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IN THE SUPREME COURT OF THE STATE OF DELAWARE

STANLEY TAYLOR,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	**No. 434, 2012**
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF SUSSEX COUNTY

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes

Rules

NATURE AND STAGE OF THE PROCEEDINGS

Stanley Taylor was indicted on several charges based on allegations that he engaged in unlawful sexual conduct with his two minor step-granddaughters, ("M.H." & "E.H."). A-2-3,6-13.

At a jury trial, E.H. testified that she had not been a victim of either unlawful intercourse or penetration. Thus, the State dropped the charges alleging that she had. Despite Taylor's request, the judge refused to strike testimony of a forensic nurse that had been offered in support of those charges.[1] The State also presented M.H.'s in-court testimony and an unsworn statement. A majority of M.H.'s allegations were exclusive to the statement.

In its closing, the State characterized as "skepticism" and "extreme" the jury instruction that it should exercise caution when considering out-of-court statements. During deliberations, the jury asked to view M.H.'s statement. Over Taylor's objection, the judge granted that request.[2] Taylor was convicted of all counts sent to the jury and was sentenced to several life sentences.[3] This is his Opening Brief in support of his appeal.

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[1] *See* Decision Denying Taylor's Oral Motion To Strike And To Issue A Cautionary Instruction, att. as Ex.A.
[2] *See* Decision Overruling Taylor's Objection To Providing The Jury With A Copy Of M.H.'s Unsworn Statement, att. as Ex.B.
[3] *See* Sentence Order, att. as Ex.C.

SUMMARY OF THE ARGUMENT

1. The State's improper argument that encouraged the jury to disregard the judge's instruction as to the manner in which it must consider an out-of-court unsworn statement jeopardized the fairness and integrity of Taylor's trial.

2. The trial court abused its discretion and violated Taylor's right to a fair trial when, despite Taylor's request, it refused to strike irrelevant and highly prejudicial evidence and refused to issue a curative instruction to the jury.

3. The trial court abused its discretion and denied Taylor his right to a fair trial when it allowed the jury to view, during deliberations, M.H.'s out-of-court statement when her statement and her in-court testimony were originally presented to the jury 4 days previous and when there were significant inconsistencies within her testimony and gaps between her statement and her testimony.

4. Even if this court were to conclude that each individual error, standing alone, does not warrant reversal, the cumulative impact of all of the errors amounts to plain error.

STATEMENT OF FACTS

On June 4, 2011, Taylor's two step grand daughters, M.H., 8-years-old, and E.H., 12-years-old, made complaints to police that over the last few years he had engaged in unlawful sexual conduct with each of them when he visited the trailer in which they lived. The complainants then went to the Beebe Medical Center for forensic examinations. A-32-37.

Cheryl Littlefield, a sexual assault nurse examiner, ("SANE nurse"), conducted a forensic examination of M.H. A-49-50. According to Littlefield, M.H. reported that she had pain in her private area. A-51-52. The nurse also claimed that during the examination she observed physical evidence that M.H. had been vaginally and anally penetrated multiple times.[4] A-53-55.

Ashley Thompson-Hill, another SANE nurse, examined E.H. A-65. She testified that E.H. reported that "my Pop-pop touched me in my breasts and in my butt three times in the last two weeks. He was in bed with my sister last night. He took pictures of me down there with his camera." A-66. However, E.H. had also been clear that no one had ever penetrated her vagina or her rectum. A-67.

The nurse claimed that during the examination "E.H. was very withdrawn. She was very scared to really talk or let us

[4] Littlefield told the jury that she found that M.H. had a "very large hymeneal ring" as well as a bruise around her rectal area. A-53.

look at her anywhere." A-68. As a result of the examination, the nurse noted bruising around E.H.'s rectum and redness in the vaginal area. A-67, 69-70. She did acknowledge that these conditions could have occurred naturally.

