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Case Number 454,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON THOMPSON, Defendant Below, Appellant. v. STATE OF DELAWARE Plaintiff Below, Appellee.	: : : : : : : : : : : :	No. 454, 2017 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE I.D. NO. 1602016732

APPELLANT'S OPENING BRIEF

FILING ID 61959875

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NATURE OF PROCEEDINGS

On September 22, 2013, Joseph and Olga Connell were shot to death in front of their residence, 84 Paladin Drive, in Wilmington, Delaware. On September 15, 2014, Joseph's business partner, Chris Rivers, and his co-defendant, Dominique Benson, were indicted on two counts of Murder First Degree, two counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), and Conspiracy First Degree. (A21 at DI 1).

On February 26, 2016, Appellant Aaron Thompson was arrested in connection with the murders of Joe and Olga Connell. (A1 at DI 3). Three days later, the State re-indicted the case, renewing the same charges against Rivers and Benson, but adding Thompson as another co-defendant. (A34 at DI 68). Because the joint trials of Rivers and Benson were scheduled to begin on April 5, 2016, the State did not oppose the severance of Thompson's trial from that of his co-defendants. (A34 at DI 68).

A jury found Benson guilty of Conspiracy First Degree, but could not reach a verdict on the remaining counts. (A39 at DI 97). The State alerted the Court that it intended to retry Benson and Thompson together. (A3 at DI 11). A joint trial was scheduled for June 6, 2017. (A4 at DI 16). Thompson filed a motion to sever defendants, which the Superior Court denied. (A5–A6 at DI 17, DI 23).

On May 9, 2017, Thompson renewed his motion to sever defendants. (A8 at DI 35). The State did not oppose Thompson's renewed request. (A9 at DI 42; A53). At an office conference held on May 23, 2017, the trial court granted Thompson's motion. (A9 at DI 45; A53). The State requested that Thompson be tried first. (A9 at DI 45; A53).

The State's theory of the case was a 'murder-for-hire' plot, in which Rivers paid to have the Connells killed so he could collect on an insurance policy where Joseph Connell was the insured and Rivers the beneficiary. (A76–A78). Rivers paid Bey, who in turn hired Benson and Thompson to carry out the murders. (A81–A84).

Trial began on June 13, 2017 and concluded on June 26, 2017. (A13 at DI 60). Two days later, the jury found Thompson guilty on all charges. (A13 at DI 60). On October 6, 2017, he was sentenced to two natural life sentences plus forty-five years at Level V incarceration. (A14 at DI 66; A17–A20).

Thompson filed a timely Notice of Appeal. (A16 at DI 82). This is his Opening Brief.

SUMMARY OF THE ARGUMENT

I. The State undermined the fairness of the trial process by asking the jury to make inferences not supported by the evidence and to consider "what will happen to" Bey once he is released from prison. Because this was a close case in which credibility was the central issue, the State's improper comments cannot be cannot be deemed harmless error. Reversal is required.

II. The trial court abused its discretion in allowing Bey's recorded statement to police to be played for the jury as a prior consistent statement under Delaware Rule of Evidence 801(d)(1)(B). The statement did not logically rebut the impeachment because Bey's motive to fabricate predated his statement to police. Admitting Bey's post-arrest statement into evidence impinged Thompson's constitutional right to a fair trial.

STATEMENT OF FACTS

At approximately 1:30 a.m. on September 22, 2013, New Castle County police officers responded to a reported shooting at 84 Paladin Drive, Wilmington, Delaware.[1] The officers discovered that Joseph Connell and his wife, Olga, had been shot and killed in front of their home.[2] Police found Joseph Connell behind a row of shrubbery, still holding onto his cellphone.[3] The cause of death was multiple gunshot wounds; the manner of death was homicide.[4] After an extensive investigation, police arrested Rivers and charged him with their murders.

The Motive

Rivers and Joseph Connell were joint owners of C&S Automotive Repair ("C&S Auto").[5] Olga Connell had worked at C&S Auto as the receptionist.[6] In October of 2012, Rivers and Joseph Connell secured a nearly million-dollar mortgage in connection with their business.[7] As partners in that transaction, they were both required to purchase life insurance, or "Key Man" insurance, in the amount of $977,500 to pay off the mortgage if one of them were to die.[8] Each policy

[1] A98(i).
[2] A98(i).
[3] A98(ii).
[4] A116.
[5] A107–A108.
[6] A106.
[7] A107–A108.
[8] A107–A108.

listed the other partner as the beneficiary of the policy.[9] The death of the Connells would have resulted in Rivers owning C&S Auto free and clear of the mortgage.[10]

The Investigation

After leaving the crime scene, Detective James Leonard, the chief investigating officer, notified Rivers of the Connells' murders.[11] While speaking with Detective Leonard at the police station, Rivers offered video surveillance from inside his home that proved he was home on the night of the murders.[12] The surveillance footage showed that Rivers was home that night, pacing back and forth on the phone.[13]

Detective Leonard obtained phone records for Rivers and the Connells.[14] He noticed that around the time of the murder, Rivers had deleted certain communications with phone number (302) 559-9574.[15] Further investigation revealed that this phone was subscribed to Alicia Prince, Joshua Bey's girlfriend.[16] On October 4, 2013, Detective Leonard questioned Bey at the police station about the deleted texts.[17]

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[9] A107–A108.
[10] A108.
[11] A102.
[12] A104.
[13] A104–A105.
[14] A121–A123.
[15] A125–A126.
[16] A125.
[17] A125–A126.

