EFiled: Aug 31 2018 03:27PM EDT
Filing ID 62403006
Case Number 210,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ABDUL WHITE,	:	
Defendant Below, Appellant,	:	
v.	:	Case No. 210, 2018
STATE OF DELAWARE,	:	
Appellee.		

DEFENDANT APPELLANT'S 2nd AMENDED OPENING BRIEF ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

LAW OFFICE OF
EDWARD C. GILL, P.A.

/s/ Edward C. Gill
Edward C. Gill, Esquire
Bar ID 2112
Attorney for Defendant
Below Appellant
P.O. Box 824
Georgetown, DE 19947
(302) 854-5400

Dated: 8/31/18

CURLEY, DODGE &
FUNK, LCC
/s/ Alexander Funk
Alexander Funk, Esquire
Bar ID 4955
Attorney for Defendant
Below Appellant
250 Beiser Boulevard
Suite 202
Dover, DE 19904
(302) 674-3333

Dated: 8/31/18

TABLE OF CONTENTS

DEFENSE PRESENTED IN THIS CASE, AND THE STATE WAS PERMITTED TO WITHHOLD FROM THE DEFENSE EVIDENCE THAT ITS BALLISTICS INVESTIGATOR IN THE CASE AT BAR ALLEGEDLY COMMITTED CRIMES INVOLVING DISHONESTY IN THE COURSE OF HIS EMPLOYMENT? THE DEFENDANT APPELLANT PRESERVED THESE ISSUES BY MAKING A MOTION FOR MISTRIAL ON THE CO-DEFENDANTS STATEMENT AT THE TRIAL COURT LEVEL (A70), WHICH WAS DENIED BY THE TRIAL COURT (A84-A87 EXHIBIT F), MAKING A MOTION AT THE TRIAL COURT LEVEL FOR PRODUCTION OF THE DNA WARRANT OF THE CO-DEFENDANT (A88-A89), WHICH WAS DENIED AT THE TRIAL COURT LEVEL (A92 EXHIBIT F), MOVING THAT THE STATE BE REQUIRED TO PRODUCE EVIDENCE CONCERNING THE THREATS MADE ON THE DEFENDANT BY A CO-DEFENDANT WHICH WERE CONSISTENT WITH THE DURESS DEFENSE AT BAR, WHICH WAS PRESERVED BY MOTION BY THE DEFENDANT AT THE TRIAL LEVEL (A110), AND DENIED BY THE TRIAL COURT, (A111-A117 EXHIBIT F) AND THE DEFENDANT MADE A MOTION FOR THE STATE TO BE COMPELLED TO PRODUCE INFORMATION REGARDING THE INVESTIGATION OF ITS BALLISTICS

INVESTIGATOR, WHICH WAS DENIED. (A167-A171, A21 EXHIBIT F) THE TRIAL COURTS RULINGS ON THESE ISSUES ARE ATTACHED HERETO AND INCORPORATED HEREIN AS EXHIBIT F.

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE DISCOVERY VIOLATIONS VIOLATED THE SUBSTANTIAL RIGHTS OF THE DEFENDANT AND THAT DEFENDANT'S RIGHTS WERE PREJUDICIALLY EFFECTED. *OLIVER V. STATE*, 60 A.3d 1093 (DEL. 2013)

C. MERITS OF ARGUMENT: THE TRIAL COURT ERRED WHEN IT DID NOT DECLARE A MISTRIAL DUE TO THE STATE'S HIDING AND WITHHOLDING A STATEMENT OF A CO-DEFENDANT, NOT PRODUCING A WARRANT WHICH WAS ISSUED FOR THE DNA OF THAT CO-DEFENDANT AND EVIDENCE WHICH SUPPORTED THREATS MADE BY A CO-DEFENDANT UPON THE DEFENDANT AT BAR WHICH WERE CONSISTENT WITH THE DURESS DEFENSE PRESENTED TO THE JURY, AND THE STATE WAS ALLOWED TO WITHHOLD EVIDENCE AS TO THE MISCONDUCT ARISING TO THE LEVEL OF CRIMINAL VIOLATIONS OF ITS BALLISTICS EXPERT IN THE CASE AT BAR.

