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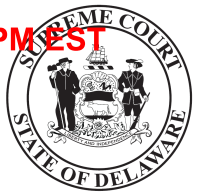

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES E. COOKE,	)	
	)	
Defendant Below	)	
Appellant,	)	
	)	
v.	)	**Case No. 519, 2012**
	)	**526, 2012**
STATE OF DELAWARE,	)	**CONSOLIDATED**
	)	
Plaintiff Below,	)	
Appellee.	)	

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

APPELLANT'S REPLY BRIEF

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I. FAILURE TO DECLARE A MISTRIAL FOR JUROR MISCONDUCT IS AN ABUSE OF DISCRETION AND A VIOLATION OF DUE PROCESS OF LAW.

Merits of Argument

Juror No. 3 was anything by a disinterested fact witness for the State when she was summoned for jury duty in this case. In fact, she had a vested interest to insure that her daughter did not participate in the prosecution of her husband, and for him to be treated leniently by the State. Evidence of juror bias in this matter is clear. Juror No. 3 witnessed a violent assault between her husband and daughter that involved a knife, a frying pan, and strangulation. During the assault, she stated "you guys are going to kill each other? Go ahead, do so."[1] After witnessing her husband with his hands around her daughter's neck, her daughter was able to break free and call the police. Juror No. 3 was present in the home when the police arrested her husband. After his arrest for felony Strangulation, Assault Third Degree, and three counts of Endangering the Welfare of a Child, she assisted her husband by bailing him out of jail.[2] Upon bailing her husband out of jail, Juror No. 3 contacted her daughter, the victim, urging her before, during,

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[1] A425.
[2] A425; A433.

and after being impaneled as a juror, to drop her husband's pending charges.[3]

On the day that she was sequestered to deliberate the guilt phase, she appeared in Family Court interpreting for her husband at his arraignment at which time she clearly knew that his criminal charges were still pending and being prosecuted by the Attorney General's office.[4] On this same date, Family Court provided her and her husband with notice of the scheduled trial date informing them that he needed to come back to court for trial. Finally, she even attempted to contact the Attorney General's office to inform the State that her daughter was not coming to the Family Court trial.[5] Based upon these facts, Cooke submits that juror bias can be inferred, and that he was denied his Federal and State Constitutional right to a fair and impartial jury.

Under the Sixth Amendment of the United States Constitution and Article I, § 7 of the Delaware Constitution, all defendants have a fundamental right to a trial by an impartial jury.[6] The impartiality and indifference of jurors is essential to the proper functioning of the jury. This

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[3] A426; A427.
[4] A426.
[5] A426.
[6] U.S. Const. amend VI; Del. Const. ann. Art. I, § 7.

Court has held "*if only one juror* is improperly influenced, a defendant in a criminal case is denied his Sixth Amendment right to an impartial jury."[7]

In *McDonough Power Equipment Inc. v. Greenwald*, the United States Supreme Court addressed juror dishonesty during *voir dire* and emphasized that "[o]ne touchstone of a fair trial is an impartial trier of fact . . . a jury capable and willing to decide the case solely on the evidence before it."[8] A juror's dishonesty during *voir dire* undermines a defendant's right to a fair trial.[9] In *Clark v. United States*, Justice Cordozo concluded "[i]f the answer to the questions [during *voir dire*] are willfully evasive or knowingly untrue, the talisman, when accepted, is a juror in name only . . . His relation to the court and the parties is tainted in its origin; it is mere pretense and sham."[10]

In *McDonough*, *supra* the Supreme Court set forth the following test to obtain a new trial based upon inaccurate juror responses during *voir dire*. First, the moving party must demonstrate that a juror dishonestly answered a

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[7] *Knox v. State*, 29 A.3d 217, 223-24 (Del. 2011)(quoting *Hall v. State*, 12 A.3d 1123, 1127 (Del. 2010))(emphasis added).
[8] 464 U.S. 548, 554 (1984).
[9] *United States v. Daugerdas*, 867 F. Supp. 2d 445 (2012).
[10] 289 U.S. 1, 11 (1993).