After the forensic examinations were completed, the complainants were taken to the Child Advocacy Center, ("CAC"), to give statements. A-47-48. In her statement, M.H. alleged that there were occasions where Taylor: took naked photos of her; engaged in anal intercourse with her; engaged in multiple acts of fellatio with her; and engaged with her in multiple acts of vaginal penetration with his finger. A-45.

Later, at trial, M.H. only relayed to the jury that Taylor stuck his finger in her "bottom" on more than one occasion. A-38, 40-41. She also claimed that he took a photograph of her while she was in the bathroom nude. A-44. As the judge later explained, M.H.'s testimony was "internally inconsistent" and there were gaps between her testimony and her CAC statement. A-46.

E.H. also took the stand at trial. She testified that no one ever touched her breasts or her buttocks inappropriately. A-76, 78, 80-81. Instead, she alleged: sexual abuse of M.H. by Taylor; that Taylor made both of the girls kiss him on the lips; that she got on top of Taylor with clothes on and moved up and down; that Taylor "pulled his part out" while she was in the

bathroom; and that Taylor took pictures of her and M.H. nude. A-75, 77-78, 82-89. Because E.H. was adamant that she talked to someone at CAC about good and bad touches but not about allegations of sexual misconduct, her statement was not presented to the jury. A-90-93.

Based on the complaints that Taylor had taken nude photos of them, police obtain a warrant and searched his home. A-14-16. Police seized a Fuji, Model Z5 camera as well as a tower to a Compaq Computer Presario and a tower to an HP Pavilion. A-17-18.

Detective Nancy Skubik examined the camera and the two computer towers. A-19. She identified six separate photos that contained images of a young female's vaginal area, a young female's buttocks, and a young female's genitalia with a male penis. A-26-28. Because the wallpaper in the background of the photos matched that in the bathroom of the trailer where the girls lived, the State claimed the photos were of M.H. and E.H. The State presented multiple copies of each of the six photos as the photos had been found on the multiple devices police had seized. Skubik told the jury that this was evidence that the photos had been transferred from the camera to the two computer towers. A-20-25, 29-31. According to the State, this was evidence of intent to use the photos for sexual gratification. A-114-120.

Finally, Taylor had given a statement to police portions of which were played for the jury. A-94-95.

At the conclusion of trial, the jury found Taylor guilty of several counts of rape, continuous sex abuse of a child, endangering the welfare of a child and sexual exploitation of a child. In a bifurcated trial the judge found Taylor guilty of sex offender unlawful sexual conduct. A-126-140. The record is very unclear as to what occurred next. It appears that two days after the verdict some of the charges of which he was convicted were *nolle prossed*. A-1. Ultimately, he was sentenced on 16 counts of unlawful sexual contact with a child and 1 count of Endangering the Welfare of a child. *See* Ex.C.

I. THE STATE'S IMPROPER ARGUMENT THAT ENCOURAGED THE JURY TO DISREGARD THE JUDGE'S INSTRUCTION AS TO THE MANNER IN WHICH IT MUST CONSIDER AN OUT-OF-COURT UNSWORN STATEMENT JEOPARDIZED THE FAIRNESS AND INTEGRITY OF TAYLOR'S TRIAL.

Question Presented

Whether a prosecutor's argument encouraging the jury to consider evidence central to the issues at trial in a manner contrary to that instructed by the trial court jeopardizes the fairness and integrity of a defendant's trial. *Delaware Supreme Court Rule* 8.

Standard and Scope of Review

This Court "review[s] errors which were not raised at the trial level for plain error." *Wainwright v. State*, 504 A.2d 1096 (Del. 1996).

