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IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYRONE CLARK,
Defendant Below,

Appellant,

v.

STATE OF DELAWARE
Plaintiff Below,
Appellee

FROM: The Superior Court of Kent County

C.A.No. 93-2021

Criminal Case No.

K1907004115

Date: 9/30/2021

**APPELLANT'S THIRD CORRECTED
OPENING BRIEF**

Christofer C. Johnson (I.D. #5621)
The Johnson Firm, LLC
704 N. King Street, Suite 205
Wilmington, Delaware 19801
(302) 397-3988
Attorney for Appellant

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NATURE OF PROCEEDINGS

This appeal consists of the appeal by Tyrone Clark (“Clark”) of the Delaware Superior Court’s Sentencing Order adjudicating Mr. Clark as guilty of the offenses that were brought against him: one count of attempted sexual abuse of a child by a person of trust, authority or supervision in the first degree; two counts of sexual abuse of a child by a person of trust, authority or supervision in the first degree; one count of sexual abuse of a child by a person of trust, authority or supervision in the second degree; one count of rape in the second degree; one count of attempted rape in the second degree; two counts of dangerous crime against a child; one count of rape in the fourth degree; and one count of unlawful sexual contact in the first degree¹.

On July 16, 2019, Mr. Clark was arrested, processed, arraigned and committed to the Sussex Correctional Institution in lieu of \$245,000 secured bail.² A hearing was held in the Kent County Superior Court on January 14, 2020 and all charges were held over. Trial was set for, and commenced on, January 28, 2020 and lasted until February 4, 2020.³ Mr. Clark was ultimately sentenced to 35 years in prison.⁴

¹ Superior Courts Order 1/25/2021

² November 9, 2020 Presentence Investigation Report, page 13

³ Transcripts of Trial Volumes A-F, A-371; 498;672;860;949 and 1047.

⁴ Superior Court for Kent County JJC Sentencing Document

On March 21, 2021, Mr. Clark timely appealed the Superior Court's sentence and adjudication to this Court.⁵ Mr. Clark's Opening Brief in support of his appeal follows.

⁵ Transaction ID # 66457689

SUMMARY OF ARGUMENT

1. Mr. Tyrone Clark was subjected to an inherently coercive police interrogation tactic known as The Reid Technique that, combined with the facts that he had not slept for two days, had barely eaten and just wanted to go home, allowed the police to obtain an involuntary confession. Mr. Tyrone Clark is requesting that this appeal be GRANTED and the matter REMANDED back to the Superior Court for a new trial.
2. Mr. Tyrone Clark was unduly prejudiced when SANE Nurse Culp testified that she believed the victim's statements. The statements caused improper vouching and took the decision away from the Jury. Further, the Superior Court's remedial order was insufficient to fix the damage that had already been done and erred when it denied Defense Counsel's Motion for a Mistrial. Mr. Tyrone Clark is requesting that this appeal be GRANTED and the matter REMANDED back to the Superior Court for a new trial.
3. The Superior Court erred when it granted The State's Motion for Enhanced Sentencing while denying Defense Counsel's Motion for Merger. The Superior Court failed to instruct the Jury that it needed to find that the victim was under 14 years of age at the time of the offense. Further, Counts 1, 2, 3 and 4 should merge under the multiplicity doctrine. Mr. Tyrone Clark is requesting that this appeal be GRANTED and the matter REMANDED back to the Superior Court for a new trial.

STATEMENT OF FACTS

The Appeal before this Court (the “Appeal”) is primarily a question of law matter. However, there are numerous case-specific facts that would have an impact on this appeal. Aside from the aforementioned procedural facts stated in the “Nature and Stage of Proceedings” section, there are additional facts of highly probative value and must be considered in this Appeal.

On July 6, 2019, Mr. Clark was interrogated by Detective Weinstein and Detective Nash.⁶ Mr. Clark’s mental, physical and emotional state were exploited and used against him by the detectives in order to obtain an involuntary confession. Mr. Clark had drank around 24 beers⁷, had been awake for two days⁸ and had only been fed once during that time frame.

On July 24, 2019, after Detective Nash and Weinstein had interrogated Mr. Clark, a DNA Laboratory Report was created based on the findings of a forensic tests done.¹⁰ The submitted items were Sexual Assault Evidence Collection Kits from both N.D and T.D, penile swabs from Mr. Clark, and

⁶ Interview of Tyrone L. Clark, July 6, 2019,

⁷ Trial Transcript D, Page 12, Lines 4-12, A-860

⁸ Trial Transcript C, Page 174, Lines 2-14, A-672; Trial Transcript D, Page 13, Lines 1-10, A-

⁹ ; Trial Transcript D, Page 29, Lines 18-23, A-860 ⁹ DNA

Laboratory Report, July 24, 2019, A-127

¹⁰ Id.

reference swabs from Mr. Clark.⁹ The report detailed that only a single DNA source profile was found from the victim, herself.¹¹

Throughout the trial, from January 28, 2020 to February 4, 2020, Mr. Clark repeatedly denied, while sworn in, that he ever confessed of any wrongdoing to the Detectives:

TC: I kept denying it. But I denied it, he kept pressuring me, pressuring me, pressuring me. And I was saying, me denying it ain't going to do no good because he just going to keep coming at me and coming at me. So I just agreed with him thinking I was going to go home.¹²

Additionally, the Superior Court wrongfully pointed out the improper vouching on behalf of SANE Nurse Culp.¹³ This called further attention to the improper testimony and ingrained it into the mind of the Jury. The Superior Court should have called a sidebar and addressed it with the attorney's before deciding a course of action.

¹¹ Id.

¹² Trial Transcript D, Page 26, Lines 12-19 , A-860

¹³ Trial Transcript Volume A, Page 59, Lines 5-9, A-371

ARGUMENT

I. APPELLANT TYRONE CLARK WAS DENIED HIS DUE PROCESS RIGHTS WHEN THE SUPERIOR COURT DENIED THE DEFENCE MOTION TO CHALLENGE THE VOLUNTARINESS OF HIS STATEMENT.