material question. Secondly, the moving party must show that a correct response would have provided a valid basis for a challenge for cause.[11]

As noted by the trial court in its opinion to deny Cooke's motion for new trial based upon juror misconduct, the court correctly held that the *voir dire* questions were material satisfying the materiality requirement of the *McDonough* test.[12] Cooke asserts, however, that the trial court erred when it found, after Cooke moved for a mistrial and filed the motion for new trial, the Cooke did not show that Juror No. 3's non-disclosure to the *voir dire* questions were dishonest and that a correct response would not hae provided a valid basis to exercise a for cause challenge.[13]

Having satisfied the materiality requirement of *McDonough*, the Court must analyze whether Juror No. 3's responses were dishonest.[14] Cooke submits that Juror No. 3's response as to what she witnessed or knew were dishonest. The *voir dire* questions in issue were questions 14, 15, and 16. Cooke submits that these questions were narrowly drafted and unambiguous leaving little room for confusion by Juror No. 3. This is evidenced, pursuant to her response to *voir dire* question 14 – "[H]ave *you*, a relative, or a close

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[11] *McDonough*, 464 U.S. at 556.
[12] A504- 505.
[13] A504-514; *see McDonough*, 464 U.S. at 556.
[14] *McDonough*, 464 U.S. at 556.

friend ever been a witness of or a victim of a violent crime?" (Emphasis added). Juror No. 3 did not disclose her own recent experience of witnessing a violent crime, however, she gave a detailed disclosure concerning the murder of her nephews.[15] Juror No. 3's response to *voir dire* question 14 evidences that she understood the question, she just chose not to disclose her experience. Juror No. 3 t5estified that she did not disclose the crime committed by her husband because she did not believe that he was trying to kill her daughter.[16] Question 14 did not ask Juror No. 3's opinion as to whether as to whether a crime occurred, it asked only if she witnessed a violent crime. Juror No. 3 chose to ignore an honest response.

Similarly, when asked *voir dire* question 14 – "[H]ave *you*, a relative, or a close friend ever been charged with, or convicted of a criminal offense . . ." she clearly answered "no".[17] She attempted to justify her response by claiming that in her opinion she believed that the charges were false.[18] Again, she subjectively chose to give a dishonest response. *Voir dire* question 16 simply asked "[A]re *you*, a relative or close friend presently

[15] A427.
[16] A427.
[17] A431 (emphasis added).
[18] A431.

under investigation or prosecution by *any* law enforcement agency for *any* criminal offense?" Juror No. 3 again answered "no".[19]

When questioned by the court as to why she did not answer these questions in the affirmative, she never indicated that the questions were confusing or vague, she just chose not to answer. This is not a case in which the criminal conduct of her husband and his arrest were remote in time causing her to honestly forget the incident. This incident occurred within two months of her appearing as a prospective juror and was an ongoing issue of which she was clearly aware throughout Cooke's jury selection and trial.

The State's Answering Brief argues that Juror No. 3's non disclosure was an honest mistake that did not affect her impartiality. The record does not support this position. The record clearly shows that Juror No. 3 gave intentionally dishonest responses to the *voir dire* questions in issue. Had Juror No. 3 answered each question honestly, each response would have independently established a valid basis to exercise a challenge for cause. Cooke submits that he has satisfied the first prong of *McDonnough*.

The second step of the *McDonough* analysis requires this Court to determine whether a correct response to the *voir dire* question or questions

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[19] A431 (emphasis added).

would have provided a valid basis to challenge for cause.[20] In *Schwan v. State*, this Court stated that a failure to honestly answer a material *voir dire* question that would provide a valid basis for a challenge for cause is reversible error.[21] The question presented is whether Juror No. 3's failure to disclose that she witnessed a violent crime constitutes a valid basis to excuse a juror for cause.

