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Case Number 120,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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

STATE'S ANSWERING BRIEF

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Dated: October 26, 2015

TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE**

STATUTES AND RULES

NATURE AND STAGE OF THE PROCEEDINGS

Darrell Coleman ("Coleman") was arrested in connection with a shooting on May 12, 2013, near the corner of 26 and Claymont streets in New Castle County and later indicted on the charges of murder first degree (11 *Del. C.* § 636), possession of a firearm during the commission of a felony ("PFDCF") (11 *Del. C.* § 1447A) and possession of a firearm by a person prohibited ("PFBPP") (11 *Del. C.* § 1448). (A1, D.I. 3; A13-14).

The Court granted Anderson's motion to sever the PFBPP charge (A3, D.I. 16 & A6, D.I. 31). A jury was selected on October 13, 2014, and trial commenced for the remaining charges on October 20, 2014. (A10 at DI 63). The jury found Coleman guilty of murder first degree and PFDCF on October 27, 2014. (A10 at DI 63). Following a presentence investigation, Superior Court sentenced Coleman on February 20, 2015, to natural life plus 3 years at Level V. (Ex. B to Op. Brf.).

Coleman filed a timely notice of appeal and opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Denied. Superior Court properly admitted JR's Child Advocacy Center statement. Superior Court did not abuse its discretion in finding that the State laid a proper foundation under 11 *Del. C.* § 3507. JR's testimony sufficiently touched and concerned the substance of his 3507 statement.

STATEMENT OF FACTS

On Mother's Day, May 12, 2013, Marvin Moore, Sr. ("Moore") held a barbeque at the house he shared with his fiancé and their children in Riverside. (A56, 57, 96-97). Moore's then six-year-old son, "JR," was visiting that weekend as part of the regular weekend visiting arrangement that Moore had with JR's mother. (B5). JR played soccer with his brother and Moore. (A86-87). In the hours leading up to the time Moore was to return JR to his mother, Moore and Coleman, who was then the boyfriend of JR's mother, exchanged numerous phone calls. (B3, B68-77; State's Exs. 16, 31 & 32). It was arranged that Moore would drop-off JR at the Wawa near Memorial Drive in New Castle.

Before JR was dropped off, Moore and his friends "Hazel" and "ATL" went to Moore's friend's house near the Wawa. (A31; B30). While he was approaching his friend's house, Moore could be heard on the phone angrily telling a male voice on the other end that he was not going to let him pick up his son. (A74). When Moore finished the call, his friend tried to calm him down and explained that because Coleman was having a baby with JR's mother, Coleman would soon be family. (B28). While Moore and his friend talked, Moore's phone was "steady ringing," but Moore did not answer the calls. (B28-29). Moore's phone rang again when they finished talking, and Moore told the caller that he would drop JR off at

the Wawa. (B30). Moore's friend convinced Moore to allow Hazel and ATL to drop JR off. (B31).

At approximately 9:35 p.m.,[1] Hazel, ATL and JR arrived at Wawa and parked at the end of the row in front of the store. (B10; State's Ex. 18). Coleman, who was wearing a white shirt and had dreadlocks down to his waist, got out of his black Nissan sedan, which was parked by the gas pumps. (B10; State's Exs. 18 & 19). Hazel got out of the car with JR, gave him a hug told him goodbye. (B17; State's Ex. 18). Hazel asked Coleman where JR's mother was, Coleman asked her where Moore was, and the two began arguing. (A29-30; B9). At Coleman's instruction, JR walked to Coleman's black Nissan by himself and got in. (A30; State's Exs. 17 & 18). Coleman followed Hazel back to her car to continue arguing. (State's Ex. 18).

ATL tried to defuse the argument.[2] (B11-12, 20). He told Hazel to get back in the car and spoke to Coleman. (B12-13; State's Ex. 18). Coleman asked ATL, "Is Marvin your peoples?" and when ATL responded affirmatively, Coleman said, "Tell Marvin next time Marvin say something craze out his mouth I be at his front door." (B15). ATL asked Coleman if he wanted ATL to go get Moore, and

[1] The times listed for activities taking place at the Wawa are based on the timestamps in the Wawa videos. *See* State's Exs. 17-20.

