



IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK HOWARD,)	
)	
Defendant-Below,)	
Appellant,)	No. 649, 2014
)	COURT BELOW: In the Superior
v.)	Court of Delaware, in and for New
)	Castle county
STATE OF DELAWARE,)	I.D. No. 0611014197
)	
Plaintiff-Below,)	
Appellee.)	

APPELLANT'S REPLY BRIEF

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I. THE STATE’S ANSWERING BRIEF CONTAINS MULTIPLE FACTUAL AND LEGAL INACCURACIES IN RELATION TO MR. HOWARD’S CLAIMS RAISED IN THE OPENING BRIEF.

A. The Standard of Review for Constitutional claims.

In response to all of Mr. Howard’s arguments raised in the Opening Brief, the State incorrectly claims that this Court should review for abuse of discretion. Answer pg. Opening pg. 7.¹ As Mr. Howard has argued, this Court reviews ineffective assistance of counsel claims *de novo*² and claims of a constitutional violation *de novo*.³ Opening pg. 7. Mr. Howard has alleged in the Opening Brief that the Trial Court and Trial Counsel’s actions have violated his Sixth and Fourteenth amendment rights under the United States Constitution and his rights under Article I §§ 4 and 7 of the Delaware Constitution. Opening pg. 7, 12, 16, 22, 27, 31. Thus, the State’s contention is incorrect and *de novo* review is the appropriate standard of review for Mr. Howard’s claims.

B. Trial Court error and ineffective claim regarding the single theory unanimity instruction argument.

In response to Mr. Howard’s argument that the Trial Court was required to provide a single theory unanimity instruction, the State incorrectly contends that

¹ The State’s Answering Brief is cited to as “Answer pg. _”

² *Swan v. State*, 28 A.3d 362, 391 (Del. 2011).

³ *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

*Probst*⁴ is distinguished and the unanimity instruction was not required. Answer pg. 11. However, the State failed to address Mr. Howard’s argument that the State presented and argued more “bets,”⁵ and other behavior⁶ than the number of counts in the indictment. Opening pg. 11.⁷ This error allowed the jury to impermissibly pick and choose which act would satisfy each count of the indictment without having to be in agreement as to which specific act Mr. Howard committed. *Id.*

The State also failed to address Mr. Howard’s argument that the State presented more than one conceptually different act for the other counts of the indictment, thus necessitating a single theory unanimity instruction for those counts. Opening pg. 11. Furthermore, the State, nor the Superior Court has identified which two “bets” the jury found Mr. Howard guilty of in relation to the sexual solicitation of a child counts or which acts the jury found that Mr. Howard exposed himself. Thus, while the jury

⁴ *Probst v. State*, 547 A.2d 114 (Del. 1988).

⁵ JK testified to being offered money on separate occasions to expose his buttocks while riding his bike and to swim nude in the Brandywine Creek. (T1:27-29; A35) He also testified to being offered money to go sit on Mr. Howard’s deck naked for one minute and on a separate occasion, perform 10 naked pushups on the same deck. (T1:29; 35) He also testified that Mr. Howard dared him to sit on a rock in the Brandywine creek, nude, for one minute. (T1:29; A35) BK testified to being offered money to swim nude. (T1:105; A54)

⁶ JK testified that Mr. Howard sat naked on a rock in a river while on a biking trip. T1:31; A36) Mr. Howard offered to measure JK’s penis. (T1:27; A35) Mr. Howard pulled JK’s pants down and looked at his private areas. (T1:61; 43) JK testified to nude massages and inappropriate touching with Mr. Howard squirting lotion on JK’s buttocks and scooped it up with his knuckle. (T1:71-4; A46-47) JK testified that Mr. Howard walked around in the apartment nude over twenty five times while JK was there. (T1:26; A35) BK also testified that Mr. Howard gave him massages down the front of BKs’ shorts. (T1:100-101; A53)

⁷ The Opening Brief on appeal is cited to as “Opening pg._”

agreed that Mr. Howard was guilty of sexual solicitation of a child due to two “bets,” there is no indication that was an agreement as to which bets (out of the large selection) Mr. Howard committed as the jury was not required to be in agreement. Since the State presented multiple independent acts which were conceptually different, *Probst* is applicable and was required in Mr. Howard’s case.