In *Banther v. State*, this Court noted that jury bias, either actual or *apparent*, undermines society's confidence in the judicial system holding that a victim of violent crime constitutes a basis for a challenge for cause.[22] Furthermore, in *Knox, supra*, a case where a juror was also a victim of a crime being prosecuted by the Office of the Attorney General, this Court stated in its analysis of juror bias that "even in factually unrelated cases, the victim's experience with the Department of Justice, whether good or bad, previous or ongoing, will affect the victim's ability to be fair and impartial in the role of a juror."[23] By contrast, when dealing with a juror who is also a witness in a criminal case, this Court has stated "unlike a witness who is indifferent to the resolution of a case and has no formal relationship with the

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[20] *McDonnough*, 464 U.S. at 556.
[21] 65 A.3d 582 (Del. 2013).
[22] 823 A.2d 467, 482 (Del. 2003).
[23] *Knox*, 29 A.3d at 221.

prosecution, a victim is emotionally invested in the outcome and personally dependent on the attorney general to bring the person the victim perceives to be the wrongdoer to justice."[24]

While Juror No. 3 is not a victim in the case that was being prosecuted by the State, she was not indifferent to the resolution of the case. Juror No. 3 is married to the defendant and mother of the victim in the State's case. She clearly had an interest in the outcome of her husband's criminal case, as evidenced by her repeated contacts with her daughter inquiring why the case was still being prosecuted. Also, the case against her husband was factually similar to Cooke's case in that both cases involve allegations of a male strangling a female victim. As stated in *Knox*, where a juror is a victim, "his or her interaction with the Department of Justice, whether good or bad, previous or ongoing" will affect the victim's perspective.[25]

Cooke submits that Juror No. 3's interaction with the police, the courts, and the Department of Justice evidences an inference of bias. Her bias would have been disclosed during *voir dire* if she honestly answered that she had witnessed a violent crime; that her daughter was the victim of that crime; and that the prosecution of her husband, the defendant in that

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[24] *Id.* at 222.
[25] *Id.* at 221.

incident, was ongoing when at the time of jury selection. This would have provided Cooke with a valid basis to exercise a challenge for cause thus satisfying the second step of the *McDonough* analysis.

While the trial judge conducted a colloquy with Juror No. 3 when her non-disclosure to the *voir dire* questions was discovered, his finding that she was impartial was erroneous. The defense submits, however, that the record supports a finding that Juror No. 3 not only failed to honestly answer two material questions on voir dire, her failure was deliberate requiring this Court to reverse Cooke's conviction.[26]

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[26] *Schwan*, 65 A.3d 582; *Banther*, 783 A.2d at 1290-91.

IV. THE DEPARTMENT OF CORRECTIONS, AN AGENCY OF THE STATE OF DELAWARE INTERFERED WITH COOKE'S RIGHT TO REPRESENTATION.

Merits of Argument

Cooke's claim is not self-serving and meaningless as the State suggests. It is conceded that certain of Cooke's actions may have been disruptive to the prison system, however, those disruptions do not provide a valid basis for the government to interfere with his relationship with his attorneys. Once a defendant's right to counsel has attached, government intrusion into the attorney-client relationship violates the Sixth Amendment if said violation was prejudicial.[27]

The trial court did take steps to correct the intrusion, however, the steps taken were too late to save the attorney-client relationship. The issue of government interference was brought to the trial court's attention as early as April 18, 2011.[28] The lack of resolution led to a Motion to Compel the State to move Mr. Cooke to a facility where he would have access to counsel and legal materials.[29] The trial court acted on that motion requiring the removal of James Cooke from the secured housing unit at the James T.

[27] *Weatherford v. Bursey*, 429 U.S. 545 (1977).
[28] C1-4.
[29] A51.

Vaughn Correctional Center[30] (Smyrna, DE), referred to a "SHU", to the Howard R. Young Correctional Institution (Wilmington, DE). The transfer took place on December 5, 2011, approximately ten weeks prior to jury selection.[31]

The State argues that no prejudice occurred, yet a review of the record clearly indicates that Cooke was unfairly prejudiced by his self-representation, subsequent removal from self representation, and the "hand cuffing" of appointed counsel, who inherited the defense crippled by Cooke as he acted *pro se*.[32]

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[30] Though not noted, visits to the SHU require attorneys to secure an appointment whereas attorneys are permitted unscheduled visits at Howard R. Young Correctional Institution in Wilmington.
[31] A53.
[32] *See infra* at (PAGE NUMBER NEEDED).