At first, Bey said that he did not know anyone by the name of Chris Rivers.[18] But after Detective Leonard confronted him with Rivers' phone records, Bey admitted that Rivers is his mechanic.[19] After further questioning, Bey claimed that he called Rivers by accident, known as "pocket dialing."[20] When Detective Leonard pointed out that incoming calls from Rivers could not be the result of pocket dialing, Bey claimed that Rivers was supposed to work on his car that night, but Rivers never showed up and did not answer his calls.[21]

As for his whereabouts on the night of the murder, Bey stated that he worked an overnight shift at the Kohl's Department Store on Route 202.[22] Bey's timesheet indicated that he clocked in at 10:07 p.m. and clocked out the next morning at 6:05 a.m.[23] Video surveillance of the Kohl's parking lot revealed that Bey's car remained parked for the duration of his shift.[24]

Detective Leonard questioned Bey again on October 24, 2013.[25] This time, Bey admitted that he was Rivers' drug dealer.[26] By then, Detective Leonard had

[18] A127.
[19] A127.
[20] A127.
[21] A127.
[22] A127.
[23] A142–A145.
[24] A147.
[25] A147–A148, A152.
[26] A148, A152.

already received and reviewed Bey's call detail records.[27] The next day, Bey was arrested for providing a false statement to the police.[28] Because he was already on probation, this arrest triggered a violation of probation ("VOP") for Bey.[29]

Prior to Bey's VOP hearing on November 19, 2013, Detective Leonard and Sergeant Breslin saw Thompson and Benson sitting outside the courthouse.[30] As they walked past, Sergeant Breslin heard Benson say, "that's them" or "there they are."[31] Shortly thereafter, Sergeant Breslin spotted Thompson and Benson enter the courtroom in which Bey's VOP hearing was to be held.[32] Sergeant Breslin used his cellphone to take a video of Benson and Thompson inside the courtroom.[33]

Bey's Proffer and Cooperation Agreement

Bey was incarcerated while awaiting trial on the charge of lying to law enforcement.[34] After almost ten months of incarceration and moments before the start of his trial, Bey agreed to provide information about the murders of the Connells in exchange for a "deal" from the State.[35] On August 14, 2014, Bey gave a proffer

[27] A147–A148; A125.
[28] A151.
[29] A152–A153.
[30] A151, A154.
[31] A151, A153.
[32] A154.
[33] A154.
[34] A181–A182.
[35] A179, A182.

that not only implicated himself, but also his co-defendants.[36] But, at that time, Bey declined to enter into an agreement with the State.[37]

After he was arrested for the Connells' murders the following month, Bey finally agreed to cooperate.[38] In exchange for his cooperation, the State offered Bey a guilty plea to Conspiracy First Degree and a VOP.[39] Under the terms of the agreement, Bey also avoided being sentenced as a habitual offender, which exposed him to a sentence of natural life.[40] Finally, he received immunity for burglarizing the Connells' residence on July 30, 2013 and for providing a false statement to the police on October 24, 2013.[41] On September 5, 2014, after becoming a cooperating witness, Bey provided his fourth—and final—statement to police.[42]

Direct Examination of Bey

On direct examination, Bey admitted that he is a multiple-time convicted felon.[43] In fact, shortly after meeting Rivers in 2012, Bey started selling him prescription pills and cocaine.[44] He sold 100 oxycodone pills to

[36] A180–A181.
[37] A181–A182.
[38] A181.
[39] A159–A160.
[40] A160.
[41] A160.
[42] A216.
[43] A159.
[44] A161.

Rivers approximately twice a week, making between $4,000 to $6,000 every week.[45]

Bey testified that in 2013, Rivers asked him to hire someone else to kill the Connells.[46] Rivers mentioned that he had an insurance policy for Joseph Connell and would use that to "pay off the [] shop."[47] Bey first told Rivers that the price would be $100,000.[48] When Rivers balked at that amount, Bey brought the price down to $60,000—$30,000 for each murder.[49] Rivers agreed and arranged to half up front and the other half in installments.[50] Bey told Rivers that he needed $5,000 immediately, which Rivers paid in cash.[51]