[2] Although Hazel did not know Coleman, ATL knew Coleman. ATL had seen Coleman talking to a girl "a bunch of times" at the Wendy's where he worked and had talked to Coleman about Coleman's long dreadlocks. (B7-8, 20).

Coleman replied, "No. If Marvin was a man, Marvin would have came down." (B13). Coleman was still mad when ATL got back in the car with Hazel and left Wawa. (B17-18). Coleman and JR left the Wawa at about 9:38 p.m. (A28; B83; State's Ex. 17).

Hazel was irate when they returned to Moore's friend's house to get Moore. (B31). When Moore heard about the confrontation, he told his friend, "'I'm sorry, but I got to go take care of my business,' and he was going to go meet [Coleman] to fight." (B31). Moore, ATL and Hazel returned to Wawa at about 9:46 p.m., but Coleman was gone. (A65; B20; State's Ex. 20).

While Moore and his friends drove back to Riverside, Moore and Coleman were "snapping over the phone" in a "heated" conversation. (A63; B21). After Moore did not answer three calls from Coleman between 9:42 p.m. and 9:43 p.m., Moore called Coleman at 9:43 p.m. and the two spoke for about two and a half minutes.[3] (B85-86; State's Ex. 32). Moore and Coleman arranged to meet at a cornerstore in Riverside. (A63, 66, 73). Coleman called Moore again from his cell phone at 9:56 p.m. – about the same time that Coleman backed his black Nissan

[3] The times listed for phone calls are based on AT&T records for Coleman's phone. *See* State's Exs. 31 & 32. The call times from those records are also noted on the exhibits mapping the cell towers that Coleman's cell phone used as he drove to the Wawa, while he remained at the Wawa, as he drove to Peralta's Market, while he was at Peralta's Market, and as he fled from Peralta's Market. *See* State's Exs. 35-43.

down the one-way street and parked near Peralta's Market in Riverside.[4] (B78, 88-92; State's Exs. 21, 32 & 38). ATL heard Moore say, "You already at the corner store, so I'll be there in a little bit." (A66-67). Coleman got out of his car and stood, at times pacing back and forth, and at times making calls on his cell phone. (B87; State's Ex. 21). Among other calls, Coleman called Moore for a 1 second at 10:02 p.m., and again at 10:03 p.m., but Moore did not answer. (B90-91; State's Ex. 32). Coleman got back in his black Nissan, started to pull away, but abruptly stopped. (B94; State's Ex. 21).

During this time, Moore, ATL and Hazel arrived at Moore's house. (B5). Moore went inside, threw his phone on the kitchen table, and walked straight out the back door. (*Id.*). Moore walked a block to a block and a half to the sidewalk across the street from Peralta's Market. (B4). At approximately 10:03 p.m.,[5] Coleman got out of his car, ran diagonally back across the street between two cars, and shot Moore. (A37, 43-45; B96-97; State's Ex. 21). JR, who was still in Coleman's car, saw Coleman shoot his father. (A32, 43-44; B83-84; State's Ex. 21; Court Ex. 4). Coleman ran back to his car and took off.

When ATL heard gunshots, he ran inside Moore's house and asked Moore's fiancé and her brother where Moore was and whether they had heard gunshots.

[4] The video from Peralta's Market bore a date and time-stamp. *See* State's Ex. 21. State's Exhibit 21 consists of video from two separate cameras outside of Peralta's Market. *Id.*

[5] Police received reports of shots fired at 10:03 p.m. (B94).

(B22). When Moore's fiancé said that Moore had gone out the back door, the three ran out the back door towards Peralta's Market. (A59; B22).

