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Case Number 126,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE ROSE, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 126, 2023

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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DATE: December 5, 2023

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I. THE JUDGE VIOLATED ROSE'S RIGHT TO A FAIR TRIAL BY, INSTEAD OF RULING ON AN OBJECTION TO THE STATE'S CENTRAL PIECE OF EVIDENCE, ORDERING THE PARTIES, IN FRONT OF THE JURY, TO RESOLVE THE ISSUE OFF THE RECORD AMONGST THEMSELVES.

a. There is no basis, in reason or the record, to find that Rose's trial objection was an attempt to rehash his previously ruled on pretrial objection.

In *Alexander v. Cahill* this Court applied a simple and straightforward rule: a trial court commits error by addressing an objection (like the one which Rose, indisputably made) by directing the parties to try and resolve the issue on their own (as occurred here), instead of timely ruling on the objection.[1] A39. In its attempt to distinguish *Cahill*, the State suggests Rose's trial objection was not subject to D.R.E. 103 or *Cahill* because it was "already ruled on." Answer at 11. Specifically, the Answer theorizes Rose's trial objection was an attempt to rehash an identical and previously denied objection to redacting the portion of Officer Marino's body camera which depicted a drawing of a penis in Marino's notepad.[2] A8—15. This argument should be rejected for two reasons:

(i) The premise of this argument – that an appellate court should simply guess as to the substance of an objection – contradicts a driving principle behind D.R.E.

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[1] *Alexander v. Cahill*, 829 A.2d 117, 129 (Del. 2003).

[2] The pretrial objection addressed the *inadmissibility* of the redacted portion, not "the *admissibility* of the [unchallenged] redacted version." Answer at 11 (emphasis added). A8—15

103, and Del. Supr. Ct. R. 8: off the record objections are not "preserved for appeal."[3] Guessing the basis of Rose's objection does not address the problem confronted in *Cahill*, it falls victim to it. And, **(ii)** nothing in the record suggests the trial objection was the same as the pretrial objection, and it is unreasonable to assume that an experienced trial attorney, like Rose's, would advance an objection identical to one already ruled (just a few pages earlier) when our rules of evidence caution against that exact practice. D.R.E. 103(b).

b. Rose did not agree to the admissibility of the video.

In a second argument the State asserts that Rose acquiesced to the video's admissibility. Answer at 12. This too misreads the record, which reflects that Rose agreed to certain *redactions* in the video (other than the picture of the penis), but not to the *foundational admissibility requirements* of the video (which were not stipulated to, nor otherwise discussed). A8. And in fact, the timing of Rose's trial objection – immediately after the State completed its attempt to lay a foundation – strongly suggests that the unheard objection was prompted by a perceived deficiency in these requirements. A39.

[3] *Id.* at 130.

c. The trial court's mistreatment of Rose's trial objection was functionally identical to that addressed in Alexander v. Cahill.

According to the Answer, unlike in *Cahill,* "the trial judge did not mandate," but instead used "permissive" language to direct the parties to resolve the issue. Answer at 12—13. This is factually wrong and legally inadequate. The trial court's direction – "[d]iscuss it" – is hardly "permissive" language; it is an unambiguous order by a trial judge. A39. That the judge noted the parties "may" (as opposed to "will") be able to resolve it, reflects a reality about any negotiation, but did not make the negotiation "permissive." And regardless, whether the trial judge encouraged or required the parties to negotiate, its affirmative duty to hear and rule on the objection was left unsatisfied.

d. The trial court's error was not harmless beyond a reasonable doubt.

The Answer makes three, easily rejected, arguments as to prejudice. First, that any flaw in the objection procedure was harmless because after the trial objection, Rose "successfully sought admission of and later played the entire body worn camera video." Answer at 14. Once again, this misconstrues the record. Rose did not seek admission of the video. Rose played portions of the video, which were already admitted and available for the jury's deliberations. A45. Rose's strategy – including playing portions of the video, and his decision to testify – was clearly influenced by the admission of the video into evidence. Rose would obviously not have played the highly incriminating video if the objection was successful. Certainly, the State

cannot show, beyond a reasonable doubt, that either of those strategic decisions would have been made regardless of how the trial objection was addressed.

Second, the State argues that excluding the video would not have made a difference because it was merely cumulative to the other, "overwhelming," evidence. Answer at 15. Even though the video was generally consistent with the testimony, it was not cumulative. Video evidence, by its very nature, is more detailed, which has immense value when prosecuting a charge with a visual component, like the "concealed" element of 11 *Del.C.* §1447A. Video evidence is also more reliable than even an honest witness's recollection of the same event.[4] And in this case there were substantial reasons to doubt Officer Marino's credibility, making the video especially valuable to the State's case. In particular, as he eventually conceded on the stand, Officer Marino had previously provided an untrue sworn statement about Rose's conduct in this case. A60—64.

Third, the State's repeated reference to the video during closing reflects that the trial prosecutor recognized the value added by the video. A99—100.

[4] "[E]ven honest eyewitnesses can make mistakes because of mental processes beyond their understanding and control." M. Mendez, *Memory, That Strange Deceiver*, 32 STAN. L. REV. 445, 445 (1980).

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid conviction should be vacated.

Respectfully submitted,

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DATED: December 5, 2023