after the State's evidence, Defendant requested a Rape 2 instruction. The State objected to the instruction because it was unsupported by the evidence; the court agreed, reasoning that Middleton testified that she was beat and raped, and Morris' defense was that he was not there, so no Rape 2 instruction was merited. The same rationale should apply. The evidence was not that Morris tried to rape Middleton; it was that he did rape her. So, the evidence does not support an attempted rape.

Since lenity requires a consideration of the sufficiency of the evidence for inconsistent verdicts to stand, the home invasion verdict must fail due to insufficient evidence of attempted rape. Tilden v. State, 513 A.2d. 1302, 1307 (Del. 1986).

B. Alternatively, the trial court erred when it denied the Defendant a mistrial on the Home Invasion charge where the jury instructions did not provide adequate legal guidance as to the elements of attempt.

In its response, the State failed to address the fact that the jury was not instructed as to “attempt” at all. Lenity does not cure this legal deficiency.

If the Court believed that the jury could have found Morris guilty of the attempted rape to convict him of the home invasion, then it also must recognize that in the absence of the proper jury instructions, those which correctly state the law and enable a jury to perform its duty, this verdict cannot stand. Cabrera v. State, 747 A.2d 543, 545 (Del. 2000). The jury was not apprised of the statutory definition of attempt at 11 Del. C. § 531, nor of “substantial step” as defined by 11 Del. C. § 532. Having not been provided a complete statement of the applicable law and definitions in the instructions, or any instructions as to attempted rape, the jury did not intelligently performed its duty in returning a verdict as to the same.

II. THE COURT ERRED BY DENYING DEFENDANT A PROOF POSITIVE HEARING AT THE STATE'S REQUEST WHICH MATERIALLY PREJUDICED HIS DEFENSE OF THE RAPE AND HOME INVASION CHARGES.

The State argues that the purpose of 11 Del. C. § 2116 is to set bond on the original offense when a subsequent offense is charged. But, in so doing, the requirements of the statute is clear and unambiguous. The accused is entitled to an evidentiary hearing on the subsequent charges, to determine if there is proof positive evidence as to the charges. And, all the Fifth and Fourteenth Amendment due process rights applicable to deprivations of liberty including the right to defend and accordingly present witnesses and evidence attach to that hearing.

In this case, the State illegally blocked the hearing because Morris subpoenaed his accuser to testify. The State recognized that the accuser's testimony would provide information useful in defending the allegations during the hearing and subsequently in the trial. The State had no lawful basis to seek to deprive Morris of witness testimony at the hearing, and Morris had no other opportunity prior to trial to compel sworn witness statements. It stole his right to obtain, present, and utilize information for his defense of the hearing and the charges, which is fundamental to a fair trial, so the charges upon which Morris was deprived evidence should be dismissed.

III. THE TRIAL COURT ERRED BY NOT SUPPRESSING THE DEFENDANT'S RECORDED PRISON CONVERSATIONS WHERE THE ATTORNEY GENERAL SUBPOENA USED TO OBTAIN THEM VIOLATED THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS IN THAT IT REQUIRED THE PRODUCTION OF MATERIALS THAT WERE NOT RELEVANT TO THE INVESTIGATION AND COVERED AN UNREASONABLE PERIOD OF TIME.

Middleton reported that she was contacted by Morris when he was incarcerated. She identified the date that she received the calls and the phone number that they came from. In response, the State subpoenaed "all phone recordings from inmate Anthony Morris." In the Answering Brief, the State offered no rationale as to why it was reasonable for the State to request all of Morris' phone calls for the entirety of his incarceration, despite the specificity provided by Middleton.

The State's request for all of Morris's prison calls for the whole time that he was incarcerated was not reasonable because it was in no way tailored to require production only of materials relevant to the investigation or for a reasonable amount of time. All of the recordings produced at the compulsion of the defective subpoena should have been suppressed as taken in violation of Morris' State and Federal Constitutional Rights against unreasonable searches and the related convictions for Noncompliance of Bond, Acts of Intimidation, and Conspiracy 2 reversed.

IV. THE COURT ERRED BY ADMITTING THE PHONE CALLS INTO EVIDENCE ABSENT A PROPER FOUNDATION AND AUTHENTICATION.

Brian Hubbs testified about a queue list of a series of phone calls that were burnt for the state. A134. That list was moved into evidence. But, during his testimony, the recordings were not. The prosecutor never presented Hubbs with a disc, thumb drive, or any other media that contained the actual recordings, so he never identified them for the jury. Further, he never testified that he heard the recordings or that they were correct and unaltered.

And, Middleton was unable to lay the foundation for their admission because she either had never heard the recordings before or was only party to a portion. On the two calls she was party to, she admitted that she had not heard the portion of the calls before her voice, did not know anything about that portion of the conversation, did not know if it was altered in any way, that she would not recognize if any portion of the conversation was taken out or changed, that there were portions of the conversation that she never heard, and that she was not aware of portions of the conversation until she heard it in court. A178-89. And she had never heard any portion of the other four calls so could not authenticate them.

Absent the State meeting the basic requirements to lay the proper foundation and authenticate the recordings, it was an abuse of discretion to admit them as evidence against the defendant. The convictions based thereon should be reversed.

V. THE TRIAL COURT ERRED BY DENYING THE MISTRIAL WHERE DELAYED DISCLOSURE OF BRADY INFORMATION MATERIALLY PREJUDICED THE DEFENSE OF THE CASE.

The State is incorrect as far as the timeline. The defense did not move for a mistrial a week after Detective Story's testimony about the two witnesses. Story testified on April 30, 2018, not April 25th. (A127, A155-57) And, the next day, on May 1st, 2018 the Defense advised the Court of the motion for a mistrial, but the judge wanted to make the best use of the time before the jury. (A159, 163) So, the motion was made on May 2nd. (A225-41)

Morris was not able to get ahold of two disinterested first hand witnesses with exculpatory testimony because their existence and information was withheld by the State. Morris only learned of them more than one year after the alleged incident during his trial and employed an investigator to locate them during the trial, to no avail. Morris was left with talking about the witnesses, but the State who failed to disclose their existence and exculpatory information also talked about them and downplayed their testimony by characterizing the reason that the witnesses indicated that they did not see the loud, aggressive behavior that Middleton claimed because they were being uncooperative with the police.

The judge found in this circumstance that Morris was "not prejudiced because the information conveyed by the officer if before the jury in cross-examination..." (A248) So, Morris went to trial on a home invasion without the

benefit of exculpatory evidence and without consideration for the prejudice its absence caused his defense. Morris was at least entitled to a Deberry instruction and stipulation but that was denied also. Morris' inability to locate defense witnesses that he learned of during trial in one night constitutes a manifest necessity to grant a mistrial. But, he received no consideration, and the State suffered no consequence or sanction for concealing the information. The outcome was unreasonable, and should be considered an abuse of discretion. The verdict on the home invasion accordingly should be reversed.

CONCLUSION

For the reasons stated herein, this Honorable Court should grant the relief sought as to each issue raised.