EFiled: Jan 03 2017 07:59PM EST
Filing ID 60017541
Case Number 379,2016

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| REUEL RAY, | ) | |
| | ) | No. 379, 2016 |
| Defendant Below-Appellant, | ) | |
| | ) | |
| | ) | Court Below—Superior Court |
| v. | ) | of the State of Delaware |
| | ) | in and for New Castle County |
| STATE OF DELAWARE, | ) | ID No. 1210020570A |
| | ) | |
| Plaintiff Below-Appellee. | ) | |

# APPELLANT'S OPENING BRIEF

**Law Office of Kevin P. Tray**

/s/ *Kevin P. Tray*
Kevin P. Tray, Esquire
Delaware I.D. No. 5280
1215 N. King Street
Wilmington, DE 19801
(302) 658-5400
Attorney for Appellant

Dated: December 31, 2016

TABLE OF CONTENTS

## TABLE OF CITATIONS

Statutes

## NATURE OF PROCEEDINGS

Ray was indicted on November 5, 2012 and charged with two counts of Murder in the First Degree, one count of Attempted Robbery in the First Degree, six counts of Possession of a Firearm During the Commission of a Felony, one count of Conspiracy in the Second Degree and one count of Possession of a Firearm by Person Prohibited for the killing of Craig Melancon.[1] The State subsequently added two additional counts of Criminal Solicitation in the Second Degree. Trial began on January 12, 2015 and ended on January 23, 2016. The jury returned a verdict of not guilty on one Murder in the First Degree (Count I- Felony Murder)) charge and the two associated Possession of a Firearm During the Commission of a Felony charges (Counts II and III). The jury returned a finding of guilty on the remaining charges.[2] Ray was sentenced to Life in prison on the Murder in the First Degree charge and additional Level V time on the remaining charges for a combined sentence of Life plus seventeen years followed by

---

[1] Refer to Docket. A1. The Possession of Firearm by a Person Prohibited charged was severed prior to trial and the State entered a *nolle prosequi* on that charge at the time of sentencing. Sentencing Transcript page 5. A321.

[2] At sentencing, the State entered *nollo prosequi* on one Possession of a Firearm During the Commission of a Felony charge associated with the Attempted Robbery in the First Degree charge (Count VI) and one associated with the Murder in the First Degree Charge (Count IX). Sentencing Transcript page 3. A319.

probation.[3]

A timely notice of appeal was filed. This is Ray's Opening Brief.

[3] Refer to Sentencing Order attached as Exhibit A.

## SUMMARY OF THE ARGUMENT

The trial court abused its discretion by failing to order a mistrial following revelations that one juror feared for her life and that the entire jury was discussing the case prior to deliberations. Further, after denying the motion for mistrial, the trial court's failure to contemporaneously include a cautionary instruction concerning the presumption of innocence and an admonition to not discuss the case prior to deliberations following the discovery that at least one juror harbored safety concerns and the jury was discussing the case prior to deliberations denied Ray of his Sixth Amendment right to a fair trial.

## STATEMENT OF FACTS

*Summary of Relevant Trial Evidence*

In the early evening on May 21, 2012, victim Craig Melancon was playing basketball in the Southbridge area of Wilmington in the county of New Castle, State of Delaware when he was approached by two men wearing hoodies, one short and stubby and the other thinner and taller.[4] Following the game, the two men followed Melancon to an alleyway located in the nearby residences.[5] After approximately five minutes, Marla Johnson, a neighbor and the mother of Melancon's girlfriend, heard gunshots and observed the two men in hoodies running away from the area with their hoodies up.[6] Officers responded to the scene shortly thereafter at approximately 7:30 p.m. to find a crowd around Melancon, who was lying on his back exhibiting a pulse and short breaths.[7] CPR and other medical aid was rendered at the scene before Melancon was transported to the Christiana Emergency Room where he was pronounced dead at 8:26 p.m.[8]

Anthony Coursey, a drug dealer in the Southbridge area and friend of Melancon, testified that he sold marijuana to co-defendant Tyare Lee and

---

[4] Trial Transcript January 12, 2015 at 63-64. A38. Victim is also referred to as "N.O." or "New Orleans" in the transcript.
[5] *Id.* at 66. A39.
[6] *Id.* at 67-69. A39-40.
[7] *Id.* at 67-69. A39-40.
[8] *Id.* at 82-83. A43.