V. THE TRIAL COURT ERRED WHEN IT REVOKED COOKE'S RIGHT OF SELF REPRESENTATION AFTER THREE DAYS OF TESTIMONY WHEN THAT RIGHT COULD HAVE BEEN TERMINATED EARLIER WITH LESS PREJUDICIAL EFFECT TO THE DEFENSE.

Merits of Argument

A. The trial court's failure to act more swiftly in revoking Cooke's right of self representation caused unfair prejudice to the defense and impinged upon the State's interest in the integrity and efficiency of the trial process.

The trial court was within its discretion to revoke Cooke's right of self representation.[33] To minimize any unfairly prejudicial impact to the defense, however, the court should act promptly upon finding the defendant is incapable of continued *pro se* representation.[34] Moreover, swift action in revoking a defendant's *pro se* representation more effectively preserves the State's interest in the integrity and efficiency of the litigation.[35]

In the Case at bar, Cooke was forewarned that self representation would require that he be civil toward the court, the State, and witnesses giving testimony.[36] Cooke was further admonished that upon being granted

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[33] *Illinois v. Allen*, 397 U.S. 337 (1970).
[34] *See, e.g.* A249-250.
[35] *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162 (2000).
[36] A95-96.

the right to proceed *pro se*, he would nto be granted a continuance.[37] Early on in the proceedings, there were ample opportunities for the trial court to revoke Cooke's right of self representation and to substitute standby counsel. The court, however, gave Cooke the benefit of the doubt and permitted him to attempt to present his own defense and continue in his obstructionist behavior.

The record before this Court is replete with examples of Cooke's inappropriate behavior prior to opening statements that would justify revocation of his self representation rights. Immediately after being granted the right of self representation and being informed that a continuance would not be granted, Cooke requested and was denied a continuance.[38] During subsequent pre-trial proceedings one month before trial, Cooke again requested and was denied a continuance of the trial date.[39] The record also reflects several instances of Cooke directing disrespectful, derogatory remarks toward the trial judge when rulings were not in his favor.[40] Similar remarks were directed toward the State.[41] Any of the foregoing occurrences

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[37] A110.
[38] A110.
[39] A120.
[40] B32-36; B46-47 (Cooke referring to the trial judge as biased and racist).
[41] B46-47.

demonstrates Cooke's disregard for the requirement that he conduct himself with civility, thus giving the court sufficient justification to revoke his self representation right.[42]

Behavior that would justify revocation of Cooke's *pro se* rights came to a head during jury selection. At the time Cooke was granted the right to proceed *pro se*, he was warned that he would be bound by the rules of the court.[43] Notwithstanding the requirement that Cooke comply with the rules of procedure, the manner in which he exercised his peremptory strikes caused the State to raise multiple *Batson* challenges.[44] Specifically, Cooke's strikes were primarily against white female prospective jurors. When the State raised its *Batson* objections, Cooke was unable to provide race or gender neutral justifications and again directed improper remarks toward the court and the State.[45]

Cooke's reference to the State and the trial judge as racist and biased is not behavior that was to be unexpected. Throughout his first trial, Cooke would accuse the State, the trial judge, and his appointed counsel as

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[42] A94-96 (trial judge informed Cooke that he would behave himself and conduct his defense in a civil manner and failure to do so would result in loss of his right of *pro se* representation).
[43] A95-96.
[44] *Batson v. Kentucky*, 476 U.S. 79 (1986).
[45] B53-57.

alternately being racist or otherwise biased.[46] In light of the state of the record leading up to jury selection and the prior history in Cooke's case, Cooke's right of self representation should have been terminated long before it ultimately was. Based upon the record before the trial court and the tumultuous history of Cooke's case, it was no secret that Cooke would likely be unable to conduct his defense in a civil manner in compliance with the court's rules and directives.

