



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GERALD ROBERSON,)
)
Defendant-Below,)
Appellant,)
)
v.) No. 16, 2025
)
STATE OF DELAWARE)
)
Plaintiff-Below,)
Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

SANTINO CECCOTTI [#4993]
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801
(302) 577-5150

Attorney for Appellant

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NATURE AND STAGE OF THE PROCEEDINGS

Gerald Roberson, (“Roberson”), was charged by indictment with five offenses which included three counts of rape first degree, one count of sexual abuse of a child by a person in a position of trust first degree and one count of continuous sexual abuse of a child. A9.

Prior to trial, on November 6, 2023 the State filed a motion to take testimony of the complainant outside the courtroom via closed-circuit television (“CCTV”) pursuant to 11 *Del.C.* §3514. A13. Roberson filed his motion in opposition on November 21, 2023. A19. An evidentiary hearing was held on November 28, 2023 to ascertain whether there may be alternative ways to accommodate the complainant in the courtroom that would still preserve Roberson’s right to confrontation. D.I. #16. On January 25, 2024, by memorandum opinion and order, the trial court granted the State’s motion to take testimony of the complainant outside the courtroom. *See* Memorandum Opinion attached as Ex.A.

Roberson had a three-day jury trial that commenced on May 13, 2024. D.I. #25. In the end, the jury found Roberson guilty of all counts. D.I. #31.

The judge sentenced Roberson to 125 years in prison.¹ This is his Opening Brief in support of a timely-filed appeal.

¹ *See* December 13, 2024 Sentence Order, attached as Ex. B.

SUMMARY OF THE ARGUMENT

1. This is an issue of first impression under Delaware Law as this case appears to be the first challenge to the constitutionality of 11 *Del.C.* § 3514. The use of closed circuit video testimony in which the defendant is not in the room violates the “face to face” provision of Delaware’s confrontation clause as recognized in Article I Section 7 of the Delaware Constitution. Here, the trial court violated Roberson’s right to confrontation when it permitted the complainant to testify in a separate courtroom via closed circuit TV and evade facing her accuser face-to-face. Thus, reversal is now required.

2. In this credibility case, the prosecutor’s comments during closing argument directly and indirectly vouched and elicited sympathy for the complainant. The prosecutor’s improper comments amounted to a material defect that denied Roberson a fair trial which requires that his convictions now be reversed.

STATEMENT OF FACTS

The charges against Roberson stem from allegations made by his minor daughter that he engaged in sexual intercourse with her between August 24, 2020 and April 9, 2022. Indictment. In June of 2022, Roberson was blindsided by these allegations when his daughter reported to her mother for the first time that Roberson had sexually assaulted her in the family's apartment 2 years earlier. A109. The complainant had a forensic examination at Nemours Children's Hospital on June 23, 2022 which yielded no evidence of sexual abuse. A192. As a result of the investigation, on July 1, 2022, the complainant was interviewed at the Children's Advocacy Center ("CAC"). A152.

Having a recorded interview from the complainant accusing Roberson, but no physical evidence, the State moved pre-trial to allow the complainant to testify via two-way CCTV, outside of Roberson's presence pursuant to 11 *Del.C.* §3514. This statute permits child witnesses up to the age of eleven to testify via CCTV in a range of cases, provided the court finds that the child of less than eleven would suffer "serious emotional distress such that they cannot reasonably communicate" in the live courtroom. 11 *Del.C.* §3514. At the pre-trial hearing, the complainant's counsellor, Coleen O'Connor, MS,NCC, was called as an expert witness by the State. A28. She admitted that she had never previously been asked in her career to make a determination or opine about

whether or not a child should be allowed in a court room to testify versus CCTV. A34. O'Connor further admitted she had never discussed with the complainant whether having herself or somebody next to her might have enabled her to appear in the courtroom in person. A32. O'Connor testified that she had not done a practice run or mock questioning, to prepare her for what she might experience in the courtroom. A33. Despite the aforementioned, O'Connor testified that in her opinion the complainant would suffer serious emotional distress from testifying in front of Roberson. A30.