Argument

Closing argument is "an aspect of a fair trial which is implicit in the Due Process Clause of the Fourteenth Amendment by which the States are bound." *Donnelly v. DeChristoforo*, 416 U.S. 637, 649 (1974). *See* U.S.Const., Amend.V. Additionally, prosecutors "represent[] all the people, including the defendant" and must "seek justice, not merely convictions." *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960); *Sexton v. State*, 397 A.2d 540, 544 (Del. 1979). In pursuing both goals, the prosecutor must abide by the American Bar Association's

standards governing prosecution and defense functions. *Trump v. State*, 753 A.2d 963, 967 (Del. 2000). They have a "special obligation to avoid improper suggestions[and] insinuations[.]" *Baker v. State,* 906 A.2d 139, 152-153 (Del. 2005). Consistent with those standards, the prosecutor should not "reinforce the proposition that the juror could disregard the law embodied in the instructions." *State v. Schnabel*, 279 P.3d 1237, 1257 (Hawaii 2012).

The first step in a plain-error review of improper prosecutorial comments is for this Court to examine the record *de novo* to determine whether prosecutorial misconduct occurred. *Small v. State*, 51 A.3d 452, 456 (Del. 2012). If the record demonstrates misconduct, this Court must then determine whether the misconduct was "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Wainwright*, 504 A.2d 1096. Here, the prosecutor made improper comments during closing argument that did, in fact, jeopardize the fairness and integrity of Taylor's trial.

Pursuant to 11 *Del.C.* §3507, the State introduced M.H.'s out-of-court unsworn statement to the CAC. This Court has stated that a fair trial requires that the jury be given specific instructions to exercise caution when considering an out-of-court statement. *See Acosta v. State*, 417 A.2d 373, 378 (Del.

1980). Accordingly, the trial court in our case quoted 3507 for the jury then instructed it as follows:

> With regard to this provision, caution must be exercised by you, the jury, when a conflict exists between the out-of-court statements themselves. You, as the jury, should be particularly careful if there is no evidence to corroborate an inconsistent out-of-court statement. Nevertheless, you as the jury, may convict on such statement if you are satisfied beyond a reasonable doubt that the statement is true.

A-104-105.

Subsequently, in its closing argument, the prosecutor acknowledged that M.H.'s testimony was inconsistent with her out-of-court statement. Then, as she is permitted to do, she offered possible reasons for the inconsistencies. However, she went on to argue:

> [The judge] also cautioned you that if these out-of-court statements are contradicting to what you heard in court, you should view them with caution if they are not supported by additional evidence.
>
> Well, that's skepticism. That extreme caution isn't warranted in this case, because what M.H. talked about at the CAC is supported, is corroborated by additional evidence.

A-106-107.

By characterizing the instruction as extreme and as representing skepticism, the prosecutor denigrated the judge and his instruction. And, she encouraged the jury to disregard the law embodied in the instructions. The instruction requires the jury to exercise caution when considering out-of-court

statements when there are inconsistencies regardless of whether there is any corroborating evidence. The instruction simply highlights that the jury should be "particularly careful" if there is no corroborating evidence.

In our case, both the prosecutor and the judge recognized that there were inconsistencies in M.H.'s statements. During argument on another issue, the prosecutor stated, "the only thing M.H. testified to that corresponds to what she said in the CAC interview was that he put his finger in her butt more than one time and that he took a naked picture of her." A-45. And, the judge observed that M.H.'s testimony was internally inconsistent and that it seemed to him "if the CAC tape is the source of the basis for those charges, that there were a huge number of gaps between what I suspect you're going to tell me it's going to show and what she had testified to in court today." A-45-46.

Contrary to the prosecutor's assertion, the caution that she characterized as "extreme" was warranted in this case as the instruction required. The inconsistencies and gaps in the testimony and statement triggered that requirement. The second portion of the instruction that tells the jury to be "particularly careful" if there is no evidence corroborating the out-of-court statement is above the initial requirement that the jury exercise caution when the statements are inconsistent.

Regardless whether there is corroborating evidence, the jury in our case was required to exercise caution if it found the statements, as did the judge and the prosecutor, to be inconsistent. Thus, the prosecutor's comments were improper as it was a misstatement of the law.