A. QUESTION PRESENTED

Whether Appellant Tyrone Clark was denied his Due Process rights pursuant to the Fourteenth Amendment when the Superior Court denied the Defense Motion to challenge the voluntariness of Mr. Clark's admission and subsequent confession. Appellant Tyrone Clark prays this Court to consider the following questions of factual circumstance, which are of paramount importance to this matter. Mr. Clark believes justice requires these issues to be heard by this Court, as he is a wrongfully convicted man, who nonetheless has had his life changed by this wrongful conviction and reputation ruined by unfounded allegations of unlawful acts against a minor.

B. STANDARD OF REVIEW

The Delaware Supreme Court reviews question of law cases under a de novo standard.¹⁴

C. MERITS OF ARGUMENT

1. Appellant Tyrone Clark's confession was a result of the controversial Reid interrogation techniques evaluated through a totality of the circumstances of the interrogation.

As a threshold issue, Appellant Tyrone Clark prays this Court to consider the foregoing questions of constitutional law, which are of paramount importance to this matter. Mr. Clark believes justice requires these issues to be heard by this Court, as he is a wrongfully convicted man, who nonetheless has had his life changed by this wrongful conviction and reputation ruined by unfounded allegations of unlawful acts against a minor. Underneath the Delaware Constitution, in all criminal proceedings, the accused has a right to . . . not be compelled to give evidence against themselves, nor shall they be deprived of life, liberty or property, unless by the judgment of their peers or by the law of the land.¹⁵ Moreover, the Constitution of the United States

¹⁴ Camtech Sch. Of Nursing & Tech. Scis. v. Del. Bd. of Nursing, 100 A.3d 1020 (Del. 2014).

See also, Schaller v. Bd. of Med. Licensure, (Del. Super. 2015)

¹⁵ Delaware Constitution, Article 1 §7

reiterates that no person . . . shall be compelled in any criminal case to be a witness against themselves.¹⁶

When a confession challenged as involuntary is sought to be used against a criminal defendant at his trial, [the criminal defendant] is entitled to a reliable and clear-cut determination that the confession was . . . voluntarily rendered.¹⁷ [T]he prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.¹⁷

When attempting to determine the voluntariness of a confession, a court looks at the totality of the circumstances as required underneath the Fourteenth Amendment.¹⁸ A court must assess the conduct of the police in obtaining the confession, and if such conduct is found to be inherently coercive, the suppression of the confession is the appropriate response.¹⁹

Police conduct may become inherently coercive when the defendant was subjected to extended periods of incommunicado interrogation.²⁰ Of

¹⁶ United States Constitution, Fifth Amendment ¹⁷ Lego v. Twomey, 404 U.S. 477, 489 (1972).

¹⁷ Id.

¹⁸ Wayne R. LaFave; Jerold H. Israel; Nancy J. King; Orin S. Kerr, 2 Crim. Proc. §6.2(c) (4th ed.), A-1109

¹⁹ Id.

²⁰ Id.

particular significance in this regard is whether the suspect was subjected to lengthy and uninterrupted interrogation, whether he was kept in confinement [for] an extended period of time even though subjected only to intermittent questioning, whether he was moved from place to place and questioned by different persons so as to be disoriented, whether he was questioned in solitary confinement or at some isolated place away from the jail, whether he was held incommunicado up until the time of the confession²¹

Additionally, a confession may be considered as involuntarily given if obtained by any other improper influence. . . .²² Illustrating this point is the Reid Interrogation Technique which virtually every police department, sheriff's office, and other law enforcement agency in the United States . . . employs.²³ The Reid Method consists of three steps: (1) Factual Analysis; (2) the Behavioral Analysis Interview ("BAI"); and (3) Interrogation.²³

According to the Reid Manual, :only people who are believed to be guilty are

²¹ Wayne R. LaFave; Jerold H. Israel; Nancy J. King; Orin S. Kerr, 2 *Crim. Proc.* §6.2(c) (4th ed.), A-1109

²² Id.

²³ Kozinski, Wyatt (2018) "The Reid Interrogation Technique and False Confessions: A Time for Change," *Seattle Journal for Social Justice*: Vol. 16: Issue 2, Article 10, page 302, A-1063 ²³ Id. at 310 *citing* James Orlando, *Interrogation Techniques*, Connecticut Office of Legislative Research, <https://www.cga.ct.gov/2014/rpt/2014-R0071.htm> ²⁶ Id. at 311 ²⁷ Id.

. . . interrogated.”²⁶ By the time that the interrogation happens, the interrogator is no longer focused on the objective collection of information.²⁷ Instead, their [] objective is to get the suspect to admit his guilt and sign a confession that is rich in detail and other indicia of voluntariness and genuineness.²⁴

The Reid Interrogation resolves itself into three major parts: (1) tell the suspect that [the interrogator] knows for sure that the suspect committed the crime, and cut off any attempts on his part to deny it; (2) offer the suspect more than one scenario for how he committed the crime, and suggest that his conduct was likely the least culpable, perhaps even morally justified; and (3) overstate the strength of the evidence that the police have inculpating the suspect – by inventing nonexistent physical evidence or witness statements – and assuring [the suspect] that he’ll get convicted regardless of whether he talks.²⁵

In order to achieve the best results using the Reid method, the interrogators are given instructions on how to overcome the suspect’s natural inclination not to incriminate himself.²⁶ [First], the suspect must be isolated .

²⁴ Id.