ARGUMENT TWO 27-44

A. QUESTION PRESENTED: DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRETION IN GRANTING THE STATE'S PRETRIAL MOTION IN LIMINE TO ADMIT INTO EVIDENCE AT TRIAL A PICTURE OF A TATTOO READING "DUCT TAPE BANDIT" LOCATED ON MR. WHITE'S PERSON? THIS QUESTION WAS PRESERVED THROUGH MR. WHITE'S WRITTEN RESPONSE IN OPPOSITION (A175-A179), MR WHITE'S ARGUMENT IN OPPOSITION DURING A PRE-TRIAL HEARING, (A118-A166), AND THE TRIAL COURT'S MEMORANDUM OPINION AND ORDER OF JULY 20, 2017, GRANTING THE STATE'S MOTION (EXHIBIT D - *STATE V. WHITE*, 2017 DEL. SUPER. LEXIS 356 (DEL. SUPER. CT., JULY 20, 2017)].

B. THE STANDARD AND SCOPE OF REVIEW IS THIS COURT REVIEWS A TRIAL COURT'S EVIDENTIARY RULINGS FOR AN ABUSE OF DISCRETION. *HORSEY V. STATE*, 2006 WL 196438 (DEL. JAN. 24, 2006).

C. MERITS OF ARGUMENT: THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION *IN LIMINE* TO ADMIT EVIDENCE OF A TATTOO READING "DUCT TAPE BANDIT" LOCATED ON MR. WHITE'S PERSON.

EXHIBITS

TABLE OF CITATIONS

Statutes and Rules

NATURE AND STAGE OF THE PROCEEDINGS

The defendant, Abdul White, was charged by indictment in Kent County Superior Court with numerous criminal offenses including murder in the first degree and home invasion. (A24-A52) Trial commenced on October 23, 2017 and ended on November 2, 2017. The defendant was convicted of many of the charges at bar.

On April 10, 2018, defendant was sentenced to the balance of his natural life on the count of murder in the first degree, for the count of home invasion the defendant received fifteen years incarceration plus one year work release plus one year level 3, for the counts of possession of a deadly weapon the defendant received 2 years incarceration, for the counts of possession of a firearm during the commission of a felony the defendant received 150 years incarceration, for the counts of kidnapping the defendant received 1 year and 11 months incarceration, for the counts of reckless endangering in the 1st degree the defendant received 10 months incarceration, for the counts of aggravated menacing the defendant received 9 months incarceration, for the counts of possession of a firearm by a person prohibited the defendant received 8 years incarceration, 1 year supervision level 4 and 1 year supervision level 3, for the conspiracy 2nd degree the defendant received 2 years incarceration followed by 1 year supervision level 2, for the charge of

disguise the defendant received 5 years incarceration suspended 1 year at supervision level 2, for the endangering the welfare of a child counts the defendant received 3 years incarceration followed by 3 years of supervision level 2. (A219-A254)

Defendant appellant Abdul White then took a timely appeal to this Court. This is defendant appellant's opening brief on appeal.

SUMMARY OF ARGUMENT

Argument I

The defendant was denied his right to a fair trial by the State hiding from and withholding from the defense a statement of a codefendant which supported the defendants defense at bar, a warrant for the taking of the DNA of that codefendant which had to obtain some justification for the issuance of the warrant, details of threats made by a codefendant against the defendant which were consistent with the defense at bar that that codefendant coerced the defendant to commit the acts he did, and evidence of the criminal dishonesty of its ballistics expert in the case at bar.

Argument II

The defendant was unfairly prejudiced by the admission of a tattoo on his body which indicated guilt, violence or depravity and had no relevantial effect in the case at bar.

