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Case Number 338,2015

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOSHUA STEPHENSON, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	))))))))))	No. 338, 2015

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING BRIEF

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DATED: February 17, 2016

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NATURE AND STAGE OF THE PROCEEDINGS

The Defendant was arrested in December 2012 and later indicted for murder first degree, possession of a firearm during the commission of a felony, possession of a firearm and ammunition by a person prohibited, offensive touching, and endangering the welfare of a child. He was convicted of murder second degree and endangering the welfare of a child after a jury trial. The Superior Court granted a motion of judgment of acquittal as to the assault third degree charge and instructed the jury on the included offense of offensive touching which the jury acquitted him on. In a bench ruling following his jury trial, the Superior Court convicted the Defendant of the severed charges of possession of a firearm and ammunition by a person prohibited. (A1, 13).

The Defendant sentenced to life imprisonment on the murder second degree offense, ten years imprisonment on the possession of a firearm during the commission of a felony offense, fifteen years imprisonment suspended after ten years on the possession of a firearm by a person prohibited offense, and one year suspended imprisonment on the endangering the welfare of a child offense. Exhibit A attached to Opening Brief.

A notice of appeal was docketed for the Defendant. This is the Defendant's opening brief on appeal.

SUMMARY OF THE ARGUMENT

1. The Superior Court should have permitted the Defendant to introduce expert psychiatric testimony concerning his state of mind at the time of the offense.

2. The Superior Court should have permitted the Defendant to present a justification defense to the jury.

STATEMENT OF FACTS

On Christmas Eve, 2012, Ruth Ann Stephenson lived at 1203 West Second Street in Wilmington along with her six year old son, Myron Ashley, Jr. ("Myron, Jr."), and her son's father, Myron Ashley Sr. (Myron Sr."), who, after being released from incarceration, had returned to live at the residence about a week before then. The Defendant, Joshua Stephenson ("Josh"), her brother, had also resided there previously but had moved out to their grandparent's house several miles away where he had been staying for about a week. (A88, 93, 95; pp. 143-146, 165, 173).

When Ms. Stephenson returned to her home from a double shift of work, Myron Sr. told her that her brother Josh had called and had asked to come over. She returned his call and said he could. Meanwhile, she and Myron Sr. were on the living room sofas watching YouTube videos. She also cooked supper. At around 7 p.m., Josh arrived and soon thereafter she sent Marvin Jr. upstairs for a bath. Meanwhile, she and Marvin Sr. talked with Josh. She testified that there was no argument or tension and that they talked with Josh for about 45 minutes, with Josh talking about girls. She then went upstairs and drew the bath water for Myron Jr., but then lied down momentarily and fell asleep. (A89, 93; pp. 147-150, 166).

Ms. Stephenson testified that she was later awakened by the sound of two

gunshots downstairs. She ran downstairs, Myron Jr. later following her, and saw Josh sitting on the small love seat in the living room. She saw Myron Sr. lying prone, face-up, on the floor in front of the opposite sofa. She testified that she yelled at Josh, "What did you do?", and grabbed at him. She testified that Josh then punched her in the face and left quickly. She then checked Myron Sr.'s pulse, found none, realized he had been shot, and called 911. When police arrived, she testified that she was hysterical, left with the police and gave them an account of what she saw and heard. (A90-91, 95; pp. 151-155, 172-173). She testified that she was not aware of any gun being in the house, never saw Josh holding a gun in the house, and had never before seen the .45 cal. semi-automatic handgun that police had found lying on top of the love seat cushion (A90-91, 95; pp. 151, 158, 171). She testified that she also did not recognize the knife that police found on the floor underneath the sofa, did not see anything in Josh's hands when he came over, and that she had not seen before or seen anyone eating the open container of Chinese food that police found in the living room. (A91-92; pp. 156-160).

Myron Ashley Sr.'s death was caused by two gunshot wounds that entered his opposite upper arms and penetrated and exited his chest torso. (D.I. 102, 1/7/15, pp. 11-29). Police recovered four spent shells in the living room, and an expended bullet lying on the floor across the room from where the gun

was recovered. There were two gunshot holes in the sofa and cushions and bullet entrance holes in the living room wall behind the sofa and underneath the sofa but those bullets were not recovered. (D.I. 101, 1/6/15, pp. 85-127).

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S REQUEST FOR THE JURY TO CONSIDER A DEFENSE OF JUSTIFICATION AND SUPPORTING EXPERT TESTIMONY FOR THAT DEFENSE.

Question Presented

The question presented is whether the Superior Court erred in precluding the Defendant from arguing a justification defense by denying a justification defense instruction to the jury and excluding expert psychiatric evidence supporting that defense. The question was preserved for review by the Defendant's proffer of the defense and request for a justification instruction which was denied by the Superior Court. (A56-71, 111-126).

Standard and Scope of Review

The scope or review is abuse of discretion as to trial court's denial of a defendant's right to present favorable evidence. *Wonnum v. State*, 942 A.2d 569, 573 (Del. 2007). The standard and scope of review is *de novo* as to the Superior Court's denial of a defendant's requested jury instruction. *Id.*; *Gutierrez v. State*. 842 A.2d 650, 651 (Del. 2003).