Ray together in the area prior to the shooting.[9] Following this transaction, Coursey returned to his nearby residence where Melancon was present.[10] Coursey next saw Lee creeping around the area in a manner in which led Coursey to believe "he was up to something."[11] Approximately 10 minutes later, Melancon exited Coursey's residence.[12] Coursey heard gunshots a few moments later and saw Melancon laying on the ground and Lee and Ray running.[13] Coursey testified that he next saw Ray a few days later at a gas station where Ray told Coursey that he did not intend to shoot Melancon.[14]

Barry Miller was driving in the area around the time of the shooting when Lee flagged him down for a ride to Lee's home.[15] The pair also picked up "Namo," later identified as Brandon Tann, at the direction of Lee.[16] Miller believed that Tann was in possession of a firearm.[17]

Entered into evidence was a recorded prison phone call between Ray's brother, Richard, and Ray approximately an hour and a half following the shooting in which Ray can be heard telling Richard that he "hit a lick" and

---

[9] *Id.* at 114-16. A51. Coursey is also referred to as "Booter" in the trial transcripts. Lee is also referred to as "Water" in the trial transcripts.
[10] *Id.* at 118. A52.
[11] *Id.* at 119. A52.
[12] *Id.* at 120. A52.
[13] *Id* at 120. A52.
[14] *Id.* at 124. A53.
[15] Trial Transcript January 13, 2015 at 49-50. A72.
[16] *Id.* at 51-52. A72.
[17] *Id.* at 56-57. A73-74.

the person "checked out."[18] Detective Michael Gifford of the Wilmington Police Department testified that, based upon his experience, a "lick" is a slang term for committing a robbery and that "checked out" means that someone has been killed.[19] It was developed in Gifford's subsequent testimony that a "lick" could also mean "when you rip someone off some way."[20]

Tyare Lee, who was a co-defendant of Ray until he entered into a plea of guilty to Murder in the Second Degree and other charges related to the homicide,[21] testified. Lee testified that he brought his own gun, a .22 revolver, to Southbridge on the day of the murder when he met Ray at the basketball courts.[22] Lee, with Ray present, spoke to Melancon about purchasing marijuana because Lee was aware that Melancon sold marijuana for Coursey.[23] Following this conversation, the parties walked from the basketball court to the nearby residences.[24] Lee and Ray parted from the others and engaged in a brief discussion with Brandon Tann and another

---

[18] Trial Testimony January 14, 2015 at 20-21. A100-101. Trial Exhibit State's 18.
[19] Trial Transcript January 14, 2015 at 22-23. A101.
[20] Trial Transcript January 16, 2015 at 16-17. A151-52
[21] *Id.* at 33-34. A156.
[22] *Id.* at 40-42. A157-58.
[23] *Id.* at 43-44. A158.
[24] *Id.* at 45. A159.

individual.[25] Following this encounter, Lee and Ray discussed robbing Melancon.[26] Lee watched for Melancon to come out of Coursey's residence. When Melancon exited the residence, Lee and Ray approached Melancon and told him not to move.[27] As Melancon reached for his pocket, Lee pulled the trigger of his gun. Ray, in possession of a .38 caliber revolver, fired several rounds at Melancon causing him to fall to the ground.[28] The Medical Examiner testified that Melancon suffered three gunshot wounds,[29] at least two of which were near contact wounds.[30]

Lee and Ray then ran from the scene.[31] Lee lost sight of Ray and flagged down Barry Miller for a ride home.[32] A few days later Lee and Ray sold Lee's gun to Darren Lamont.[33] Lee admitted being untruthful during his prior statements to investigators and the same was explored extensively during cross-examination.[34]

Jonda Tann, the mother of Brandon Tann, testified that Ray

---

[25] *Id.* at 72-73. A165-66.
[26] *Id.* at 75. A166.
[27] *Id.* at 77-78. A167.
[28] *Id.* at 80-82. A167-68.
[29] Trial Transcript January 14, 2015 at 62. A111.
[30] *Id.* at 65-67, 69. A112-13.
[31] Trial Transcript January 16, 2015 at 83. A168.
[32] *Id.* at 86. A169.
[33] *Id.* at 91-92. A170; Trial Transcript January 22, 2015 at 65. A282. Darron Lamont is also referred to as "D-Nice" in the transcripts.
[34] Trial Transcript January 16, 2015 at 115-92. A176-95; Trial Transcript January 20, 2015 at 16-53. A203-12.

approached her in the days following the murder and stated that he and Lee shot Melancon.[35] Tann indicated that she provided this information to the detective previously although the lead investigator denied this.[36]

Darnequia Aikens, Ray's girlfriend, testified that Ray requested that she get two female witnesses to testify for him because two other female witnesses were afraid to come forward.[37] Allesha Taylor testified that Ray contacted her and requested that she testify at trial for him, however, she declined.[38] Specifically, Ray wrote her a letter that provided her an account of what happened that was to be recited in her own words.[39]

*First Request for a Mistrial*

The first request for a mistrial occurred during the redirect testimony of Coursey when the State asked "[S]ince the time you have been in jail on those charges and on the warrant to force you to be here today, has there been any attempt by anyone in the prison to intimidate you or influence your testimony?"[40] An objection was timely made and a request for mistrial was made at the sidebar conference.[41] The prosecutor indicated that this line of

