



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES HALL,)
)
 Defendant-Below,)
 Appellant)
)
 v.) No. 171, 2012
)
)
)
 STATE OF DELAWARE)
)
 Plaintiff-Below,)
 Appellee.)

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW CASTLE COUNTY

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NATURE AND STAGE OF PROCEEDINGS

James Hall, ("Hall"), was indicted on Attempted Robbery 1st Degree, Criminal Mischief under \$1,000, Assault 1st Degree, Reckless Endangering 1st Degree and weapons charges related to two separate events. A-1, 9-13. Hall went to jury trial on all charges except his two "person prohibited" charges which the judge decided. A-15.

On the first day of trial, the State moved to allow the use by its witnesses Hall's nickname, "Nasty Nate" rather than his nickname "Nate." The State claimed this was necessary for the purpose of identification. The judge granted the motion over Hall's objection.¹

Later, the court granted Hall's motion for judgment of acquittal on four counts. A-6. The jury found him: not guilty of Attempted Robbery 1st Degree and the related weapon offense alleged as to one event; and guilty of Assault 1st Degree and the related weapon offense alleged as to the other event. The judge later found Hall guilty of the "person prohibited" offenses alleged in each event. A-68. Hall was sentenced to 14 years in prison followed by probation.² This is Hall's Opening Brief in support of his timely-filed appeal.

¹ See Oral Decision Granting State's Motion, Ex.A.

² See Sentence Orders, Ex. B & C.

SUMMARY OF ARGUMENT

1. Throughout the State's case, the prosecutor unnecessarily elicited testimony that one of Hall's nicknames is "Nasty Nate." The prosecutor also frequently used that nickname in his questioning and referred to Hall as "Nasty Nate" throughout his closing argument. Before trial, the prosecutor claimed that this particular nickname was probative as the witnesses only knew Hall by that name. However, police reports referred to Hall as both "Nasty Nate" and "Nate"; the alleged victim identified Hall at trial as "James Nathaniel Hall;" Gee referred to Hall as "Nate" in her testimony; and police used the nickname "Nate" to identify Hall as the suspect. The State's use of the pejorative nickname not only lacked probative value it strongly suggested a criminal disposition and propensity to commit crimes. Thus, the trial court's admission of the pejorative nickname over Hall's objection was an abuse of discretion and violated his rights to a fair trial. See *D.R.E.* 404 (a); Amend. V, U.S.Const; Art.I, §7, Del.Const. Therefore, his convictions must be reversed.

STATEMENT OF FACTS

On November 6, 2010, Charlotte Bush, ("Charlotte"), her son Alex Bush, ("Bush"), and her young grandson attended a party with family in the first floor apartment at 1228 4th Street. A-20-21, 27, 38. There were some kids inside the apartment and some kids playing outside in the street. The adults were in the kitchen which is located in the back of the apartment. A-23, 27.

After it got dark outside, Charlotte headed from inside the residence to the front door to wait for a ride home. Her grandson was next to her and her son, Bush, walked behind her. A-21, 23, 25. When she opened the door, Charlotte saw a man standing on the front porch to the side of the door. He was wearing a red hoodie and a hat and was holding a silver gun. A-21, 25, 39. Even though the front porch light was on, Charlotte never got a good look at his face. A-23, 39.

It was at this point that Bush purportedly pushed his mother and his son back into the house. A-22. At trial, Bush told the jury that the man in the red hoodie told him to "run it" which to him means to hand over his valuables. A-39. Instead of following directions, Bush supposedly grabbed the man's wrist and the two tussled for anywhere between 4 and 10 minutes. The struggle ended when the gun

went off. A-22-23, 25-26, 40. Bush claimed that he shoved the man and ran across the street. A-41. The unknown man also took off. A-42. No bullets or shell casings were ever found during an investigation of this incident. A-19.

At the time of this incident, Bush did not know the man on the porch. A-43, 56.³ Initially, he claimed that after the man's hood came off, the kids on the street hollered "Nate, Nate." A-40. At trial, he stated that he came to believe that the man was "James Nathaniel Hall." A-43-44. Upon further questioning by the prosecutor, he told the jury that on "that night, the name that was the street name, that he go by is 'Nasty Nate.'" A-44. He also later claimed that the kids actually hollered "Nasty Nate, Nasty Nate."