A neighborhood resident looked out her window after hearing gunshots and saw a man with dreadlocks run from the sidewalk on her side of the street to a black or dark blue four-door car parked in the street, get in the car and "instantly" drive off down the street. (B32-39). Moore's fiancé saw a silver car and a black car drive by very fast. (A59). ATL saw "[Coleman] flying up the road in the same car that he was just in at the Wawa." (B22). Then, ATL and Moore's fiancé found Moore laying on the sidewalk shaking. (B6, 23). Although Coleman had fired five shots, Moore had been shot twice, once in the sternum and once in the right side of his face near his jaw. (A52; B2, 41-45). The police officer rendering medical aid pulled Moore's athletic pants down to look for wounds and then found a revolver that had not been fired on the ground between Moore's thighs. (A52-53; B24-27, 49-52). Moore died as a result of the gunshot wounds. (B1, 40; Court Ex. 1).

Although Coleman's cell phone records reflects 20 calls between Coleman's and Moore's cell phone in the hours before the shooting, the calls abruptly stopped after the shooting. (B97; State's Ex. 32). Within about an hour after the shooting, Coleman's cell phone was turned off and all calls went to voicemail. (B79-82; State's Ex. 32).

Two days later, the 9mm Smith & Wesson Glock handgun with an obliterated serial number that fired the 5 shell casings recovered from the crime scene was found on the Delaware Memorial Bridge. (B2, 43-45, 60, 65). It was located on the catwalk next to the right-hand lane of the roadway on the bridge going from Delaware to New Jersey. (A77; B53, 55-60, 67).

Police unsuccessfully attempted to locate Coleman in Delaware by executing search warrants at three different locations and checking a fourth location. (B98-99). The U.S. Marshal Service took Coleman into custody on May 31st in New Jersey. (B99-100).

I. Superior Court properly admitted the prior out-of-court statement of the decedent's young son.

Question Presented

Whether Superior Court abused its discretion in ruling that JR's testimony on direct examination satisfied the foundational requirements to admit his prior statement pursuant to 11 *Del. C.* § 3507.

Standard and Scope of Review

This Court reviews a ruling on the admissibility of a § 3507 statement for abuse of discretion.[6] "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice."[7]

Merits of the Argument

Coleman argues that the "State failed to lay an adequate foundation pursuant to 11 *Del. C.* § 3507 as JR's in court testimony did not sufficiently touch and concern the core substance of the inculpatory statements from his CAC interview." (Op. Brf. 6). Coleman contends that this asserted failure rendered JR's CAC interview inadmissible and mandates reversal.[8] Coleman is incorrect. Superior

[6] *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006); *Johnson v. State*, 878 A.2d 422, 427 (Del. 2005); *Feleke v. State*, 620 A.2d 222, 225 (Del. 1993) (citing *Smith v. State*, 560 A.2d 1004 (Del. 1989)).

[7] *Collins v. State*, 56 A.3d 1012, 1018 (Del. 2012) (citation omitted).

[8] Coleman does not assert that the State failed to meet any other foundational requirement to admit the statement pursuant to 11 *Del. C.* § 3507.

Court did not abuse its discretion in ruling that JR's direct examination sufficiently touched upon the events from his prior statement, thus rendering his statement admissible under section 3507.

Then eight-year-old JR testified at trial that he understood the difference between a truth and a lie (A81), and that when he spoke to "Miss Michele" he told her the truth. (A88). JR initially testified that he talked to Miss Michele about the last time that he saw his dad (A85), then testified that he was not sure whether he talked to Miss Michele about his dad (A86), and then testified that he had told Miss Michele about playing soccer with his dad and brother, and getting ice cream with his dad. (A87-87). JR testified that he does not remember the day that he played soccer with his dad and brother, but that he had talked about it with Miss Michele. (A87).

Superior Court then held a side-bar to discuss whether the State had met the section 3507 foundation requirements. The discussion focused on whether JR's direct testimony sufficiently touched on the events that were the subject of his CAC statement. (A88-93). The court ruled: "I do think that there needs to be a little bit more that touches on the events…. So, I am going to go ahead and sustain the objection, but give you an opportunity to develop that." (A92-93).