---

[35] Trial Transcript January 20, 2015 at 85-86. A220.
[36] Trial Transcript January 22, 2015 at 61-62. A281.
[37] *Id.* at 11. A268.
[38] *Id.* at 26. A272.
[39] *Id.* at 28. A272.
[40] Trial Transcript January 13, 2015 at 28. A66.
[41] *Id.* at 30. A67.

questioning was for the purpose of rehabilitation of Coursey following cross-examination into his credibility regarding the alleged confession on the part of Ray.[42] That confession was first disclosed to the defense during his direct examination as it was not mentioned in a prior recorded statement he provided to police on June 7, 2012 in the weeks following the murder.[43] Accordingly, the defense noted that Coursey's testimony actually improved for the State therefore the suggestion that Coursey has changed his testimony due to intimidation connected to Ray had no purpose but to inflame the jury, and a mistrial was requested.[44] After a recess, the trial judge sustained the objection and admonished the State that "unless the State can make a proffer that any witness intimidation is tied to this defendant, [it] cannot be brought up in this trial."[45] The trial judge denied the motion for a mistrial and instead instructed the jury to disregard the question and "please be advised that there is no evidence that this defendant Reuel Ray has intimidated this witness Anthony Coursey."[46]

*The Second Request for Mistrial*

---

[42] *Id.* at 29-30. A67.
[43] *Id.* at 28-36. A66-68.
[44] *Id.* at 29-36. A67-68.
[45] *Id.* at 36. A68.
[46] *Id.* at 36-38. A68-69.

On the third day of trial, added security measures were taken due to the State's concern for potential witness intimidation. Specifically, it was ordered that a Capitol Police officer and a bailiff be stationed outside the courtroom.[47] On the fifth day of trial, and during the critical direct testimony of co-defendant Tyare Lee, the prosecutor requested a sidebar conference to discuss a spectator that had just walked into the courtroom in the presence of the jury.[48] Defense counsel raised the issue of timing of the sidebar and the appearance of it to the jury.[49] In fact, during the ten minute recess called by the trial judge to consider the matter, the jury, through a communication with the bailiff, "expressed concern for their safety and wants to know why the recess was taken when that man walked into the room" which the judge noted was consistent with the concern expressed by defense counsel at sidebar.[50] The trial judge proposed a cautionary instruction that, to facilitate witness sequestration, "it is necessary for the Court to ascertain the identity of persons who come in to make sure that the testimony that's presented by the witness is not influenced by the testimony

---

[47] Trial Transcript January 14, 2015 at 99. A120.; Trial Transcript January 15, 2015 at 19. A139.
[48] Trial Transcript January 16, 2015 at 48. A159.
[49] *Id.* at 49. A160. Counsel state he was "concerned about [the] timing of asking for the sidebar and sending the jury out because it does not look good. It makes it look like we brought this guy in to try to intimidate this witness, may or may not be accurate. Sure is what it looks like."
[50] *Id.* at 50-51. A160.

of other witnesses."[51] The defense made an application for a mistrial citing its concern of the inference taken by the jury and, in the alternative, that the court "voir dire each juror at this point in time to determine whether or not they feel they can fairly continue judging this defendant."[52]

A bailiff, when questioned by the trial judge about whether it was an individual concern on the part of one juror or a collective concern, responded "I believe there is more than one that expressed their safety, just concerns of they saw Capital [sic] yesterday in the courtroom when exiting, the jurors out back to elevators, at the same time Capital [sic] was walking down to get on elevator, they think that that was a security we needed more security for this trial."[53] He later specified that on two occasions a member of the jury has spoken to him about safety, that day and the day prior.[54] The defense modified its request for *voir dire* to limit it to the two jurors specified but to include questioning about safety concerns of the jury collectively.[55]

---

[51] *Id.* at 51. A160.
[52] *Id.* at 51-52. A160.
[53] *Id.* A161.
[54] *Id.* at 55. A161.
[55] *Id.* at 56. A161. Defense counsel stated, "I was going to suggest that application could be modified to a certain extent to voir dire if the mistrial is not granted on its face, that voir dire those two jurors we can inquire as to whether or [not] jurors feel the same way their fears [and whether] their fears have been communicated to other jurors." *Id.*

The first juror questioned, Juror #11, stated,

> Okay, so a lot of stopping and starting, a lot of stuff we don't understand. We come in yesterday from a break there is now two police officers standing there by the doors, no one there they let us on the freight elevator altogether then of course you know a murder trial today, someone walks in and we all stop again, we leave.[56]

Upon questioning about the juror's specific concerns, she responded, "Did you ever see [T]he [J]uror [with] Demi Moore, I know it sounds—this is a murder trial. Kind of wonder if I am going to get shot in my car, not like I am really think it is going to happen, I watch a lot of TV. In the back of your mind..."[57] Juror #11 indicated that she inquired of the Bailiff "what was going on" in the presence of all of the other jurors.[58]