Cooke's behavior early in the stages of his self representation would have amply justified the right being revoked at that time. The trial judge in this case must be commended for his patience in attempting to accommodate Cooke's right of self representation, however, by the time the court finally revoked Cooke's *pro se* right, the integrity of the trial proceeding had already been impugned. Because the court delayed in revoking Cooke's self representation right and the integrity of the trial had already been compromised, reversible error occurred.[47]

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[46] *Cooke v. State*, 977 A.2d 803 (Del. 2009).
[47] U.S. Const. amend VI; *Faretta v. California*, 422 U.S. 806 (1975); A215-250.

B. Revocation of Cooke's *pro se* representation three days into trial was constitutional deficient and prevented the rendering of the effective assistance of counsel.

The Sixth Amendment's right of self representation is fundamental to the due process of law, but the right is a limited one.[48] By the time the trial court revoked Cooke's *pro se* rights, three days into trial, he had already engaged in substantial obstructionist behavior (at times in the presence of the jury) and had already made improper obfuscatory remarks during his opening statement to the jury.[49] The revocation of Cooke's self representation right, therefore, came at a time when substitution of standby counsel resulted in a situation where counsel would be unable to adequately represent Cooke in light of the harm he had already done.[50] Moreover, the delay in revoking Cooke's self representation interfered with the State's interest in preserving the integrity an efficiency of the proceedings.[51] Because the trial judge unreasonably delayed in revoking Cooke's self

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[48] *Id.* at 835, n. 46.
[49] A157 (Cooke attempted to make reference to Bonistall's drug use, a matter that was previously excluded from evidence by the trial court in pretrial rulings).
[50] *United States v. Cronic*, 466 U.S, 659-62 (1984).
[51] *Martinez*, 528 U.S. at 162;

representation resulting in prejudice to both the State and the defense, the revocation is constitutionally deficient.[52]

[52] *Id.*; *Cronic*, 466 U.S. at 659-62; A252-259 (requiring that continuation of trial proceedings be delayed for several days to allow newly appointed standby counsel time to attempt to undue damage done to the defense by Cooke while acting *pro se*).

VII. COOKE WAS DENIED HIS RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT HELD THAT 11 *DEL. C.* § 3508 BARRED INTRODUCTION OF THE OCCURRENCE OF CONSENSUAL INTERCOURSE BETWEEN COOKE AND BONISTALL.

Merits of Argument

The State, in addressing the Argument ignores the Appellant's position that the Rape Shield Statute, codified at 11 *Del. C.* § 3508, should not have been applied to this case. In *United States v. Simpson*, the Court held that an interpretation of evidence is best left to the jury.[53] In the case at bar, the only allegation of rape was that made by the State in its indictment. The testimony of the Medical Examiner was that she could not render an opinion as to whether Bonistall was sexually assaulted, and further that the sexual contact could have been consensual.[54]

Cooke never challenged the statute itself, only its application to his case. The State's Answering Brief fails to address this specific issue.

Because there was neither a complaining witness to cross examine, nor a complaining witness upon which evidence may have been admitted pursuant to 11 *Del. C.* § 3509, the provisions of 11 *Del. C.* § 3508 were inapplicable.

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[53] 992 F.2d 1224 D.C. Cir. 1993).
[54] A204-205; A268-269.

VIII. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING LAY-OPINION TESTIMONY CONCERNING A MATERIAL FACT IN ISSUE.

Merits of Argument

As set forth in Cooke's Opening Brief, the defense submits that the trial court abused its discretion by allowing the chief-investigating-officer (hereinafter "CIO") to offer lay opinion testimony concerning the identity of the 911 caller.[55] In response the State argues that the trial court did not abuse its discretion and that the officer's testimony identifying Cooke as the 911 Caller was admissible pursuant to D.R. E. 901(5) and tangentially under D.R.E. 701. The appellant submits that the State's position is misplaced. The 911 caller used a disguised voice and there is nothing in the record indicating that the CIO ever heard Cooke using this disguised voice making his identification admissible under D.R.E. 901(5).[56] In order for the CIO's lay opinion to be admissible, it must satisfy D.R.E. 701(b) "helpfulness" requirement.[57] The trial prosecutor correctly informed the trial court that he was seeking to admit the introduction of the lay-opinion testimony pursuant to D.R.E. 701 and D.R.E. 901(5).[58] The trial court allowed the CIO to