CONCISE STATEMENT OF FACTS

Abdul White at the time of trial was thirty three years old. (A93) He has a cousin named Kevin McDonald, Sr., who goes by the name of Big Sprite. Mr. McDonald ran an extensive illegal drug operation in Kent County, Delaware, and Philadelphia. (A94-A95)

After Abdul White had been released from a prior prison term he ended up doing work for Mr. McDonald's drug operation in order to survive. He was holding $20,000.00 in drugs for Mr. McDonald which were seized by the police due to the fault of Abdul White. (A98-A99)

Mr. McDonald had previously shot and killed another cousin for violating his orders in the drug trade. (A97) Mr. McDonald pointed out to Mr. White that getting rid of weak people in the organization was like getting rid of a cancer. (A96)

Abdul White attempted to get away from Mr. McDonald. However, Mr. McDonald threated him by saying you can run but your whole family cannot run. (A100) Thus, Abdul White felt he had no choice but to go along with a plan which was formulated by Kevin McDonald, Sr. to make good his debt to Mr. McDonald. (A102-A103)

The plan which Mr. McDonald formulated was to rob a drug dealer by the name of John Harmon. (A101) Abdul White's job in this robbery was to

search the house for the drugs which Mr. Harmon was supposedly keeping in the Harmon house. (A106)

Mr. McDonald supplied the guns and waited outside with his son, Kevin McDonald, Jr., in a minivan. He also supplied two other people to be the muscle for the operation. (A104, A105)

One of those individuals who was supplied was Khalil Baines. Mr. Baines stabbed, beat and ultimately shot to death John Harmon when Mr. Harmon would not reveal the location of any drugs in the home. (A108)

Abdul White completely failed to protect Mr. Harmon. The reason that he failed to protect Mr. Harmon was that if he had done that he would have been shot. (A107)

Detective Young testified as the chief investigating officer for the State. At trial he claimed that he did not believe that Khalil Baines had made any statement about his involvement in the incident. (A63-A64) He claimed that Mr. Baines refused to talk about the incident. (A65) As the defense questioned Detective Young about Mr. Baines's statement the State feigned ignorance of any recorded statement of Mr. Baines and did not correct this false testimony. (A69)

A Pretrial Hearing was held in this case on January 5, 2017. On the day of the hearing, after the hearing, the State arrested Khalil Baines. He provided

a two and a half hour statement which was both audio and video recorded. The State hid the existence of the statement from Abdul White's defense and never produced it at any point until ordered by the Court in the midst of trial. (A90-A91)

Both trial prosecutors were actually present at the police department for Mr. Baines' statement. (A82-A83) Further, on April 6, 2017, one of the trial prosecutors wrote a letter to the attorney for another co-defendant, Ashley Gonzalez, which stated as follows:

> "Law enforcement recently arrested Khalil Baynes. As you may recall from your client's statement, he was involved in the Home Invasion and Murder. He also confirmed that your client was present during the Home Invasion and Murder. He gave additional statements regarding the planning and indicated your client was present during those times." (A211-A212)

Mr. Baines in his statement stated that he was present in preparation for the robbery when Kevin McDonald, Sr., supplied the guns. He admitted to being present with Abdul White when Abdul White drove him home after the crime occurred. (A71, A75, A76)

Mr. Baines admitted that his DNA could be in the Harmon home. (A77-A78) He asked how the people in the home would know it was him if he had a mask on. (A77)

Mr. Baines confirmed that Kevin McDonald, Sr., was the person who ordered things to occur. (A76) He refused to voluntarily provide a buccal swab

for DNA testing. (A79) He corroborated that the plan was to steal drugs from the home. (A81)

The state agents in the interrogation, the police officers, pointed out that they knew that he was in the home. They pointed out that he lied about any claims to not being in the home and having any limited involvement. (A71-A74) They pointed out that Abdul White was telling the truth when he had told the police previously about Mr. Baines' involvement. (A80)

Despite Mr. Baines' refusal the State did eventually obtain a warrant for a buccal swab to test his DNA. That was never produced by the State to Abdul White's defense. (A88-A89)

At the end of the trial, after Abdul White had publically testified to the facts of this case, which included the involvement of Kevin McDonald, Sr., it was reported to the State that Mr. McDonald had put out a hit on the defendant. (A110)

At trial the State introduced evidence regarding a tattoo on Abdul White. This tattoo read, "Duct tape bandit." (A60)

A forensic ballistics examination and report was issued by Carl Rone for the State in this case. (A189-A210) This was referred to in the trial, was introduced to the jury by stipulation and mentioned by the State in closing argument. (A53, A54, A68, A109)