Upon further questioning, Juror #11 indicated that she could remain impartial. However, the following exchange then took place:

> Court: Do you think that you would be more or less likely to find the defendant guilty or not guilty because of these concerns that you have expressed here?
> Juror #11: Yes.[59]

The juror was excused from *voir dire* and told it would "[p]robably be best not to discuss the subject of this discussion with the jurors,

---

[56] *Id.* at 57-58. A162.
[57] *Id.* at 58. A162.
[58] *Id.* at 59. A162.
[59] *Id.* at 60. A162.

because, as we have instructed earlier, we ask that the jurors not have any discussion about the case while the case is ongoing."[60]

Evidently, jurors were already discussing the case. An alternate juror questioned during *voir dire* did not express any individual safety concerns but noted, regarding her fellow jurors, "everybody has been kind of open and honest about it if, like, we all noticed the same thing."[61] Her remarks about the timing of the interruptions echo the inference derived by Juror #11[62] as feared by defense counsel[63] and confirmed to the trial court.[64]

Following *voir dire*, the court did not find "any basis at this time to declare a mistrial."[65] Rather, the trial judge ordered that Capitol police remain outside of the courtroom and gave the jury cautionary instructions concerning sequestration, court recesses,

---

[60] *Id.* at 60-61. A162-63.
[61] *Id.* at 61-62. A163.
[62] "...I have noticed different things happening , and us being released at different times, and just hoping that they didn't relate. Like someone walking in to – the last person who walked in, all of a sudden we leave. Yesterday leaving on the elevator with two cops and then coming in yesterday afternoon they were standing there, being overly observant, that's all." *Id.* at 61. A163.
[63] *Id.* at 49. A160.
[64] *Id.* at 50-51. A160.
[65] *Id.* at 63. A163.

objections and court impartiality.[66] There was no contemporaneous instruction or admonition to the jury to preserve the presumption of innocence for Ray or admonition to discontinue discussing the case until the close of evidence.

[66] *Id.* at 65-68. A164.

## ARGUMENT

## I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO GRANT THE SECOND REQUEST FOR A MISTRIAL.

### QUESTION PRESENTED

Did the trial judge abuse her discretion by failing to grant a mistrial when it was revealed during voir dire that one juror harbored concerns for her safety, expressed that such concerns would impact her verdict and that all of the other jurors were discussing the case? (A163).

### STANDARD AND SCOPE OF REVIEW

This Court reviews for abuse of discretion the Superior Court's decision to deny a motion for a mistrial.[67] It is well settled in Delaware that a mistrial is "mandated only where there are 'no meaningful and practical alternatives' to that remedy"[68] and that the "trial judge is in the best position to assess whether a mistrial should be granted."[69] Additionally, prejudice must be egregious when a curative instruction is deemed insufficient to cure prejudice to the defendant.[70] Granting a mistrial is an extraordinary remedy

---

[67] *Taylor v. State,* 685 A.2d 349, 350 (Del.1996).
[68] *Dawson v. State,* 637 A.2d 57, 62 (Del. 1994) (quoting *Bailey v. State,* 521 A.2d 1069, 1077 (Del. 1987)).
[69] *Bowe v. State,* 514 A.2d 408, 410 (Del. 1986).
[70] *Id.; see also Ney v. State,* 713 A.2d 932 (Del. 1998) (stating that in certain cases "a cautionary instruction is a 'meaningful and practical' alternative

warranted "only when there is 'manifest necessity' "[71] and "no meaningful and practical alternative."[72]

MERITS

The Sixth Amendment guarantees to the criminally accused a fair trial by a panel of impartial jurors.[73] If even "only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury."[74] Due process requires that the defendant have a jury capable and willing to decide the case solely on the evidence before it and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.[75] The right to an impartial jury is compromised when the trier of fact is unable to render a disinterested, objective judgment.[76]

In this matter, Juror #11 was unduly prejudice or biased as evidenced by her responses to the trial court's questioning during voir dire. When

---

obviating the need for a mistrial"); *But see Weddington v. State,* 545 A.2d 607, 611-15 (Del. 1988) (holding that an instruction did not cure the prejudice of an unsupported interjection of race into the case).

[71] *Chambers v. State,* 930 A.2d 904, 909 (Del. 2007) (citations omitted).

[72] *Dawson* at 62 (citing *Bailey* at 1077).

[73] U.S. Const. amend. VI; *see Irvin v. Dowd,* 366 U.S. 717, 722 (1961).

[74] *Tinsley v. Borg,* 895 F.2d 520, 523–24 (9th Cir. 1990).

[75] *Smith v. Phillips,* 455 U.S. 209, 217 (1982).