These improper comments were "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." *Small*, 504 A.2d at 461 (*citing Wainwright,* 504 A.2d at 1100). M.H.'s unsworn statement was a significant piece of evidence in this case. The majority of the charges against Taylor involving M.H. were contained only within the CAC statement. The record reveals that the jury put a lot of stock in the statement as it requested and was permitted to review it during deliberations four days after it was originally presented. They did not ask for or receive that same opportunity with respect to M.H.'s testimony that had also been presented four days prior to deliberations.

A defendant is entitled to have the jury instructed with a correct statement of the substance of the law. *See Claudio v. State,* 585 A.2d 1278, 1282 (Del.1991). Assuming, *arguendo*, one concludes that Taylor "participated in despicable conduct" his "conviction of a particular offense under the criminal burden of proof" is not justified unless this Court is satisfied the jury fairly understood the particular evidence on the particular

offense." *Acosta*, 417 A.2d at 377. This Court cannot be satisfied that the jury understood its duty with respect to considering the out-of-court statement because the prosecutor's remarks "brought the jury instructions into disrepute" and as a result "seriously affect[ed] the fairness, integrity, [and] ... public reputation of [the] judicial proceedings." *Schnabel*, 279 P.3d at 1262 (finding the prosecutor's argument to not "get too caught up in the mumbo jumbo of all the words [in the jury instructions] but use your common sense" to be improper conduct). Thus, this Court must reverse Taylor's convictions and sentences because the improper comments were "so clearly prejudicial" to his substantial rights that they "jeopardized the fairness and integrity of the trial process." *Wainwright*, 504 A.2d at 1100.

II. TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED TAYLOR'S RIGHT TO A FAIR TRIAL WHEN, DESPITE TAYLOR'S REQUEST, IT REFUSED TO STRIKE IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE AND REFUSED TO ISSUE A CURATIVE INSTRUCTION TO THE JURY.

Question Presented

Whether the trial court abuses its discretion and violates a defendant's right to a fair trial when, despite a request by the defendant, it refuses to strike irrelevant and highly prejudicial evidence and refuses to issue an instruction to the jury to disregard that evidence. A-101.

Standard and Scope of Review

"This Court reviews a trial judge's evidentiary rulings for abuse of discretion." *Collins v. State*, 2012 WL 5828598 (Del. Nov. 15, 2012) (attached as D). This Court reviews constitutional issues *de novo*. *See Zebroski v. State*, 12 A.3d 1115, 1119 (Del.2010).

Argument

The jury heard and was permitted to consider in its deliberations as to Taylor's guilt or innocence of charges of unlawful sexual activity involving M.H. evidence that he allegedly engaged in other similar activity. This evidence was irrelevant to the ultimate issues at trial and was unduly prejudicial. The evidence was not offered for any purpose sanctioned under *D.R.E.* 404 (b) and was not offered to support the allegations underlying the charges upon which the jury was

required to deliberate. Yet, the trial court denied Taylor's request to have the evidence struck and to have the jury instructed to disregard that evidence. This denial was not only an abuse of discretion, it violated Taylor's right to a fair trial. U.S.Const., Amend.V. Thus, his convictions and sentences must be reversed.

The parties agreed to allow Ashley Thompson-Hill, the SANE nurse who examined E.H., to testify "out of order" due to scheduling issues. This agreement was based upon the understanding that E.H. would subsequently testify that Taylor had engaged in certain unlawful sexual activity with her. Thompson-Hill's testimony immediately followed that of the nurse who examined M.H. A-56-58.

Because Thompson-Hill she was presented as an expert, the jury was permitted to hear about her training and qualifications. A-58-64. She then claimed that E.H. told her that Taylor had touched her breasts and buttocks three times in the last two weeks and that he "took pictures of [E.H.] down there with his camera." A-66. E.H. also purportedly told her that Taylor was in bed with her sister the previous night. A-66.[5] However, E.H. did not report that she had suffered any unlawful sexual contact by anyone.