Bey hoped to make money off this transaction by hiring someone else to carry out the murders for cheaper.[52] Bey asked Benson to do it.[53] He brought Benson to C&S Auto to see the shop and meet Rivers.[54] When Bey asked Rivers if he had the money, Rivers responded, "Yeah I got the money, 30/30."[55] This revelation put Bey in a "tight spot" with Benson because he

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[45] A161, A183–A184.
[46] A164.
[47] A164.
[48] A164.
[49] A164.
[50] A165.
[51] A165.
[52] A165.
[53] A165.
[54] A166.
[55] A166.

told Benson that Rivers was willing to pay only $20,000, not $60,000.[56] Bey admitted that he intended to keep the remaining $40,000 for himself.[57] Even though Bey's cover was blown, Benson agreed to find someone else to do it for them.[58]

As part of the plan to kill the Connells, Rivers gave Benson steroids to place at the would-be crime scene.[59] Rivers wanted Benson to make the Connell's murders look like the result of a drug-deal-gone-bad.[60] As the planning progressed, Bey was under the impression that Benson would commit the murders.[61] But at some point, Benson told Bey that he would ask Thompson to assist him.[62]

First Attempt

Bey testified that Benson's cousin, Willis Rollins or "Little Willis," was also asked to carry out their plan.[63] According to Bey, Benson thought that he could get Rollins to do it for only $10,000, allowing Benson to keep more money for himself.[64] Benson arranged for Bey and Rollins to meet at a McDonald's restaurant.[65] The

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[56] A166.
[57] A166.
[58] A166.
[59] A168.
[60] A168.
[61] A168.
[62] A168.
[63] A168.
[64] A169.
[65] A169.

purpose of this meeting saw to show Rollins where the Connells lived.[66] However, Bey claimed that Rollins was waiting for Thompson to bring him a gun.[67] Bey testified that Thompson arrived in a gold LeSabre, reached into the car, and handed Rollins a black gun with a silencer.[68] After showing Rollins which path to walk to get to the Connells' apartment, Bey went back to his car and waited for Rivers to provide updates as to their whereabouts.[69] The following day, Bey called Benson and asked him what happened.[70] Benson stated that Rollins "froze up."[71]

Second Attempt

Bey testified about a second attempt to kill the Connells.[72] As more time passed, Rivers became increasingly impatient.[73] Benson assured Bey that it would happen, but that they were having trouble finding a car to use.[74] When Bey told Rivers this, Rivers offered to let them drive his Tahoe.[75] The offer was accepted, so Bey picked up Rivers' Tahoe up from C&S Auto and then met Benson and Thompson in a parking lot behind his mother's house.[76] Bey testified that Benson

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[66] A169.
[67] A169.
[68] A169.
[69] A170.
[70] A170.
[71] A170.
[72] A171.
[73] A171.
[74] A171.
[75] A171.
[76] A171.

and Thompson got into the Tahoe and drove off.[77] However, the Connells were not killed that night either.[78] Bey claimed that, because the Tahoe was equipped with On Star, Thompson was concerned about driving it.[79]

The Murders and Collecting Payment

On the night of the murders, Rivers told Bey that the Connells were going to Firestone's, a restaurant on the Riverfront.[80] Throughout the night, Rivers relayed their whereabouts to Bey, who in turned, passed the information along to Benson.[81] After Bey arrived at Kohl's for his overnight shift, he received a call from Benson asking when the Connells would be leaving Firestone's.[82] Bey called Rivers, who said that they would be leaving in 30 minutes.[83]

Bey testified that he not speak to Benson again until after his shift ended.[84] From the Kohl's parking lot, he called Benson to ask what happened, but Benson said he needed to call Thompson to find out.[85] Around 8:00 or 9:00 a.m., Bey received a call from Benson saying that it was official and to "go collect."[86]

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[77] A171.
[78] A171.
[79] A171.
[80] A172.
[81] A171–A172.
[82] A173.
[83] A173.
[84] A174.
[85] A174.
[86] A174.

Besides the initial $5,000 payment, Bey did not receive any more money prior to the murders.[87] After the murders, Bey began calling Rivers to collect the rest of the money.[88] Rivers eventually paid another $5,000 to Bey; Bey then took that $5,000 payment to Benson.[89] But Benson refused the payment, saying it was too late.[90] Bey testified that Rollins was present during this meeting.[91]

Later that day, Bey received a phone call from Benson instructing him to meet with Thompson.[92] When Bey arrived, Thompson was sitting on the step, reading a newspaper.[93] Bey gave Thompson the $5,000 payment and explained that Rivers would be receiving more money from an insurance payout.[94] A couple days later, Bey received another $2,500 from Rivers.[95] And Rivers made one final payment of $1,500.[96] Bey gave both payments to Benson.[97]

Bey testified that he never directly communicated with Thompson about the plan to kill the Connells.[98] He only communicated with Rivers and Benson.[99] Bey

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[87] A174.
[88] A175.
[89] A175–A176.
[90] A176.
[91] A175–A176.
[92] A176.
[93] A176.
[94] A176–A177.
[95] A177.
[96] A177.
[97] A177.
[98] A166.
[99] A166, A181.