In objecting to taking the complainant's testimony remotely, defense counsel argued that 11 *Del.C.* §3514 violates the "face to face" provision under the Confrontation Clause under the Delaware Constitution. Defense counsel underscored the importance of face-to-face confrontation, particularly given the fact that this court has recognized that Article I Section 7 of the Delaware Constitution contemplates a greater right to confrontation than does the federal constitution. A21. Unpersuaded, the trial court granted the State's motion to permit the complainant to testify via CCTV, squarely ruling "that [Roberson's] argument is foreclosed by the Supreme Court's ruling in *McGriff*[".] Ex.A at 2. The court allowed the complainant to testify via CCTV based on O'Connor's testimony that testifying in open court in front of her father would cause her to suffer serious emotional distress. *Id.*

At trial the complainant testified from a separate courtroom. A141. Prior to her testimony, defense counsel renewed its objection to the use of CCTV. A137-138. The complainant's testimony was displayed on a television screen inside a courtroom where her father, Roberson, was on trial. Roberson could only see the complainant on the television screen.

After the close of evidence and argument, the jury found Roberson guilty on all counts. He was sentenced to 125 years imprisonment.

I. REVERSAL IS REQUIRED BECAUSE 11 DEL.C. §3514 VIOLATES DELAWARE’S CONFRONTATION CLAUSE AS RECOGNIZED IN ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION.

Question Presented

Whether 11 *Del.C.* § 3514 comports with the Confrontation Clause under Article I, Section 7 of the Delaware Constitution and violates the “face to face” provision when it permits closed circuit video testimony by victims in a criminal trial? The question presented is cleanly preserved below by Roberson’s Motion in Opposition to the State’s Motion to take testimony of the complainant outside the courtroom via CCTV pursuant to 11 *Del.C.* §3514.

Standard and Scope of Review

Challenge to constitutionality of a statute involves a question of law, and thus the standard of review is *de novo*.²

Argument

In a pure credibility case, where there was no physical evidence to support the allegations of misconduct, Roberson’s right to confrontation was violated when, pursuant to 11 *Del.C.* §3514, (i.e., Delaware’s “CCTV” statute), the Court allowed the complainant to testify via CCTV in an

² *State v. Baker*, 720 A.2d 1139, 1144 (Del. 1998).

adjoining courtroom. Due to the judge's decision, Roberson was unable to confront his accuser "face to face" as guaranteed by the Delaware Constitution.

In the same way that many state constitutions have been interpreted by state courts to provide greater protections than the federal Constitution, this Court has held that the Delaware Constitution provides individuals with greater rights in some areas than those afforded by the United States Constitution.³ "For example, we have held that the Delaware Constitution provides greater rights than the United States Constitution in the preservation of evidence used against a defendant, the right of confrontation, the right to counsel, and the right to trial by jury."⁴

In *Xenidis v. State*, this Court recognized that Article I Section 7 of the Delaware Constitution contemplates a greater right to confrontation than does the federal constitution.⁵ The *Xenidis* Court also stated that

³ *Jones v. State*, 745 A.2d 856, 863 (Del. 1999).

⁴ *Id* at 863 (citing *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989) (preservation of evidence); *Van Arsdall v. State*, 524 A.2d 3, 6-7 (Del. 1987) (confrontation); *Bryan v. State*, 571 A.2d 170, 176 (Del. 1990) (counsel); *Claudio v. State*, 585 A.2d 1278, 1298 (Del. 1991) (trial by jury)).

⁵ *Xenidis v. State*, 212 A.3d 292, 300 (Del. 2019) fn. 33 ("holding that Article I, Section 7 of the Delaware Constitution contemplated a greater right of confrontation than the Sixth Amendment of the United States Constitution"), citing *Van Arsdall*, 524 A.2d at 6-7. ("We do not hold that a reversal of the conviction is automatic under State law whenever cross-examination on bias

factors such as textual language, legislative history, preexisting state law, structural differences, matters of particular state interest or local concern, state traditions and public attitudes are all instructive in the determination as to whether the Delaware Constitution provides greater protection than the federal constitution.⁶

Article I, Section 7 of the Delaware Constitution guarantees that an accused person has the right to "meet the witnesses in their examination face to face."⁷ This "face to face" language is not included in the federal constitution nor is it included in many other state constitutions.

In 2004, Pennsylvania amended their state constitution to remove "face to face" language "to permit the enactment of laws or the adoption of rules that would permit child witnesses to testify in criminal proceedings outside the physical presence of the accused."⁸ Delaware's Constitution has never been amended to remove the "face to face" language.

Before 2004, the Pennsylvania Supreme Court had held that "[t]he use of closed circuit television to transmit the testimony of the witness in this case

is improperly restricted, and while we cite significant rulings of federal courts we do not base our decision on federal law.") *Van Arsdall v. State*, 524 A.2d 3, 6-7 (Del. 1987).

⁶ *Id.*

⁷ Del. Const., art. I, § 7.