[76] *U.S. v. Thompson,* 744 F.2d 1065, 1068, (4th Cir. 1984)(finding trial court improperly allowed a juror to remain on the jury after he gave equivocal responses to whether he could be impartial after viewing photographs of the victim).

asked by the court what "concerns" she has, Juror #11 responded that the circumstances have caused her to "wonder if I [am] going to get shot in my car."[77] Although she partially walked back that assertion later in her response, she nevertheless concluded by stating "[i]n the back of your mind..."[78] Thus, Juror #11 never actually divorced herself of the notion that she enters and leaves the courthouse every day throughout a murder trial involving a shooting wondering if she, herself, is going to be the victim of a shooting. That level of fear, which is beyond a generalized anxiety, but is a specific concern expressed on the part of Juror #11, is of such a nature that it can safely be concluded that it makes her "unable to render a disinterested, objective judgment" and thusly compromised Ray's right to an impartial, disinterested and objective jury primed to deliberate only that which is in evidence, rather than extraneous factors, such as fear.

As noted in *U.S. v. Blitch*, where unexplored safety concerns of the empaneled jury necessitated reversal, the Sixth Amendment right to a fair trial guarantee means "a jury that determines guilt on the basis of the judge's instructions and the evidence introduced at trial, as distinct from preconceptions or other extraneous sources of decision."[79] The *Blitch* court

---

[77] Trial Transcript January 16, 2015 at 63. A163.
[78] *Id.* at 63. A163.
[79] *U.S. v. Blitch*, 622 F.3d 658, 664 (7th Cir. 2010)(quoting *Oswald v.*

noted that its case was not one of hypothetical fear, rather, it involved real fear that at least one juror had of his or her safety and that the jurors were discussing any fears they had.[80]

In the instant matter, Juror #11 expressed concern for her safety that spanned at least two days of trial and it is clear from the responses of both jurors during voir dire that the trial proceedings in the context of safety were already being discussed by the entire jury. Specifically, Juror #11 responded in plural terms about how there was "a lot of stuff **we** don't understand."[81] Juror #11's response expressly notes that the jury has be discussing "a lot" of "stuff" and have been speculating about its implications and therefore this was not a "one off" remark or event but rather a pervasive pattern throughout trial. Likewise, the alternate juror spoke about how "everybody" on the jury has be "open and honest" about what they "noticed" in the courtroom.[82] Again, notwithstanding the admonition given to the jury to refrain discussing the matter until the close of evidence, two independent sources on the jury indicated that exactly that was happening. The

---

*Bertrand,* 374 F.3d 475, 477 (7th Cir. 2004)).

[80] *Blitch* at 665 ("This is not a case, then, of speculation about whether jury members might have feared for their safety. They did here. This is also not a case of speculation about whether jury members might have been discussing any fears they held. They did that here as well.").

[81] Trial Transcript January 16, 2015 at 57-58. A162. (emphasis supplied).

[82] *Id.* at 61-62. A163.

pervasiveness of the *intra*-trial discussions makes any action short of a mistrial a meaningless and impractical alternative.

As troubling as the intra-trial discussions among "everybody" on the jury is that Juror #11 went on to indicate that her safety concerns would impact her verdict. Juror #11 expressly responded in the affirmative that, because of her "concerns," she "would be more or less likely to find the defendant guilty or not guilty."[83] That even one juror's "peace of mind" was affected can be enough to deprive a defendant of a fair trial.[84] This was not a drug dealing or aggravated menacing case where a juror expressed general concern for safety based on the nature of the charges or the "cast of characters" involved. Rather, this was a murder case involving a shooting a close range where a jury member expressed, based upon her view of the proceedings, a fear of being shot in her car as the trial progressed in the manner in which it did.

The assurances given in response to other *voir dire* questioning by the trial court as to whether Juror #11 could remain "impartial" are not determinative on the question of her ability to render a disinterested,

---

[83] *Id.* at 60. A162.

[84] *U.S. v. Simtob,* 485 F.3d 1058, 1064 (9th Cir. 2007) (vacating conviction and remanding for further proceedings in light of court's failure to investigate potential juror prejudice after a juror informed the court that he felt threatened by the defendant's "eye-balling" him).

objective judgment. In *State v. Brown*,[85] the New Jersey Appellate court found that a juror with a demonstrated latent racial bias arising during deliberations could not be an impartial juror notwithstanding her assurances to the judge that it did not effect on her impartiality, that she would follow the court's instructions on the law, and would base her verdict only on the evidence presented at trial.[86] There the court found that the juror was compromised in a manner that "far trumped her subsequent assurances of impartiality."[87] Once Juror #11's fear of being shot was brought to the surface, to ignore it and allow the trial to continue requires a quantum leap of logic that a lay person juror can set aside her ongoing thoughts of being shot during a murder to render a dispassionate verdict based solely on the evidence.