²⁵ The Reid Interrogation Technique and False Confessions: A Time for Change, *supra* note 19, at 311-312, A-1063

²⁶ Id. at 312. ²⁷

Id

. . [and] must get the impression that he must face this ordeal by himself, with no help from anyone outside the interrogation rooms.²⁷ The interrogations may continue uninterrupted for many hours, with the suspect alternatively badgered and cajoled to admit his guilt.²⁷ “From the perspective of the hungry, tired, anxious and despondent suspect, complying with the interrogator’s demands might seem like the only way to terminate the ordeal and gain the interrogator’s favor.”²⁸²⁹

In this instant matter, the record demonstrates that the Interrogators’ use of the Reid method, combined with the length of the interrogation, the failure to reiterate the Miranda warnings and Mr. Clark’s physical, mental and emotional state during the length of the interrogation constituted inherently coercive conditions and led to an involuntary confession.

First, Detective Weinstein and Detective Nash (hereinafter “The Detectives”) attempted to interrogate Mr. Clark through use of the Reid Technique, which can be seen throughout the entire interrogation transcript. The Detectives began by repeatedly telling Mr. Clark that they knew he committed rape and kept insisting that he stop denying it.

²⁷ . at 312 - 313

²⁸ *Id* at 319 quoting Saul M. Kassin, Sara C. Appleby & Jennifer Torkildson, *Interviewing Suspects: Practice, Science, and Future Directions*, 15 LEGAL & CRIMINAL PSYCHOL. 39,

²⁹ .

DW: Yeah, if it goes on for a minute or two then just tell me that.
Because like I said – TC:

It –

DW: - if – if you want me to believe you didn't have sex – TC:

It might have been a minute or two but I'm – DW: Okay.³⁰

..

.

DW: - okay. What are you doing? Because you're – I damn sure know
that you're not just standing there like, hmmm, she's pulling on my penis and
I'm just standing here. What's going on? Are you kissing her? Are you –

TC: No, I didn't kiss her. DW: - hold – hold up TC: I didn't kiss
her.

DW: Hold up. I told you she's been swabbed from head to toe for
DNA³¹

..

.

DW: How do you expect me to believe that she's rubbing on your penis
and you're not touching her?

TC: I know her mom.

DW: That has nothing . . . this is – TC: And

mom-mom –

DW: - this is three grown men talking –

TC: And I'm –

DW: - and this is three grown men talking.

TC: And I'm not –

DW: Okay, this is three grown men – TC:

- and mom-mom is –

DW: - hold – hold on, hold on, let me finish. This – I'm being straight
with you. Real – real talk. Straight. Three grown men here talking, okay? If I
am having a girl rubbing on my penis I'm not thinking about what this girl's
mom is – is thinking.

³⁰ Interview of Tyrone L. Clark by Detectives Weinstein and Nash, page 11/38

³¹ Id .

TC: No, I'm thinking of mom-mom, my granddaughter.

DW: Hmm, no.

TC: Yes.

DW: No, no.

TC: I did not in – I did not think –

DW: Have you ever though about a girl's mom when you're – TC: We didn't have sex.

DW: - having – TC: We didn't have sex.

DW: - I'm not saying that you had sex. But you have to understand if you want me to believe that you guys didn't have sex you have to tell me the other stuff that – that happened leading up to that, okay? If you want me to believe that you didn't have sex then you need to tell me everything else that did happen.

TC: She grabbed me.

DW: Okay. She grabbed you. But now I'm asking if you touched her and you're saying no, and I'm telling you right now, straight up, that's not true. I know that's not true. I've already spoken to her, I've already – we've already had the other girl brought there, too. All right? I know that's not true so –

TC: Mom-mom did not see me doing nothing to her.

DW: Yeah, but she can corroborate other parts of what [N.D] had already told us. Okay.

DN: We're not, nobody – we're – listen, nobody's saying that mommom saw anything. Okay? You can count that out, all right? We're – we're telling you and we're being 100% honest with you, we have gotten statements from both of them, okay? At a special place, special investigators that – that specialize in children – TC: Right.

DN: - Okay? They have disclosed details that we're giving you the option, we're giving you the opportunity, better, to be honest with us up front. Okay? Because right now we – we know more than what you think we know. All right? And we're – we're – we're trying to give you an opportunity to help yourself –

TC: No, but like I told – like I told, like I told him, I don't know why she's doing this but I'm serious I didn't – I didn't – not have intercourse with her.³²

As demonstrated above, The Detectives kept cutting off Mr. Clark's opportunities to explain himself and deny the accusations that were leveled against him, staying in line with the first step of the interrogatory technique that is taught in Reid. Further:

DN: Well, okay, you might not have had intercourse with her, okay, but that doesn't mean that other things don't take place, i.e., you know you rub each other, you put your face in her neck or, you know what I mean? When a – when a guy is getting – well when a woman has her hand down another man's pants, you're going to enjoy it some way, shape or form, okay? You said it lasted for a minute or two. In a minute or two you – you and I both know that you're not standing there going I want this to stop or you would have stopped it within a – a couple of seconds. You wouldn't have let it go as long as you did without –³³

The Detectives kept in line with Reid. They offered suggestions as to alternate facts that Mr. Clark kept denying in the beginning of their interview with him. Mr. Clark kept reiterating that he kept telling Nayaya “no”. Yet, The Detectives' suggest that he enjoyed the contact and wanted it to continue and kept pressing this point until Mr. Clark

³² Interview of Tyrone L. Clark by Detectives Weinstein and Nash, page 12-13/38

³³ Id. at 13.

caved in to their coercive line of questions. Finally, as demonstrated above, The Detectives explained that they had already interviewed the two girls and “knew more than [Mr. Clark] thought.” These kinds of inherently coercive questions overrode Mr. Clark’s voluntary will and forced him to submit to The Detectives coercion.

Additionally, the totality of the circumstances would have weighed heavily on Mr. Clark’s mental, physical and emotional state during this time. Mr. Clark had been drinking before the interrogation and stated that he had in excess of “24 beers.” When he got arrested, he hadn’t slept in around two days, was handcuffed to a concrete bench for around 10 hours before The Detectives interviewed him and was fed once during the time that he was held. All of these circumstances provide enough mental, physical and emotional degradation that would allow The Detectives’ inherently coercive Reid questioning line to overpower Mr. Clark’s will, causing him to involuntarily confess. In sum, Mr. Clark believes that the totality of the circumstances substantiates the fact that he was coerced into giving an involuntary confession.