[5] The nurse recited to the jury that M.H. reported that "He got into bed and was on top of me. He put his thing in my hole. I

The nurse told the jury that she examined E.H. because "the parents were concerned and her sister had been touched[;]"and because E.H. had given some indication that there had been touching of a sexual nature. A-71, 73-74. The nurse claimed that during the examination "E.H. was very withdrawn. She was very scared to really talk or let us look at her anywhere." A-68. The nurse also claimed that, as a result of the examination, she noted bruising around E.H.'s rectum and redness in the vaginal area. A-67, 69-70. However, she acknowledged that these were conditions that could have occurred naturally.

E.H. took the stand the day after Thompson-Hill testified and told the jury that no one had ever touched her breasts or her buttocks inappropriately. A-76, 78, 81. Instead, she alleged: sexual abuse of M.H. by Taylor; that Taylor forced both of the girls to kiss him on the lips; that she got on top of Taylor with clothes on and moved up and down; and that Taylor took pictures of her and M.H. nude. A-75, 78, 82-89. Her out-of-court statement given at the Child Advocacy Center was not presented to the jury as she adamantly told the jury that, while she talked to someone about good and bad touches, she was never asked about sexual abuse. A-90-93.

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tried…." A-72. The nurse did not say where she got this information.

Due to insufficient evidence, the State dropped three counts that alleged that Taylor had engaged in some type of unlawful activity with E.H. A-101. Immediately thereafter, Taylor requested that Hill's testimony be struck from the record and an instruction be given to the jury to disregard that testimony:

> As the Court recalls, prior to [E.H.]'s testimony, the State presented the testimony of Ashley Thompson Hill, who was the SANE nurse that examined [E.H.]. So I think for purposes of the record, since all the charges involving [E.H.] have been dismissed, I'm going to ask the Court to strike the testimony of Ashley Thompson Hill from the record, and this Court should admonish the jury to disregard that testimony since it's not necessary.

A-101.

The State opposed this request claiming that the nurse

> testified about statements that E.H. made to her, statements made for the purpose of the medical diagnosis, which include the statement that the defendant was in bed with [her] sister last night and that he took pictures of [E.H.] down there with his camera, both of which are relevant to charges that are remaining.

A-101-102. The trial court then ruled, "[w]ell, I think on that it would not be appropriate to strike her testimony." A-102.

Admissible evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *D.R.E.* 401. Any evidence of prior criminal or bad acts sought to be presented against the

defendant at trial must conform with this requirement. *See Getz v. State*, 538 A.2d 726, 731 (Del. 1988). As such, this Court has set forth a very detailed analysis that must be conducted before evidence of other bad acts can be admitted even if it is offered for a proper purpose under *D.R.E.* 404 (b) (i.e., intent, motive, etc.). *See Getz*, 538 A.2d at 731.[6] Then, if that evidence is permitted to be presented to the jury, the court must give a cautionary instruction which explains the limited

[6] In order to present evidence of prior bad acts under *D.R.E.* 404 (b) to the jury, the court must conduct an analysis that includes consideration of the following:

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.
>
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
>
> (3) The other crimes must be proved by evidence which is "plain, clear and conclusive." *Renzi v. State*, 320 A.2d 711, 712 (1974).
>
> (4) The other crimes must not be too remote in time from the charged offense.
>
> (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by *D.R.E.* 403.
>
> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by *D.R.E.* 105.

Getz, 538 A.2d at 734.

purpose for which the evidence was admitted must be given. *See Weber v. State*, 547 A.2d 948, 956 (Del. 1988) ("evidence of prior criminal acts cannot be submitted to the jury without guidance from the trial court.").

Here, Thompson-Hill's testimony included claims that Taylor touched E.H.'s breast and buttocks. Additionally, the nurse told the jury that she discovered bruising in E.H.'s rectum and redness in her vaginal area. She told the jury that the examination was conducted because E.H. gave an indication of sexual abuse. And, during the exam, E.H. was scared and withdrawn. While this evidence was initially admissible against Taylor as to the allegations that he engaged in unlawful sexual contact with E.H., once the State dropped the charges based on those allegations, the evidence became irrelevant. And, that evidence "by its very nature and similarity to the remaining charges, [became] highly prejudicial." *State v. Babcock*, 185 P.3d 1213, 1217-18 (Wash.App. 2008) (*citing State v. Suleski*, 406 P.2d 613 (Wash. 1965)).

