EFiled: Aug 31 2017 10:48PM EDT
Filing ID 61058764
Case Number 271,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MARK BARTELL,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	**No. 271, 2017**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF KENT COUNTY

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NATURE AND STAGE OF THE PROCEEDINGS

Mark Bartell ("Bartell") was initially indicted on two counts of rape first degree, one count of rape fourth degree, one count of terroristic threatening, and one count of offensive touching. Months later, the State re-indicted Bartell to include two counts of criminal solicitation first degree. (A9).

On December 14, 2016, Bartell filed a motion to sever the criminal solicitation charges from all the remaining counts in the indictment. (D.I.#30). A hearing was held on January 13, 2017. The Court denied the motion by written order dated January 25, 2017. (*See* Order, attached as Ex. A).

A six day jury trial commenced on March 20, 2017. Bartell was acquitted of terroristic threatening and offensive touching. For the two counts of rape first, he was instead found guilty of the lesser included offense of rape second. He was convicted on all remaining counts. (D.I.#67). Bartell was sentenced to seventy-five years at Level 5 followed by various levels of probation. (*See* Sentence Order, attached as Ex. C).

Bartell filed a timely notice of appeal. This is his opening brief in support of that appeal.

SUMMARY OF THE ARGUMENT

1. Bartell suffered substantial prejudice when the trial court denied his motion to sever the criminal solicitation charges from the remaining counts in his indictment. The State was improperly permitted to use evidence of the charges to impugn his character and draw an improper inference. Reversal is now required.

2. The trial court violated Bartell's rights to a fair trial provided by both the Federal and State Constitutions when it failed to declare a mistrial after multiple instances injected inadmissible, irrelevant and highly prejudicial testimony. Reversal is now required.

STATEMENT OF FACTS

On November 3, 2015, Mark Bartell was blindsided by allegations that he raped his wife of fifteen years, Michelle Bartell. (A30). The complainant alleged that on the evening of November 2, 2015, the couple had gotten into a dispute over ordering a pizza and a 2-liter bottle of soda. (A41). According to the complainant, the following morning, Bartell who was still upset, insisted on having anal sex and she refused. (A43). The couple had previously engaged in anal sex during the course of their marriage and had last had intercourse just a few weeks earlier on the complainant's birthday. (A54). The complainant alleged however that on November 3, 2015, Bartell penetrated her vaginally and anally without her consent. (A45). Afterwards, the complainant showered and left for work. Instead of arriving at work, she went to Cheswold police department to report the incident. (A46).

The complainant had an Sexual assault nurse examination ("SANE") performed at Kent General Hospital in Dover. (A60). Prior to the exam, the complainant bathed, changed her clothes, urinated, defecated and wiped her genital area. (A66). There was conflicting testimony at trial as to the physical injury findings of the SANE exam. The nurse who examined the complainant testified according to her report that there were injuries including: abrasions, redness in the vaginal opening and anus and a hemorrhoid. (A69). However, Dr. Kathleen

Brown, a professor at the University of Pennsylvania with a specialty as a Woman's health nurse practitioner, opined differently. (A129). Dr. Brown testified that she saw no evidence of abrasions or tears to the complainant and that the general redness could be consistent from engaging in consensual sex. (A132-133). Moreover, she testified that from the characteristics of the hemorrhoid, it pre-dates the alleged assault. (A133). Finally, Dr. Brown opined that the history provided by the complainant does not correlate with the findings of the SANE examination since the complainant reported activities that would produce injuries that were simply not present. (A136).

At trial, the State offered testimony from two inmates at James T. Vaughn Correctional Facility in its efforts to prove the two criminal solicitation charges. The inmates, both whom the State charged with murder, testified that Bartell offered to compensate them to kill the complainant. (A100; A127).

I. BARTELL SUFFERED SUBSTANTIAL PREJUDICE WHEN THE TRIAL COURT DENIED HIS MOTION TO SEVER THE CRIMINAL SOLICITATION CHARGES FROM THE REMAINING COUNTS IN HIS INDICTMENT AS THE STATE WAS IMPROPERLY PERMITTED TO USE EVIDENCE OF THE CHARGES TO IMPUGN HIS CHARACTER AND DRAW AN IMPROPER INFERENCE.

Question Presented

Should the offenses have been severed when the criminal solicitation charges occurred while Bartell was incarcerated, four months after the original offenses which were alleged to have occurred at his residence and involved entirely separate witnesses? The question was preserved by a Motion to Sever. (A12).

Standard and Scope of Review

The review of a denial of a motion to sever is for abuse of discretion. *Weist v. State*, 542 A.2d 1193, 1195 (Del. 1988).

Argument

On July 5, 2016, Bartell was re-indicted by the Grand Jury. The State consolidated two separate cases into one indictment. Counts 1-5 involve Rape charges involving the complainant occurring on November 3, 2015. However, counts 6 and 7 allege Criminal Solicitation occurring in March of 2016, over four months after the original offenses and involved separate witnesses while Bartell was incarcerated. Accordingly, prior to trial, Bartell made an application to sever

the criminal solicitation charges from the rest of the indictment. (A12). The trial court denied the motion.

Joinder of offenses in the same indictment is only permissible when the offenses are "of the same or similar character, are based on the same act or represent a common scheme or plan[.]" *State v. Sisson*, 2005 WL 914464 at*3 (Del. Apr. 7, 2005) . *See* Superior Court Criminal Rule 8(a). However, when there is a reasonable probability that substantial prejudice may result from a joint trial, the court must sever the offenses. *See Weist*, 542 A.2d at 1195 (*citing Bates v. State*, 386 A.2d 1139, 1141 (Del. 1978)). Two forms of substantial prejudice which can result from the joinder of offenses are: "1) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find; [and] 2) the jury may use the evidence of one of the crimes to infer a general criminal disposition of the defendant in order to find guilt of the other crime or crimes." *Weist*, 542 A.2d at 1195. To determine whether a defendant will suffer substantial prejudice, the trial court is required to consider whether evidence admissible to one charge would be admissible as to the other charge in a severed trial. *See Sisson*, 2005 WL 914464 at*3.