⁸ *Commonwealth v. Tighe*, 224 A.3d 1268, 1278-1279 (Pa. 2020).

violates the constitutional protection given to the defendant under Article I, Section 9 of the Pennsylvania Constitution.”⁹

Section 3514 provides for the taking of a child's testimony “outside the courtroom and shown in the courtroom by means of secured video connection,” provided the court finds that the child of less than 11 would suffer “serious emotional distress such that [she] cannot reasonably communicate” in the live courtroom. Under such proceedings, only the prosecutor, defense counsel, camera technicians and support for the child are permitted.¹⁰

What transpired in this case breathes life into precisely what Justice Scalia warned against in his impassioned dissent in *Maryland v. Craig*:

Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in presence of the child, and to ask, personally or through counsel, “it is really not true, is it, that I --your father (or mother) whom you see before you -- did these terrible things?” Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it

⁹ *Commonwealth v. Ludwig*, 594 A.2d 281, 282 (Pa. 1991).

¹⁰ *State v. Roberson*, 2024 WL 302437, at *2 (Del. Super. Ct. Jan. 25, 2024)(citing 11 *Del.C.* §3514).

is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.¹¹

Here, Roberson's daughter, the complainant, testified as the key witness against him during his rape trial. The complainant did so after having not seen her father in the two years following making the allegations and after being in the custody of her mother who strongly believed in Roberson's guilt. Yet, this critical testimony was presented to the jury without Roberson being able to see his accuser. "[F]ace-to-face confrontation enhances the accuracy of factfinding by reducing the risk that a witness will wrongfully implicate an innocent person."¹²

What's more, the presentation of the complainant's testimony through the filter of closed-circuit television no doubt bolstered the complainant's credibility as a prosecution witness by the undeniable implication that she needed to be protected from her father. How could a criminally accused's procedural right to be confronted by the witnesses against him, face-to-face, be satisfied when the witness is in another room, shielded from the person against whom the testimony is offered?¹³

¹¹ *Maryland v. Craig*, 497 U.S. 836, 861 (1990) (Justice Scalia, dissenting).

¹² *Id.* at 846.

¹³ *Id.* at 862. (Scalia, J., dissenting) ("[t]hat face-to-face presence may, unfortunately, upset the truthful rape victim or abused child; but by the same token it may confound and undo the false accuser, or reveal the child coached by a malevolent adult."); see also *Coy v. Iowa*, 487 U.S. 1012, 1019-1020

Finally, as an alternative, Defense counsel, to no avail, urged the trial court that there may be ways to provide comfort for the complainant in the courtroom that would still preserve Roberson's right to confrontation. Counsel stressed that his very important right to confrontation should override any concerns about the time it might take to then have the child testify by video if in-court testimony does not work. A48. Moreover, any mistrial concerns could have been alleviated by first having the complainant in the same room as Roberson without the jury and before questioning begins to see how the complainant would respond. A49. The trial court would not budge.

Massachusetts, a state that has found closed circuit testimony unconstitutional in these types of cases, has recommended certain measures to alleviate the stress of the child such as making the environment where the child would testify less formal, counseling before and after testifying, and allowing the witness to sit at a 45 degree angle.¹⁴ The *Johnson* Court even cited a case where there was videotaped testimony but the defendant was at least in the same room.¹⁵

(1988) ("It is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' ").

¹⁴ *Commonwealth v. Johnson*, 631 N.E.2d 1002, 1007 (Mass. 1994).

¹⁵ *Id.* (citing *Commonwealth v. Tufts*, 542 N.E.2d 586 (Mass. 1986)).

This case also underscores how easily a criminal defendant's right to face-to-face confrontation can be “virtually” diminished where the opinion of a counselor that the child would suffer emotional trauma if required to testify in open court was enough to abridge the Defendant's right to face-to-face confrontation-even though the counselor had never previously assessed in her career to make a determination or opine about whether or not a child should be allowed in a court room to testify versus CCTV. Likewise, this case exemplifies how dramatically the Confrontation right can be circumscribed by remote testimony. Therefore, this Court must strike § 3514 as unconstitutional and find that its application in our case violated Roberson’s right to confrontation.

II. IN THIS CLOSE CASE WHICH HINGED ON THE JURY'S CREDIBILITY DETERMINATION, THE PROSECUTOR JEOPARDIZED THE FAIRNESS AND INTEGRITY OF THE TRIAL BY IMPERMISSIBLY VOUCHING, ELICITING SYMPATHY FOR THE COMPLAINANT, AND ENCOURAGING THE JURY TO DRAW IMPERMISSIBLE INFERENCES.