The State is also incorrect in contending that Trial Counsel was not ineffective for failing to request the single theory unanimity instruction or failing to file a motion for reargument as the instruction was not required. Answer pg. 14-6. As outlined in the Opening Brief, Trial Counsel admitted⁸ that he should have requested an instruction for the sexual solicitation charges. Opening pg. 12-3. Mr. Howard was also prejudiced as the State presented multiple independent acts which were conceptually different without a proper jury instruction being given in violation of *Probst*. Opening pg. 9-14. As such an instruction was required, either *sua sponte* by the Trial Court or by a request from Trial Counsel. Upon *de novo* review, this court should reverse and remand Mr. Howard’s case for a new trial.

C. Ineffective claim for failing to request a bill of particulars

In relation to Mr. Howard’s claim that Trial Counsel was ineffective for failing to request a bill of particulars, the State is incorrect when it contends that “the court’s

⁸ A97-98.

rejection of this claim can be affirmed because, as the court found earlier when considering this claim in Howard's pro se motion, Howard suffered no strickland prejudice from his attorney's failure to request a bill of particulars." Answer pg. 16. The State cites *Torrence v. State*⁹, in arguing that this Court may affirm on the basis of the Superior Court's rational in Mr. Howard's pro se Rule 61 proceeding.¹⁰ (Answer pg. 16) The State's reliance on *Torrence* is misplaced as this Court in *Torrence* rejected the Superior Court's rational for denying Torrence's post conviction motion but affirmed the holding as Torrence's claims on the grounds that the claims were procedurally barred. *Id.* at 2. As explained below, *Torrence* is distinguished.

The rationale in *Torrence* does not support the State's argument that this Court should affirm the denial of Mr. Howard' ineffective claim concerning the bill of particulars based off of another Superior Court's ruling when Mr. Howard was pro se. First, two different Superior Court judges heard arguments based on different facts and law as Mr. Howard was a pro se litigant when Commissioner Reynolds denied his post conviction motion.¹¹ However, Judge Davis heard the amended

⁹ 2010 WL 3036742 (Del. Aug. 4, 2010)

¹⁰ On August 19, 2013, this Court remanded the denial of Mr. Howard's pro se Motion for Post Conviction Relief to Superior Court for appointment of counsel, amended briefing, and reconsideration of the appellant's first motion for post conviction relief. (Exhibit B)

¹¹ See State's Exhibit A. Adopted by Judge Ableman. DE 78.

motion arguments after Rule 61 Counsel was appointed. Second, the *pro se* post conviction ruling should not be considered as this Court remanded the denial of that ruling for reargument and *reconsideration* of Mr. Howard's claims. Exhibit B (emphasis added) This Court's language in the order indicated that the Superior Court must take a fresh look at all of Mr. Howard's claims raised in an amended motion. Thus, the prior Superior Court's order denying Mr. Howard's *pro se* motion for post conviction should not be considered. Lastly, the rationale used in the *pro se* post conviction motion denial is flawed and incorrect. Commissioner Reynolds held¹² that Mr. Howard suffered no prejudice as Trial Counsel was given a pre-trial letter from the previous prosecutor outlining the charges and that Trial Counsel presented a chart to the jury outlining the events. State's Exhibit A at 14. As Mr. Howard has argued, the language of the pre-indictment letter did not match the indictment that was ultimately returned¹³ and the prosecutor at trial did not agree with the contents of the letter. Opening pg. 19. Furthermore, the *pro se* denial ignored Trial Counsel's admissions at oral argument that a request for a bill of particulars should have been filed¹⁴ and that Trial Counsel exhibited a mistaken belief that Mr. Howard was charged in relation to requesting or suggesting a child commit the act of

¹² Adopted by Judge Ableman. DE 78.

¹³ Contrast A21-22 with A23-28.

¹⁴ A59.

masturbation.¹⁵ Thus, the Superior Court's *pro se* post conviction denial should not be considered by this Court in deciding any of Mr. Howard's claims.

The State is also incorrect when it argued that the pre-indictment letter sent to Trial Counsel supports a conclusion that "Howard had been informed before trial as to the specific basis for each sexual solicitation charge." Answer pg. 17. The State does not address Mr. Howard's argument that the language of the pre-indictment letter outlining the possible charges did not match the indictment that was ultimately returned¹⁶ and the prosecutor at trial did not agree with the contents of the pre-indictment letter. Opening pg. 19. Furthermore, the indictment did not contain any facts which would make Mr. Howard aware of the factual basis for the charges. A23-28. Thus, the State's argument has no merit.