II. THE SUPERIOR COURT FAILED TO TAKE APPROPRIATE REMEDIAL ACTION FOLLOWING THE COURT'S JURY INSTRUCTION STATING THAT THE JURY MAY NOT AFFORD WEIGHT TO SANE NURSE CULP'S TESTIMONY

A. QUESTION PRESENTED

Whether the trial court's jury instruction was insufficient to remedy the prejudice that occurred when SANE Nurse Culp said that she believed Nayaya. Appellant Tyrone Clark prays this Court to consider the following questions of factual circumstance, which are of paramount importance to this matter. Mr. Clark believes justice requires these issues to be heard by this Court, as he is a wrongfully convicted man, who nonetheless has had his life changed by this wrongful conviction and reputation ruined by unfounded allegations of unlawful acts against a minor.

B. STANDARD OF REVIEW

The Delaware Supreme Court reviews matters of evidentiary rulings for an abuse of discretion.³⁴

³⁴ Richardson v. State, 43 A.3d 906, 911 (Del. 2012)

C. MERITS OF ARGUMENT

I. The trial court's jury instruction was insufficient to remedy the prejudice that Mr. Clark faced after SANE Nurse Culp stated that she believed the victim.

Under Delaware law, specifically Title 11, Section 3507 of the Delaware Code, in a criminal prosecution, the voluntary-out-of-court-statement of a witness who is present and subject to cross examination may be used as affirmative evidence with substantive independent testimonial value.³⁵ In order to provide a proper foundation for the introduction of a §3507 statement, the offering party must establish that the out-of-court statement was voluntary; the witness must testify about the content of the prior statement and whether or not it is true; and the witness must be available for crossexamination.⁴⁰ If the voluntariness of the statement is not in issue, the interviewer's testimony should be limited to authentication.³⁶

Additionally, it is settled law that “a witness may not bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth.”³⁷ Improper vouching includes testimony that directly or

³⁵ Del. Code Ann. Tit. 11, §3507(a) ⁴⁰

Richardson v. State, 43 A.3d at 909

³⁶ Id.

³⁷ Richardson v. State, 43 A.3d at 910 *quoting* Capano v. State, 781 A.2d 556, 595 (Del. 2001).

indirectly provides an opinion on the veracity of a particular witness.³⁸ The admission of such testimony constitutes plain and reversible error.³⁹ Moreover, courts normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant.⁴⁰

In this instant matter, SANE Nurse Culp directly testified to N.D. credibility. By indicating to the jury that she, Nurse Culp, believed her, after completing an exam and listening to the victim, Nurse Culp “vouched” for her credibility and improperly prejudiced the jury that the given instruction did not remedy.

SANE Nurse Culp, as a witness, was there to give her opinion as to the facts about the case. She was not allowed or permitted to disclose her personal observation about the trustworthiness of the victim as that is left to the jury to decide. After testifying that she “believed her”, the court's jury instruction would have provided minimal, if any protection, against the prejudice that Mr.

³⁸ Id.

³⁹ Id.

⁴⁰ Michaels v. Phelps, 924 F. Supp.2d 566, 571 (Del. 2013)

Clark suffered as a result. The jury, as a result of listening to SANE Nurse Culp, a medical professional, would have trusted her opinion as to the trustworthiness of the victim. Therefore, because of SANE Nurse Culp's professional station and her testimony regarding the veracity of the victim, would have created an overwhelming probability that the jury would not follow the instruction and created a very strong likelihood that the given opinion greatly prejudiced Mr. Clark.

II. The trial court erred when it failed to grant the Defense’s request for a mistrial.

There is a clearly established body of law regarding and governing mistrial claims.⁴¹ Trial judges may declare a mistrial “whenever, in their opinion, taking all of the circumstances into consideration, there is a manifest necessity” for doing so.⁴² The decision to declare a mistrial is left to the sound discretion of the judge, but the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.⁴³ The standard of manifest necessity cannot be interpreted literally, but a mistrial is appropriate when there is a high degree of necessity.⁴⁴ Specifically, in Delaware, a mistrial is warranted only where there is a manifest necessity or the ends of public justice would be otherwise defeated, and there are no meaningful and practical alternatives to that remedy.⁴⁵

⁴¹ Michaels v. Phelps, 924 F. Supp.2d at 571

⁴² Id. quoting United States v. Perez, 22 U.S. 579, 580, 9 Wheat. 579, 6 L.Ed. 165 (1824)

⁴³ Id.

⁴⁴ Id.

⁴⁵ Id.

In this instant matter, the trial court erred when it failed to grant Defense Counsel's request for a mistrial. SANE Nurse Culp created a situation that required a manifest necessity for doing so after testifying that she, in her professional opinion as a nurse, believed the truthfulness of the victim. Her testimony regarding the veracity of the victim took that discussion away from the jury, prejudicing the defendant to the point that the ends of public justice were defeated. Although the trial court gave a limiting instruction, the damage had already been done, leaving no meaningful or practical alternatives.

III. THE TRIAL COURT ERRED WHEN IT GRANTED THE STATE'S MOTION FOR ENHANCED SENTENCING AND DENIED MERGER ON COUNTS 1, 2, 3 AND 4.

A. QUESTION PRESENTED

Whether the trial court erred when it granted the State's motion for enhanced sentencing and denied merger on Counts 1, 2, 3 and 4.

Appellant Tyrone Clark prays this Court to consider the following questions of factual circumstance, which are of paramount importance to this matter. Mr. Clark believes justice requires these issues to be heard by this Court, as he is a wrongfully convicted man, who nonetheless has had his life changed by this wrongful conviction and reputation ruined by unfounded allegations of unlawful acts against a minor.