Neither Bush nor his mother reported the incident to or spoke with police that night. A-44, 63-64. However, Tracy Gee, ("Gee"), an occupant of the apartment, did talk to police that night. She told them that she heard two shots come from the front porch. A-35. She claimed that she saw the suspect who "is known by the nickname of 'Nate' standing on the front porch prior to the shots being fired." A-34. According to police, she "described the

³ He did claim that he had seen the defendant in the neighborhood a couple of times before. A-46.

suspect, or 'Nate,' as a black male as approximately 18-22 years of age, height 5'2" and 150 pounds." A-35. Gee did not tell police that there were any kids out on the street or that anyone else saw anything. A-35. Nor did Gee mention any struggle on the porch. And, she did not give any description of the suspect's clothing.

Contrary to her statement to police, Gee told the jury that she ran outside after hearing the shots and saw a tall, skinny male being chased off the steps by her friend. A-29-30, 32. She also testified that she could not "really say" who the person was that she saw on the porch "because it was dark." A-30. Even though she never mentioned kids to police, she told the jury that there were kids playing "[r]ight on the porch" and some in the alleyway outback. A-31. She claimed that the kids hollered, 'Nasty Nate, Nasty Nate.'" A-28. The prosecutor then asked her if she knew "Nate" or "Nasty Nate" from around the area; she said that she did. A-29. She described him as being skinny, tall and having big eyes. A-30. The prosecutor then asked her if "[t]he person [she] know[s] as 'Nasty Nate'" was in the courtroom; she identified Hall. A-30.

Bush told the jury that on November 8th, two days after the porch incident, he walked up Pleasant Street and turned on to Van Buren Street when he saw someone whom he believed

to be the man with whom he struggled two days earlier. A-52. According to Bush, on this occasion, the man was wearing black pants and possibly dark shoes and a hoodie with "like a big white stripe, big dark blue or black stripes[.]" A-53. Purportedly, the unknown man pulled up his jacket, pulled a gun from his waistband and shot toward Bush. A-54. Bush claimed that it was the same gun he saw two nights earlier. A-44.

Bush ran back up Pleasant Street, got between two cars then realized he had been shot in the leg. A-53-54.⁴ Police and an ambulance arrived. On the way to the hospital, Bush told police that he could see the man's face for a few seconds under a light. A-54. He claimed that it was "Nasty Nate" who shot him that night and who had tried to shoot him two days earlier. A-46, 50-51, 55, 61. However, he never mentioned that he learned the name "Nasty Nate" from the kids on the street. A-51. Bush described the shooter to police as wearing a "black in color hoodie with a stripe and blue jeans." A-50.

After learning that something had occurred on Pleasant Street, Gee and a couple of family members drove over to investigate. Because they were not allowed on the street,

⁴ The parties stipulated that Bush's injuries amounted to serious physical injuries. A-15.

they returned home in the early morning hours of November 9th. Gee told the jury that as they were getting out of the car, "Nate" approached and said "I don't care." She could not remember what else he may have said. Gee then called 911. A-30.

In her 911 call Gee described the man who confronted her as a male wearing a brown jacket and blue jeans, was 18 years old and was riding a bicycle. A-31-32, 59. She also stated that his mother's name was Tonya and that Tonya was currently in jail. She also claimed that his grandmother's name was Mary and that she worked at a mission located at Second and Jackson Streets. A-36.

After the 911 call, Officer Luker responded and ended up at 1015 Elm Street. A-57. He saw an unknown female and an unknown male on the steps of a stoop of the residence. A-57. Luker claimed that the unknown male matched the description from the 911 call. A-57. However, the person on the steps was not wearing a brown jacket. He was wearing a black thermal shirt. A-59. There was no bicycle. In fact, no jacket or bicycle was ever found. A-59, 63. Additionally, there was no information in the 911 call about the presence of a female. A-59.

As police approached him, the man in the black thermal shirt went inside the residence. A-57. Police told him to

stop but he slammed the door and locked it. A-58. The female told police she did not know him and that he did not live there. A-58. Police forced their way into the house and found the man in the black thermal shirt, who turned out to be Hall, hiding in the basement. A-60. He was not in possession of a gun. Police took him into custody.

While police did find a copper-jacket projectile in front of 1109 Pleasant Street, no physical evidence was found linking Hall to either the November 6th or the November 8th crimes. A-47-50, 62. Beyond Bush, no witnesses to the November 8th shooting were ever located. A-51.

Officer Pfaff told the jury that after Bush gave her the name "Nasty Nate" at the hospital, she "attempt[ed] to figure out who the governmental name of the nickname, who that person may be." A-61. After her investigation, she "developed 'James Hall' as a suspect[.]" A-61. She put Hall's picture in the photo line up and on November 10th, she showed the line up to Bush who identified him as the assailant from both events. A-56, 61-62. The jury was never told that police actually investigated the name "Nate" and not "Nasty Nate." A-18.