Thompson-Hill's testimony regarding her discussions with and examination of E.H. improperly buttressed M.H.'s claims against Taylor. It allowed the jury to believe he engaged in improper conduct with M.H. because there are other witnesses to say he did the same thing to E.H. Additionally, it improperly allowed the jury to speculate that E.H. denied everything on the

stand because she was scared. The jury may have been motivated to convict Taylor on all counts in order to hold him accountable for the behavior he allegedly engaged in with E.H.

In order to mitigate against the highly prejudicial effect of the inadvertent admission of Thompson-Hill's testimony, the trial court should have, at the very least, granted Taylor's request to strike the evidence from trial and instruct the jury to disregard that evidence. This Court has "consistently held that 'even when prejudicial evidence is admitted, its prompt excision followed by a cautionary instruction will usually preclude a finding of reversible error.'" *Smith v. State*, 913 A.2d 1197, 1221 (Del. 2006) (*quoting Sawyer v. State*, 634 A.2d 377, 380 (Del. 1993)).[7] Here, by contrast, the trial court's failure to grant Taylor's request amounts to reversible error because the prejudice it created was so great that it denied Taylor a fair trial.[8] *See State v. Bagby*, 642 P.2d 993, 997 (Kan. 1982) (noting, while affirming conviction, that trial court properly struck testimony relevant to charges dismissed

[7] *See Getz*, 637 A.2d at 819 ("An error resulting from inadvertent presentation of irrelevant testimony is usually cured by the trial court's immediate instruction.").

[8] *See Collins*, 2012 WL 5828598 (*quoting Culp v. State*, 766 A.2d 486, 489 (Del.2001)) ("'An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice.' If this Court determines that the trial judge abused his or her discretion, it then determines whether the error rises to the level of significant prejudice sufficient to deny the defendant a fair trial.").

and instructed jury disregard the stricken testimony). It "violate[d] those 'fundamental conceptions of justice which lie at the base of our civil and political institutions." *Capano v. State*, 781 A.2d 556, 605 (Del. 2001) (*quoting Dowling v. United States*, 493 U.S. 342, 353–53 (1990)). In fact, the prejudice created in our case was so great that a mistrial may have been warranted as "the inherently prejudicial impact of [evidence of other sexual abuse] is not easily overcome." *Suleski*, 406 P.2d 613 (holding defendant denied right to fair trial due to admission of evidence that was the basis of a charge that had been dismissed). *See Babcock*, 185 P.3d at 1217-18 (holding mistrial was required after admission of hearsay statements to prove charges of one complainant upon which the State could not proceed because "[t]here is no guarantee that the jury could effectively disregard that evidence.").

To the extent the trial court agreed with the State that portions of the testimony were relevant, it could have decided, with input from the parties, which portions should be struck. This Court cannot be "assured that the evidentiary harpoon here inserted could effectively be withdrawn. It was equipped with too many barbs." *Suleski,* 406 P.2d 613. Because the trial court abused its discretion and violated Taylor's right to a fair trial, his convictions and sentences must be reversed.

III. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED TAYLOR HIS RIGHT TO A FAIR TRIAL WHEN IT ALLOWED THE JURY TO VIEW, DURING DELIBERATIONS, M.H.'S OUT-OF-COURT STATEMENT WHEN HER STATEMENT AND HER IN-COURT TESTIMONY WERE ORIGINALLY PRESENTED TO THE JURY 4 DAYS PREVIOUS AND WHEN THERE WERE SIGNIFICANT INCONSISTENCIES WITHIN HER TESTIMONY AND GAPS BETWEEN HER STATEMENT AND HER TESTIMONY.