B. STANDARD OF REVIEW

The Delaware Supreme Court reviews this issue for plain error.⁴⁶ Under Delaware law, plain error occurs when an error is so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process . . . and is a material defect which is

⁴⁶ Williams v. State, 796 A.2d 1281, 1284 (Del. 2002)

apparent on the face of the record and is basic, serious and fundamental . . .⁴⁷ Moreover, the denial of a merger argument is reviewed under the scope of *de novo*.⁴⁸

C. MERITS OF ARGUMENT

I. The trial court erred when it granted the State’s motion for enhanced sentencing and denied merger on Counts 1, 2, 3 and 4.

Firstly, any fact that, by law, increases the penalty for a crime is an “element” that must be submitted to the jury and found beyond a reasonable doubt.⁵⁴ It follows [] that any fact that increases the mandatory minimum is an “element” that must be submitted to the jury.⁴⁹

⁴⁷ Williams v. State, 796 A.2d at 1284; *see also* Handy v. State, 803 A.2d 937, 940 (Del. 2002) “This Court has previously held . . . that a multiplicity violation may constitute plain error.”

⁴⁸ Pierce v. State, 911 A.2d 793, 796 (Del. 2006)⁵⁴

Alleyne v. United States, 570 U.S. 99, 103 (2013)

⁴⁹ Id.

Secondly, the multiplicity doctrine is one of the protections afforded by the Double Jeopardy Clause of the United States Constitution.⁵⁰ The Double Jeopardy Clause protects a defendant against (i) successive prosecutions; (ii) multiple charges under separate statutes; and (iii) being charged multiple times under the same statute.⁵¹ Underneath the multiplicity doctrine, the State is prohibited from manufacturing additional counts of a particular crime by the simple expedient of dividing a single crime into a series of . . . units.⁵² Additionally, the court must determine whether the defendant's actions are sufficiently separate in time and location to constitute distinct acts.⁵³ The critical inquiry in determining this is whether the temporal and spatial separation between the acts supports a factual finding that the defendant formed a separate intent to commit each criminal act.⁵³ Moreover, [t]he courts have looked to legislative intent in determining

⁵⁰ Zugehoer v. State, 980 A.2d 1007, 1013 (Del. 2009); *see also* Delaware Constitution, Article 1, Section 8 “no person shall be for the same offense be twice put in jeopardy of life or limb . . .”

⁵¹ Id.

⁵² Id.

⁵³ Pierce v. State, 911 A.2d at 796. ⁵³

Id.

whether the constitutional protection against Double Jeopardy permits multiple counts in a particular statutory setting.⁵⁴

Underneath the multiplicity doctrine, [t]he State may charge different theories of criminal liability for the same offense in a single indictment.⁵⁵ Whether multiple theories of criminal liability for the same offense are alleged in a single count or multiple counts, the jury must unanimously decide which method – if any – was used to commit the alleged offense.⁵⁶ But where . . . the jury unanimously finds that the defendant used multiple methods to commit a single offense, the multiple counts merge, and the trial judge may enter judgment only on one count.⁵⁷

Aiding the courts in their analysis of whether charged offenses merge is the Blockburger Test.⁵⁸ Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to

⁵⁴ Zugehoer v. State, 980 A.2d at 1013

⁵⁵ Id.

⁵⁶ Zugehoer v. State, 980 A.2d at 1013-1014

⁵⁷ Id. at 1014 *citing* Ball v. United States, 470 U.S. 856, 865 (1985)

⁵⁸ Blockburger v. United States, 284 U.S. 299, 304 (1932)

be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.⁵⁹ A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.⁶⁰

In this instant matter, for the purposes of enhanced sentencing, the trial court failed to instruct the jury that they must find that the victim was less than 14 years old as to Count 1, Count 2, Count 3, Count 4, Count 5, Count 7 and Count 9. Each of these Counts required that the jury find that the victim was under the age of 14 years at the time of the assault in order to satisfy the enhanced sentencing requirements as described under Alleyne.

Further, under the multiplicity doctrine and the Blockburger Test, Counts 1 and 2 should be merged, as well as Counts 3 and 4.

Under the facts of this case, Mr. Clark did not have the requisite time and space needed to formulate additional intent.

⁵⁹ Blockburger v. United States, 284 U.S. at 304

⁶⁰ Id.

Moreover, the State cites Title 11, §4205(A)(a) of the Delaware Code as a reason for enhancing the punishment against Mr. Clark.⁶¹ However, the State further cites subsection (2) stating “the victim of the instant offense(s) is a child less than 14 years of age.” Since the jury was never instructed on this additional enhancement information, they never specifically found that the victim was under the age of 14 in this case and the sentence runs afoul of Alleyne.

WHEREFORE, Appellant Tyrone Clark respectfully requests this Honorable Court to grant Appellant’s appeal and reverse the decision of the Superior Court and remand the matter back to the trial court.

Dated: July 30, 2021

THE JOHNSON FIRM LLC

/s/ Christofer C. Johnson
Christofer C. Johnson, Esq.
(I.D. #5621)
704 N. King Street, Suite 205
Wilmington, Delaware 19801
(302) 397-3988
Attorney for Appellant Tyrone Clark

⁶¹ See the State’s Application for Additional Penalties for a Pedophile Offender, page 2, A-120

TRIAL COURT'S ORDER AND SENTENCING ORDER

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,

ID No. 1907004115

TYRONE CLARK,

Defendant.

ORDER

Submitted: January 15, 2021 Decided:
January 25, 2021

On this 25th day of January 2021, having considered the application of the State, the motion of Defendant Tyrone Clark, and the parties' responses to both, it appears that:

1. On February 4, 2020, after a five-day trial, a Kent County jury convicted Mr. Clark of ten felony sexual offenses. It found him guilty of the following: one count of attempted sexual abuse of a child by a person of trust, authority or supervision in the first degree, two counts of sexual abuse of a child by a person of trust, authority or supervision in the first degree, one count of sexual abuse of a child by a person of trust, authority, or supervision in the second degree, one count of rape in the second degree, one count of attempted rape in the second degree, two counts of dangerous Crime against a child, one count of rape in the fourth degree, and one count of unlawful sexual contact in the first degree.