ARGUMENT I

A. QUESTION PRESENTED: DID THE TRIAL COURT ERR IN NOT GRANTING THE DEFENDANT'S MOTION FOR MISTRIAL WHEN THE STATE WRONGFULLY WITHHELD A VIDEO TAPED RECORDED STATEMENT OF A CO-DEFENDANT WHICH SUPPORTED THE DEFENSE AND ATTEMPTED TO HIDE THE EXISTENCE OF THAT STATEMENT TO THE DEFENSE, WHEN THE STATE WITHHELD A WARRANT FOR TAKING THE DNA OF THE CO-DEFENDANT AND THE TRIAL COURT EVEN AT TRIAL REFUSED TO ORDER THE STATE TO PRODUCE THAT WARRANT, THE STATE WAS ALLOWED TO WITHHOLD FROM THE DEFENSE THE DETAILS OF THREATS MADE BY A CO-DEFENDANT ON THE DEFENDANT AT BAR WHICH WERE CONSISTENT WITH THE DEFENSE PRESENTED IN THIS CASE, AND THE STATE WAS PERMITTED TO WITHHOLD FROM THE DEFENSE EVIDENCE THAT ITS BALLISTICS INVESTIGATOR IN THE CASE AT BAR ALLEGEDLY COMMITTED CRIMES INVOLVING DISHONESTY IN THE COURSE OF HIS EMPLOYMENT? THE DEFENDANT APPELLANT PRESERVED THESE ISSUES BY MAKING A MOTION FOR MISTRIAL ON THE CO-DEFENDANTS STATEMENT AT THE

TRIAL COURT LEVEL (A70), WHICH WAS DENIED BY THE TRIAL COURT (A84-A87 EXHIBIT F), MAKING A MOTION AT THE TRIAL COURT LEVEL FOR PRODUCTION OF THE DNA WARRANT OF THE CO-DEFENDANT (A88-A89), WHICH WAS DENIED AT THE TRIAL COURT LEVEL (A92 EXHIBIT F), MOVING THAT THE STATE BE REQUIRED TO PRODUCE EVIDENCE CONCERNING THE THREATS MADE ON THE DEFENDANT BY A CO-DEFENDANT WHICH WERE CONSISTENT WITH THE DURESS DEFENSE AT BAR, WHICH WAS PRESERVED BY MOTION BY THE DEFENDANT AT THE TRIAL LEVEL (A110), AND DENIED BY THE TRIAL COURT, (A111-A117 EXHIBIT F) AND THE DEFENDANT MADE A MOTION FOR THE STATE TO BE COMPELLED TO PRODUCE INFORMATION REGARDING THE INVESTIGATION OF ITS BALLISTICS INVESTIGATOR, WHICH WAS DENIED. (A167-A17, A21 EXHIBIT F) THE TRIAL COURTS RULINGS ON THESE ISSUES ARE ATTACHED HERETO AND INCORPORATED HEREIN AS EXHIBIT F.

B. THE STANDARD AND SCOPE OF REVIEW IS WHETHER THE DISCOVERY VIOLATIONS VIOLATED THE SUBSTANTIAL RIGHTS OF THE DEFENDANT AND THAT DEFENDANT'S RIGHTS WERE

PREJUDICIALLY EFFECTED. *OLIVER V. STATE*, 60 A.3D 1093 (DEL. 2013)

C. MERITS OF ARGUMENT: THE TRIAL COURT ERRED WHEN IT DID NOT DECLARE A MISTRIAL DUE TO THE STATE'S HIDING AND WITHHOLDING A STATEMENT OF A CO-DEFENDANT, NOT PRODUCING A WARRANT WHICH WAS ISSUED FOR THE DNA OF THAT CO-DEFENDANT AND EVIDENCE WHICH SUPPORTED THREATS MADE BY A CO-DEFENDANT UPON THE DEFENDANT AT BAR WHICH WERE CONSISTENT WITH THE DURESS DEFENSE PRESENTED TO THE JURY, AND THE STATE WAS ALLOWED TO WITHHOLD EVIDENCE AS TO THE MISCONDUCT ARISING TO THE LEVEL OF CRIMINAL VIOLATIONS OF ITS BALLISTICS EXPERT IN THE CASE AT BAR.