Question Presented

Whether the trial court abuses its discretion and violates a defendant's right to a fair trial when it allows the jury to view, during deliberations, a "3507 statement" of a complainant who testified 4 days earlier and where there are significant inconsistencies in the complainants testimony and gaps between the statement and the complainant's testimony. A-124-125.

Standard and Scope of Review

This Court reviews evidentiary issues under an abuse of discretion standard. *See Culp*, 766 A.2d at 489. Constitutional issues are reviewed *de novo*. *See Zebroski*, 12 A.3d at 1119.

Argument

The trial court allowed the jury to give undue emphasis and credence to M.H.'s out-of-court unsworn statement when it sent a copy of that statement into the jury room during deliberations. M.H.'s testimony and statement were originally presented to the jury 4 days before deliberations. There were many internal inconsistencies in her testimony and many gaps between her testimony and her statement. However, the jury did not request

and was not given the opportunity to review M.H.'s testimony during deliberations. Since the statement contained most of the allegations involving M.H., allowing the jury to place undue emphasis on it was an abuse of discretion and denied Taylor his right to a fair trial. U.S.Const., Amend.V.

In our case, the jury was required to decide, among other things, whether or not Taylor was guilty of 8 charges based on allegations that he engaged in unlawful sexual conduct with M.H.[9] M.H.'s in-court, sworn testimony contained only two allegations of such conduct. A-38-43. It was only in her unsworn statement at the Child Advocacy Center that "she actually describe[d] several more occasions where [Taylor] took naked pictures of her; she describe[d] anal intercourse she describe[d] multiple acts of fellatio; she describe[d] multiple acts of vaginal penetration with his finger; and she also describe[d] seeing thing happen to [E.H.]." A-45-46. This statement was played for the jury.

The prosecutor acknowledged, "the only thing M.H. testified to that corresponds to what she said in the CAC interview was that he put his finger in her butt more than one time and that

[9] In the Amended Indictment, Counts 1-4, 6-9 and 11 involved allegations of sexual intercourse or penetration. Of those: Counts 1 and 2 were supported by allegations contained in both M.H.'s testimony and her statement; Counts 3-4, 6-8 and 11 were based solely on the CAC claims; and Count 9 was based on the testimony of the nurse. Counts 5 and 10 were *nolle prossed*. A-6-13, 97-100, 108-113.

he took a naked picture of her." A-45. And, the judge observed that M.H.'s testimony was internally inconsistent and that it seemed to him "if the CAC tape is the source of the basis for those charges, that there were a huge number of gaps between what I suspect you're going to tell me it's going to show and what she had testified to in court today." A-45-46.

At the end of trial, the judge provided the standard jury instructions. It then added the following:

> You are going to get everything that was entered into evidence as an exhibit. We had two DVDs; one was [M.H.]'s statement to Mr. Ramirez initially. You will not get that.
>
> The second one was the defendant's statement, to the police officer that interviewed him. You will get that initially. If you want to see and listen to [M.H.]'s statements, you will have to tell the bailiff and then I will have to make a decision as to whether or not you will get to listen to that again. It is a process we follow; why we do it is of no importance to you folks.

A-121-122.

After a period of deliberation, the jury requested to view M.H.'s unsworn statement. A-124. Explaining that both M.H.'s testimony and her statement were presented 4 days earlier, Taylor objected because "permitting [the jury] to see the CAC interview today would give undue influence [sic] over the comments of the CAC versus the in-court testimony." A-124. In other words, the jury would have a fresher recollection of the unsworn statement than it would the inconsistent sworn

testimony. The State did not disagree with Taylor.[10] Yet, the judge overruled Taylor's objection reasoning "the jury has asked for it, and since there are many conflicts between the 3507 statements and the in-court testimony, I certainly think it is appropriate that the jury get to listen to it again." A-125.

