



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARRELL COLEMAN,)
)
 Defendant Below,)
 Appellant,)
) **No. 120, 2015**
 v.)
)
 STATE OF DELAWARE,)
)
 Plaintiff Below,)
 Appellee.)

APPELLANT'S OPENING BRIEF

**ON APPEAL FROM THE SUPERIOR COURT IN AND FOR
NEW CASTLE COUNTY**

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DATE: September 21, 2015

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NATURE AND STAGE OF THE PROCEEDINGS

Darrell Coleman (“Coleman”) was indicted for murder first degree, possession of a firearm during commission of a felony (“PFDCF”) and possession of a firearm by a person prohibited (“PFBPP”). (A-13). The PFBPP charge was severed and later *nolle prossed*. (D.I. #31).

Coleman went to trial on October 20, 2014. At trial the State introduced a videotaped out-of-court interview of its central witness, the decedent’s son, pursuant to 11 *Del.C.* § 3507. Prior to admission of the video, defense counsel objected for lack of proper foundation by the State on direct examination of the witness. However, the court permitted the interview to be played to the jury.¹ (10/24, 53).

Coleman was found guilty on both counts. (D.I. #63). He was sentenced on February 20, 2015 to life in prison. *See* Sentence Order attached as Ex. B.

Coleman filed a timely appeal. This is his Opening Brief as to why his convictions must be reversed.

¹ *See* Oral ruling attached as Ex. A.

SUMMARY OF THE ARGUMENT

1. The trial court committed reversible error by permitting the admission of the CAC interview from the State's central witness against Coleman. The State failed to lay an adequate foundation pursuant 11 *Del.C.* § 3507 as the witness's in court testimony did not sufficiently touch and concern the core substance of the events perceived by the witness as detailed in the out-of-court interview. Because section 3507 prohibits the introduction of such testimony without an appropriate foundation by the State, the trial court's refusal to exclude the statements requires Coleman's convictions to be reversed.

STATEMENT OF THE FACTS

Shortly after 10:00 p.m. on May 12, 2013, Wilmington Police responded to a radio call for shots fired in the area of 2699 North Claymont Street, Wilmington, Delaware. (A-50). Upon arrival police discovered Marvin Moore, the decedent, lying on the street with two gunshot wounds. (A-50). After searching his person, police discovered a loaded revolver between the decedent's thighs. (A-53-54).

At the time the decedent was living with his fiancé, Keena Dryden at 3 Jensen Drive, Wilmington, Delaware. (A-56). The decedent was scheduled to return his son, Marvin Moore Junior ("J.R."), to his biological mother earlier that evening. (A-57). The transfer was to take place at the WAWA on Route 13 in New Castle. J.R.'s mother sent Darrell Coleman, whom she was dating, as the intermediary for the pickup. (A-60). Because the decedent had an outstanding *capias* and he was concerned about police presence at the WAWA, he sent two friends, Tierra Battles and Dearius Riley, to drop off J.R. (A-68).

The decedent, Battles and Riley had all been drinking throughout the evening at a barbecue hosted by Dryden. (A-57; A-63). When Battles and Riley arrived at the WAWA to transfer J.R. to Coleman, a verbal dispute ensued that ended with the parties leaving. (A-61). The decedent became

visibly agitated and irate upon learning that Coleman had been sent to pick up his son. (A-64). This prompted the decedent to return to the WAWA to confront Coleman but when he arrived he was no longer there. (A-65). This only infuriated him further and he expressed his intent to kill Coleman. (A-70; A-73-74). The decedent was known to carry guns in the past and gave every indication he would use one on the evening at issue. (A-72; A-75).

The State introduced cell phone records that showed the decedent making multiple calls to Coleman's phone. Riley testified that during one of the conversations he overheard the decedent tell the individual on the other line to "meet him at the corner store". (A-66). Instead, the decedent drove back to Dryden's residence at Jensen Drive. (A-67). Shortly after arriving, Dryden, Riley and Battle heard gunshots. (A-62). Karina Bautista, a neighbor who lived across the street, told police that after she heard the gunshots she observed two separate cars speed away from the scene. (A-110-111). Dryden also testified that she saw different cars go past her on Claymont Street after the gunshots. (A-58-59).