In *State v. Guoveia*,[88] a manslaughter case, the jury sent two notes during deliberations. The first note indicated that a verdict was reached and the second expressed safety concerns over a man appearing in the gallery glaring and whistling at the defendant.[89] The trial court granted a mistrial

---

[85] 121 A.3d 878 (N.J. Super. Ct. App. Div. 2015).
[86] *Id.* 880-81.
[87] *Id.* at 881.
[88] 348 P.3d 496 (Table)(Haw. Ct. App. 2015) *aff'd*, 2016 WL 6216145 (Haw.).
[89] *Id.* at *3.

citing "manifest necessity."[90] Importantly in *Guoveia*, while jurors gave conflicting responses on whether the episode was discussed prior to reaching a verdict and although several jurors expressed safety concerns, each indicated that it did not affect their own decision during deliberations.[91] Notwithstanding these assurances, the trial court found that "manifest necessity" was established requiring the mistrial.[92]

In the context of a motion for a mistrial, the *Guoveia* court defined "manifest necessity" using similar language to that of Delaware, specifically, "circumstances in which it becomes no longer possible to conduct the trial or to reach a fair result based upon the evidence."[93] In the instant matter, the circumstances existed where one juror indicated that her safety concerns – giving the example of being shot by a firearm in her car - would influence her verdict, and another juror indicated that "everyone" on the jury was discussing the case, made it no longer possible to conduct the trial or reach a fair verdict based upon the evidence notwithstanding any assurances to the

---

[90] *Id.* at *7.
[91] *Id.* at *3.
[92] *Id.* at *7 In affirming the trial court's decision to grant the mistrial, the appellate court noted this was an "outside influence" and therefore created a rebuttable presumption of prejudice. *Id.* at *9.
[93] *Id.* *8. Compare with Delaware definition of "manifest necessity" where "the end of public justice would not be served by a continuation of proceedings." *Sudler v. State*, 611 A.2d 945, 949 (Del. 1992)(quoting *Bailey* at 1076.

contrary. With a jury so compromised, the only practical resolution was a discontinuation of the proceedings to ensure Ray received his Constitutionally guaranteed right to a fair trial.

## II. THE TRIAL COURT DENIED RAY'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL BY FAILING TO GIVE A CONTEMPORANOUS CAUTIONARY INSTRUCTION ON THE PRESUMPTION OF INNOCENCE AND ADMONITION TO THE JURY TO REFRAIN FROM DISCUSSING THE CASE PRIOR TO DELIBERATIONS.

### QUESTION PRESENTED

Was it a denial of Ray's Sixth Amendment right to a fair trial for the trial judge to fail to contemporaneously give the jury a cautionary instruction on the presumption of innocence and an admonishment to not discuss the case until the close of evidence after it was brought to the trial court's attention that at least one juror harbored serious safety concerns and that the entire jury was already discussing the case? (A163).

### STANDARD AND SCOPE OF REVIEW

This Court reviews claims alleging an infringement of a constitutional right *de novo*.[94]

### MERITS

A defendant has a Sixth Amendment right to "a verdict by impartial, indifferent jurors" to avoid any bias or prejudice that might affect the defendant's right to a fair trial.[95] Improper influence or bias of a single juror

---

[94] *Stigars v. State,* 674 A.2d 477, 481 (Del. 1996).
[95] *Dyer v. Calderon,* 151 F.3d 970, 973 (9th Cir. 1998) (en banc); *see also U.S. v. Soulard,* 730 F.2d 1292, 1305 (9th Cir. 1984).

would affect that right.[96] Granting a mistrial is an extraordinary remedy warranted "only when there is 'manifest necessity'"[97] and "no meaningful and practical alternative."[98] In this argument, the defense takes up the "practical alternative" chosen by the trial court, a cautionary instruction.

This Court has held that, "even when prejudicial evidence is admitted, its prompt excision followed by a cautionary instruction will usually preclude a finding of reversible error."[99] Although prejudicial "evidence" was not admitted, it was apparent that extraneous factors (jury safety) existed in the mind of at least one juror and the entire jury was in discussions about the case prior to deliberations. In this case, following the individual *voir dire* of two jurors, the full jury reconvened and the court provided them with cautionary instructions as to sequestration, objections by counsel and court impartiality.[100]

The Fourteenth Amendment to the United States Constitution embodies the notion, reaching back to Roman law, that a "shield of

---

[96] *See U.S. v. Gonzalez,* 214 F.3d 1109, 1111 (9th Cir. 2000).
[97] *Chambers* at 909.
[98] *Dawson* at 62 (citing *Bailey* at 1077).
[99] *Sawyer v. State,* 634 A.2d 377, 380 (Del. 1993). *See also Ashley v. State,* 798 A.2d 1019, 1022, n. 15 (Del. 2002) (citing *Ney v. State,* 713 A.2d 932 (Del. 1998)) ("stating that 'in certain cases a cautionary instruction is a 'meaningful and practical' alternative obviating the need for a mistrial.'").
[100] Trial Transcript January 16, 2015 at 65-68. A164.