also admitted that, prior to the murders, he burglarized the Connell's home because Rivers indicated that there was money, drugs, and jewelry inside.[100] Rivers told Bey that Joseph Connell's brother-in-law would be blamed for the burglary because of an on-going feud related to a family heirloom.[101] Bey testified that he, along with an unnamed accomplice, used a crowbar to break into the house.[102] Once inside, they stole jewelry, a laptop, and a Movado watch.[103]

Cross Examination of Bey

The defense's cross examination of Bey portrayed him as being untrustworthy and manipulative.[104] A substantial portion of Bey's cross examination consisted of confronting him with inconsistent statements that he made during the proffer on August 14, 2014.[105] However, there were two areas of inquiry related to Bey's September 5, 2014 statement that defense counsel explored. The first concerned the manner in which Bey dropped the Tahoe off to Benson and Thompson; the second concerned the items that Bey stole during the burglary of the Connell's residence.[106]

Redirect of Bey

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[100] A167.
[101] A167–A168.
[102] A167.
[103] A167.
[104] A183–A185, A192, A203–A2045.
[105] A186–A187, A188, A191–A192, A193, A196–A197, A201–A202.
[106] A194; A201–A202.

Before beginning its redirect, the State announced that it intended to play Bey's September 5, 2014 statement for the jury as a prior consistent statement under Delaware Rule of Evidence 801(d)(1)(B).[107] Defense counsel objected, arguing that it amounted to inadmissible hearsay because Bey's statement was "made at a time when there was a motive for fabrication."[108] The trial court ruled it admissible as a prior consistent evidence.[109] Thompson's counsel then agreed to allow Bey's statement to be introduced through Detective Leonard.[110]

The Cell Phone Records

Throughout the course of the investigation, police obtained call details records ("CDRs") for Rivers, Bey, Benson, and Thompson.[111] CDRs, which are generated by the cell phone company, document phone usage and cell tower information.[112] Using the data contained within these records, Detective Leonard created a color-coded timeline that compiled the phone communications of Rivers, Bey, Benson, and Thompson before and after the Connells were killed.[113] Also included in this

[107] A207, A319
[108] A321–A322.
[109] A207.
[110] A210.
[111] A326–330 (listing each trial exhibit).
[112] A224.
[113] A253–A256, A258–A261.

timeline were phone calls to and from "Kenny AAAA," a 'burner phone' which the State sought to prove was in Thompson's possession on the night of the murders.[114]

The State's Closing Arguments

The State emphasized in its closing arguments that the cell phone evidence established a pattern of communication. On the night of the murders, after a call or text between Rivers and Joseph Connell, Rivers would contact Bey, then Bey would call Benson, and finally Benson would contact either Thompson or "Kenny AAAA."[115] While the State conceded that Benson and Rollins also used the phone registered to "Kenny AAAA," it maintained that Thompson was using it on the night of the murder.[116]

In an attempt to downplay the communications between Bey and Rollins, the State claimed that Benson used Rollins' cell phone to call Bey on September 26, 2013.[117] Defense counsel objected to this argument as being outside the proper scope of rebuttal.[118] The State countered that it was proper because the defense is "challenging as a whole what [Bey] is saying."[119] The trial court sided with the State, explaining that "credibility is front and center of the case."[120]

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[114] A178–179, A285–A286.
[115] A302–A303.
[116] A285–A286.
[117] A302–A303.
[118] A304.
[119] A304.
[120] A304.

Finally, to minimize the favorable plea deal extended to Bey, the State asked the jury to consider "what will happen" to Bey once he is released from prison.[121] This comment drew an immediate objection from defense counsel.[122] The trial court allowed the State to "finish [its] point."[123] The jury was not instructed to disregard the prosecutor's comment.

[121] A306.
[122] A306.
[123] A306.

I. THE PROSECUTOR MISREPRESENTED THE EVIDENCE AND IMPROPERLY ASKED THE JURY TO SYMPATHIZE WITH A CO-DEFENDANT WHO COOPERATED IN THE INVESTIGATION, DEPRIVING THOMPSON OF HIS RIGHT TO DUE PROCESS AND REQUIRING REVERSAL.

A. Question Presented

Whether under the Due Process Clause of the United States Constitution and Art. I §7 of the Delaware Constitution, the prosecution tainted a jury trial when it (1) argued facts that were not supported by the evidence in summation and (2) appealed to the jury's emotions by evoking sympathy for a cooperating co-defendant?[124]

B. Standard and Scope of Review

The standard for reviewing prosecutorial misconduct claims depends on whether the issue was fairly presented below. If defense counsel raised a timely objection to the conduct at trial, or if the trial judge considered the issue *sua sponte*, then the conduct is reviewed for harmless error.[125] Otherwise, the conduct is

[124] Issue preserved at A281, A304 (objecting to the State's attempt to prove that Benson's girlfriend had the cell phone and objecting to argument in rebuttal summation as sandbagging); A306 (objecting to the State asking the jury to consider "what will happen" to Bey after he is released from prison).