Police obtained video surveillance footage from a convenience store near the area of 2619 North Claymont Street. (A-55). The surveillance footage from the convenience store appears to show Coleman talking on his cell phone. There is another male subject with him that remains

unidentified. At the end of the video Coleman is seen returning to his car and driving away. (A-106-109). However, none of the footage captured the shooting.

A few days after the shooting, the Delaware River and Bay Authority recovered a 9 millimeter revolver on the northbound catwalk of the Delaware Memorial Bridge. (A-77). Ballistics evidence connected the handgun to the shell casings found near the decedent. (A-76). However, the firearm was submitted for DNA testing and the results did not link it to Coleman. (A-78).

On May 13, 2013, J.R., age six at the time, was interviewed at the Children's Advocacy Center ("CAC"). (A-104). In his recorded interview J.R. stated that he was in the car with Coleman and witnessed him shoot the decedent. (A-43-45). The recorded interview was the only evidence that implicated Coleman as the shooter and became the strongest circumstantial evidence the State presented since no physical evidence connected Coleman to the shooting

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE STATE TO RELY UPON 11 DEL.C. § 3507 TO INTRODUCE THE PRIOR OUT-OF-COURT STATEMENT FROM ITS CENTRAL WITNESS EVEN THOUGH THE STATE FAILED TO LAY THE PROPER FOUNDATION.

Question Presented

Whether an out-of-court statement of a witness can be introduced into evidence under 11 Del.C. § 3507 when the witness does not testify as to the events he or she perceived that were the subject of the out-of-court statement? The issue was preserved by defense counsel’s objection to the admissibility of the out-of-court statement. (A-88-89).

Standard and Scope of Review

This Court “review[s] a trial judge’s decision on the admissibility of a 3507 statement for abuse of discretion.” *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006).

Argument

The trial court abused its discretion when it permitted the admission of J.R.’s CAC interview. The State failed to lay an adequate foundation pursuant 11 Del.C. § 3507 as J.R.’s in court testimony did not sufficiently touch and concern the core substance of the inculpatory statements from his CAC interview. Because section 3507 prohibits the introduction of an out-

of-court statement when the witness on direct examination does not testify as to the events underlying the statement, the CAC interview implicating Coleman was inadmissible. Thus, reversal is now required.

***J.R.'s CAC Interview Did Not Qualify For Admissibility Pursuant
11 Del.C. § 3507 For Lack Of Proper Foundation.***

On May 13, 2013, a forensic interviewer from the CAC conducted a recorded interview with J.R. in connection with this case. During his interview, J.R. recounted his recollection of what he observed on the evening in question and implicated Coleman in the decedent's shooting. More specifically, during his interview J.R. discussed the following events: [1] being in the car with Coleman after leaving the WAWA (A-32-33); [2] witnessing Coleman exit the vehicle next to a convenient store and approach the sidewalk (A-37; A-43); [3] witnessing Coleman pull a gun out of his pocket (A-45); [4] witnessing Coleman shoot the decedent and seeing the decedent on the ground (A-43-44); [5] hearing gunshots and leaving the scene (A-37).

J.R. testified at Coleman's trial. He acknowledged speaking with the CAC forensic interviewer and that he told her the truth. (A-88). However, none of J.R.'s testimony touched or concerned about what he observed, in particular the shooting, at 26th and Claymont Street on the night at issue. Instead, J.R. testified as to portions of the interview that were used in an

effort to make him feel comfortable in that setting. For example, he recalled playing soccer and eating ice cream with the decedent earlier in the afternoon. (A-86-87).

After J.R.'s direct examination was completed, the State moved for the admission of the CAC interview under section 3507. (A-88). Defense counsel objected to the admission of the interview on the basis that the foundation requirements had not been met because J.R.'s testimony failed to touch on the events he perceived that were detailed in the interview, i.e. the shooting, and made up the crux of the State's case. (A-88-91). The trial court sustained the objection and agreed that there "need[ed] to be a little bit more that touches on the events." (A-92-93).

The trial court State provided the State an opportunity to develop the testimony in order to meet the foundational deficiencies. Despite the additional questioning, J.R. still failed to testify concerning the events surrounding the shooting, that he was even in Coleman's presence or connected with him that evening. The only additional events that were touched on were that J.R. was driven to the gas station and went to his mother's house at the end of the night. (A-97-99). Once again, defense counsel objected on the basis that J.R.'s testimony did not touch upon the events described in the CAC interview. (A-100-101). However, the trial

court found to the contrary and ruled that the recorded CAC interview was admissible. (A-102-103).