Argument

A. The Superior Court erred by not permitting the Defendant to introduce expert psychiatric testimony concerning his mental illness that was relevant to his hyper-acute and defensive mental state that would be relevant to the defense of self-justification.

Before trial, the State moved to exclude the testimony of Susan Rushing,

M.D., a psychiatrist who had examined the Defendant on the ground that her clinical findings concerning the Defendant's mental state were not reliable and not relevant to the defense of justification.[1] (A21-30). Among Dr. Rushing's findings after her review of the Defendant's history, records, and clinical examinations was her diagnosis that the Defendant suffered from the mental illness of "Schizoaffective Disorder, bipolar type." (A23, 40, 43). Among her findings were that the "hallmark feature" of the Defendant's psychosis was that it was "characterized by delusions and hallucinations that typically occur without the patient understanding the pathological nature of the experience." A40. She also opined that the Defendant's history evidenced delusions which are "erroneous beliefs that usually involve a misinterpretation of perceptions or experiences." (A40). She also stated that a person with the Defendant's schizophrenic condition would have "problems with making sense of information." (A40). He would also "experience a disturbance in major areas of functioning such as … interpersonal relationships…." Based on her review of the Defendant's records, including reports of the evidence the prosecution intended to produce at trial, and her clinical examination of the Defendant, she observed that the Defendant's mental state was characterized by "auditory

[1] "The use of deadly force is justifiable under this section if the defendant believes that such force is necessary to protect the defendant against death, serious physical injury, kidnapping or sexual intercourse compelled by force or threat." 11 *Del. C.* § 464(c).

hallucinations and paranoia." (A41). Based on all this, she concluded that "Mr. Stevenson was in a manic state on Christmas Eve 2012." (A41). Based on Dr. Rushing's psychiatric findings, the Defendant's counsel contention that the Defendant was mentally ill at the time of the offense was amply supported. (A56-58).

The Superior Court expressed concern that Dr. Rushing should not be permitted to express a legal conclusion that the homicide was justifiable due to the Defendant's mental illness or introduce the Defendant's hearsay account of the homicide without his testimony. Defendant's counsel assured the Court and the State that her testimony was not being offered for that purpose because it would be irrelevant and inadmissible. (A59-64). The Defendant's counsel stated that Dr. Rushing's would be relevant "to say a person who is paranoid or hypervigilant or has the diagnosis that Mr. Stephenson had would be at a higher sense of alert…." (A61, p. 13). The Superior Court agreed that the Defendant's state of mind was relevant and that testimony to that effect would be "fine." (A61, p. 13). The Superior Court also agreed that it was the Defendant's subjective state of mind that was relevant under section 464, not what a reasonable person might do. A63 (p. 20).

One week later, the Superior Court reversed course and ruled that, while Dr. Rushing's testimony would ordinarily be admissible "to show how the

defendant perceived the events at the time," her testimony would not be admitted because her "report does not address that … she does not say anything about his mental state at the time of his – of the alleged shooting" (A67, p. 30). The Superior Court added that "[s]he says nothing in her report that would tell us how Mr. Stephenson perceived the events of December 24." (A67, p. 32). In its following memorandum opinion, the Superior Court again emphasized that "[t]here is nothing in Dr. Rushing's report addressing how defendant perceived events on December 24 and therefore her testimony will not assist the trier of fact on the issue." (A80). That ruling is plainly not supported by the facts and Dr. Rushing's report. In her report, Dr. Rushing discussed at length the Defendant's "Schizoaffective Disorder, bipolar type," (A23, 40, 43), and its "hallmark feature … characterized by delusions and hallucinations that typically occur without the patient understanding the pathological nature of the experience." (A40). She discussed the Defendant's delusions which are "erroneous beliefs that usually involve a misinterpretation of perceptions or experiences." (A40). She observed that in his schizophrenic condition, he would have "problems with making sense of information." (A40). He would also "experience a disturbance in major areas of functioning such as … interpersonal relationships…." (A41). Based on her review of the Defendant's records, including reports of the evidence the prosecution intended to produce at trial,

and her clinical examination of the Defendant, she observed that the Defendant's mental state was characterized by "auditory hallucinations and paranoia." (A41). Most significantly, while the Superior Court stated that Dr. Rushing's testimony was irrelevant and inadmissible because she did not specifically address his mental state on December 24, her report plainly contradicts the Superior Court's finding: "Mr. Stevenson was in a manic state on Christmas Eve 2012." (A41).

