



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ELMER DOBSON, :
 :
 DEFENDANT BELOW, :
 APPELLANT, :
 :
 v. : No. 617, 2012
 :
 STATE OF DELAWARE :
 :
 PLAINTIFF BELOW,
 APPELLEE

**DEFENDANT APPELLANT'S REPLY BRIEF ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR
SUSSEX COUNTY**

LAW OFFICE OF
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DATED: August 7, 2013

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¹ Pseudonym for minor child.

C. MERITS OF THE ARGUMENT: THE TRIAL COURT ERRED IN ALLOWING COUNTS FIVE AND SIX TO PROCEED TO THE JURY WITHOUT FURTHER INSTRUCTION AS TO WHAT ALLGED OCCURRENCES CORRESPONDED WITH THESE COUNTS.

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B. THE STANDARD AND SCOPE OF REVIEW: THE STANDARD AND SCOPE OF REVIEW IS THAT OF ABUSE OF DISCRETION, WHETHER THE TRIAL COURT'S DECISION WAS BASED UPON CONSCIENCE AND REASON, AS OPPOSED TO CAPRICIOUSNESS OR ARBITRARINESS.

C. MERITS OF THE ARGUMENT: THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE STATES OBJECTION. THE PURPOSED LINE OF QUESTIONING WAS BOTH RELEVANT TO THE CREDIABILITY OF THE WITNESSES AND TO THE POTENTIAL BIAS OF THE WITNESS.

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ARGUMENT I

A. QUESTION PRESENTED: DID THE TRIAL JUDGE ERR IN ALLOWING EVIDENCE OF UN-INDICTED CHARGES TO BE ENTERED INTO EVIDENCE THROUGH WITNESS B.C.²?(A1-16)

B. THE STANDARD AND SCOPE OF REVIEW: THE STANDARD AND SCOPE OF REVIEW IS PLAIN ERROR. WHETHER THE TRIAL JUDGE MADE A PLAIN ERROR THAT AFFECTED A SUBSTANTIAL RIGHT. WAINWRIGHT V. STATE, 504 A.2d 1096 (Del. 1986).

C. MERITS OF THE ARGUMENT: THE TRIAL COURT ERRED IN ALLOWING EVIDENCE OF PRIOR BAD ACTS THAT WERE UN-IDICTED WITHOUT CONDUCTING A *GETZ* ANALYSIS NOR GIVING A LIMITING INSTRUCTION

The State in its Answering brief puts forth a two part defense of the introduction of evidence of uncharged offenses. First, that Defense counsel made a tactical decision not to object the testimony of the uncharged conduct, and second, the if there was error it was harmless error.

The State's contention that the decision not to object to the introduction of evidence of un-indicted charges, was a tactical decision is not supported by the record. As supposed evidence of this intent the State directs the Court to the decision of trial counsel to cross examine B.C. before any 3507 statements are introduced. (A27-28) It is clear from the record the decision to cross B.C. prior to the potential introduction of 3507 statements was a tactical decision based on the

² Pseudonym for minor child.

record, but in no way does this tactical decision imply that defense counsel chose as a tactic not to object to the introduction of evidence of un-indicted charges. In fact at the time, the current tactical decision was made; the evidence of the un-indicted charges had already been introduced through the testimony of B.C. The State in its argument points to the fact that Defense counsel wished to cross examine B.C. regarding discrepancies between her in Court testimony and her CAC interview, this while accurate it in no way shows a tactical decision not to object to the evidence of un-indicted charges. In fact defense counsel makes it clear at side bar that his cross is likely to focus on the discrepancies in the timing of the claimed offenses both the timing as stated in the CAC and the supposed different time frame that was testified to at trial. (A26-27).

Defense counsel later in trial chooses not to object to the introduction of the CAC interview, this is clearly a tactical decision but once again not a decision that evidences a willful tactic to allow the introduction of evidence of in-indicted charges. The record shows that the focus of defense counsel's approach to cross examination was to focus on the claimed dates when this abuse was to occur and not that B.C. claimed six acts of Rape at the time of the CAC and eight acts at the time of trial. (A29-32).