Here, the Jury was forced to make an improper inference as to the general criminal disposition of Bartell since these charges were tried together. The Criminal Solicitation charges allegedly occurred at James T. Vaughn Correctional

more than four months after the original initial sexual assault, alleged to have occurred at Bartell's marital residence. Moreover, the solicitation charges involved separate witnesses who were alleged to be Bartell's cellmates. Any juror would infer guilt just based alone on the fact that they knew Bartell was incarcerated during the time that his case had been pending, which would be obvious because the State's witnesses in the criminal solicitation case were inmates. The irreparable harm was that the jurors inferred guilt and that the combination of the charges was so prejudicial that the jury was not be able to separately assess them fairly.

Finally, the evidence of criminal solicitation was not necessary to establish the rape offenses. *See Sisson*, 2005 WL 914464 (granting severance as defendant would be unfairly prejudiced by overwhelming evidence of child pornography that was not necessary to establish offenses sought to be severed). It simply amounted to additional criminality which failed to advance the State's case rendering it prejudicial without being relevant. Because of the trial court's failure to grant Bartell's motion to sever, Bartell was substantially prejudiced. Thus, his convictions must be reversed.

II. THE TRIAL COURT VIOLATED BARTELL'S RIGHTS TO A FAIR TRIAL PROVIDED BY BOTH THE FEDERAL AND STATE CONSTITUTIONS WHEN IT FAILED TO DECLARE A MISTRIAL AFTER MULTIPLE INSTANCES INJECTED INADMISSIBLE, IRRELEVANT AND HIGHLY PREJUDICIAL TESTIMONY.

Question Presented

Whether a defendant's right to a fair trial was violated when after the trial court ruled that any mention of defendant's prior allegations of abuse were inadmissible, repeated references by the State's witnesses are still made in front of the jury? The issue was preserved by objection. (A64).

Standard and Scope of Review

Constitutional claims are reviewed *de novo*. *Weber v. State*, 971 A.2d 135 (Del. 2009).

Argument

The trial court should have declared a mistrial in response to the injection of unsolicited, inadmissible and highly prejudicial testimony from multiple State witnesses, regarding Bartell's prior history. This deprived Bartell of his right to a fair trial in violation of his due process rights guaranteed by the United States and Delaware Constitution. Therefore, this Court must reverse Bartell's conviction and order a new trial.

During the trial, defense counsel brought to the court's attention that in the complainant's medical records from the incident report, there were statements

made referencing alleged past domestic violence. There was however no documentation supporting the allegations. (A58). The State sought to have the statements come in as an hearsay exception for the purpose of medical diagnosis and treatment. (A59). Defense counsel argued that such statements were inadmissible given their prejudicial nature outweighed their marginal relevancy and thus requested that the records be redacted accordingly and that the State's witnesses be advised not to reference it. (A58). The trial court agreed. (A59).

However, during direct examination of the SANE nurse, she testified that the complainant stated "this has happened before." Defense counsel immediately objected. (A64). The report the nurse was referencing appeared to have been redacted, however the record is silent as to whether the State's witnesses were ever advised by the prosecutrix not to reference the complainant's reference to past allegations. The court sustained the objection and advised the jury to disregard the statement. (A64).

In another instance, the State admitted to violating the motion in limine with regard to a protection from abuse ("PFA") order. At trial, the State played for the jury a recorded prison call between Bartell and his sister, Mary Davis. During the call, Davis referenced the PFA that the complainant had against Bartell. The State acknowledged that it failed to redact the reference because of an oversight. (A118). Finally, on a third occasion, when Davis testified for the State, she made

reference to the PFA. (A115). Oddly, the State argued that this somehow mitigated the harm from the failure to redact the initial reference as instructed by the court. Instead, it buttressed the prejudice.

A witness's misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. The touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?[1] Thus, the ultimate inquiry is not whether the error complained of was harmless or not, but rather whether the impropriety violated the defendant's due process rights to a fair trial.

In the case at bar, the State's witnesses repeatedly injected a highly prejudicial "evidential harpoon," the allegation that Bartell was abusive to the complainant before and had a PFA order against him. was convicted and serving a sentence for assaulting a female victim.[2] The witnesses reference to Bartell's PFA and abuse allegation "injected into the trial the assertion of a prior bad act that was [] on point" with the central issue at trial.[3] These injections were "likely to give rise to the impermissible inference that [Bartell] was acting in conformity

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1 See *Smith v. Phillips*, 455 U.S. 209 (1982).

2 *United States v. Hooks,* 780 F.2d 1526, 1535 n.3 (10th Cir. 1986); *Taylor,* 371 P.2d at 620-621.

3 *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002).

with previous behavior, which is precisely the concern that the trial judge [and the parties] correctly weighed" during trial.[4]

The repeated injections by the complainant were so highly prejudicial that it could not be cured by an admonition to the jury and therefore required a mistrial. Thus, the prejudice from this evidential harpoon was only aggravated by the court's instruction to disregard it. Here, the serious improprieties by the witnesses made it impossible to attain a fair and impartial verdict under the law. The trial court should have *sua sponte* declared a mistrial in order to cleanse the taint and begin anew. Thus, reversal is required

[4] *Id.* at 1023.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that Mark Bartell's convictions should be reversed.

\s\ Santino Ceccotti
Santino Ceccotti, Esquire

DATE: August 31, 2017