JR thereafter testified that the last time he saw his dad was the day he played soccer with his dad and brother. (A95). JR testified that his dad's friends, an adult

female and adult male, drove him to the gas station. (A97-98). JR testified that he did not remember where he went after the gas station. (A99). However, JR also testified that he went back to his mom's house in his mom's car. (A96-97). Although he could not remember who was in his mom's car, he remembered that he talked to Miss Michele about that. (A100).

Superior Court then held another sidebar to discuss the State's renewed request to admit JR's 3507 statement. (A100). Defense counsel argued, as Coleman argues here, that JR did not sufficiently testify as to the actual shooting at 26th and Claymont Streets. (A101; Op. Brf. 10). The court ruled:

> It seems to me that on direct he did talk about the events, who he was with, and that he went in his mother's car, that he slept at his mother's house, and he remembers telling the truth, and he talked to … Miss Michele about who was in the car.
>
> And I think that, to the extent that he can't remember between the time that – what happened in the 25 or 30 minutes that it took for him to get home, he clearly remembers that he was at his mother's house that evening, or stayed at his mother's house, and he clearly remembers details that do touch upon the events. So I am going to allow the statement to come in. (A102-03).

Superior Court's ruling was not an abuse its discretion. It is axiomatic that JR did not have to testify that he saw Coleman shoot his father to allow his CAC statement to that effect to be admitted pursuant to section 3507. As this Court has held, section 3507 does not "key the admission of the out-of-court statement to any

particular recall in court on the part of the witness."[9] "[T]here is nothing in the Statute or its intent which prohibits the admission of the statements on the basis of limited courtroom recall."[10] JR's testimony about being dropped off at the Wawa by his dad's friends (a boy and a girl), being driven in his mom's car, and then spending the night at his mom's house sufficiently touched on the events he perceived to allow admission of his statement. Even though he did not recall at trial who was driving his mom's car or where he went after leaving the gas station, his direct testimony placed him in the car that was seen on the Peralta's Market video approximately 20 minutes after it was seen on the Wawa video leaving with JR in the back seat, and his direct testimony made clear that he had discussed those very topics with Miss Michele.

This Court has recognized that "[o]ne of the problems to which the Statute is obviously directed is the turncoat witness who cannot recall events on the witness stand after having previously described them out-of-court."[11] While JR, a young child whose mother has had a baby with the defendant, would not be considered a classic turncoat witness, it is clear that he was a "witness who cannot recall events on the witness stand after having previously described them out-of-court."

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[9] *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975) (quoted in *Turner v. State*, 5 A.3d 612, 616 (Del. 2010)).

[10] *Id.*

[11] *Id.*

Importantly, this is not a case where "the only direct evidence concerning the commission of the offense … [was] presented through the testimony of third parties relating what the victim stated on a prior occasion."[12] Here, JR did not refuse to testify about the events as the child sexual abuse victim in *Ray* did.[13] And, here, the jury saw the video of JR's CAC statement, rather than hearing the out-of-court statement relayed by another person as in *Ray*.[14] The jury heard JR's exact words spoken the day after the murder and could judge his credibility and demeanor both on the basis of the video of the CAC statement and his live testimony. The jury, therefore, had a basis to judge the reliability of JR's CAC statement, which is the purpose of the foundational requirement that the witness's trial testimony touch on the events discussed in the out-of-court statement.

This Court's decision in *Burke* is instructive on this point.[15] In *Burke*, a witness who made pretrial statements implicating Burke in the rape of another woman, testified at trial that, due to a car accident and resulting coma, she lacked any memory of the victim, the events surrounding the rape, or the subsequent statements she made about the incident.[16] In finding admission of the witness's

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[12] *Ray v. State*, 587 A.2d 439, 444 (Del. 1991).

[13] *Id.* at 443-44.

[14] *Id.* at 444 (noting "the hearsay statements of the victim in this case were presented by her aunt and Detective Townsend").