The State also cites to Trial Counsel's argument and exhibit during trial in support of its contention that Trial Counsel understood the charges and basis for the State's case. Answer pg 17. This argument is meritless as the State failed to address

¹⁵ At oral argument Trial Counsel stated that "in this particular case, there were three categories of potential prohibited sexual acts vis-a-vis [JK]: masturbation, sexual contact, and/or lascivious display of the genitals. With regard to [BK] there were only two, masturbation there was no evidence of masturbation and it was the latter two of lascivious exposure of the genitals and sexual contact.... It is certainly within the realm of genuine possibility that some of the jurors would say vis-à-vis [JK]. I think ah suggesting to him that it's a good idea to masturbate, uh that is prohibited sexual act...And with regard to [JK], there's masturbation. They're all in there." A86-87.

¹⁶ Contrast A21-22 with A23-28.

how Trial Counsel admitted that he focused his defense on the requesting or suggesting a child to commit the act of masturbation and not the “bets.” A86-96. This was evident on appeal as Trial Counsel challenged the constitutionality of 11 *Del. C.* § 1103(e)(3) (defining “masturbation” as a prohibited sexual act) for being void for vagueness, despite the fact that Mr. Howard was never charged with soliciting a child to masturbate.¹⁷ As such, it is apparent from the record that Trial Counsel did not have a firm understanding of the charges Mr. Howard was facing and therefore, the State’s argument is unpersuasive.

The State’s argument that *Dobson*¹⁸ is distinguished from Mr. Howard’s case because Trial Counsel’s decision not to request a bill of particulars was reasonable is also unpersuasive. Answer pg. 17. The State failed to specifically address Mr. Howard’s argument that *Dobson* and Mr. Howard’s cases are strikingly similar as trial counsel in both cases were not aware of which factual allegations were related to which charge of the indictment, uncharged crimes were presented to the jury without a limiting instruction, and half way through trial the State had to clarify for the court which factual allegations were allocated to which count of the indictment.¹⁹ Opening pg. 20. Furthermore the State failed to address Mr. Howard’s argument that this

¹⁷ See *Howard v. State*, 2009 WL 3019629*1 (Del. Sept 22, 2009).

¹⁸ *Dobson v. State*, 2013 WL 5918409 (Del. Aug. 13, 2013).

¹⁹ *Dobson v. State*, 2013 WL 5918409*1-2 (Del. Aug. 13, 2013).

Court's recent decision in *Luttrell*²⁰ sheds further light on the bill of particulars issue while sharing similar facts to Mr. Howard's case. Opening pg. 20.

In support of its argument that Trial Counsel was not ineffective for failing to request a bill of particulars and contending that *Dobson* is distinguished, the State cites to Trial Counsel's testimony explaining generally that it can be advantageous for defense counsel not to request a bill of particulars. Answer pg. 17. The State's representation of Trial Counsel's argument at oral argument is inaccurate as Trial Counsel later admitted that a bill of particulars should have been filed in this case. A90. Trial Counsel continued to explain to the Court how he missed the bill of particulars issue. *Id.* Additionally, Trial Counsel admitted that he relied on the previous prosecutor's assertions of the charges as he stated that, "I said how am I supposed to defend this stuff and [the previous prosecutor] gave me what each count was and he had mentioned masturbation so I went off on this as masturbation." A88. As Mr. Howard was never charged in relation to soliciting a child to masturbate, Trial Counsel's reliance on the previous prosecutor's assertion of the charges was unreasonable and it is apparent from the record that Trial Counsel's failure to request a bill of particulars was not sound trial strategy. *Strickland v. Washington*, 466 U.S. 668, 689 (1984). Thus, the State's argument that Trial Counsel's was not ineffective

²⁰ *Luttrell v. State*, 97 A.3d 70 (Del. 2014).

for failing to file a request for a bill of particulars is incorrect and *Dobson* is not distinguished.

