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Case Number 150,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES SIMMERS,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	No. 150, 2015
	)	
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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DATE: June 26, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

James Simmers ("Simmers") was indicted on two counts of rape 4th degree and one count of indecent exposure second degree. (A7). A two day jury trial before the Honorable Diane Clarke Streett commenced on October 28, 2014. The jury returned a verdict of guilty on all counts. (A51).

On November 5, 2014 Simmers through defense counsel filed a motion for a new trial pursuant to Superior Court Rule 33. (D.I. #29). The State responded on November 21, 2014. (D.I. #32). By written decision dated February 18, 2015, the trial court denied Simmers' motion.[1]

Simmers was sentenced to 20 years at level V followed by various levels of probation.[2] This is his Opening Brief in support of a timely-filed appeal.

[1] See Order denying motion for new trial attached as Exhibit A.
[2] Sentencing Order attached as Exhibit B.

SUMMARY OF THE ARGUMENT

1. The record, when taken as a whole, clearly and convincingly establishes that Mr. Simmers is entitled to a new trial. Although the Superior Court applied the appropriate test to determine whether a new trial was warranted, the Court's findings were erroneous. The State, minutes before opening statements, revealed potentially exculpatory evidence concerning the complainant that unfairly prejudiced Mr. Simmers' ability to evaluate all discoverable evidence, present an appropriate defense strategy and probably would have changed the result at trial. As a result of this indisputably unfair prejudice, Mr. Simmers was denied due process of law and reversal is now required.

STATEMENT OF FACTS

On March 13, 2014 James Simmers was blindsided by claims that he engaged in inappropriate sexual conduct with the complainant, Elizabeth Ann Mason. These allegations were in no way substantiated by any physical or other evidence. Yet, Simmers, was required to answer to these claims.

The complainant was 27 years old at the time of the allegations. However, due to an intellectual disability she functioned at the equivalent of a teenager. (A12). The complainant maintained considerable independence as her mother allowed her to take walks alone around the neighborhood and to the local shopping center where she would get her nails done. (A12). Her mother also testified that she had a boyfriend at her place of work that she called her "fiancé". (A13).

The complainant testified that on March 12, 2014, while going for a walk, she encountered Simmers riding a bicycle, and followed him into the woods. (A16). She claimed that Simmers touched her breast, exposed his genitals and digitally penetrated her vagina and anus. (A14). When the complainant arrived home, instead of telling her mother what allegedly occurred she confided to an individual named Dwayne, one of her mother's tenants. (A11). Later that afternoon the police were notified. (A12).

The complainant underwent a sexual assault examination at Christiana Care. (A19). No injuries were discovered and no evidence of a sexual assault existed. (A22). Although the complainant and Simmers were both swabbed for DNA analysis, none was submitted for testing. (A24). At trial, the lead investigator on the case candidly admitted that he had made numerous mistakes in the investigation. (A26). This included but not limited to: writing his report four days before trial nearly seven months after the alleged incident occurred (A26); incorrectly reading the Sexual Assault Nurse Examiner ("SANE") exam (A26); not collecting the complainant's clothing for analysis (A26); failing to submit any DNA collected from Simmers and the complainant for testing (A27); failing to show the complainant a photograph of Simmers or a lineup to identify the assailant[3] (A27); failing to exam the scene of the alleged incident and collecting any shoe or tire prints; (A28) and taking the complainant to the scene for the first time a week before trial. (A28).

Despite the complainant providing no physical description of the suspect, and no physical evidence, Simmers was arrested and charged. (A24).

[3] The complainant testified that the first time she was shown a photograph to identify Simmers was a week before trial and it was conducted by the prosecutor. (A17).

I. IN THE INTEREST OF JUSTICE, SIMMERS MUST BE GRANTED A NEW TRIAL SINCE THE STATE DISCLOSED POTENTIALLY EXCULPATORY NEW EVIDENCE TO DEFENSE COUNSEL MINUTES PRIOR TO OPENING STATEMENTS WHICH DENIED SIMMERS DUE PROCESS BY UNFAIRLY PREJUDICING HIS ABILITY TO EVALUATE ALL DISCOVERABLE EVIDENCE AND PRESENT AN APPROPRIATE DEFENSE STRATEGY.