[125] *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012).

reviewed for plain error.[126] Here, counsel for Thompson raised timely objections to the prosecutor's improper statements.[127]

When conducting a harmless error review, this Court first reviews the record *de novo* to determine whether the misconduct occurred.[128] If this Court determines that no misconduct occurred, then our analysis ends there.[129] If, however, the prosecutor engaged in misconduct, then the Court reviews "whether the improper comments or conduct prejudicially affected the defendant's substantial rights necessitating a reversal of his conviction."[130]

To make this determination, this Court applies the three-factor Hughes test analyzing "(1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error."[131] Any one factor can be determinative.[132] If, after applying the *Hughes* test, this Court finds that the errors do not require reversal, the fourth and final step requires examination of all of the errors to determine "whether the prosecutor's statements or misconduct are

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[126] *Id.*

[127] A281, A304 (objecting to the State's attempt to prove that Benson's girlfriend had the cell phone and objecting to argument in rebuttal summation as sandbagging); A306 (objecting to the State asking the jury to consider "what will happen" to Bey after he is released from prison).

[128] *Baker v. State*, 906 A.2d 139, 148 (Del. 2006) (citations omitted).

[129] *Id*.

[130] *Id.* at 149 (citing *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004)).

[131] *Id.* (citing *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981)).

[132] *Id*.

repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.[133]

C. Argument

i. Prosecutors tainted the summation by asking the jury to draw inferences that were not supported by the evidence

A prosecutor may not misrepresent the evidence presented at trial.[134] A prosecutor's duty "to see that justice be done by giving [a] defendant a fair and impartial trial" extends through closing arguments.[135] Although a prosecutor may argue all reasonable inferences from the evidence in the record, the prosecutor must not misstate evidence or mislead the jury as to the inference it may draw therefrom.[136] Additionally, the prosecution may not "appeal to the jurors' passions and prejudices."[137]

In rebuttal, the prosecution improperly suggested that Bey was actually speaking to Benson when he called Rollins on September 26, 2013—the day on which Bey attempted to give Benson a partial $5,000 payment.[138] The State

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[133] *Id.* (citing *Hunter v. State*, 815 A.2d 730, 732 (Del. 2001) (per curiam)).
[134] *Flonnory v. State*, 893 A.2d 507, 540 (Del. 2006)
[135] *Hughes*, 437 A.2d 559 at 568 (quoting *Bennett v. State*, 164 A.2d 442, 446 (Del. 1960)).
[136] *Hughes*, 437 A.2d at 567 (citing A.B.A. Standards for CRIM. JUST. § 5.8 (1971)).
[137] *Hunter*, 815 A.2d 730 at 732.
[138] A304–A305.

endeavored to make this same argument during its rebuttal examination of Detective Leonard. When Thompson objected,[139] the prosecutor explained its tactic at sidebar:

> The State is showing on rebuttal that, in fact, . . . [Bey] is communicating with [Rollins's] phone, although he is talking to [Benson].
> And the reason that – we are able to show that is because [Benson's girlfriend] has the phone at work and is making calls to her friends at the courthouse.[140]

But the prosecutor did not have any proof that Benson's girlfriend was calling the courthouse, prompting the judge to warn that "[i]f you want to make that point, you need a witness to say those calls are coming to me or some record that proves it."[141] After the prosecutor advised that it would move on, the judge admonished that if the State "need[s] a piece of evidence about who subscribes to a phone number, get it in before you start making these connections that aren't supported by the record."[142] Thompson's objection was sustained.

Nevertheless, during rebuttal closing argument, the prosecutor asked the jury to draw the very same inference that the judge determined was not supported by the record. With a clever twisting of Bey's testimony, the State argued:

> Now, the defense makes much of the fact that Willis Rollins's phone communicates with Joshua Bey.
> Yes, it does.

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[139] A280.
[140] A280.
[141] A281.
[142] A281.

> But what [Bey] says is the person he is talking to is Dominque Benson.
> He doesn't say what phone number he is talking to Dominique Benson on.[143]

Not only did the prosecution misstate the facts, it worded its argument to inject doubt where none existed.

There is simply no evidence to suggest that Benson used Rollins' phone to contact Bey. Bey testified that on September 26, 2013, he met Benson at the park behind his house.[144] After Bey told Benson he only had $5,000, Benson "shook his head. He got on the phone and called [Thompson]."[145] Bey did not indicate that Benson used Rollins' phone. If there remains any doubt about which phone Benson used that day, the prosecution told the jury in closing argument that Rollins' phone actually belonged to his mother, so he "can't take it from the house."[146] The record does not support the conclusion that Benson used Rollins' phone to contact Bey.