2. Because of logistical concerns caused by the Covid-19 pandemic, Mr. Clark remains unsentenced one year after his trial. In advance of his sentencing, both parties submitted detailed written arguments regarding two issues: (1) the

extent that some of these convictions should merge for purposes of sentencing, and

(2) whether the sentencing enhancement of 11 Del. C. 4205A applies to the guilty verdicts as to Counts 1 through 5 of the indictment. If the sentencing enhancement applies to those convictions, then Section 4205A increases the minimum mandatory sentence for each offense to twenty-five years of incarceration. Applying that sentence enhancer also increases the upper range for those offenses to life imprisonment.

3. Mr. Clark argues that eight of the charges the jury convicted him of should merge into four for purposes of sentencing. As to the merger argument, he argues that the same elements are included in each pair of convictions and that the jury found him to have committed only four distinct acts.

4. Mr. Clark also opposes the State's application for enhanced sentencing pursuant to 11 Del. C. 4205A. He disputes applying it to his convictions of Counts 1 through 5. He contends that increasing the penalties for these counts would be inappropriate because doing so would violate the principles recognized in *Apprendi v. New Jersey*¹ and *Alleyne v. United States*.² The holdings in those cases recognize that any fact that

increases the statutory maximum penalty,³ or the minimum mandatory sentence⁶² for an offense, with the exception of the fact of a prior conviction, must first be found by the jury beyond a reasonable doubt. He emphasizes that although the indictment alleged the necessary age in those five counts, the Court did not instruct the jury that her age of less than fourteen years was an element of the offense.

5. With regard to the issue of merger at sentencing, the State concedes that Mr. Clark's conviction of Count 6, rape fourth degree, merges into his conviction of

¹ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
² *Alleyne v. United States*, 570 U.S. 99 (2013).
³ *Apprendi*, 530 U.S. at 490.

Count ⁶³ 7, dangerous crime against a child.

Furthermore, the State concedes that Mr. Clark's conviction of Count 8, sexual abuse of a child by a person of trust, authority, or supervision in the second degree merges into Count 9, dangerous crime against a child.

6. The parties disagree, however, regarding whether Count 3, attempted rape in the second degree, merges into Count 1, attempted sexual abuse of a child by a person of trust, authority, or supervision in the first degree (hereinafter "attempted sexual abuse first"). They also dispute whether his conviction of Count 4, rape in the second degree, merges into his conviction of Count 2, sexual abuse of a child by a person of trust, authority, or supervision in the first degree (hereinafter "sexual abuse first").

⁶² *Alleyne*, 570 U.S. at 108.

⁶³ *Am. Jur. 2d Criminal Law* §21 (Nov.

7. At the outset, Mr. Clark correctly emphasizes that each pair of offenses include crimes that contain the same elements, with the exceptions of one additional element that is found in each corresponding offense.⁵ In such cases, when one criminal occurrence gives rise to more than one crime, merger may be appropriate.⁶⁴ In response, the State does not dispute that the charges that allegedly merge arise from the same occurrence. Accordingly, they would merge for the purposes of sentencing absent clear legislative intent that the convictions (that arise from the same criminal acts) carry separate penalties.⁶⁵

8. The State correctly argues that when the General Assembly created the offenses of sexual abuse first degree and attempted sexual abuse first degree it demonstrated its intent to punish those charges separately from any other convictions. It expressly provided for separate sentences in the statute creating the

offense and in the statute that defines an attempt of that offense.⁶⁶ Accordingly, neither rape second degree or attempted rape second degree merge into the two sexual abuse charges for sentencing purposes.

⁶⁴ See *Poteat v. State*, 840 A.2d 599, 603 (2003) (recognizing that "[g]enerally, multiple punishments are 'not imposed for two offenses arising out of the same occurrence . . . [the legislature] ordinarily does not intend to punish the same offense under two different statutes.") (citation omitted).

⁶⁵ *State v. Cook*, 600 A.2d 352, 355 (Del. 1991).

⁶⁶ See 11 Del. C. 778(7) (providing that nothing contained in the section creating the crime of sexual abuse of a child by a person of bust, authority, or supervision in the first degree "shall preclude a separate, charge, conviction, or sentence for any other crime set forth in this title, or in the Delaware Code.") (emphasis added). Based on unequivocal direction by the General Assembly that these charges, involving the same conduct, carry separate sentences, the Court need not address the State's separate contention that 11 Del. C. 3901 (d)'s consecutive sentencing provision requires separate sentences for the what are the same two criminal acts. Likewise, the General Assembly provided clear statutory direction that the LIO attempt verdicts returned in Counts 1 and 3 trigger the enhancer. See 11 Del. C. 531 (providing that "[a]ttempt to commit a crime is an offense of the same grade and degree as the most serious offense which the accused is found guilty of attempting.").

