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Case Number 538,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID BUCKHAM	:	
	:	No. 538, 2016
Defendant Below-Appellant,	:	
	:	ON APPEAL FROM
	:	THE SUPERIOR COURT OF THE
v.	:	STATE OF DELAWARE
	:	IN AND FOR NEW CASTLE
	:	COUNTY
STATE OF DELAWARE,	:	I.D. No. 1509012122A & B
	:	
Plaintiff Below-Appellee.	:	

APPELLANT'S REPLY BRIEF

FILING ID: 60591703

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Dated: May 11, 2017

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CASE LAW

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING A RECESS SPECIFICALLY FOR A WITNESS TO CONFER WITH HIS COUNSEL ABOUT HIS TESTIMONY DURING HIS DIRECT EXAMINATION.

A. Argument

The State contends that Mr. Buckham was not prejudiced by the State's requested break in the direct testimony of their witness in order for the witness to consult with his attorney about the content of his testimony.[1] In support of their contention the State suggests that this case is no more egregious than *Chambers*. Also the State argues that the prosecutor in this case faced special circumstance to allow the break in testimony. Further in support of their contention, the State argues that the State's witness in this case could have faced further prosecution had the testimony continued without the State's interference.[2] However, the State's argument fails for several reasons.

First, this case is not like *Chambers v. State*.[3] In *Chambers*, the witness requested to speak with the chief investigating officer about his safety; here, in the middle of Mr. Waters' direct examination, the State prosecutor requested that the witness speak with his attorney specifically about his testimony. Further in *Chambers*, the officer put on the record the contents of the discussion showing that the discussion was about the witness' safety concerns and not about the substance

[1] Answ. Br. 9.

[2] Answ. Br. 12-16.

[3] *Chambers v. State*, 930 A.2d 904 (Del. 2007).

of the witness' testimony. In its Answering Brief, the State contends that the break was to discuss Mr. Water's privilege against self-incrimination, but that contention is not borne out by the record, and the State is merely speculating as to what was discussed during the break between Mr. Waters and his attorney. Because the prosecutor requested the consultation and the discussion was aimed at the contents of the witness' testimony, this case is substantially different than *Chambers*. Thus, the Court should not be controlled by the holding in *Chambers*.

Second, the State argues that the prosecutor faced special circumstances that according to *Webb* required the witness to be permitted a limited consultation.[4] The State argued that Mr. Waters could have faced further prosecution for his involvement in both incidents, the aggravated menacing in September and the attempted murder in August, if his testimony had continued without a consultation. However, that argument is incorrect as Mr. Waters was already sentenced for the September incident prior to testifying. (AR 6) Also, Mr. Waters signed a cooperation agreement with the assistance of his counsel, Mr. Meyer, in March of 2016, where Mr. Waters understood all of the consequences and penalties he faced should he not testify accordingly with that agreement. (AR 1-3) Thus, it would not be the State prosecutor's duty to request that their witness be allowed a break in their testimony for another consultation when that witness had previously been advised of consequences and penalties by their own counsel.

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[4] Answ. Br. 13.

The State further argues that "a prosecutor cannot allow false testimony of his or her own witness."[5] It is true that a prosecutor can not knowingly allow false testimony to be allowed into evidence. However, there is quite a difference between a prosecutor knowingly allowing a witness to lie about material information while on the witness stand and a prosecutor's witness "going south" during their direct examination. In the first instance, the prosecutor has a duty to correct the false testimony. In the second instance, the prosecutor has no duty to correct the testimony, but obviously would want to correct the poor testimony in order to strengthen their case.

The State's desire to correct the inconsistent testimony of Mr. Waters would fall under the second scenario. There was no physical evidence connecting Mr. Buckham to the shooting of the victim. The only direct pieces of evidence were the victim's testimony that Mr. Buckham shot him and Mr. Waters' statement to police on September 16, 2015 that Mr. Buckham was the shooter. Because Mr. Waters' testimony was inconsistent with his prior statement the State would like to claim that Mr. Waters testimony was false testimony, and therefore, they had a duty to correct it. However, they simply cannot claim this duty when the reality was that they were attempting to save their witness' poor testimony and strengthen their case.

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[5] Answ. Br. 13.

Finally, the State argues that they had to suggest that Mr. Waters meet with his attorney during his direct examination because he could have faced further prosecution if he testified inconsistent with his prior statement.[6] While it may be true that Mr. Waters could have faced further prosecution for his inconsistent testimony and that Mr. Waters had a constitutional right to invoke the privilege against self-incrimination, the decision to invoke that privilege lies solely with Mr. Waters. The State uses a Grand Jury analogy to show that breaks in testimony are allowed when deciding to invoke such a privilege. But, again, it is the testifying witness alone who can assert such a right, not the questioning attorney.[7] Here, the State prosecutor requested the break for the consultation, not Mr. Waters. Mr. Waters had been fully advised of his rights and consequences related to testifying when her signed his cooperation agreement, his plea agreement, and his guilty plea. (AR 1-5) Thus, there was no need for Mr. Waters to be advised again of the same rights and consequences in the middle of his testimony at the request of the State.