In addition, the Superior Court also ruled in its memorandum opinion that Dr. Rushing's testimony was inadmissible as a discovery violation under Criminal Rule 16 because she did discuss the Defendant's mental condition on the night of December 24 and that therefore the State did not have "fair notice that Dr. Rushing would testify about how his mental condition affected his perception of the events on December 24." (A83). That is likewise an abuse of discretion because Dr. Rushing's report plainly states, among many other psychiatric observations concerning his mental condition, that, "Mr. Stevenson was in a manic state on Christmas Eve 2012." (A41). Furthermore, what is also remarkable about the Superior Court's rationale that Dr.Rushing's testimony was inadmissible due to a defense discovery violation is that State had never raised or argued a discovery violation in arguing that Dr. Rushing's testimony should be excluded. Plainly, the State never thought there was a discovery

violation or it would have raised the issue. The State was competent enough to raise numerous other issues in order to exclude Dr. Rushing's testimony. It did not raise a discovery issue because there was no discovery issue with Dr. Rushing's report. Even if there had been, this occurred six months before trial and the State could have cured any prejudice with contrary testimony, but there was no prejudice because the State didn't assert any. This was a punishing decision where there was no prejudice and the remedy was unrelated to any conceivable harm. Sanctions for discovery violations should not be imposed where there is no prejudice to the opposing party. *Fuller v. State*, 922 A.2d 415, *14 (Del. 2007) ("We therefore conclude that although the State did not adequately comply with Superior Court Criminal Rule 16, Fuller has not shown that he was substantially prejudiced by the State's discovery violation.").

Dr. Rushing should have been permitted to testify concerning the Defendant's mental condition on the night of the alleged offense:

> [T]he report contained more than a psychological diagnosis; it also contained an opinion on why [the defendant] would legitimately perceive (or by inference any reasonable person similarly situated) [the decedent] to be a threat. Expert testimony is relevant if it "will assist the trier of fact to understand the evidence or to determine a fact in issue[.]"

Wonnum v. State, 942 A.2d 569, 573 (Del. 2007) (internal citation omitted). The Superior Court abused its discretion by not permitting her to do so.

B. A defendant is not required to waive his privilege against self-incrimination and testify in order to present a justification defense to the jury

Six months later, during trial, the Superior Court denied the Defendant's request for a justification defense instruction.[2] The Superior Court explained that:

> There is simply no credible evidence that there was any confrontation at all before the weapon was fired. There's no indication of whatsoever of a struggle before the weapon was fired. There was no indication of an argument before the weapon was fired. And indeed, I find there is no indication of a struggle at all.
> ******
> But more importantly, I don't see there was any evidence of a struggle or some sort of confrontation before the weapon was fired that would have given rise to a belief on the part of the defendant that his life was in danger or that he was in danger of serious injury, so I'm going to decline to give an instruction.

(A126, pp. 55-56).

In *Guiterrez v.State*,[3] the Court explained that the trial judge's role as gate-keeper is to ensure that the defense describes a situation "that is within the realm of possibility," and that "[o]nce a judge determines that the defense is 'credible' in the sense of being possible, he or she should submit to the jury the question of which version of the facts is more believable and supported by the

[2] A justification defense is permitted by statute. 11 *Del. C.* § 464. A justification defense need only raise a reasonable doubt as to the Defendant's guilt of the charged offense and the jury must be instructed accordingly. 11 *Del. C.* § 303(c).

[3] 842 A.2d 650, 652 (Del. 2003).

evidence as a whole." *Id*. at 653. *See also Wonnum v. State*, 942 A.2d at 574 ("[W]hen the defendant presents some evidence capable of being believed, on each of the elements of an affirmative defense, whether the defendant has proved the affirmative defense by a preponderance of the evidence is a jury question").

The chief investigating police officer in this case admitted at trial that, "… I can't sit here and tell you exactly what happened in the house." (A109, pp. 231). Under these circumstances, it was possible and plausible that the Defendant used deadly force in self-defense and even that it was the decedent's gun that was used. An argument to that effect could have been made to the jury based on the evidence or absence of evidence, but there was no justification instruction to give possible effect to such an argument. The Court has acknowledged that a jury is capable of deciding "which version of the facts is more believable and supported by the evidence as a whole." *Guiterrez*, 842 A.2d at 653. A justification defense is permissible if it is "within the realm of possibility" that the Defendant had used deadly force to counter a similar threat against him. *Id*.. A properly instructed jury should have been permitted to consider that defense in this case. *Wonnum v. State*, 942 A.2d at 575 ("It should have been they, and not the trial judge, who answered the questions of whether a reasonable person in [the defendant's] situation would have been able to find

legal alternatives to … shooting the victim").

Furthermore, the excluded psychological report and Dr. Rushing's barred testimony would have provided "*some credible evidence* to support a [justification] instruction." *Wonnum*, 942 A.2d at 574 (emphasis in original).[4] The Defendant had no burden to present evidence to the jury. The State had the burden of persuading the jury that a defense of justification did not raise a reasonable doubt as the Defendant's guilt. Under these circumstances, the Defendant should have been permitted to present and argue his defense to the jury.

[4] *See also People v. Saavedra-Rodriguez*, 971 P.2d 223, 228 (Colo. 1998) ("The quantum of evidence that must be offered by the defendant in order to be entitled to an instruction on a theory of defense is 'a scintilla of evidence'").

CONCLUSION

For the reasons and upon the authorities cited herein, the Defendant's convictions and sentences should be reversed.

Respectfully submitted,

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DATED: February 17, 2016