innocence surrounds a defendant on trial."[101] This so-called "presumption of innocence" is "a basic component of a fair trial under our system of criminal justice."[102] In *Estelle,* the Supreme Court of the United States held that a State may not—consistent with the presumption of innocence—create trial conditions that affect the jurors' perception of the defendant unless there is a substantial government interest in doing so.[103]

The trial court neglected to advise the fully impaneled jury of the defendant's ongoing presumption of innocence or to admonish them for the ongoing misconduct of prematurely discussing the case. This is especially problematic given the context. The existing safety concerns were heightened and compounded by the prosecutor calling a sidebar at the moment a spectator entered the gallery – an occurrence that went noticed by both jurors *voir dired* and creating an inference that reinforced the existing narrative of safety concerns expressed by Juror #11. This, of course, is also after the State was admonished, outside the presence of the jury, for improperly suggesting through its questioning of Coursey, in the presence of

---

[101] *U.S. v. Thomas,* 757 F.2d 1359, 1363 (2nd Cir. 1985) cert. denied sub nom. *Fisher v. United States,* 474 U.S. 819 (1985), citing *Coffin v. United States,* 156 U.S. 432, 453–454 (1895).
[102] *Estelle v. Williams,* 425 U.S. 501, 503 (1976).
[103] *Id.* at 505.

the jury, that Ray was involved in witness intimidation.[104]

A member of the jury expressed a serious safety concern and the court had in front of it that these safety concerns had be ongoing since at least the prior day when they were first brought to the attention of the bailiff.[105] It was no coincidence that her safety concerns were brought up again when the State interrupted its own questioning of a witness when an individual entered the gallery. The trial court's cautionary instructions following the discovery of these jury issues, did not allay safety concerns, extinguish any negative inference towards Ray, prevent future discussion about the case or remind the jury of Ray's presumption of innocence. Accordingly, a situation was created where inferences of danger would be held against Ray to which the court's response was an insufficient counter and the universal jury misconduct was allowed to continue.

In *State v. Brown*,[106] a murder trial, the concern for juror safety was brought forth by the judge when explaining why the jury would be anonymous. The issue requiring reversal, however, was the manner in which the trial judge addressed the concern for juror safety. Specifically, the trial judge did not take measures to ensure the jury should not interpret the

---

[104] Trial Transcript January 13, 2015 at 36. A68.
[105] Trial Transcript January 16, 2015 at 55. A161.
[106] 118 P.3d 1273 (Kan. 2005).

additional security measures as a reflection of the defendant's guilt or innocence.[107] In *Brown*, the Kansas Supreme Court found that the judge's comments, without those additional safeguards, infringed on the defendant's presumption of innocence and right to a fair trial.[108] In the instant case, the trial judge did not admonish the jury to maintain the presumption of innocence and the existing fear of the jury was reinforced, and heightened, through the interruption by the prosecutor during a pivotal moment in the trial. As in *Brown*, juror safety concerns were compounded when placed in context with the conduct of the prosecutor.[109]

In *U.S. v. Peneranda*, the jury sent a note expressing concerns for safety.[110] There, the appellate court found that the trial court acted properly by denying a request for a mistrial by dealing with jury safety concerns and premature discussion through a sufficient cautionary instruction.[111] "had broad discretion to pass on allegations of juror prejudice *by giving a special instruction to the jury to keep an open mind and consider all the evidence.*"[112] In the instant case, while the trial judge issued cautionary instructions surrounding the conduct of court proceedings, there was no

---

[107] *State v. Brown*, 118 P.3d 1273, 1276 (Kan. 2005).
[108] *Id.*
[109] *Id.*
[110] *U.S. v. Penaranda*, 2006 WL 2389525, *5 (S.D.N.Y.).
[111] *Id.*
[112] *Id.* at *7 (S.D.N.Y.)(emphasis supplied).

reminder that the jury was to keep an open mind and consider all the evidence at the end of trial or a reminder that Ray was presumed throughout the proceedings. This is particularly problematic in the face of evidence from the alternate juror that the entire jury was already discussing the case and from Juror #11 indicating she feared for her life in the back of her mind. There were no reassurances of juror safety given and the fully empaneled jury was not contemporaneously told to keep an open mind and consider all the evidence even though the court was aware that "everyone" on the jury was already discussing the case.

## CONCLUSION

Based on the foregoing, Appellant respectfully requests that his convictions and the sentence be vacated and the matter be remanded.

**Law Office of Kevin P. Tray**

*/s/ Kevin P. Tray*
Kevin P. Tray, Esquire
Delaware I.D. No. 5280
1215 N. King Street
Wilmington, DE 19801
(302) 658-5400
Attorney for Appellant

Dated: December 31, 2016

EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

REUEL RAY

Alias: See attached list of alias names.