The State asserts that Mr. Buckham was not prejudiced by the break in testimony for the consultation because Mr. Waters' statement was admitted into evidence under section 3507 and the Judge found that the case turned on the victim's testimony. Merely because Mr. Waters' prior statement was admitted into

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[6] Answr. Br. 13.

[7] *Steigler v. Insurance Company of North America*, 306 A.2d 742, 743 (Del. 1973).

evidence does not diminish the effect on the jury of the witness' altered answers after the break. Also, since the jury is the ultimate finder of fact and they weigh the evidence accordingly, the jury could have given more or less weight to Mr. Waters' testimony than what was perceived by the trial court.

Allowing a State's witness, at the request of the State, to consult with their counsel about their testimony in the middle of their direct examination severely hindered the truth seeking process and substantially prejudiced Mr. Buckham. The Superior Court therefore abused its discretion by allowing such a consult to occur at the request of the State.

II. THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL THE OPPORTUNITY TO CROSS EXAMINE THE STATE'S WITNESS ABOUT HIS DISCUSSION WITH HIS ATTORNEY ABOUT HIS TESTIMONY DURING THE BREAK IN HIS DIRECT EXAMINATION.

A. Argument

The State argues that Mr. Buckham was not prejudiced by the Superior Court prohibiting him to cross-examine Mr. Waters about the discussion he had with his attorney during the break in his testimony. The State supports this argument by asserting that the jury had other ample facts to assess Mr. Waters' credibility and that Mr. Buckham had an adequate record from which to argue that Mr. Waters was biased. Further, the State contends that Mr. Buckham waived this issue because he did not ask any questions to Mr. Waters about what had occurred during the break. The State's argument fails for two reasons.

The jury did have other factors to consider in assessing Mr. Waters' credibility. But, if the jury had known that Mr. Waters was just advised of the severe consequences he faced by not testifying in accordance with his prior statement, yet he was still willing to testify that Mr. Buckham was not involved, the jury may have given greater weight to Mr. Waters' testimony. Also, while there was information to argue Mr. Waters' bias, Mr. Buckham's ability to examine the bias of the immediately altered testimony was insufficient. If Mr. Buckham had been able to bring out on cross examination the reason for Mr. Waters' recently

altered testimony, then the jury would have had a better understanding of his testimony and basis on which to assess his credibility.

Second, Mr. Buckham did not waive the issue because he did not ask any of the permitted questions to Mr. Waters following the break. Mr. Buckham objected at the outset of the request by the State for Mr. Waters to meet with his attorney. (A 193) A trial attorney must make strategic decisions on which questions to ask on cross examination that will have the most effect on the jury and that will weaken the State's case. A strategic decision to not ask the witness whether or not he met with his counsel during the break is not a waiver when defense counsel had previously objected to the issue. Also, similar to Mr. Waters' privilege against self incrimination is his attorney-client privilege, which again only Mr. Waters can invoke.[8] Therefore, when the Court decided to invoke such a privilege for Mr. Waters before he could even be asked any questions about the contents of the discussion, it violated Mr. Buckham's right to confront the witnesses against him.

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[8] *Moyer v. Moyer*, 602 A.2d 68, 72 (Del. 1992) (citing *United States v. Landof*, 591 F.2d 36, 38 (9th Cir. 1978) (*quoting*, "The burden of proving that the privilege applies to a particular communication is on the party asserting the privilege.")

III. THE COURT ERRED IN HOLDING THAT A SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE WHERE THERE WAS NO NEXUS BETWEEN THE ALLEGED CRIME COMMITTED AND THE CELL PHONE TO BE SEARCHED.

A. Argument

The State argues that the warrant is valid because it specified how the cell phone related to the firearm charge. The State contends that the warrant was supported by probable cause because the police did not know where Mr Buckham was between the date of the shooting and his arrest date, Mr. Buckham made a social media post about being arrested while he was missing, Mr. Buckham had a cell phone on his person at the time of arrest and through officer training and experience cell phones hold information that can be used to locate individuals.[9] The assertions, while indicative of someone who knows they are wanted by the police, do not link the alleged criminal activity, possession of a firearm, to the cell phone to be searched.

The State argues that they linked the criminal activity and the cell phone because the police could not locate Mr. Buckham between the shooting and his arrest, because Mr. Buckham had a cell phone on his person at the time of his arrest and because the police knew through training and experience that cell phones contain GPS information. However, there was no evidence that a cell phone was used as an instrumentality of the crime or that a cell phone was used by

[9] Answ. Br. 21-24.