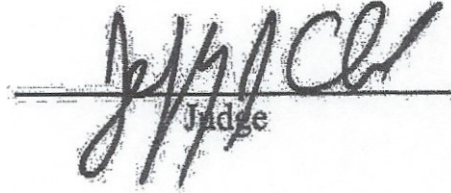
9. The Court next examines whether there was legally sufficient proof of the victim's age to justify applying 11 Del. C. 4205 A(a)'s sentencing enhancer. Mr. Clark emphasizes that the jury instructions for Counts 1, 2, 3, 4, 5 did not include the victim's age as an element of the offense. In relying on the United States Supreme Court's decisions in *Apprendi* and *Alleyne*, Mr. Clark argues that increasing the minimum mandatory sentences for Counts 1 through 5 to twenty-five years each, and increasing the maximum sentences for each to life in prison, requires that a jury find the victim's age to be less than fourteen.⁶⁷ There was no dispute at trial that the victim was twelve years old and that Mr. Clark acknowledged the fact on cross-examination. That alone, however, would not trigger the enhancement absent a jury finding that the victim was less than fourteen years old. The Court's decision, however, turns on a different factor. Namely, the enhancer applies in this case because the jury did find beyond a reasonable doubt that the victim was under fourteen years of age, albeit in separate counts than the ones at issue. Namely, the jury instructions in Counts 7 and 9 both included an element requiring the victim to be "less than 14 years of age at the time of the charged offense." The jury convicted Mr. Clark of both counts. It follows that the jury found beyond a reasonable doubt that the victim was under fourteen, thus satisfying Mr. Clark's Due Process and Sixth Amendment rights as recognized in *Apprendi* and *Alieyne*.

10. Here, the Genpral Assembly directed that upon the State's application, the Coun "shall sentence defendant convicted of [Counts 1, 2, 3, 4, 5, 7, and 9] to not less than 25 years up to life imprisonment [if] the victim of the instant offense is a child less than 14 years of age."¹⁰ Likewise, the General

⁶⁷ See *Alleyne*, 570 U.S. at 99 (holding that the Sixth Amendment requirement that a jury find all elements of a crime beyond a reasonable doubt "applies with equal force to facts increasing the mandatory minimum [because] a fact triggering a mandatory minimum alters the ptescribe range of sentences to which a criminal defendant is exposed.").

Assembly correspondingly increased maximum penalty for these enhanced offenses to life imprisonment. ¹¹ Because the jury found beyond a reasonable doubt that the victim was less than fourteen years old, the Court has no discretion other than to apply the sentencing enhancement to Counts 1 through 5.

WHEREFORE, for the reasons discussed, the State's application to apply the enhanced penalties based upon 11 Del. C. 4205A (a) is GRANTED. Furthermore, Defendant Clark's motion to merge Count 6 into Count 7 and Count 8 into Count 9 is GRANTED. Defendant Clark's motion to merge Count 3 into Count I, and Count 4 into Count 2, however, is DENIED.



A handwritten signature in black ink, appearing to read 'J. J. C.', is written over a horizontal line. Below the line, the word 'Judge' is printed in a small, sans-serif font.

cc: Prothonotary sc: Kevin Smith, DAG James
Liguori, Esquire

¹¹ 11 Del. C. 4205A (a) (emphasis added), 11
'd.

STATE OF DELAWARE

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

VS .

TYRONE 1, CLARK

Alias: See attached list OE alias names .

DOB: 06/20/1956

SBI: 00135975

CASE NUMBER:
R1907004115

IN AND FOR KENT COUNTY
CRIMINAL ACTION NUMBER:
11<19-07-0381
ATT CHILD ABUSE (F)
LIO:ATT CHILD ABUSE
IK19-07-0382
CHILD ABUSE (F) IK19-07-
0383
ATT RAPE 2ND WO (F)
LIO: RAPE 2ND WO CON
IK19-07 -0384
RAPE 2ND WO CON (F)
11<19-07-0385
CHILD ABUSE (F) IK19-09-
0001
DANGEROUS ACTS (F)
11<19-09-0002
DANGEROUS ACTS (F) IK19-
07-0387
USC (F)

COMMITMENT

SEX OFFENDER NOTIFICATION IS REQUIRED

TIER 3

SEE NOTES FOR FURTHER COURT ORDER-TERMS/CONDITIONS MERCE

- SEE NOTES

SENTENCE ORDER

NOW THIS 26TH DAY OF FEBRUARY, 2021, IT IS THE ORDER
OF THE COURT THAT:

STATE OF DELAWARE

TYRONE CLARK

DOB: 06/20/1956 SBI:
00135975

* *APPROVED ORDER* * 1 March 2021 14:15

The defendant is adjudged guilty of the offense (s) charged.
The defendant is to pay the costs of prosecution and all s
tatutory surcharges .

AS TO IK19-07-0381- : TIS
ATT CHILD ABUSE

Effective July 6 r 2019 the defendant is sentenced as follows
:

9,

VS .

L

- The defendant is placed in the custody of the Department of
Correction for 35 year (s) at supervision level 5

- Suspended after 25 year (s) at supervision level 5
- Followed by 2 year (s) at supervision level 3

AS TO IK19-07-0382- : TIS
CHILD ABUSE

The defendant is placed in the custody of the Department of
Correction for 35 year (s) at supervision level 5

- Suspended after 25 year (s) at supervision level 5
- - Followed by 2 year (s) at supervision level 3

Probation is concurrent to criminal action number
11<19-07-0381

AS TO IK19-07-0383- : TIS ATT
RAPE 2ND WO

- The defendant is placed in the custody of the Department
of Correction for 35 year (s) at supervision level 5

STATE OF DELAWARE

TYRONE CLARK

DOB: 06/20/1956 SBI:
00135975

March 2021 14:15

Suspended after 25 year (s) at supervision level 5

- Followed by 2 year (s) at supervision level 3

Probation is concurrent to criminal action number
11<19-07-0381

AS ^tro IR19-07-0384- . TIS
RAPE 2ND WO CON

- The defendant is placed in the custody of the Department
of Correction for 35 year (s) at supervision level 5

Suspended after 25 year (s) at supervision level 5

- Followed by 2 year (s) at supervision level 3

Probation is concurrent to criminal action number IR19-07-
0381

AS TO IK19-07-0385- : TIS
CHILD ABUSE

- The defendant is placed in the custody of the Department

****APPROVED ORDER* * 9, vs.**

L

of Correction for 35 year (s) at supervision level 5

- Suspended after 25 year (s) at supervision level 5

- Followed by 2 year (s) at supervision level 3

Probation is concurrent to criminal action number
11<19-07-0381

AS TO IR19-09-0001- : TIS
DANGEROUS ACTS

The defendant is placed in the custody of the Department
of Correction for 35 year (s) at supervision level 5