More importantly, the State ignored the trial court's ruling. The prosecutor knew that it had not introduced any proof that Benson's girlfriend called the courthouse on September 26, 2013. Absent that evidentiary support, the prosecutor could not ask the jury to infer that Benson's girlfriend had the phone. Nor could it ask the jury to assume that Benson used Rollins' phone instead.

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[143] A304.
[144] A175.
[145] A176.
[146] A285.

ii. The prosecution improperly asked the jury to speculate about future consequences that the cooperating co-defendant might face in order to evoke sympathy for him

When a prosecutor unfairly appeals to the emotions of a jury, s/he prejudices the defendant's right to a fair trial. "A guilty verdict must be based upon the evidence and the reasonable inferences therefrom, not on an irrational response which may be triggered if the prosecution unfairly strikes an emotion in the jury."[147] "Appeals to sympathy and jurors' emotions are impermissible because they go beyond the facts of the case and the reasonable inferences from the facts."[148]

In this case, during its rebuttal summation, the prosecution attempted to invoke sympathy for Bey and, in doing so, left the jury with the impression that his safety was at risk:

Prosecutor:	He is a flipped co-defendant. He is a snitch. He is a rat. All of those things. He will serve eight-and-a-half years in prison, and then he will get out. And what will happen to him then?
Defense:	Objection, Your Honor.
Court:	I am not sure what counsel means by that, but–
Defense:	I don't either. I am going to object and ask for – well, I will address that later.
Court:	Let her finish her point. [149]

[147] *DeShields v. State*, 534 A.2d 630, 642 (Del. 1987).
[148] *Id*.
[149] A306.

The trial judge did not ask the parties to come to sidebar. Instead, after the prosecution concluded its rebuttal argument and the jury was excused for a brief recess, defense counsel was finally given an opportunity to address the improper comment. Thompson's counsel moved for a mistrial, arguing that the prosecutor intentionally created the inference that Bey would be harmed in the future.[150] The prosecutor responded that "there has been a lot of discussion . . . about the sentence [Bey] will receive, and how he got a good deal. He is going to get out after eight-and-a-half years. His girlfriend is gone; his child is gone."[151]

Although the State clarified that it was suggesting Bey will suffer "other consequences" for cooperating,[152] even this argument is impermissible. By inviting the jury to consider how Bey's decision to cooperate impacted his relationship with his girlfriend and child, the State hoped that the jury would feel sympathy for him.[153] This tactic is improper.

Even worse, as the judge pointed out, the prosecution did not return to its original point after defense counsel objected.[154] As a result, its comment left with the jury with the impression that "that something untoward is going to happen to

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[150] A307–A308.
[151] A308.
[152] A308.
[153] *Briscoe v. State*, 2006 WL 2190581, at *3–4 (Del. July 28, 2006) (prosecutor improperly evoked sympathy for deceased victim by stating that he grew up in a "tough neighborhood" and "will never have a chance").
[154] A306, A308.

[Bey] because he is a rat."[155] And that impression was amplified by the fact that two Department of Corrections officers stood on either side of Bey for the duration of his trial testimony.[156] During a break in his direct examination, and in the presence of the jury, the State announced that it would need extra time due to "security purposes."[157] These circumstances underscore the inflammatory nature of the prosecutor's inquiry into what Bey's future might hold.

Because the comment directed the jury's attention away making a "determination of guilt or innocence on an individualized basis,"[158] the prosecution engaged in misconduct during its rebuttal summation. However, the test is not whether the statements are improper, but whether they were so prejudicial as to compromise the fairness of the trial process."[159]

iii. The prosecutor's misconduct prejudiced Thompson and compromised the integrity of the jury

The first prong of the *Hughes* test analyzes the closeness of the case. Thompson's case was a close one. In addition to being excluded as a contributor to the DNA left on the casings found at the crime scene,[160] there was no eyewitness to

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[155] A308.

[156] Although this fact is not expressly reflected in the record, as participants in the trial, the undersigned counsel aver that two corrections officers stood on either side of the witness stand while Bey testified.

[157] A173 (defense counsel objects to the State's use of the phrase "security purposes).

[158] *Black v. State*, 616 A.2d 320, 324 (Del. 1992).

[159] *Id*. at 324 (citation omitted).

[160] A135–A138, A140.

the shooting, no physical evidence, and no murder weapon linking Thompson to the murders. The linchpin in this case is Bey. In fact, State argued to the jury that Bey is "the only person who can connect" Rivers to Benson and Thompson.[161] But even the State admitted that Bey is a "liar, a snitch, a drug dealer, and he was involved in the deaths of Joseph and Olga Connell."[162]

The second *Hughes* factor—the centrality of the issue affected by the error—also favors Thompson. The prosecution's improper comments struck at the heart of this case. The trial judge repeatedly emphasized that Bey's credibility was "the central element of the case."[163] Nevertheless, the State attempted to bolster Bey's credibility with the jury by invoking sympathy for him. More problematic is the ambiguity created by the State's request to consider "what will happen" to Bey. Such a request impermissibly invited the jury to infer that Bey is in danger, making his testimony more credible because he risked his life to cooperate.