[55] Op. Br. 66-81.
[56] Trial Tr., March 28, 2012 at 189-190.
[57] D.R.E. 701 (b) ("helpful to a clear understanding of [. . .] a fact in issue . . ."
[58] Trial Tr., March 28, 2012 at 129.

testify that the voice on the three 911 calls belonged to Cooke. Specifically, the State, referring to each of the 911 calls, asked the officer if he had an opinion as to identification of the voice on each of the 911 calls to which the officer opined that the voice was that of Cooke.[59]

A. The trial court abused its discretion by ruling that the CIO's lay-opinion testimony regarding the voice on the three 911 calls was admissible from an authentication stand-point.

Pursuant to D.R.E. 901(5), a voice on a recording can be authenticated by someone who is familiar with the speaker(s).[60] However, the comment to the rule states "the mere authentication of evidence under this rule does not necessarily mean the evidence is admissible under other rules."[61] Cooke asserts that the CIO's lack of familiarity with Cooke's disguised voice makes his identification inadmissible under D.R.E 901(5) and the trial court, therefore, clearly abused its discretion should this Court find that the trial court ruling was based solely upon D.R.E. 901(5).

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[59] Trial Tr. March 28, 2012 at 189-190.
[60] D.R.E. 901(5).
[61] D.R.E. 901.

B. Because the court failed to properly instruct the jury as to proper interpretation of lay-witness testimony, and because the State's use of the CIO's lay-opinion was not helpful to the jury in resolving a disputed fact in issue, the court abused its discretion by admitting such lay-opinion testimony.

As stated, *supra*, the trial prosecutor correctly sought admission of the CIO's opinion testimony under D.R.E 701. Cooke asserts that pursuant to D.R.E. 701, the trial court abused its discretion by allowing the CIO to present lay-opinion testimony identifying the voice on the 911 calls as being Cooke.

Under D.R.E. 701(a), Cooke submits that authentication is a prerequisite to admissibility of lay-opinion testimony, however, the analysis does not end with authentication. Pursuant to D.R.E. 701(b), the lay-opinion testimony must be helpful to a clear understanding of the witness' testimony or a determination of a fact in issue. Rule 701(b), therefore, is a safeguard against the introduction of lay-opinion testimony where the witness is in no better suited position than the jury to make the judgment in issue.[62] Similarly, lay-opinion testimony will fail the rule 701(b) "helpfulness"

[62] *United States v. Meises*, 645 F.3d 5, 24-25 (1st Cir. 2011)(internal citations omitted).

requirement "when the jury can readily draw the necessary inferences and conclusions without the aid of the opinion testimony."[63]

Cooke submits that this opinion testimony was not helpful because the jury had essentially the same degree of familiarity with Cooke's voice as the CIO. Firstly, Cooke elected to represent himself at trial so the jury was in a unique position to hear him speak at length. The jury heard his voice during his opening statement, when he would make legal arguments and during the three days of trial during his cross-examination of several of the State's witnesses. Secondly, the State admitted into evidence and played for the jury Cooke's video recorded police interrogation that was approximately forty-five minutes long. Thirdly, Cooke waived his Constitutional right to remain silent thus subjecting himself to direct and cross-examination before the jury.[64] Finally, Rochelle Campbell testified that the 911 caller was Cooke, however, she only recognized the 911 caller's voice as Cooke because it sounded like a disguised voice he had used in the past.[65] The CIO's testimony did not touch upon his familiarity with Cooke using a disguised voice nor did it educate the jury as to how he recognized the disguised voice as Cooke's based upon any distinctive cadence or

[63] *United States v. Sanabria*, 645 F.3d 505, 25 (1st Cir. 2011).
[64] A365-373.
[65] Op. Br. 67.

intonations of the 911 caller's voice when compared to Cooke's voice.[66] Clearly the CIO's lay-opinion testimony failed the helpfulness part of D.R.E. 701(b) and the trial court abused its discretion by allowing him to present lay-opinion testimony concerning the identity of the 911 caller. As stated in Cooke's Opening Brief, Rubin's testimony and its introduction was an attempt by the State to bolster Rochelle Campbell's inconsistent identification of Cooke as the 911 caller.[67]