STATE OF DELAWARE

TYRONE CLARK

DOB: 06/20/1956 SBI:

00135975

* *APPROVED ORDER* * March 9, 2021 14 : 15

Suspended after 25 year (s) at supervision level 5

Followed by 2 year (s) at supervision level 3

Probation is concurrent to criminal action number 11<19070381

AS TO IR19-09-0002- . TIS

DANGEROUS ACTS

The defendant is placed in the custody of the Department of Correction for 35 year (s) at supervision level 5

Suspended after 25 year (s) at supervision level 5

Followed by 2 year (s) at supervision level 3

Probation is concurrent to criminal action number IRI 9-07-0381

AS TO IK19-07-0387- : TIS

USC<13

The defendant is placed in the custody of the Department of Correction for 8 year (s) at supervision level 5

Suspended for 2 year (s) at supervision level 3

Probation is concurrent to criminal action number IK19-070381

STATE OF DELAWARE

TYRONE CLARK

DOB: 06/20/1956 SBI:
00135975

March 2021 14:15

SPECIBL CONDITIONS BY ORDER

vs .
L

CASE NUMBER:

1907004115

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Have no direct or indirect contact with Nihaya Dunson

Have no contact with any minor under the age of 18 years
.

The provisions of 11 Del. C. Sections 4120, 4121 and 4336 Sex Offender Registration and Community Notification apply to this case. NOTE: Victim is under 16 years of age.

Defendant shall complete Sexual Disorders counseling treatment program .

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

S. B. 50 limits do not apply, 11 DEL. C. 4333 (d) (1)

Pursuant to 29 Del. C. 4713 (b) (1) , the defendant having been convicted of a sex offense, it is a condition of the defendants probation that the defendant shall provide a DNA

STATE OF DELAWARE

TYRONE CLARK

DOB: 06/20/1956 SBI:

00135975

sample at the time of the first meeting with the defendant(s)
probation officer. See statute.

* *APPROVED

March 2021 14:15

Defendant must surrender drivers license to court pursuant to 21 Del. C. 2718 (e) .

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant

ORDER** 9,

to 11 Del . C. 4101 without further hearing .

NOTES

As to IK19-07-0381, 11<19-07-0382, 11<19-07-0383, 11<19-070384, and IRI 9-07-0385, the Court's Level V sentences shall run consecutively. As to IRI 9-09-0001, IK19-09-0002, and 11<19-09-0387, any Level V sentences shall run concurrently.

As to IK19-07-0381, IRI 9-07-0382, 11<19-07-0383, IK19-07-0384, 11<19-07-0385, 11<19-09-0001 and 11<19-09-0002 a minimum mandatory sentence pursuant to 11 Del. C. 4205A (a) provides each offense carry a 25 year minimum mandatory incarceration.

While at Level V the defendant shall complete a sex offender treatment program at the discretion of the DOC.

Pursuant to the order of Judge Clark dated February 25 , 2021, the charge of Rape 4th Degree-IR19-07-0386 has been removed/ struck from the order and merged into the charge of Dangerous crimes 11<19-09-0001. In addition, the charge of Sexual Abuse of a Child by a Person of Trust 2nd Degree-IRI 9-07-0389 has been removed/ struck from the order and merged into the charge of Dangerous Crimes-IRI 9-09-0002. Lifetime no contact order applies to Nihaya Dunson.

The Department of Correction shall notify this Court if any aspect of this sentence cannot be carried out .

JUDGE JEFFREY J CLARK

FINANCIAL gtnääARY

STATE or DELAWARE vs.
TYRONE CLARK

* *APPROVED ORDER* * 6

2021 14:15

STATE OF DELAWARE

TYRONE CLARK

DOB: 06/20/1956 SBI: 00135975

DOB: 06/20/1956 SBI:

00135975 CASE NUMBER; 1907004115

SENTENCE CONTINUED :

TOTAL DRUG DIVERSION FEE ORDERED TOTAL CIVIL PENALTY ORDERED
TOTAL DRUG REHAB. TREAT. ED. ORDERED TOTAL EXTRADITION ORDERED
TOTAL FINE Æ40UNT ORDERED FORENSIC FINE ORDERED RESTITUTION
ORDERED

SHERIFF, NCCO ORDERED

SHERIFF, KENT ORDERED 360 .

SHERIFF, SUSSEX ORDERED 00

PUBLIC DEF, FEE ORDERED

PROSECUTION FEE ORDERED 100.

CTIM _S COM ORDERED 00

VIDEOPHONE FEE ORDERED 10 .

00

DELJIS FEE ORDERED 10.

00

SECURITY FEE ORDERED

100.

TRANSPORTATION SURCHARGE ORDERED

00

150.

FUND TO COMBAT VIOLENT CRIMES FEE

00

SENIOR TRUST FUND FEE

* *APPROVED ORDER* * 7 March 9, 2021 14 : 15 AMBULANCE
FUND FEE

TOTAL

730.00

* *APPROVED ORDER* * 8 2021 14:15
LIST OF ALIAS NAMES

STATE OF DELAWARE vs .
TYRONE L CLARK
DOB: 06/20/1956
SBI: 00135975

CASE NUMBER:
1907004115

TYRONE CLARK

* *APPROVED ORDER* * 9 March 9, 2021 14 :

15

AGGRAVATING-MITIGATING

March

STATE OF DELAWARE vs.

TYRONE CLARK

DOB: 06/20/1956 SBI: 00135975

CASE NUMBER: 1907004115

AGGRAVATING

NEED FOR CORRECTIONAL TREATMENT

OFFENSE AGAINST A CHILD STATUTORY AGGRAVATION

LACK OF REMORSE

* *APPROVED 10 2021 14:15

ORDER**

9 ,

* *APPROVED ORDER* * 11 March 9, 2021 14 :
15