Mr. Buckham at any point between the alleged shooting and his arrest. Further, the officers didn't even list GPS coordinates/ data in the list of items to be searched in the description. This shows that the added language in the affidavit about how cell phones can be used was generalized standard language and did not provide a specific link between Mr. Buckham's cell phone and the crime alleged. The last assertion, based on his training and experience, again amounts to a hunch which is insufficient to establish probable cause.[10]

The State also argues that a nexus was created between the criminal activity and Mr. Buckham's cell phone because Mr. Waters called Mr. Buckham's girlfriend on her cell phone before he talked to the police and because criminals use cell phones to communicate. The State is incorrect in their stating of the facts. The warrant states "the owner of the vehicle that was used in the shooting contacted [Mr.] Buckham's girlfriend via cell phone prior to talking to the police." (A 33) The owner of the vehicle in questions was Mr. Waters girlfriend, Dariya Wilson. (A 132) Further, that allegation would only give rise to probable cause to search Mr. Buckham's girlfriend's phone, not Mr. Buckham's. There is no probable cause to believe that Mr. Buckham's cell phone would have any evidence of this conversation or evidence of the crime alleged based off of this conversation.

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[10]*See State v. Ranken*, 25 A.3d 845, 863-64 (Del. Super. Ct. 2010) (quoting a Sixth Circuit decision describing that "[w]hile an officer's training and experience may be considered in determining probable cause, it cannot substitute for the lack of evidentiary nexus.) (internal quotations omitted).

The State further argues that because Mr. Buckham had made a social media post referring to his arrest and that cell phones can be used to communicate on social media, this also established a sufficient nexus between the cell phone to be searched and the crime alleged. The State's argument that these assertions create probable cause also fails. The alleged social media post was about Mr. Buckham's warrant for his arrest. Further, there is no evidence that the social media post was made from a cell phone and not from an actual computer. Also, once Mr. Buckham was arrested evidence of a social media post only referring to his wanted status became irrelevant.

Therefore, there was no probable cause to search Mr. Buckham's cell phone because there was no nexus between the alleged crime of possession of a firearm and the item to be searched, the cell phone. Generalized assertions based on officer training and experience can not make up for a lack of probable cause, and thus, Mr. Buckham's rights were violated when the police illegally searched his cell phone. The Superior Court therefore erred by denying Mr. Buckham's motion to suppress the cell phone evidence.

IV. THE TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE CELL PHONE DATA AND MESSAGES THAT WERE SEIZED AS PART OF A GENERAL WARRANT.

A. Argument

The State argues that the warrant is not over broad because the police specified the crimes and the items to be searched with as much specificity as possible at the time they wrote the warrant. This is incorrect.

The police knew the exact time period for the data they wished to search, but did not include any temporal limit in the description of the items to be searched. At the time the police submitted the warrant, they knew the exact date of the shooting, the exact date of the aggravated menacing and the arrest date of Mr. Buckham. Thus, they knew the data they wanted to search would roughly be between the dates of August 3, 2015 and October 26, 2015, but they did not include this temporal limit in the scope of their search.

Further, the police did not include GPS data/ locations or social media data in the description of items to be searched on the cell phone even though they knew they were going to be searching the phone for those items. In the affidavit, the affiant notes how Mr. Buckham's location was unknown until his arrest, how there was a social media post about getting arrested, and how cell phones can be used based off of the affiant's training and experience. (A 34) The police clearly knew both the time frame for the data to be searched and they knew a more precise description of the items within the cell phone that they wished to search, but they

did not include either of those narrowing descriptions when the information was available to them at the time they wrote the warrant.

In the warrant, the description of the items to be searched was "any and all stored data contained within the internal memory of the cellular phones, including but not limited to, incoming/outgoing calls, missed calls, contact history, images, photographs, and SMS (text) messages." (A32) The Court in *Wheeler* made clear that warrants with no limit on the items to be searched will not be upheld as valid warrants.[11] The Superior Court in *Westcott* recently reaffirmed the holding in *Wheeler* when the court invalidated a search warrant where officers had available to them information about the date of the alleged crime, but did not include a time frame in which to limit the scope of their search.[12] While the warrant in this case stated the crime that the search was for, the description of the items to be searched fails to meet the particularity requirement as a matter of law because the officers did not include the relevant time frame and the type of data that the officers clearly sought. Thus, the warrant lacked the required particularity as it did not effectively limit the scope of the search, and Mr. Buckham was deprived of his constitutional rights.