In its Answering Brief, the State directs this Court to *Smith v. State* which dealt with the authentication of a letter written by a defendant.[68] This Court held that the trial court did not abuse its discretion by allowing a witness, who received a letter written by the defendant, to testify that the defendant wrote the letter because he was familiar with the defendant's handwriting so the letter was properly authenticated under D.R.E. 901(b)(2) dealing with authentication of handwriting.[69] The Court hoding was based in part upon the witness' familiarity with the defendant's distinctive use of words and nicknames that gave reliability to his authentication of who wrote

[66] Trial Tr. March 28, 2012 at 189-190.
[67] Op. Br. 78-81; *see also* D.R.E. 403 (prohibiting presentation of cumulative evidence or testimony).
[68] 902 A.2d 1119 (Del. 2006).
[69] *Id.* at 1124.

the letter.[70] Unlike *Smith*, the CIO in the case at bar had no familiarity with Cooke's alleged disguised voice. The *Smith* decision, therefore, is not helpful.

The State also relies on *United States v. Gholikan*, a decision from the United States Court of Appeals for the Eleventh Circuit to support its position that the trial court did not abuse its discretion in admitting the CIO's lay-opinion testimony under D.R.E. 701.[71] In the State's Answering Brief, the State cites the *Gholikan* decision concerning the analysis of the second prong of Federal Rule of Evidence 701 where the court stated:

> [w]e have held that lay opinion identification testimony was "helpful . . . to the determination of a fact in issue" where there was some basis for concluding that the witness was more likely to correctly identify the defendant from a surveillance photo than the jury. In this regard, we noted that the witnesses had become familiar with the defendant's appearance and facial features over time.?[72]

The *Pierce* decision cites to *United States v. LaPierre* for the holding that "a lay witness may give an opinion concerning the identity of a person depicted in a surveillance photograph *if there is some basis for concluding that the witness is more likely to correctly the defendant from the*

[70] *Id.*
[71] 370 F. App'x 987 (11th Cir. 2010).
[72] *Id.* (citing *United States v. Pierce*, 136 F.3d 770, 775 (11th Cir. 1998).

photograph than is the jury."[73] In *LaPierre*, a police officer testified, after reviewing bank surveillance photographs of a suspected bank robber, that the person depicted in the photograph was the defendant.[74] The Ninth Circuit held that because the jury could view the photographs and identify the perpetrator, the officer's testimony "ran the risk of invading the province of the jury and unfairly prejudicing" the defendant.[75]

The *LaPierre* decision was discussed at length in *United States v. Bush*.[76] In *Bush*, the defendant appealed his conviction arguing that the trial court abused its discretion when it allowed the investigating officer's lay-opinion testimony identifying the defendant's voice on one recorded conversation because it ran afoul of the Fed. R. Evid. 701(b) helpfulness requirement.[77] At trial, the investigating officer testified that he had three telephone conversations with an individual named J.R. in the hopes of facilitating an undercover drug buy. Only one of the telephone calls between eh investigating officer and J.R. was recorded. The officer also testified that he personally met and talked to the defendant on at least three occasions. Also the government introduced into evidence audio recordings

[73] 998 F.2d 1460, 14565 (9th Cir. 1993)(emphasis added).
[74] *Id.* at 1465.
[75] *Id.*
[76] 405 F.3d 909 (10th Cir. 2005).
[77] *Id.* at 917.

of Bush and J.R. The investigating officer was allowed to present lay-opinion testimony that he recognized the voice of Bush to be the same voice as J.R. The defense argued that because the jury heard the audio recordings of Bush and J.R., the officer's testimony was not helpful to the jury as required by Fed. R. Evid. 701(b).