Finally, Hall's mother testified that her name was Shirley and not Tonya as Gee had claimed. She also informed the jury that Hall's grandmother's name was

Barbara and not Mary as Gee had claimed. Additionally, Shirley works for the State of Delaware and was not incarcerated on November 2010 as Gee had claimed. And, Barbara had a stroke and has been in nursing home 13 years, so she did not work in a mission as Gee had claimed. A-65-66.

At the conclusion of trial, the jury found Hall not guilty as to the crimes related to the allegations of November 6th and guilty as to the allegations of November 8th. The trial court found Hall guilty of the "person prohibited" charges alleged in each instance. The court justified its decision by fathoming that the jury likely found Hall not guilty of the first incident not because it found that Hall was not the assailant but because they found that the unlawful conduct did not amount to the specific crime of attempted robbery. A-74-76.

- I. BECAUSE HALL'S NICKNAME, "NASTY NATE," WAS NOT RELEVANT TO ANY PROPER PURPOSE AND BECAUSE IT STRONGLY SUGGESTED THAT HALL HAD A PROPENSITY FOR CRIMINAL CONDUCT, THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED HALL HIS RIGHTS TO A FAIR TRIAL WHEN IT ALLOWED THE PROSECUTOR TO INTRODUCE THAT NICKNAME THROUGH HIS WITNESSES, USE THAT NICKNAME DURING QUESTIONING AND REFER TO HALL BY THAT NICKNAME DURING HIS CLOSING ARGUMENT.

Question Presented

Whether the use of Hall's nickname, "Nasty Nate," was unduly prejudicial and deprived Hall of his rights to a fair trial under both the United States and Delaware constitutions when it was not relevant to any proper purpose and it strongly suggests a propensity for criminal conduct. A-14-18.

Standard and Scope of Review

This court reviews evidentiary issues for abuse of discretion. See *Smith v. State*, 913 A.2d 1197, 1223 (Del. 2006). It reviews constitutional issues *de novo*.

Argument

Throughout the State's case, the prosecutor unnecessarily elicited testimony that one of Hall's nicknames is "Nasty Nate." The prosecutor also frequently used that nickname in his questioning and referred to Hall as "Nasty Nate" throughout his closing argument. Before trial, the prosecutor claimed that this particular nickname was probative as the witnesses only knew Hall by that name.

However, police reports referred to Hall as both "Nasty Nate" and "Nate"; the alleged victim identified Hall at trial as "James Nathaniel Hall;" Gee referred to Hall as "Nate" in her testimony; and police used the nickname "Nate" to identify Hall as the suspect. The State's use of the pejorative nickname not only lacked probative value it strongly suggested a criminal disposition and propensity to commit crimes. Thus, the trial court's admission of the pejorative nickname over Hall's objection was an abuse of discretion and violated his rights to a fair trial. See *D.R.E.* 404 (a); Amend. V, U.S.Const; Art.I, §7, Del.Const. Therefore, his convictions must be reversed.

The Trial Court's Erroneous Decision

Prior to trial, the prosecutor told the judge that there would be "multiple references" to Hall's nickname, "Nasty Nate." A-14. He claimed that the use of this particular nickname was necessary in order to establish identity, stating, "[a] lot of the witnesses know him as 'Nasty Nate,' and in fact, their description of 'Nasty Nate' is one of the things that cause[d] the investigation to unfold." A-14. However, the prosecutor later noted that it was the name "Nate" that was actually used by police in their investigation which led to Hall's identification as a suspect. A-18.

Defense counsel objected to the use of "Nasty Nate," because it strongly suggested a criminal disposition and propensity to commit crimes. A-14, 17.⁵ She noted that in the police reports Hall was sometimes referred to by the nickname "Nasty Nate" and sometimes referred to by his abbreviated nickname "Nate." Thus, she urged the court to follow the procedure set forth in *Taylor v. State*,⁶ and have the witnesses who only knew Hall by the nickname "Nasty Nate" asked whether they recognized Hall without asking them by what name they knew him. A-14, 17.

Initially, the judge told the State to instruct its witnesses to call Hall "Nate." However, it changed its ruling because it later erroneously found that the pejorative nickname "Nasty Nate" was "an important component to identification" - a main issue at trial. A-14, 18. Yet, there was never any dispute or argument made that "Nate" and "Nasty Nate" were not one and the same.

The Unnecessary Use Of "Nasty Nate" During Gee's Testimony

Gee's testimony and statement to police undercut the prosecutor's claim that the witnesses could only identify Hall as "Nasty Nate." Gee told the jury that she "could

⁵ (citing *Taylor v. State*, 23 A.3d 851 (Del. 2011) and *Delaware Rule of Evidence* 404 (a) and quoting *United States v. Farmer*, 583 F.3d 131 (2d Cir. 2009)).