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[11] *Wheeler v. State*, 135 A.3d 282, 304 (Del. 2016)

[12] *State v. Westcott*, 2017 WL 283390 at *3 (Del. Super. Ct. Jan. 23, 2017).

V. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. BUCKHAM A NEW TRIAL AFTER THE LEAD OFFICER TESTIFIED TO THE DEFENDANT'S PREJUDICIAL NICKNAME WHICH HAD BEEN AGREED TO BE EXCLUDED FROM TRIAL.

A. Argument

The State argues that the Superior Court did not abuse its discretion by denying Mr. Buckham's motion for a mistrial and his motion for a new trial because Mr. Buckham waived the offer of a curative instruction and because Mr. Buckham admitted that the officer's use of the prejudicial nickname was inadvertent. The State's argument fails because defense counsel's choice to not have a curative instruction given was not a waiver for a later claim, but rather a strategic decision to not call more attention to the prejudicial nickname that the parties had previously agreed would not be shared with the jury. Their argument also fails because unsolicited prejudicial comments to the jury do not have to be intentional or purposeful to cause substantial prejudice to the defendant.

The State can not argue that defense counsel waived the giving of a curative instruction to correct the lead officer's prejudicial comment to the jury. Defense counsel objected immediately and moved for a mistrial when the prejudicial nickname was stated by the chief investigating officer. (A193) Therefore, the issue was preserved. It was defense counsel's strategic decision to not have a curative instruction given to the jury about the prejudicial nickname because he did not want to draw any more attention to the nickname than what had already occurred.

The State used *Stevenson* as a comparison of a defense counsel's affirmative response of, "No objection," to the scenario here.[13] This case is unlike *Stevenson* because defense counsel objected immediately and approached at side bar to elaborate on the objection. A curative instruction is only one factor to be considered by *Pena* when deciding if the unsolicited comment resulted in prejudice.[14] Defense counsel's strategic decision to not have a curative instruction is not a waiver of the issue of whether the Superior Court abused its discretion by denying a mistrial when the chief investigating officer testified to Mr. Buckham's prejudicial nickname.

Further, the State argues under *Pena* that a mistrial was not warranted. First, the State argues that the prejudicial nickname was said only once.[15] The officer testified to the nickname "Gunner Montana" only once, however there were approximately seventy social media exhibits admitted into evidence where the name "Gunner" was redacted and the end of the nickname "Montana" was left. Thus, the jury could infer seventy times that in front of the word "Montana" would have been the word "Gunner." Second, the State argues that the resulting prejudice was low because the judge found that the nickname was said during "mind-numbing" testimony and because the jury did not convict Mr. Buckham of

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[13] Answ. Br. 30.

[14] *State v. Smith*, 963 A.2d 719, 722 (Del. 2008) (citing *Pena v. State*, 856 A.2d at 550-51.)

[15] Answ. Br. at 32.

Attempted Murder, but rather of the lesser included offense of Assault in the First Degree.[16] This argument fails because the jury is the ultimate fact finder and jury lenity can not account for lack of prejudice where the defendant was convicted of a crime for causing serious physical injury to someone using a firearm. Third, the State posited the trial court's opinion that the case turned on the victim's testimony.[17] But, again, the jury is the ultimate fact finder and they decide how much weight to give certain pieces of evidence when deciding on a verdict. There was no physical evidence connecting Mr. Buckham to the crime, only the testimony of the victim and the State's cooperating witness. Therefore, the use of the defendant's nickname of "Gunner Montana" by the lead officer in a case involving a shooting was extremely prejudicial to this case that was so close. Fourth, the State again argues that defense counsel denied a curative instruction and therefore can not claim now that the court should have done more.[18] Defense counsel made a strategic decision to not have a curative instruction read in order to not bring more attention to an already damaging mention of Mr. Buckham's nickname.

Finally, the State's argues that defense counsel admitted that the testimony of the lead officer to Mr. Buckham's nickname was not intentional, and therefore

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[16] Answ. Br. at 32.

[17] *Id.*

[18] *Id.*

because the testimony was not intentional it can not be prejudicial. Unsolicited comments do not have to be intentional or purposeful to have a prejudicial effect on the jury. The witness who testified to the nickname "Gunner Montana" was not a lay witness without experience testifying, but rather, the chief investigating officer who had been instructed by the prosecutor that the nickname was inadmissible. Even with the pre-trial meetings, discussions, and redactions to safeguard against such a prejudicial nickname being used in front of the jury on a shooting case, the name "Gunner Montana" was still testified to and around seventy social media chats where the nickname can clearly be inferred were entered into evidence. Thus, Mr. Buckham suffered substantial prejudice by having his nickname of "Gunner Montana" testified to in front of the jury.

CONCLUSION

Based on the facts and legal authorities set forth above, Appellant David Buckham respectfully requests that this Honorable Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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