DOB: 03/20/1993
SBI: 00570699

CASE NUMBER:
N1210020570A

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:
IN14-10-1331
MURDER 1ST(F)
IN14-10-1332
PFDCF(F)
IN14-10-1335
PFDCF(F)
IN14-10-1338
CRIM SOLIC 2ND(F)
IN14-10-1339
CRIM SOLIC 2ND(F)
IN14-10-1337
CONSP 2ND(F)
IN14-10-1334
ATT ROBBERY 1ST(F)

Nolle Prosequi on all remaining charges in this case
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE
SEE NOTES FOR FURTHER COURT ORDER-TERMS/CONDITIONS
NOLP remaining charges including ID/CRA: #1210020570B

## SENTENCE ORDER

NOW THIS 8TH DAY OF JULY, 2016, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. Costs are hereby suspended. Defendant is to pay all statutory surcharges.

AS TO IN14-10-1331- : TIS
MURDER 1ST

Effective November 1, 2012 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IN14-10-1332- : TIS

**STATE OF DELAWARE**
**VS.**
**REUEL RAY**
**DOB: 03/20/1993**
**SBI: 00570699**

**PFDCF**

- The defendant is placed in the custody of the Department of Correction for 3 year(s) at supervision level 5

**AS TO IN14-10-1335- : TIS**
**PFDCF**

- The defendant is placed in the custody of the Department of Correction for 3 year(s) at supervision level 5

**AS TO IN14-10-1338- : TIS**
**CRIM SOLIC 2ND**

- The defendant is placed in the custody of the Department of Correction for 3 year(s) at supervision level 5

**AS TO IN14-10-1339- : TIS**
**CRIM SOLIC 2ND**

- The defendant is placed in the custody of the Department of Correction for 3 year(s) at supervision level 5

**AS TO IN14-10-1337- : TIS**
**CONSP 2ND**

- The defendant is placed in the custody of the Department of Correction for 2 year(s) at supervision level 5

**AS TO IN14-10-1334- : TIS**
**ATT ROBBERY 1ST**

- The defendant is placed in the custody of the Department of Correction for 20 year(s) at supervision level 5

- Suspended after 3 year(s) at supervision level 5

- For 2 year(s) supervision level 3

## SPECIAL CONDITIONS BY ORDER

**STATE OF DELAWARE**
**VS.**
**REUEL RAY**
**DOB: 03/20/1993**
**SBI: 00570699**

**CASE NUMBER:**
**1210020570A**

Pursuant to 29 Del.C. 4713(b)(2), the defendant having been convicted of a Title 11 felony, it is a condition of the defendant's probation that the defendant shall provide a DNA sample at the time of the first meeting with the defendant's probation officer. See statute.

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

All financial obligations for this case are deemed uncollectible.

**NOTES**

Defendant is to have no contact with the victim or victim's family.

Defendant is to have no contact with co-defendant, Tyare Lee or his family.

==Defendant shall be evaluated for mental health treatment at L5 and shall follow recommendations and participate in treatment==

==DOC, see Dr. Mandell Much's report dated April 18, 2016 re: MH diagnosis==

Aggravating Factors:
-Undue depreciation of offenses
-Lack of remorse
-Lack of amenability

Mitigating Factor:
-Childhood trauma

**JUDGE ANDREA L ROCANELLI**

## FINANCIAL SUMMARY

**STATE OF DELAWARE**
**VS.**
**REUEL RAY**
**DOB: 03/20/1993**
**SBI: 00570699**

**CASE NUMBER:**
**1210020570A**

| | |
|---|---|
| SENTENCE CONTINUED: | |
| TOTAL DRUG DIVERSION FEE ORDERED | |
| TOTAL CIVIL PENALTY ORDERED | |
| TOTAL DRUG REHAB. TREAT. ED. ORDERED | |
| TOTAL EXTRADITION ORDERED | |
| TOTAL FINE AMOUNT ORDERED | |
| FORENSIC FINE ORDERED | |
| RESTITUTION ORDERED | |
| SHERIFF, NCCO ORDERED | |
| SHERIFF, KENT ORDERED | |
| SHERIFF, SUSSEX ORDERED | |
| PUBLIC DEF, FEE ORDERED | |
| PROSECUTION FEE ORDERED | |
| VICTIM'S COM ORDERED | |
| VIDEOPHONE FEE ORDERED | 9.00 |
| DELJIS FEE ORDERED | 9.00 |
| SECURITY FEE ORDERED | 90.00 |
| TRANSPORTATION SURCHARGE ORDERED | |
| FUND TO COMBAT VIOLENT CRIMES FEE | 135.00 |
| SENIOR TRUST FUND FEE | |
| AMBULANCE FUND FEE | |
| TOTAL | 243.00 |

# LIST OF ALIAS NAMES

**STATE OF DELAWARE**
**VS.**
**REUEL RAY**
**DOB: 03/20/1993**
**SBI: 00570699**

**CASE NUMBER:**
**1210020570A**

REUEL A RAY
REYEL RAY
REUEL RAYE
REYEL RAYE
REVEL RAY