The appellate court held that there was no abuse of discretion because the lay opinion testimony satisfied the second prong of Rule 701. Specifically, the court found that the office had spoken to Bush on three different occasions and had the direct opportunity to become familiar with his voice and to compare it to J.R.[78] Interestingly, in analysis of this issue, the appellate court noted that the jury was never able to hear Bush's voice in person because he exercised his right not to testify. Additionally, the jury was only able to hear audio recordings of one of the three face-to-face conversations between Bush and the officer and to listen to some of the telephone calls between the officer and J.R., because not all of the calls between the two had been recorded.[79]

In the case at bar, the jury was able to hear Cooke's voice during his opening statement, during legal argument before the court, and when he

[78] *Id.* at 917.
[79] *Id.*

cross-examined several State witnesses. The state also played for the jury Cooke's forty-five minute police interrogation and introduced the three contested 911 calls. Cooke also waived his Fifth Amendment right to remain silent and testified before the jury.[80] In light of the foregoing, the jury was in a unique position to hear Cooke's voice allowing them to compare his voice to the voice on the 911 calls. Rubin, therefore, was in no better position than the jury to determine whether Cooke's voice was on the three contested 911 calls. Rubin's lay-opinion testimony ran afoul of D.R.E 701(b)'s helpfulness prong and was impermissibly offered to bolster Rochelle Campbell's contradictory testimony.

Assuming this Court finds that the trial court abused its discretion, the error was not harmless. Delaware law on harmless error is well established. The Court has consistently refused to reverse a conviction for errors found to be harmless.[81] An error in admitting evidence may be harmless when the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction.[82] However, when the evidentiary error is of a

[80] A365-373.
[81] *Van Arsdall v. State*, 534 A.2d 3, 10 (Del. 1987).
[82] *McLaughlin v. State*, 628 A.2d 69, 77 (Del. 1998).

constitutional magnitude, the conviction may be sustained only if the error is harmless beyond a reasonable doubt.[83]

In the case at bar, the ultimate issue in fact was the identity of the person who committed the Harmon and Cuadra burglaries and the Bonistall murder. The defense was one of actual innocence in that the defendant testified that he did not commit the crimes. Cooke testified that he had consensual sexual intercourse with the victim before she was murdered, thus explaining the presence of his DNA.[84] There were no eyewitnesses to the Harmon and Bonistall crimes. The only eyewitness in the Cuadra burglary was the victim and she identified someone other than Cooke when presented with a photographic array of suspects.

Cooke repeatedly denied any involvement in the crimes. The defense submits that the case against the defendant was circumstantial at best. However, allowing the CIO to offer his lay-opinion identifying Cooke as the 911 caller allowed the State to link all of the crimes to Cooke. The erroneous admission of this lay-opinion testimony was not harmless and denied Cooke a fair trial. The court erred in admitting the CIO's lay opinion testimony eviscerating the defendant's actual innocence defense.

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[83] *Id.* (citations omitted).
[84] A367; A361.

In conducting the harmless error analysis, this court must take into consideration the trial court's jury instruction for expert witnesses. The trial court instructed the jury on expert witnesses and failed to instruct the jury on how to interpret lay-opinion testimony. The court instruction was as follows:

> THE COURT: "In this case you have heard the testimony of expert witnesses. Generally, a witness cannot testify as to their opinion or conclusions. Expert witnesses may state their opinions, and reasons for their opinions because of their education and experience in their field. You should give such expert testimony only the weight you feel it deserves. If it is not based upon sufficient education or experience, or if the reason given in support thereof are not sound, or you feel it is outweighed by other evidence, you may disregard it entirely."[85]

The trial court's failure to instruct on lay-witness opinion testimony taken in conjunction with its instruction on expert testimony compounded the error of admitting the challenged testimony. Under D.R.E 701, lay opinion testimony specifically excludes expert witness testimony.[86] By only instructing the jury about expert witness testimony, the court elevated the CIO's testimony from lay to expert witness testimony.

Based upon the foregoing, the court clearly abused its discretion by admitting the lay-opinion testimony of the CIO concerning voice recognition

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[85] A525.
[86] D.R.E. 701(c).

of the three 911 calls. Additionally, the court erred by only instructing the jury about expert witness testimony. The defense submits that the court's error was not harmless and denied the defendant a fair trial.

CONCLUSION

For the reasons and upon the authorities cited herein, the undersigned respectfully requests that this Court vacate Cooke's conviction and sentence of death and remand for a new trial.

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