The State is also incorrect when it argues that “Howard failed to explain how a bill of particulars would have altered or significantly aided the defense strategy in this case, which was a general denial of any wrongdoing.” Answer pg. 18. The State again does not address Mr. Howard’s argument that the focus of Trial Counsel was not in combating the “bets” but in defending the phantom charges in relation to soliciting a child to masturbate. Opening pg 19-21. Furthermore, Mr. Howard’s case is similar to *Dobson* and *Luttrell* in which counsel did not file a bill of particulars and proceeded to trial with inadequate knowledge of the case while allowing in prior bad acts.²¹ Opening pg. 20-21. As such, Mr. Howard has demonstrated prejudice and upon *de novo* review, this court should reverse and remand Mr. Howard’s case for a new trial.

D. Ineffective claim for failing to properly advise.

In response to Mr. Howard’s argument that Trial Counsel was ineffective for failing to properly advise Mr. Howard, the State references the prosecutor’s opening statement and asserts that Mr. Howard was aware what constituted sexual solicitation of a child. Answer pg. 19. The State does not provide any case law to supports its

²¹ *Dobson*, 2013 WL 5918409*1-2 (Del. Aug. 13, 2013); *Luttrell*, 97 A.3d 70 at 77.

argument that prior knowledge of the State's theory relieves trial counsel of his obligation to properly advise his client on the benefits and risks of testifying in ones own defense. Furthermore, both Trial Counsel and the Trial Judge were unaware of which counts of the indictment related to which acts and victims.²² If an experienced judge and attorney were unable to follow the State's theory of the case, then one would not expect a layman to comprehend the factual and legal basis for State's case. As such, the State's argument is meritless.

The State also did not address Mr. Howard's argument that Mr. Howard's testimony was an admission of several crimes: sexual solicitation of a child for a "bet" with each boy and walking around nude with a child in sight. Opening pg. 25-26. Nor does the State address Mr. Howard's argument that Trial Counsel admitted that he should have discussed the pros/cons of testifying. *Id.*

Additionally, the State incorrectly asserts that Howard's testimony was the only way a general denial of any wrong doing defense could have been presented. Answer pg. 20. A general denial of any wrong doing could still have been presented without Mr. Howard's testimony through cross examination of the alleged victims. As outlined in the Opening Brief, Mr. Howard would not have testified if Trial Counsel would have properly advised him concerning the pros and cons of testifying as well

²² See Affidavit of Joe Hurley, A97-104; Side bar discussion, A56-57.

as being advised that offering a financial benefit to a child to exhibit himself with partial or complete nudity constitutes a crime. Opening pg. 26.

Furthermore, the State fails to address how Mr. Howard was only found guilty of only two counts of sexual solicitation which most likely coincided with “two bets” Mr. Howard admitted to offering. Opening pg. 26. A logical inference can be made that Mr. Howard’s admission to the “two bets”, the massages, and the nudity, were the deciding factors in the jury’s mind of whether he was guilty as he confirmed parts of the testimony of the alleged victims. *Id.* Thus, without Mr. Howard’s testimony, the jury may not have found him guilty of the related counts of the indictment as there was no corroborating proof of any of the “bets,” massages, or exposes. As Mr. Howard suffered prejudice due to Trial Counsel’s ineffectiveness, the State’s contention is meritless and upon *de novo* review, this court should reverse and remand Mr. Howard’s case for a new trial.

E. Ineffective claim for failing to move in limine concerning Mr. Howard’s prior bad acts.

In response to Mr. Howard’s argument that Trial Counsel was ineffective for failing to file a motion in limine concerning Mr. Howard’s prior bad acts, the State incorrectly contends that Mr. Howard’s argument was waived. Answer pg. 21. The

State's reliance of *Ploof*²³ to support its waiver argument is misplaced and distinguished from Mr. Howard's case. In *Ploof*, this Court granted Ploof a ten page extension for his opening brief and then "Ploof proceeded to include approximately forty-five additional pages of argument by describing claims in single sentences and incorporating by reference the Superior Court briefs filed as part of his appendix." *Ploof*, 75 A.3d at 822. This Court then held that those claims were waived. *Id.*

Unlike *Ploof* in which the defendant attempted to incorporate single sentence arguments,²⁴ Mr. Howard did not incorporate any arguments from this Superior Court brief but was citing to where the issue was raised in the Superior Court. The State's argument is also incorrect when Mr. Howard's argument is viewed in its entirety as Mr. Howard argues that "the Superior Court's holding is incorrect as the State introduced uncharged prior bad acts which occurred both inside the State of Delaware and the surrounding states without a limiting instruction as to how the jury should use this evidence." Opening pg. 29. Thus, Mr. Howard clearly articulates how the Superior Court erred. Furthermore, the Superior Court did not conduct a *Getz* analysis but rather jumped to the conclusion that a limiting instruction should have been given but concluded that Mr. Howard was not prejudicial. Denial pg. 20. Mr.