Furthermore, the prosecutor's suggestion that Benson used Rollins' phone to contact Bey was a thinly veiled attempt to rehabilitate his trial testimony. Bey had no reason to speak to Rollins after his failed attempt on the Connells' lives. In fact,

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[161] A286.

[162] A85, A286, A288.

[163] A309; see also, A304 (giving the State wide latitude on rebuttal because "credibility is front and center of the case"); A115 (requiring the parties to request permission to approach while cross examining a witness, except for Bey because "Bey is Bey, right? . . . He's different.")

he testified on cross that did not recall *ever* speaking to Rollins on the phone.[164] Yet the phone records suggested otherwise. With Bey's credibility at stake, the prosecution resorted to making inferences not supported by the record.

The final *Hughes* factor weighs heavily in favor of finding that the State's error prejudiced Thompson. With respect to the comment about "what will happen to Bey," other than defense counsel's objection that diverted the State from commenting any further, no steps were taken to mitigate the effects of the error. The trial court did not sustain the objection or grant the motion for a mistrial.[165] Instead, the judge allowed the prosecution to finish making its point. Without "a specific, immediate caution to the jury contemporaneous with the objection,"[166] the trial court failed to mitigate the effects of the error.

As for the improper argument that Benson used Rollins' phone to call Bey, no steps were taken to cure the error because the trial court overruled Thompson's objection. Although the State prefaced its unsupported inference with qualifiers such as "the State would suggest" and "the State would argue to you,"[167] the prejudice to Thompson remained. This Court has reiterated that there is a "possibility that the jury will give special weight to the prosecutor's arguments, not

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[164] A200.
[165] A306, A309.
[166] *Black*, 616 A.2d at 324.
[167] A305.

only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office."[168]

Even if these errors did not individually cause prejudice to Thompson, the cumulative impact of repeatedly making the same unsupported inference in combination with the appeal to the jury's sympathy mandates reversal. The determination of guilt rested on witness credibility. Improper comments aimed at bolstering Bey's credibility prejudiced Thompson and resulted in a due process violation. Under the *Hunter* prong of the *Hughes-Hunter* test, this Court should that the cumulative impact of the repeated errors compromised the integrity of the trial.

[168] *Whittle v. State*, 77 A.3d 239 (Del. 2013), *as corrected* (October 8, 2013) (citing A.B.A. Standards for CRIM. JUST. §3–5.8 (1993)).

II. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING THE COOPERATING CO-DEFENDANT'S POLICE STATEMENT TO BE ADMITTED AS A PRIOR CONSISTENT STATEMENT.

A. Question Presented

Whether prior consistent statements are admissible under Delaware Rule of Evidence 801(d)(1)(B) when a declarant's motive to fabricate predated his statement to police?[169]

B. Standard and Scope of Review

This Court reviews a trial judge's decision about the admissibility of evidence for an abuse of discretion.[170] A trial judge abuses his discretion when the judge has "exceeded the bounds of reason in view of the circumstances, [or] . . . so ignored recognized rules of law or practice so as to produce injustice."[171] If this Court finds error or abuse of discretion in the rulings, then it must determine whether the mistakes constituted significant prejudice so as to have denied the appellant a fair trial.[172] Whether Thompson's constitutional rights were infringed raises a question of law that this Court reviews *de novo.*[173]

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[169] Issued preserved at A207–A210 (trial court's ruling on admission of Bey's statement under DRE 801(d)(1)(B)); A321–323 (oral argument on admission of Bey's statement under DRE 801(d)(1)(B)).

[170] *Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007) (citing *McGriff v. State,* 781 A.2d 534, 537 (Del. 2001).

[171] *Id*. (quoting *Lilly v. State,* 649 A.2d 1055, 1059 (Del. 1994)).

[172] *Id*.

[173] *McGriff,* 781 A.2d at 537.

C. Argument

Hearsay evidence is generally not admissible unless subject to an exception under the Delaware Rules of Evidence ("DRE").[174] DRE 801(d)(1)(B) was amended on November 28, 2017 to incorporate a change to its federal counterpart that permitted the admission of a testifying witness' prior consistent statements as substantive evidence. The amendment provides that an out-of-court statement is not hearsay if the statement:

> (A) is inconsistent with the declarant's testimony, or
> (B) in civil cases, is consistent with the declarant's testimony and is offered:
> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
> (C) in criminal cases, is consistent with declarant's testimony and is permitted under 10 *Del. C.* § 3507; or
> (D) identifies a person.[175]

Before this amendment took effect, DRE 801(d)(1) did not distinguish between civil and criminal cases. It provided that a statement is not hearsay if the declarant testifies, is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, or (B) consistent with his testimony

[174] DRE 802.
[175] DRE 801(d)(1)(B) (effective Jan. 1, 2018).

and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive, or (C) one of identification of a person.[176]

The trial court permitted Bey's September 5, 2014 statement to be played for the jury. Although the trial court did not have the benefit of the amendment to guide its decision, Thompson maintained that the statement did not rebut an express or implied charge of recent fabrication or improper motive.[177] Rather, Bey's motive to fabricate arose before he gave the statement.