⁶ 23 A.3d 851 (Del. 2011).

not really say" who the man was that was on the porch on November 6th. However, she claimed that she heard kids screaming "Nasty Nate, Nasty Nate." A-28-29.⁷ The prosecutor then asked Gee a question indicating that she knew Hall as both "Nate" and "Nasty Nate:"

Prosecutor: Do you know a person by the name of "Nate" or "Nasty Nate?"

Gee: I seen him a couple times around the area. A-29.

That she knew Hall as "Nate" is supported by the following exchange:

Gee: As we was getting out of the car, we was going across the street. We stayed on the corner. I don't know what time it was. I know that I seen him on a bicycle.

Prosecutor: When you say "him," who are you talking about?

Gee: Nate. A-30.

Finally, Gee's "3507 statement"⁸ also supports the conclusion that she knew Hall by both nicknames. Officer Humphry testified that she told him that she knew the suspect "by the nickname of, Nate" and that she "described the suspect, or Nate, as ..." A-34-35. Yet, the prosecutor chose to elicit testimony from Gee that she knew Hall as "Nasty Nate." A-36.

⁷ Because the court believed it to be hearsay, it instructed the jury not to consider this testimony. A-29.

⁸ See 11 Del.C. §3507.

***The Unnecessary Use Of "Nasty Nate" During Bush's
Testimony***

Bush's testimony reveals that he also could identify Hall by a name other than "Nasty Nate." In court, Bush twice identified his assailant as "James Nathaniel Hall." A-39, 44. He initially stated that he learned that name after he heard the kids on the street on November 6th holler, "Nate, Nate." A-40.⁹ However, the prosecutor unnecessarily elicited a claim from Bush that "the name that was the street name, that he go by is 'Nasty Nate,'" that the kids actually hollered "Nasty Nate" and that he gave that name to police. A-44, 56.

The Unnecessary Use Of "Nasty Nate" By Police

Two police officers repeated for the jury that Bush told them that the assailant was "Nasty Nate." A-50, 61. Officer Pfaff told the jury that after Bush gave her the name "Nasty Nate" at the hospital, she "attempt[ed] to figure out who the governmental name of the nickname, who that person may be." A-61. After her investigation, she "developed 'James Hall' as a suspect[.]" A-61. What she did not tell the jury was that the actual nickname used in her investigation was "Nate" and not "Nasty Nate." A-18.

⁹ Just as it had with Gee's testimony, the court instructed the jury not to consider this testimony. A-40-41.

The Unnecessary Use Of "Nasty Nate" By The Prosecutor

The prosecutor frequently used the name "Nasty Nate." In his questioning throughout the two day trial, he used it about 7 times. A-29-30, 36-37, 44, 56. In his closing argument, he used it four times. A-66-67.

"What are the chances that, he said it's Nasty Nate?"

"The detective goes, conducts an investigation comes back with a picture of Nasty Nate for James Nathaniel Hall..."

"A guy he's never seen before and only knows his nickname to be 'Nasty Nate'."

"James 'Nasty Nate' Hall is sitting in that defense chair right now...."

A-66-67. None of these references were necessary and all were unduly prejudicial.

The Unnecessary Use Of "Nasty Nate" Throughout Trial Requires Reversal

When a defendant's pejorative nickname is unrelated to any proof against him it is substantially prejudicial and requires reversal.¹⁰ Thus, such a nickname should be kept from the jury unless it is relevant for a proper purpose.¹¹

¹⁰ See *United States v. Williams*, 739 F.2d 297, 299-301 (7th Cir. 1984) (finding testimony of defendant's nickname "Fast Eddie" was unrelated to proof against him and was so prejudicial as to warrant a new trial); *United States v. Farmer*, 583 F.3d 131 (2d Cir. 2009) (reversing an attempted murder conviction under plain error standard in a case involving the nickname "Murder").

¹¹ With few exceptions, not applicable in this case, Delaware Rule of Evidence 404 (a) provides:

This Court recognizes the principle that nicknames that suggest the defendant has a propensity for committing crimes should not be presented to the jury.

In *Taylor*, a homicide case, this Court found that the use of the defendant's nickname, "Murder," was prejudicial:

it does not appear from this record that the State's witnesses had to be allowed to use [the nickname] instead of [the defendant's] given name. Those witnesses who only knew Taylor by his nickname could have been asked, in court, whether they recognized defendant, without asking what name they knew him by. The questioning then could have proceeded using Taylor's real name. Again, in the retrial, the court should make an effort to delete all references to Taylor's nickname, if possible.