Question Presented

Whether the fairness and integrity of a trial is jeopardized when, in a close case hinging on the jury's credibility determination, the prosecutor impermissibly vouches and elicits sympathy for the complainant? The issue was preserved by Defense Counsel's request for a curative instruction. A236.

Standard and Scope of Review

Whether the prosecutor's statements amounted to prosecutorial misconduct requires an application of the law to undisputed facts and is reviewed de novo.¹⁶

Argument

During the prosecutor's closing arguments in this credibility case, he made comments that directly or indirectly vouched for the complainant's credibility. The State relied heavily on her CAC statement and testimony to prove its case. There was no physical evidence to support her allegation

¹⁶ *Hughes v. State*, 437 A.2d 559, 673 (1981).

against Roberson. None of the State’s other witnesses validated her claim. Thus, the prosecutor’s improper comments amounted to a material defect that denied Roberson a fair trial which requires that his convictions now be reversed.

In closing argument, the prosecutor vouched for the credibility of the complainant by expressing to the jury:

Defense counsel’s probably going to get up and try to say this is made up, this didn’t really happen. Why? Ask yourselves why an eight-year-old girl would want to deal with law enforcement, have an awkward conversation with her mom, go to the hospital, and do whatever that frog position is that Mr. Turner was cross-examining the FNE about, have her body exposed, be humiliated and then talk about it at length with a stranger in her room at the hospital and then two years later come in here and sit up there and testify. Did it look like she wanted to be here today?¹⁷

Immediately after the prosecutor concluded his closing argument, defense counsel objected, stating that the above remark constituted “credibility vouching” and requested an “instruction to the jury that they not consider the idea that because somebody – because an investigation starts that it must have happened.” The trial court denied relief, stating that it was not convinced that the prosecutor’s argument needs a curative instruction.¹⁸

¹⁷ A223.

¹⁸ A236.

The clear message that was conveyed to the jury by the prosecutor's statement, quoted above, was that the complainant would not have come forward with the allegations and gone through the investigation if it was not true. In other words, the State would not prosecute someone for the crimes charged unless the complainant was telling the truth. The State went a step too far.

Improper prosecutorial vouching occurs when a prosecutor suggests a personal belief about the credibility of a witness, or in the accused's guilt.¹⁹ This Court has recognized two distinct rationales behind the prohibition of prosecutorial vouching: first, it “implies some personal superior knowledge, beyond that logically inferred from the evidence at trial, that the witness has testified truthfully;”²⁰ and second, it creates a risk that the authority and respect the office of the prosecutor commands may “induce the jury to trust the Government's judgment rather than its own view of the evidence.”²¹

¹⁹ *Kirkley v. State*, 41 A.3d 372 (Del. 2012) (new trial ordered when prosecutor argued, “The State . . . is bringing this charge because it is exactly what [defendant] did,” and noting the statement implies personal knowledge outside the evidence and emasculates the constitutionally guaranteed presumption of innocence”).

²⁰ *Trala v. State*, 244 A.3d 989, 999 (Del. 2020).

²¹ *Id.* at 1000.

The misconduct in this case was objected to. This Court must reverse because it was “clearly prejudicial to [Roberson’s] substantial rights as to jeopardize the fairness and integrity of the trial process.”²² This was a pure credibility case where there was no physical evidence to support the allegations of misconduct. The prosecution abandoned its “duty to see that justice be done by giving [the] defendant a fair and impartial trial,”²³ and instead engaged in misconduct which, given their “influential role,”²⁴ surely “affected the outcome of the trial.”²⁵ The prosecutors statements went beyond a mere recitation of the evidence by asserting that the complainant would not have come forward and go through the investigation unless she was telling the truth. Thus, this Court should conclude that the prosecutor's remarks “crossed the line” and amounted to improper “vouching.”²⁶

²² *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

²³ *Whittle v. State*, 77 A.3d 239, 244 (Del. 2013) (internal quotations omitted).

²⁴ *Id.*

²⁵ *Morales v. State*, 133 A.3d 527, 532 (Del. 2016).

²⁶ *Hardy v. State*, 962 A2d 244, 247 (Del. 2008); *See also Heald v. State*, 251 A.3d 643, 652 (Del. 2021).

CONCLUSION

For the reasons and upon the authorities cited herein, Roberson's convictions must be reversed.

Respectfully submitted,

/s/ Santino Ceccotti
Santino Ceccotti [#4993]
Carvel State Building
820 North French Street
Wilmington, DE 19801

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