Despite relying on common law principles to justify admission of Bey's statement,[178] the trial ignored perhaps the most fundamental common law limitation on the use of prior consistent statements. In *Tome*, the United States Supreme Court noted that "[t]he prevailing common-law rules for more than a century . . . was that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being."[179] In other words, a prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before the source of the bias originated.[180]

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[176] DRE 801(d)(1)(B) (effective July 1, 2014).
[177] A207.
[178] A207 (quoting from *State v. Brown*, a decision by the New Mexico Supreme Court).
[179] *Tome v. United States*, 513 U.S. 150, 156 (1995).
[180] *Id*.

Even so, the trial court reasoned that "[i]f we assume that a proper motive to testify is to tell the truth, the whole truth and nothing but the truth, the attack on Bey was that his motives were improper . . . So as such, The Court views the prior consistent statements to fit squarely within 801(d)(1)(B)."[181] But prior consistent statements are not admissible to "counter all forms of impeachment or to bolster the witness merely because he has been discredited."[182]

Even though the cross-examination of Bey sought to portray him as untrustworthy using prior inconsistent statements, the defense contended that Bey's motive to fabricate arose once he was charged with killing the Connells—if not sooner.[183] Bey was arrested and charged on September 3, 2014.[184] Therefore, his subsequent statement to police on September 5, 2014 did not refute that Bey's trial testimony was contrived by a desire to falsify. Stated more simply, the statement did not logically rebut the impeachment.

This case is a classic example of the common-law promotive requirement. Bey's motive to fabricate predated his statement to police. Consistent with *Tome*, when "a witness is obviously under investigation or has been arrested when the statements were made, [the witness's prior statements] are generally inadmissible

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[181] A207–A208.

[182] *Tome*, 513 U.S. at 157.

[183] A322 (arguing that "there is no recent fabrication here . . . there has always been fabrication and [] the details are inconsistent because he's not telling the true story").

[184] A206.

because the motive to fabricate has already arisen."[185] Courts have consistently held that a co-defendant's post-arrest statement constitutes inadmissible hearsay.[186]

Even under the prevailing law at the time, the trial court's decision to admit Bey's September 5, 2014 statement exceeded the bounds of reason. In light of the recent amendment to DRE 801(d)(1)(B), it is clear that Bey's statement does not qualify as a prior consistent statement. It is hearsay, the admission of which requires reversal. As set forth in Argument I, the importance of Bey's testimony cannot be overstated. He was the central piece in a case involving multiple co-defendants, an investigation that spanned several years, and cell phone evidence that did not connect Rivers to Thompson. Bey provided that crucial link. Therefore, allowing his post-arrest statement to be played for the jury was not harmless error.

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[185] *Thomas v. State*, 55 A.3d 10, 20 (Md. Ct. App. 2012).

[186] *United States v. Moreno,* 94 F.3d 1453, 1455 (10th Cir. 1996) (holding that a testifying co-conspirator "had an incentive to concoct a story implicating the [defendant] as soon as he was arrested[,]" therefore, under *Tome* it was error to admit the witness's statement); *United States v. Forrester,* 60 F.3d 52, 64 (2d Cir. 1995) (holding that the testifying co-participant's "motive to fabricate arose as soon as she was arrested and that, therefore, her statement was inadmissible hearsay")); *United States v. Trujillo,* 376 F.3d 593, 610, 611 (6th Cir. 2004) (holding that the witnesses' prior consistent statements were made after they formed their motive to lie, noting that "[i]t is simply not believable to suggest that, a day or two after [the witnesses] were stopped with more than fifty kilograms of marijuana in their car and were subsequently arrested, they did not have a motive to lie, regarding the source of the marijuana, in order to get lenient treatment"); *Blair v. State,* 747 A.2d 702, 718 (Md. Ct. Spec. App. 2000) (acknowledging that the witness, a co-defendant, had a motive to fabricate at the moment the crime was committed, if not earlier).

Although the State may now claim that Bey's statement was admissible pursuant to 10 *Del. C.* § 3507, the prosecution expressly disclaimed that it was being offered as a § 3507 statement.[187] As such, the State has waived that argument.

The trial court abused its discretion in allowing Bey's post-arrest statement to be admitted as a prior consistent statement under DRE 801(d)(1)(B), violating Thompson's constitutional right to a fair trial under the Due Process Clause of the United States Constitution and Art. I §7 of the Delaware Constitution.

[187] A210.

CONCLUSION

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

Respectfully submitted,

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