The State argues that if this claim was not waived then it was harmless error. In arguing harmless error the State attempts to distinguish the current case from

Barnett v. State, 893 A.2d 556 (Del. 2006), in which this Court found that the introduction of un-indicted charges not to be harmless. In attempting to distinguish the matter the State's position is that *Barnett* included multiple defense witnesses whereas the case at bar included only the testimony of the Defendant. This argument fails to show how this error was harmless, on the contrary the fact that the State's entire case was based on the testimony of the complaining witness, and that the defense's entire case was based on the testimony of the Defendant makes it more likely that the error was not harmless. Introduction of evidence of un-indicted charges allowed the State to attempt to show evidence of a claimed general characteristic of the Defendant, which went directly to the creditability of the Defendant.

This was a close case, with no actual evidence of the offenses presented by the State other than that of the complaining witness, it is clear that the evidence of the un-indicted charges had an effect on the jury's judgment of credibility of the Defendant.

ARGUMENT II

A. QUESTION PRESENTED: DID THE TRIAL JUDGE ERR IN SENDING TO THE JURY COUNTS FIVE AND SIX OF THE INDICTMENT? (A24-25).

B. THE STANDARD AND SCOPE OF REVIEW: THE STANDARD AND SCOPE OF REVIEW IS PLAIN ERROR. WHETHER THE TRIAL JUDGE MADE A PLAIN ERROR THAT AFFECTED A SUBSTANTIAL RIGHT. WAINWRIGHT V. STATE, 504 A.2d 1096 (Del. 1986).

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The Defense has nothing further to add to its argument as set forth in Defendants opening brief.

ARGUMENT III

A. QUESTION PRESENTED: DID THE TRIAL COURT ERR IN SUSTAINING THE STATE'S OBJECTION TO THE QUESTIONING OF WITNESS CASSANDRA CANNON REGARDING AN INVESTIGATION BY THE DEPARTMENT OF FAMILY SERVICES? DEFENDANT PRESERVED THIS ISSUE BY OPPOSING SAID OBJECTION. (A17-23)

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C. MERITS OF THE ARGUMENT: THE TRIAL COURT ABUSED ITS DISCRETION IN SUSTAINING THE STATES OBJECTION. THE PURPOSED LINE OF QUESTIONING WAS BOTH RELEVANT TO THE CREDIABILITY OF THE WITNESSES AND TO THE POTENTIAL BIAS OF THE WITNESS

The State in its Answering Brief asserts that Cassandra Cannon's testimony was not crucial and would likely confuse the jury, and as such the trial judge did not abuse his discretion in sustaining the State's objection. The claim that this potential testimony is not crucial is not supported by the record. The evidence presented at trial was that a twelve year old child, was claimed to have be raped when she was ten years old. That the child never disclosed this to anyone until close to a year after the alleged occurrences. During the entirety of this time the child was residing with her Mother whom later developed animosity towards the Defendant. Prior to this disclosure the Defendant and the child's Mother, separated after numerous disputes regarding alleged infidelity and arguments regarding a vehicle. ~~That~~ the Defendant left the Cannon residence in the early summer of

2011, and that the child didn't disclose the alleged rape until months later. Mother potential bias is a crucial part of the case as it would tend to show Mother's testimony is not creditable as well as providing a motive for Ms. Cannon to potentially persuade her daughter to make up allegations against the Defendant. The questioning was directly to Mother's bias and should have been allowed under Delaware Rules of Evidence 616.

The State's claim that allowing the Defense to question Cassandra Cannon regarding the DFS investigation would confuse the jury is base less. Said questioning would have been limited to the allegations made by the Defendant, what became of said allegations and likely the effect said allegation had on the witness. The Defendant fails to see how this in any way would cause the jury to be confused as to the separate counts of Rape.

CONCLUSION

For the reasons set forth herein Defendant respectfully prays that the Defendant's convictions at bar be reversed and an order be entered that all charges against the defendant are dismissed or, if that remedy is not granted, that all convictions of the Defendant be reversed and the matter remanded to the Superior Court for a new trial.

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DATED: August 7, 2013

AFFIDAVIT OF ELECTRONIC MAILING

BE IT REMEMBERED that on this 7th day of August, 2013 Elizabeth Stewart, Secretary for the Law Office of Edward C. Gill, P.A., does state that she forwarded, via electronic filing, two copies of: **Defendant Appellant's Reply Brief on Appeal from the Superior Court of the State of Delaware in and for Sussex County** to:

Gregory E. Smith, Esquire
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/s/ Elizabeth Stewart
Secretary