23 A.2d at 857.

The nickname "Nasty Nate" is just as prejudicial in our assault case as "Murder" is in a homicide case.¹² "Nasty Nate" strongly suggests a propensity for committing the crimes with which Hall was charged.¹³ The ordinary

Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]

¹² The Court agreed with defense counsel that due to Hall's "normal" appearance, a juror could infer that the nickname was a result of his actions. A-14.

¹³ "Nasty Nate" happens to be the name of a character in the 1998 movie "Half Baked." The movie is about a group of friends who sell marijuana in an attempt to raise money to get their other friend out of jail who is in danger of being sexually assaulted by "Nasty Nate." In fact, "Nasty Nate" does attempt to sexually assault their friend in the

definition of the word "nasty" includes "disgustingly filthy;" "physically repugnant;" "extremely hazardous or harmful;" and "causing severe pain or suffering." *Merriam Webster's Dictionary* 10th ed. 773. Here, Hall was charged with the "harmful" crime of Assault 1st Degree which includes causing "serious physical injury" as an element.

Prior to trial the prosecutor claimed that "Nasty Nate" was important because that was the way the witnesses identified Hall. Contrary to the State's claim and the trial court's finding, "Nasty Nate" had no probative value with respect to identification as compared to "Nate" or "James Nathaniel Hall." The State's two "eyewitnesses" referred to Hall as "Nate" and one of those witnesses also referred to him as "James Nathaniel Hall. A-30, 34-36. Thus, the pejorative nickname "served no purpose in the prosecution's proof and bore no direct relationship to any of the acts charged." *United States v. Clark*, 541 F.2d 1016, 1018 (4th Cir. 1976) (finding use of nickname "Mauser" - a type of German gun- to be prejudicial). The use of the nickname was "tantamount to testimony about a defendant's character that is proffered to show the probability that the defendant acted in conformity with that character in a

prison shower. <https://www.imdb.com/title/tt0120693> (last visited 8/17/12).

particular case. This type of evidence, of course, is not permitted in the prosecution's case-in-chief, on the theory that it causes defendant undue prejudice and denies defendant the opportunity to defend against the particular charges against him." *Williams*, 739 F.2d at 300 (citing *F.R.E.* 404(a) and *Michelson v. United States*, 335 U.S. 469, 475-476 (1948)).

The nickname was not probative of an explanation of how the police investigation unfolded. While Bush had given police the name "Nasty Nate," police only entered the name "Nate" into their "nickname database." From that entry, police found the photograph of Hall and placed it in a photo line up. From that photograph, Bush identified Hall as the perpetrator. The jury was never told that the identification of Hall came from the name "Nate" as opposed to "Nasty Nate." A-18, 66-67.

There was never a dispute that "Nate" and "Nasty Nate" referred to the same person. Thus, the use of "Nasty Nate" could have been avoided in two easy ways: 1) the witnesses could have simply referred to Hall as "Nate;" or 2) the witnesses could have identified Hall without the prosecutor asking them by which name they knew him. *Taylor*, 23 A.3d at 857. Unfortunately, the State went out of its way to present the perjorative nickname to the jury. There

certainly was no need for the prosecutor's frequent use of the perjorative nickname in either his questioning or his closing argument. See *Farmer*, 583 F.3d at 145 (noting the relevance of the frequency with which the prosecutor uses the nickname in determining prejudice); *Williams*, 739 F.2d at 300 (finding the elicitation of "gratuitous testimony" of the defendant's nickname to be improper).

Here, the improper admission of evidence violates due process because it "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions[.]'" *Dowling v. United States*, 493 U.S. 342, 353 (1990) (citations omitted). See *Farmer*, 583 F.3d at 147. There was no probative value to the nickname. Its use was highly prejudicial but could have easily been avoided. The trial court "imposed no restraint or limitation on the government's use of the nickname. And nothing was done to mitigate prejudice, such as giving a curative instruction." *Farmer*, 583 F.3d at 146. Thus, the abuse of discretion by the trial court in this case was so significant that it violated Hall's right to due process under both the Delaware and United States Constitutions. See *Zebroski v. State*, 715 A.2d 75, 79 (Del. 1998) (noting that the introduction of inflammatory material violates the due process clauses of both the United States and Delaware

Constitutions when the introduction serves no proper purpose).

Hall's convictions must be reversed due to the improper admission of unduly prejudicial evidence and its denial of his rights to due process.

CONCLUSION

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

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

DATE: August 17, 2012