The case at bar arose out of a home invasion and murder. The defense presented by Abdul White was that he was present and participated in the home invasion for the purpose of stealing drugs but that he was coerced into his participation. Thus, the affirmative defense of duress (11 Del. Code Sec. 431) applied.

The evidence showed that Abdul White was forced into participating in this incident by threats from his cousin, who was a drug dealer. His cousin,

Kevin McDonald, Sr., already murdered one other cousin due to his alleged failures to properly carry out his role in the drug business.

The State at bar asserted that Abdul White was the actual killer. The evidence revealed that Abdul White was not the actual killer but the actual killer was Khalil Baines.

On January 5, 2017, a Pretrial Hearing was held in the case at bar. The same night the State arrested Khalil Baines. Mr. Baines gave a lengthy, two and a half hour, videotaped statement. Both trial prosecutors who handled the case at bar from its inception to verdict were present for Mr. Baines' statement.

In Mr. Baines' statement he provided corroboration for the defense. He admitted that the entire operation was planned as a drug theft by Kevin McDonald, Sr. Mr. Baines admitted that he was there with Abdul White both before and after the incident and was present when Mr. McDonald supplied the guns to be involved in the incident. He did claim that he did not go into the home and that another person named Khalil went into the Harmon home.

Mr. Baines refused to supply a buccal swab for DNA testing. He indicated that his DNA may be in the Harmon home.

The State's chief investigating officer, Detective Young, testified at trial. He testified in the presence of both of the trial prosecutors who were present for Mr. Baines' statement.

He claimed to the jury that despite the fact that DNA was taken from Mr. Baines pursuant to a warrant no DNA was taken. He claimed Mr. Baines did not discuss the incident at bar. No effort was made by the prosecutors to correct the record.

Even at trial the prosecutors refused to turn over Mr. Baines' statement to the defense until ordered by the Court. After reviewing Mr. Baines statement the defense made a Motion for Mistrial. The Court denied the defendant's Motion for Mistrial, ruling that there was no prejudice suffered by the defendant. (A84-A87 Exhibit F) The defendant respectfully submits that was error in failing to apply appropriate sanctions for the prosecutorial misconduct in this case.

This court will only reverse cases for discovery violations if substantial rights of the accused are prejudicially effected. It is clear that this Court should consider the reasons for the State's delay in discovery. *Oliver v. State*, 60 A.3d 1093 (Del. 2013)

This Court in that case pointed out that the analysis must consider the centrality of the error to the case, the closeness of the case and steps taken to mitigate the error.

No valid reason was given by the State for its failure to produce the co-defendant's statement. The Trial Court ruled appropriately that this constituted a co-defendant statement under Superior Court Criminal Rule 16 and no cross appeal has been taken by the State.

It is also clear that the evidence was central to the case at bar and it was a close case. The evidence strongly supported the defendant's defense that, contrary to the State's assertions, he was not the killer. It also clearly supports defendant's assertion that he was acting under duress due to the fact that Mr. McDonald required him to participate in the actions at bar due to a debt owed and that defendant had good reason to fear Mr. McDonald, Sr. Thus, it is also submitted that this also clearly constitutes Brady Material, contrary to the Court's ruling that it did not constitute Brady Material. *Brady v. Maryland*, 373 US 83 (U.S. 1963). No steps were taken to mitigate the error other than ordering production of the statement in the midst of trial.

It is also respectfully submitted that there was nothing that could have been done during the trial process to cure this prosecutorial misconduct. This was evidence which the defendant should have had months before the trial to

determine how to appropriately use that evidence, what witnesses to call, and how to conduct cross examination of all witnesses, including not being deceived by the chief investigating officer.

In the Oliver, Id, case, this Court ruled that since notes from the State chemist had not been produced that substantial rights of the accused were prejudicially effected. The case at bar is much worse in that a long detailed statement of a co-defendant was intentionally kept from the defendant in an attempt to deceive him and the justice system. There is no way that any counsel could have attempted to properly put that statement into context and use in the midst of a trial.

The case of ***Ray v. State*** 587 A2d 439 (Del. 1991); is also instructive. There, the State failed to disclose a taped statement of the co-defendant. Mitigating the State's conduct in that case was the fact that the co-defendant had only been arrested one week before the new trial. In the case at bar the arrest occurred and the statement was obtained of the co-defendant over ten months prior to the defendant at bar's trial. In the Ray case this Court properly reversed the defendant's conviction.

