



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE DUNNELL,)
)
Defendant-Below,)
Appellant,)
)
v.) No. 564, 2017
)
STATE OF DELAWARE)
)
Plaintiff-Below,)
Appellee.)

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

APPELLANT'S REPLY BRIEF

NICOLE M. WALKER [#4012]
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801
(302) 577-5121

Attorney for Appellant

DATED: July 11, 2018

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CITATIONS	ii
 ARGUMENT	
I. NO RATIONAL TRIER OF FACT COULD FIND DWAYNE GUILTY BEYOND REASONABLE DOUBT OF DRUG DEALING, AGGRAVATED POSSESSION OR CONSPIRACY SECOND WITH RESPECT TO THE HEROIN LOCKED IN KYLE’S BURIED SAFE.	1
II. THE TRIAL COURT ERRED IN ADMITTING, WITHOUT PROPER AUTHENTICATION, WHAT THE STATE CLAIMED WERE TEXT MESSAGES SENT BY DWAYNE ON PHONES PURPORTEDLY BELONGING TO HIM.	4
III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO INTRODUCE THE PURPORTEDLY DRUG-RELATED TEXT MESSAGES AS THEIR PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.	7
IV. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO INSTRUCT THE JURY THAT THE SOLE PURPOSE FOR WHICH IT COULD USE THE TEXT MESSAGES WAS TO DETERMINE WHETHER DWAYNE HAD KNOWLEDGE OF AND PARTICIPATED IN DEALING THE HEROIN LOCKED IN KYLE’S BURIED SAFE.	8
V. THE ERRORS AT TRIAL CUMULATIVELY PREJUDICED DWAYNE AND DEPRIVED HIM OF A FAIR TRIAL.....	10
 Conclusion	 11

TABLE OF AUTHORITIES

Cases:

Farmer v. State, 698 A.2d 946 (Del.1997).....7
Getz v. State, 538 A.2d 726 (Del. 1988)..... 8
Holden v. State, 305 A.2d 320 (Del. 1973)2
Moss v. State, 2017 Del. LEXIS 271 (June 28, 2017).....4
Parker v. State, 85 A.3d 682 (Del. 2014)4
White v. State, 906 A.2d 82 (Del. 2006)..... 1, 2
Whitfield v. State, 524 A.2d 13 (Del. 1987)7

Rules:

D.R.E. 404(b)8

I. NO RATIONAL TRIER OF FACT COULD FIND DWAYNE GUILTY BEYOND REASONABLE DOUBT OF DRUG DEALING, AGGRAVATED POSSESSION OR CONSPIRACY SECOND WITH RESPECT TO THE HEROIN LOCKED IN KYLE’S BURIED SAFE.

It is quite telling that the State fails to address this Court’s decision in *White v. State*.¹ Perhaps it is because that case hits too close to home. In that case, this Court found no more than mere suspicion to support a claim that the defendant had knowledge of the drugs found in the closet in her bedroom. In our case, the State relies on weaker inferences than existed in *White* in an effort to convince this Court that Dwayne had knowledge of the drugs locked in Kyle’s buried safe. The State forgets, however, that, while circumstantial evidence can establish knowledge for purposes of constructive possession, “[i]nferences from circumstantial evidence are not limitless[.]”² Even circumstantial evidence must give rise to inferences of more than mere suspicion. And, mere suspicion, however strong, is insufficient for a criminal conviction.

In *White*, police found quite a bit of drugs and paraphernalia on the defendant, amongst her belongings and in her room. There was also paraphernalia and evidence of drug dealing in common areas of the house. Yet, this Court held that the evidence supported a conclusion that the

¹ *White v. State*, 906 A.2d 82 (Del. 2006).

² *White*, 906 A.2d at 88.

defendant was possibly aware of the drug operation in the house and/or was using drugs but not that she was a participant in the operation.³ “Mere proximity to, or awareness of drugs is not sufficient to establish constructive possession.”⁴

In our case, the State urges an even greater leap than it did in *White*. Unlike *White*, there were no drugs, paraphernalia or contraband found on Dwayne, amongst his belongings or in the room in which he stayed. The drugs for which Dwayne was charged with possessing were in a locked safe inside a bag buried under a 3’ pile of clothes in a laundry room. The State never established to whom that pile of clothes belonged. Also, the evidence at trial indicates that Dwayne stayed at this location much more sporadically than *White* stayed at the residence where she was arrested. However, in our case, the State did establish that Kyle, the individual who lived at the residence, was the one with a key to the safe.

Thus, viewing all the evidence in a light most favorable to the State could not lead a rational jury to conclude that Dwayne exercised dominion and control over and intended to guide the destiny of the heroin locked in

³ *Id.*

⁴ *White*, 906 A.2d at 86 (citing *Holden v. State*, 305 A.2d 320 (Del. 1973)) (finding, where, in a car, heroin was buried in container of Chinese food inside a paper bag and several small scales were also found and where a large amount of cash was found on the defendant, that mere proximity was not enough to convict for possession with intent to deliver).

Kyle's buried safe. Therefore, Dwayne's convictions for Drug Dealing and Aggravated Possession must be reversed.

Similarly, it is due to nothing more than the State's weak string of compound inferences that reveals its inability to establish any agreement between Dwayne and Kyle to engage in any activity related to the drugs locked in Kyle's buried safe. Therefore, Dwayne's conviction for Conspiracy Second Degree must also be reversed.