Title 11, section 3507 of the *Delaware Code* provides:

(a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.

(b) The rule in subsection (a) of this section shall apply regardless of whether the witness' in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.

(c) This section shall not be construed to affect the rules concerning the admission of statements of defendants or of those who are codefendants in the same trial. This section shall also not apply to the statements of those whom to cross-examine would be to subject to possible self-incrimination.

In order to offer the out-of-court statement of a witness, the State, pursuant to *11 Del.C. § 3507*, is statutorily required to engage in direct examination of its witness as to both the events perceived or heard it alleges incriminates the defendant and the out-of-court statement itself. *Keys v. State*, 337 A.2d 18, 20 (Del. 1975).

“The Sixth Amendment requires an entirely proper foundation, if the prior statement of a witness is to be admitted under section 3507 as independent substantive evidence against an accused.” *Blake v. State*, 3 A.3d

1077, 1083 (Del. 2010). For nearly forty years this Court has consistently ratified and reaffirmed its holding that “a witness' statement may be introduced *only* if the two-part foundation is first established: the witness testifies about both the events and whether or not they are true.” *Id.* at 1078. These indispensable foundational requirements are one of the key reasons why the substantive operation of section 3507 does not violate the Sixth Amendment. *Id.*

Here, J.R. testified that his statement to the CAC forensic interviewer was truthful and he was also subject to cross-examination. However, he failed to testify about the events he perceived on the evening of May 12, 2013. “The admission of out-of-court statements is inextricably linked to the witness' ability to at least 'touch on the events perceived.” *Ray v. State*, 587 A.2d 439, 444 (Del. 1991).

In J.R.’s out-of-court statement that was replayed before the jury, he gave a detailed description of the shooting including the alleged actions of Coleman as the gunman. However, during direct examination, his testimony focused almost exclusively on portions of the interview that were used in an effort to make him feel comfortable in the CAC setting. None of his testimony had any relevance to what he perceived at 26th and Claymont on the night in question and the core substance of the CAC interview. Thus,

the recorded interview in this case was presented without the benefit of an appropriate foundation and should not have been admitted under section 3507.

The Prejudice From The Admission Of J.R.'s 3507 Witness Statement Cannot Be Deemed Harmless Beyond A Reasonable Doubt.

J.R.'s 3507 witness statements were not harmless beyond a reasonable doubt because they made up the sole basis for Coleman's conviction. An error in admitting evidence may be deemed harmless only when the properly admitted evidence, taken alone, is sufficient to support a conviction. *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991). The State's case against Coleman was exceedingly weak. The State offered no physical evidence connecting Coleman to the crime charged. Instead, the only evidence tending to suggest a link between Coleman and the shooting was brought out by the recorded CAC interview played in front of the jury. No other witnesses on behalf of the State provided any critical evidence that directly inculpated Coleman.² As a result, there can be little doubt that the 3507 statements contributed significantly to Coleman's conviction.

The CAC interview was the only evidence in the record that puts the

² In fact, the State's witnesses testified that the decedent had the intention of killing Coleman on the night at issue. (A-70; A-73-74).

gun in Coleman's hand. *See Blake*, 3 A.3d at 1083 (finding that the erroneous admission of witness statements under section 3507 without a proper foundation was not harmless beyond a reasonable because the only evidence that "puts the gun in Blake's hand" came from prior out-of-court statements). J.R.'s 3507 statement not only identifies Coleman as the shooter but also describes in detail Coleman's actions during the incident. The jury learned of these incriminating facts through the improper admission of the CAC interview.

The record makes evident that J.R.'s erroneously admitted 3507 statements made up the core of evidence advanced by the State that implicated Coleman in the shooting. So much so that it was the first sentence uttered during the State's closing argument and used more than once. (A-112-113). The CAC interview was clearly a principal factor in Coleman's conviction and thus cannot be harmless. The question is less complicated when the State's case is a strong one. However, for this Court to find that the effect of the error here did not cause actual prejudice and was thus harmless would be sheer conjecture against the backdrop of the State's feeble case. Therefore, the admission of the 3507 statements requires reversal of the conviction in order to ensure that Coleman is not deprived of his right to a fair trial.

CONCLUSION

For the reasons and upon the authorities cited herein, the undersigned counsel respectfully submits that Darrell Coleman's convictions and sentences must be reversed.

Respectfully submitted,

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