In *Flonnory v. State,* this Court set forth a "default" rule "that written or tape or video-recorded § 3507 statements should *not* be admitted into evidence as separate trial exhibits that go with the jury into the jury room during deliberations although the statements may be played or read to the jury in the first instance during the course of trial." 893 A.2d 507, 526-27 (Del. 2006). The primary reason for this rule is that "a § 3507 witness's in-court direct testimony and cross-examination testimony is also rarely, if ever, transcribed and given to the jury." Thus, allowing the jury to repeatedly view the 3507 statement during deliberations "might result in the jury giving undue emphasis and credence" to that unsworn statement. *Flonnory*, 893 at 526-27.

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[10] The prosecutor responded to Taylor's objection as follows:

> Your Honor, the *Flonnory* case basically gives the Court discretion. I understand Mr. Callaway's concerns about, you know, putting undue emphasis on the CAC statement as opposed to the in-court testimony. The State will rely on Your Honor's decision.

A-125.

However, this Court also provided, that

> [t]he trial judge does, however, have discretion to depart from this default rule when in his judgment the situation so warrants (e.g., where the jury asks to rehear a § 3507 statement during its deliberations or where the parties do not object to having the written or recorded statements go into the jury room as exhibits). The trial judge's broad discretion in these circumstances is coextensive with his discretion to allow or to refuse to allow the jury to rehear in-court trial testimony of any witness.

Flonnory, 893 A.2d at 526-27.

Here, the trial court pointed to the inconsistencies of the unsworn statement as a reason to provide it to the jury. That reasoning is precisely what this Court sought to guard against when it created the default rule. The fact that there were internal inconsistencies in M.H.'s testimony and gaps between her testimony and statement required the jury to consider both the testimony and the statement on an equal playing field.[11] Both parties in our case seemed to recognized that.

The trial court allowed the jury to place undue emphasis on the out-of-court statement that contained the majority of the allegations. While the jury got to review these allegations, it did not have the same opportunity to review the in-court

[11] *See Waterman v. State*, 956 A.2d 1261, 1265 (Del. 2008) (finding trial court abused its discretion by allowing the jury to have the CAC tape during deliberations, in part, because of the trial court's odd rationale that the defendant's statements contained a lot of inadmissible statements by the police officer that it had to disregard but would need to focus on the victim's claims).

testimony where M.H. denied the vast majority of those claims. Thus, the trial court abused its discretion to such a degree as it denied Taylor his right to a fair trial. Therefore, his convictions and sentences must be reversed.

IV. EVEN IF THIS COURT WERE TO CONCLUDE THAT EACH INDIVIDUAL ERROR, STANDING ALONE, DOES NOT WARRANT REVERSAL, THE CUMULATIVE IMPACT OF ALL OF THE ERRORS AMOUNTS TO PLAIN ERROR.

Question Presented

Whether the cumulative effect of the trial court's errors warrants reversal assuming, *arguendo*, this Court concludes that none of the errors standing alone require reversal. *Delaware Supreme Court Rule* 8.

Standard and Scope of Review

When there are several errors at trial, this Court determines whether they add up to plain error. *Wright v.State*, 405 A.2d 685, 690 (Del. 1979).

Argument

The prejudicial effect created by the combination of all of the trial court's errors in this case rendered the verdict unreliable. *See Michaels v. State*, 970 A.2d 223 (Del. 2009). As a result of the errors, the jury was: permitted to review, four days after originally presented, M.H.'s unsworn statement but not her inconsistent testimony; told to ignore the judge's instruction to exercise caution while considering that unsworn statement; and allowed to hear and consider the highly prejudicial and irrelevant evidence of other alleged bad acts.

The jury was allowed to repeatedly view M.H.'s statement and not exercise any caution while considering it. It was

also permitted to factor in Thompson-Hill's inadmissible testimony while considering M.H.'s statement. Thus, the trial court's multiple acts of abuse of discretion coupled with the prosecutor's improper comments created prejudice to such a degree that one cannot be confident in the integrity of the trial. Thus, Taylor was denied his right to a fair trial and his convictions and sentences must be reversed.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that each of Taylor's convictions and sentences must be reversed.

\s\ Nicole M. Walker
Nicole M. Walker, Esquire

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