²³ *Ploof v. State*, 75 A.3d 811 (Del. 2013)

²⁴ *Id.*

Howard's case is completely distinguished from *Ploof* as there was no incorporation of any arguments. As such the State's argument is unpersuasive.

The State also contends that the jury did not improperly use the out of state and uncharged conduct in reaching their verdict as Mr. Howard was only found guilty of two of the five counts of sexual solicitation of a child. Answer pg 22. As previously argued, a logical inference can be made that Mr. Howard's admission to the two bets, the massages, and the nudity, were the deciding factors in the jury's mind when determining whether he was guilty. *See* pg 10 *supra*. The State and the Trial Court failed to take into account that the out of state and uncharged conduct allowed the jury to impermissibly use that evidence to judge Mr. Howard's character. This tainted view of Mr. Howard more than likely caused the jury to find Mr. Howard's explanation of the "bets," massages, and exposures unpersuasive and decide that they were sexual in nature. Thus, the State's argument has no merit and upon *de novo* review, this court should reverse and remand Mr. Howard's case for a new trial.

F. Cumulative error claim.

The State's argument that there was no cumulative error in Mr. Howard's case is not persuasive. pg 22-23. As argued in the Opening Brief and throughout this Reply, Mr. Howard suffered prejudice warranting reversal as a *Probst* instruction was necessary, Trial Counsel was ineffective on multiple issues and an evidentiary

hearing is needed. As such, the State’s argument is not persuasive and upon *de novo* review, this court should reverse and remand Mr. Howard’s case for a new trial.

G. Denial of an evidentiary hearing or new affidavit from Trial Counsel.

The State is incorrect in arguing that “another affidavit or an evidentiary hearing was not necessary” in relation to Mr. Howard’s claim that Trial Counsel was ineffective for failing to move in limine concerning Mr. Howard’s prior bad acts. Answer pg. 24. Mr. Howard asserts that a sufficient record exists for this Court to reverse and remand Mr. Howard’s conviction for a new trial. However, if the Court does not remand for a new trial, Mr. Howard asserts that a remand is needed for an evidentiary hearing or for Trial Counsel to file a new affidavit to respond to the claims of ineffectiveness for failing to file a motion for reargument and failing to move in limine concerning the uncharged conduct. As this Court opined in *State v. Home*, 887 A.2d 973, 975 (Del. 2005), the production of Trial Counsel affidavits is the preferred practice in response to claims of ineffectiveness. Without a hearing or a new affidavit, the Court will not be able to rule on whether Trial Counsel’s actions were reasonable or unreasonable under *Strickland*. As such a new affidavit is needed if this Court does not grant reversal for a new trial.

The State is similarly unpersuasive when contending that “[t]o the extent that Howard argues more broadly that the court should have held an evidentiary hearing

on all issues, Howard fails to articulate what information such a hearing would have provided the court.” Answer pg. 25. The State’s assertion is incorrect as Mr. Howard does not argue that an evidentiary hearing is needed in relation to all claims raised but only for the ineffective claims relating to the motion for reargument and admission of uncharged conduct. Opening pg. 15, 30, 33.

Lastly, the State is incorrect when it asserts that “Howard’s concern for judicial economy on habeas review in federal court (Op. Brf. 35) simply provides no basis to conclude that the court abused its discretion in deciding the motion without an evidentiary hearing. “ Answer pg. 25-26. As demonstrated above and in the Opening Brief on pgs. 33-35, Mr. Howard has already provided a sufficient basis to demonstrate how the Superior Court erred below in failing to grant an evidentiary hearing or order a new affidavit from Trial Counsel. Remanding for either a new evidentiary hearing or order a new affidavit from Trial Counsel, would afford Mr. Howard a full and fair hearing by creating a sufficient factual record for review by this Court or a federal court. As such, the State’s assertion is incorrect.

CONCLUSION

WHEREFORE, based on the foregoing, Mr. Howard respectfully requests that this Court reverse and remand Mr. Howard's conviction and grant all appropriate relief.

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