II. THE TRIAL COURT ERRED IN ADMITTING, WITHOUT PROPER AUTHENTICATION, WHAT THE STATE CLAIMED WERE TEXT MESSAGES SENT OR RECEIVED BY DWAYNE ON PHONES PURPORTEDLY BELONGING TO HIM.

More than a link between a cell phone and the defendant is necessary to authenticate the text messages the State seeks to introduce at trial. Thus, the trial court's finding that "linking a phone to a particular person through both physical evidence and other evidence is enough to authenticate the messages sent from that phone as being sent by the person who owned the phone and that everything else goes to the weight of the evidence" is erroneous.⁵ While ownership is a factor to consider,⁶ it is "witness testimony, corroborative circumstances, distinctive characteristics, or descriptions and explanations of the technical process or system that generated" the text that must be examined in order to determine its authorship.⁷

⁵ B11.

⁶Dwayne never specifically admitted ownership of the phone found in the car. Defense Counsel asked one officer, "[d]id you ever ask him, this cell phone that was recovered from your vehicle, is that your phone?" The officer responded, "[n]o." A61.

⁷ *Parker v. State*, 85 A.3d 682 (Del. 2014). See *Moss v. State*, 2017 Del. LEXIS 271, *7-8 (June 28, 2017).

Of main concern was the King Kong text on the phone found in the car. In its closing argument, the State conceded that it could not identify who sent that text: “ Ladies and gentlemen, how do we know that Dwayne, the defendant, sent that text message? Officer told you he didn’t see him send it. No one saw him send it. We can’t say he sent that text message.”⁸

The State claims that the use of the brand name King Kong is one characteristic that suggests a link between the message and Dwayne because King Kong was one of the brands of heroin found in Kyle’s buried locked safe. First, this is a circular argument as the State sought to establish Dwayne’s knowledge of the drugs by arguing that he was the author of this text. Yet, the State argued he was the author of the text because he knew about the drugs in the safe. Secondly, if, as the State claims, the King Kong brand was being sold to the masses on the streets, knowledge of King Kong was not solely within Dwayne’s knowledge. Thus, King Kong would not be a “unique characteristic” of the text pointing to Dwayne as its author.

Finally, locating the phone near Dwayne is not sufficient for authentication. Further, none of the texts found on the other phones provided any circumstances that linked the text to Dwayne. Therefore, the

⁸ A92.

texts should not have been admitted and Dwayne's convictions must now be reversed.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO INTRODUCE THE PURPORTEDLY DRUG-RELATED TEXT MESSAGES AS THEIR PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

The State does not dispute that its expert witness testified that he was unable to say what drugs or, in some cases, what type of drugs were the subject of the texts that involved purported drug dealing.⁹ Thus, the State is incorrect that the texts provide anything more than speculation with respect to any link between Dwayne and the drugs buried in Kyle's locked safe. Speculation that Dwayne was involved in dealing those drugs based on the possibility that he may have been involved in dealing other drugs subjected him "to the same risk that impermissible character or bad act evidence may pose -- equating disposition with guilt."¹⁰

The trial court abused its discretion when it failed to exclude the text messages because their probative value was substantially outweighed by the danger of unfair prejudice, they should have been excluded. Thus, Dwayne's convictions must be reversed.

⁹ A88.

¹⁰ See *Farmer v. State*, 698 A.2d 946, 948-949 (Del. 1997) (citing *Whitfield v. State*, 524 A.2d 13 (Del. 1987)).

IV. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO INSTRUCT THE JURY THAT THE SOLE PURPOSE FOR WHICH IT COULD USE THE TEXT MESSAGES WAS TO DETERMINE WHETHER DWAYNE HAD KNOWLEDGE OF AND PARTICIPATED IN DEALING THE HEROIN LOCKED IN KYLE’S BURIED SAFE.

The State asserts that the texts referred to conduct that was part of an ongoing illegal heroin distribution scheme and not to prior bad acts that would require the issuance of a limiting instruction.¹¹ However, the conduct referred to in the texts is not part of the offenses for which Dwayne was charged. Therefore, they are prior bad acts and their only relevance is to show knowledge of Kyle’s drugs. And, it is precisely because prior bad acts can be admissible for the limited purpose of knowledge that a limiting instruction is necessary.¹²

Significantly, the State does not challenge the fact that there was no strategic reason for defense counsel to not request a limiting instruction in this case. And, because the State relied heavily on the texts that contained evidence of the prior bad acts, the trial court’s failure to, *sua sponte*, issue a limiting instruction was so clearly prejudicial to substantial rights as to

¹¹ Ans.Br. at p. 28.

¹² *Getz v. State*, 538 A.2d 726, 730 (Del. 1988) (“Under the exclusionary approach, evidence of prior bad acts would not be admissible unless it fits within a finite list of recognized exceptions provided in *D.R.E.* 404(b), *i.e.*, intent, motive, opportunity, identity, plan, knowledge, preparation or absence of mistake of accident.”)

jeopardize the fairness and integrity of the trial process. Thus, Dwayne's convictions must be reversed.

**V. THE ERRORS AT TRIAL CUMULATIVELY PREJUDICED
DWAYNE AND DEPRIVED HIM OF A FAIR TRIAL.**

Appellant rests on his argument set forth in his Opening Brief.

CONCLUSION

For the reasons and upon the authorities cited herein, Dunnell's convictions must be reversed.

Respectfully submitted,

/s/ Nicole M. Walker
Nicole M. Walker [#4012]
Carvel State Building
820 North French Street
Wilmington, DE 19801

DATED: July 11, 2018