Question Presented

Whether the trial court abused its discretion by denying Simmers' motion for new trial when the State, minutes before opening statements, revealed potentially exculpatory evidence concerning the complainant that unfairly prejudiced Simmers ability to evaluate all discoverable evidence, present an appropriate defense strategy and probably would have changed the result at trial? The question was preserved by a motion for new trial. (A54).

Standard and Scope of Review

This Court reviews the denial of a motion for new trial for an abuse of discretion. *See Cabrera v. State*, 840 A.2d 1256, 1266 (Del. 2004) (*citing Blankenship v. State*, 447 A.2d 428, 433 (Del. 1982)).

Merits of Argument

On the day of trial, after jury selection and just minutes before opening statements, the State advised defense counsel that the complainant

had recently accused another person of sexual assault. The prosecutor advised that the incident was reported to him only hours before by the complaining witness' mother. The State could only advise that the other incident involved an intellectually disabled suspect and that the incident was never formally investigated or prosecuted by the police. The State could provide no other details other than it did not involve digital penetration similar to the incident before the Court. In its response to Simmers' motion, the State admitted that a social worker informed them, during jury selection, that the complainant mentioned a recent unrelated incident where she alleged that she was groped by a different person other than Simmers.[4]

A Delaware court should grant a motion for new trial pursuant to Del. Super. Ct. Crim. R. 33 if it appears that the evidence (i) is such as will probably change the result if a new trial is granted; (ii) is newly discovered, meaning it was discovered since trial, and the circumstances are such as to indicate that it could not have been discovered before trial with due diligence; and (iii) is not merely cumulative or impeaching. *See Wing v. State,* 538 A.2d 1114 (Del. 1988) *(citing State v. Lynch,* 128 A. 565, 568 (Del. Ct. O & T. 1925)); *State v. Hamilton*, 406 A.2d 879, 880 (Del. Super. 1974).

[4] *State v. Simmers*, 2015 WL 721292, at *1 (Del. Super. Feb. 18, 2015).

Applying the first prong, it is evident that the potentially exculpatory evidence, i.e. admission of the accusation of an unprosecuted sexual assault, would tend to discredit the complainant's statement and probably changed the result if presented to the jury. The instant case was not close. It was exceedingly weak. Here, the only evidence that Simmers was guilty of any of the three indicted charges was the testimony of the complainant. The State did not produce any other witnesses or physical evidence that corroborated her allegations. Moreover, the lead investigator on the case unabashedly testified that he had made countless mistakes in his handling of the case which more likely than not compromised the investigation. (A24-A27).

Turning to the second prong, since the evidence at issue was not divulged to defense counsel until minutes before opening statements, it was the functional equivalent of not being discovered until after trial. The newly discovered information about the complainant was not available for purposes of trial because defense counsel had insufficient time to appreciate its materiality and incorporate it into the defense strategy. *Lloyd v. State*, 534 A.2d 1262, 1267 (Del. 1987)(citing *Jones v. Scurr*, N.W.2d 905, 908–911 (Iowa 1982)). Therefore, the second prong has also been satisfied.

Finally, the record reflects that the newly discovered evidence was not merely cumulative or impeaching. Here, it is apparent that the State never sufficiently investigated the incident. Such information could have been relevant had the investigation determined that the complaining witness had falsely accused the other suspect or if the suspect was responsible for both incidents. Further, the information could have been relevant had the facts of that case been similar to the facts of the case at bar and the complainant was determined to be untruthful. The revelation that the complainant may have been involved in a similar encounter by a different suspect "throw[s] severe doubt on the truthfulness of the critical inculpatory evidence that has been introduced at trial." *United States v. Quiles*, 618 F.3d 383, 391 (3th Cir. 2010) ("District courts do not and should not ignore a claim that there has been a miscarriage of justice just because the newly discovered evidence supporting the claim could be categorized as impeaching in character."). Had the information been provided earlier than minutes before opening statements, the Court could have conducted a hearing outside the presence of the jury to make a determination of whether that allegation made by the complainant in the unrelated case was relevant and/or admissible in the instant case.

In sum, Simmers' motion for new trial was improperly denied, and this Court should reverse the ruling of the Superior Court and order a new trial. In the alternative, this Court should remand the case to the Superior Court and order an evidentiary hearing regarding the prior unrelated allegation of sexual assault.

CONCLUSION

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

\s\ Santino Ceccotti
Santino Ceccotti, Esquire

DATE: June 26, 2015