EFiled: Jan 29 2019 02:04PM EST
Filing ID 62908945
Case Number 201,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEVEN KELLAM,	)	
	)	
Defendant Below-	)	
Appellant,	)	No. 201, 2018
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 1506014357A
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF

THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

COLLINS & ASSOCIATES

Patrick J. Collins, ID No. 4692
716 North Tatnall Street, Suite 300
Wilmington, DE 19801
(302) 655-4600

Dated: January 29, 2019

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Rules

ARGUMENT

I. THE TRIAL JUDGE ERRED BY PERMITTING THE ADMISSION OF IRRELEVANT AND PREJUDICIAL WIRETAP RECORDINGS AND TEXT MESSAGES.

The wiretap calls and texts were improperly admitted

Mr. Kellam argued in the Opening Brief that these wiretap recordings were irrelevant and prejudicial because they do not demonstrate any conduct establishing him as involved in the charged crimes or as the kingpin of a racketeering organization. They establish only that his relatives and friends contacted him to talk about their various drug dealing and gambling problems. The State disagrees.[1] For support, the State cites *Kendall v. State*.[2] But *Kendall* actually underscores the difference between properly and improperly admitted evidence.

Kendall was apparently a con artist who took money to build homes and then bilked customers. He did it first in Maryland for years and then started doing so in Delaware.[3] He used his purported Maryland successes to convince Delaware customers to hire him.[4] Kendall's misconduct in Maryland was admissible in the Delaware case because he "followed the precise pattern he had used to victimize

---

[1] Answering Brief (Ans. Br.) at 36.
[2] 726 A.2d. 1191 (Del. 1999).
[3] *Id.* at 1192.
[4] *Id.*

homebuyers and others in Maryland in the 1980s."[5] This Court held that the Maryland evidence was direct proof of Kendall's pattern of racketeering.[6]

The evidence admitted in Mr. Kellam's case sharply contrasts with the evidence admitted in the Kendall trial. The wiretap recordings are not direct proof of anything, other than that his cousins and friend contacted him to complain about their various problems. Mr. Kellam did not do anything, or direct anyone to do anything, in response to the various issues raised by Robinson, Waples, and Vanvorst. The calls and texts occurred months after the end date of the Racketeering charges in the indictment. They were the State's attempt to shore up inconsistent and contradictory testimony by accomplice witnesses.

The State further claims that Mr. Kellam concedes that the admission of this evidence is harmless error.[7] That is not the case. The argument regarding the availability of plenty of other proof was a direct reference to the rubric established in *Deshields v. State*.[8] Moreover, the argument is that there was ample other proof of the *charged offenses*. The evidence admitted had nothing to do with the charged offenses; it was admitted to demonstrate that Mr. Kellam is a person of bad character and to bolster the testimony of his alleged accomplices.

---

[5] *Id.* at 1193.
[6] *Id.* at 1194.
[7] Ans. Br. at 37.
[8] 706 A.2d 502, 506-07 (Del. 1998).

The State has mischaracterized the timing element of the admitted calls and texts as too remote in time in the context of D.R.E. 404(b).[9] Certainly, other misconduct evidence occurring a few months after a crime would fit within the *Getz* rubric.[10] The issue in this case is that the evidence was admitted as direct proof of the Racketeering charges to prove, as the judge put it, to identify Mr. Kellam "as the alleged boss man."[11] Not only did the evidence not establish him as a boss man, the evidence was of conversations occurring months after the purported enterprise was over.

The State has taken a narrow definition of vouching as pertaining to a prosecutor's comment implying personal knowledge.[12] While it is true that vouching in that sense is a term used to discuss prosecutorial misconduct, obviously, that was not the argument made in the Opening Brief.[13] The argument was that the State, by its own admission, had witness credibility problems and wanted the wiretap calls and texts admitted so the jury could hear Mr. Kellam's own words rather than their flawed accomplice witnesses.

The Opening Brief argued that it was improper for the judge to consider how the other defendants fared in their trials as a data point in the admissibility

---

[9] Ans. Br. at 37.
[10] *Getz v. State,* 538 A.2d 726, 734 (Del. 1988).
[11] A175.
[12] Ans. Br. at 38.
[13] Opening Brief (Op. Br.) at 47.

decision. The State contends that no cases were cited for this contention.[14] Not so; the argument is that *Getz* and *Deshields* provide the appropriate rubric – or at least it did according to the Court. How juries decided other defendants' trials is not among any of the factors to be considered under D.R.E. 401 or any other rule of evidence.

The instruction given was insufficient to cure the unfair prejudice

Appellant concedes the State's point that this argument should have been framed for plain error review, because counsel did not raise a timely objection.[15] But the State's argument that the jury did not use the evidence improperly because it found Mr. Kellam not guilty of two out of 47 charges lacks merit. There was no evidence of a second or third firearm used by the robbers in one of the robberies. Those two not guilty verdicts comment more on lack of evidence than anything else.

The judge's instruction that the jury could use the wiretap calls and texts to determine if Mr. Kellam directed others to commit the charged crimes was plain error. The wiretap evidence had nothing to do with the charged crimes and was irrelevant. Moreover, Mr. Kellam is not directing others to do anything in the calls and texts, and certainly not directing anyone to commit crimes that occurred from a

[14] Ans. Br. at 38-39.
[15] *See,* Ans. Br. at 40-41.

year to months prior. As such, it was plain error to instruct the jury to consider the evidence in this fashion.

CONCLUSION

For the foregoing reasons, as well as those stated in the Opening Brief, Appellant Steven Kellam respectfully requests that this Court reverse the judgment of the Superior Court.

COLLINS & ASSOCIATES

/s/ Patrick J. Collins
Patrick J. Collins, ID No. 4692
716 North Tatnall Street, Suite 300
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

Dated: January 29, 2019