[15] *Burke v. State*, 484 A.2d 490 (Del. 1984).

[16] *Id.* at 493-94.

out-of-court statements proper under section 3507, this Court, like in *Johnson*, was not dissuaded by the witness's limited recall – even though, like here, the witness testified to a current lack of memory.[17] The Court stated:

> We find adequate "indicia of reliability" to afford the jury a satisfactory basis for evaluating the truth of the prior statements in that (a) the statements made to the police officer and the social worker at the hospital had a trustworthiness akin to matters *res gestae;* (b) the reliability of the statement made the next day to the police detective was enhanced by its timing and its having been tape-recorded; and (c) the trustworthiness of the statement to the FBI was buttressed by the credibility of the FBI personnel and the presence of a member of the Bar. These factors were indicia of reliability sufficient, in our view, to afford the jury a satisfactory basis for evaluating the truthfulness of the statements.
>
> Moreover, with [the witness] on the stand, the trustworthiness of her prior out-of-court statements could have been tested by defense counsel. The genuineness of her limited recall was open to cross-examination and her demeanor on the stand was subject to the jury's scrutiny in weighing the truthfulness of her statements. The following thought of Judge Learned Hand is appropriate:
>
> > The possibility that the jury may accept as the truth the earlier statements in preference to those made upon the stand is indeed real, but we find no difficulty in it. If, from all that the jury see of the witness, they conclude that what he says now is not the truth, but what he said before, they are none the less deciding from what they see and hear of that person and in court. There is no mythical necessity that the case must be decided only in accordance with the truth of words uttered under oath in court.

[17] *Id.* at 494 (quoting *Johnson*, 338 A.2d at 127).

> *DiCarlo v. United States*, 2d Cir., 6 F.2d 364 *cert. denied*, 268 U.S. 706, 45 S. Ct. 640, 69 L. Ed. 1168 (1925).[18]

Here, like *Burke*, there was a sufficient basis for the jury to judge the reliability of JR's CAC statement, and it was properly admitted under section 3507.[19]

Although Superior Court's proper ruling renders a harmless error analysis unnecessary, the State notes that Coleman's argument that JR's statement was "the sole basis for Coleman's conviction" is incorrect. (Op. Brf. 11). Coleman's claim that "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" is belied by the other three and half days of evidence presented by the State, including:

- the videos at Wawa showing Coleman arguing with Hazel and ATL when they dropped off JR;
- the testimony of Hazel and ATL about Coleman's anger towards Moore and the subsequent calls between Coleman and Moore arranging to meet at the cornerstore;

[18] *Id.* at 496 (emphasis added).

[19] *See id. See also Berry v. State*, 2013 WL 1352424, at *3 (Del. 2013) (finding no error where witness "gave an out-of-court statement recalling certain events, and then when he was on the witness stand he claimed he had no memory of those same events when questioned about them").

- the cell phone records documenting that 20 calls were made between Coleman and Moore before the murder, but Coleman made none to him after, and the phone was turned off about an hour after the murder;
- the cell phone tower maps tracking Coleman's movement to Wawa and then to Peralta's Market;
- the video at Peralta's Market showing Coleman arriving, waiting and talking on his cell phone at the same time as the records showed calls. The video also showed Coleman starting to leave, but then stopping, getting out of his car, running over to where Moore's body was later found, running back to his car and fleeing;
- the testimony of a neighborhood resident that, after hearing gunshots, she saw a man with dreadlocks running to a dark colored sedan that took off;
- despite efforts to do so, police could not thereafter locate Coleman in Delaware and he was taken into custody by the U.S. Marshal's Service in New Jersey; and
- the murder weapon was found two days after the murder on a catwalk on the Delaware Memorial Bridge on the northbound (towards New Jersey) side of the bridge.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Dated: October 26, 2015

CERTIFICATE OF SERVICE

I, Karen V. Sullivan, Esq., do hereby certify that on October 26, 2015, I have caused a copy of the State's Answering Brief to be served electronically upon the following:

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