Similarly, in ***Valentin v. State***, 74 A3d 645 (Del. 2014); this Court reversed once again for failing to disclose evidence. In that case the failure to disclose was a dispatch recording.

While certainly this conduct regarding the co-defendant's statement was the most egregious defect this was not the only problem with the State withholding evidence in the case at bar. In the investigation of this matter the State chose to have the ballistics examination report done and issued by Carl Rone. This report was entered into evidence at the trial and cited by the State in its arguments. (A53, A54, A68, A109)

After the trial was completed it was learned by the defense that Mr. Rone was being investigated for misconduct relating to his employment. The defendant made a Motion on April 5, 2018 (A167-A171, A21 Exhibit F) before the Court to compel the State, which would not voluntarily provide the information to the defense. (A167-A171 Exhibit F) That Motion was denied and the State never supplied the information to the defense. (A21 Exhibit F)

It was thus learned independently by the defense that Mr. Rone had a warrant issued for him. That warrant indicated that the State alleged that Mr. Rone committed crimes of dishonesty of theft by false pretenses and falsifying business records all the way from January 1, 2016, through December 31, 2017. (A213-A217) This information, which surely impacted on the credibility of the State's witness, was never supplied to the defense.

It is also respectfully submitted that this conduct of the State in attempting to deceive defendant and the Courts to the detriment of justice is

clearly not unique. In *State v. Coverdale*, 2017 WL 1405815 (Del. Super 2017), the State misled multiple Judges and defendants as to the existence of Brady Material concerning misconduct of an employee of the State chemist's office. (Attached as Exhibit B)

When the co-defendant, Khalil Baines, was arrested, a DNA warrant was issued to take his DNA when he refused to voluntarily provide it. The State did not reveal to the defense the existence of that warrant or the application for the warrant, which necessarily would have included some information about the State's justification for requesting a warrant. This prevented the defendant from seeking to compare it to DNA found at the crime scene. DNA found under Mr. Harmon's fingernails came from a person other than Mr. Harmon or Mr. White. (A218) The Court at bar denied the defendant's application for the State to even produce that warrant at trial. (A92 Exhibit F)

Finally, consistent with the defendant's defense that he was acting under duress from Kevin McDonald, Sr., the State was allowed to not provide details to the defense, despite application, of threats made by Mr. McDonald upon Abdul White after Abdul White publically testified as to Mr. McDonald's role in the incident. (A110-A117 Exhibit F,) It is respectfully

submitted that the Trial Court's ruling that Brady does not apply after the jury receives a case is in error.

Accumulation of error occurs when two or more errors have the potential to prejudice the same as a single reversible error. *Black v. Wyoming*, 405 P.3d 1045 (Wy. 2017) It is respectfully submitted by the defense that the Courts' remedy of simply recessing a matter of days is not sufficient considering all the facts at bar.

"The rules of criminal discovery are not "mere etiquette," nor is compliance a matter of discretion" *State v. Martin*, 2017 WL 6398318 at p20 (Ala. Ct. Cr. App) (2017) It is thus respectfully submitted that due to the State's conduct in the case at bar which prejudicially effected substantial rights of the defendant the defendant's convictions at bar should be set aside.

ARGUMENT II

A. QUESTION PRESENTED: DID THE TRIAL COURT COMMIT AN ABUSE OF DISCRETION IN GRANTING THE STATE'S PRETRIAL MOTION IN LIMINE TO ADMIT INTO EVIDENCE AT TRIAL A PICTURE OF A TATTOO READING "DUCT TAPE BANDIT" LOCATED ON MR. WHITE'S PERSON? THIS QUESTION WAS PRESERVED THROUGH MR. WHITE'S WRITTEN RESPONSE IN OPPOSITION (A175-A179), MR WHITE'S ARGUMENT IN OPPOSITION DURING A PRE-TRIAL HEARING, (A118-A166), AND THE TRIAL COURT'S MEMORANDUM OPINION AND ORDER OF JULY 20, 2017, GRANTING THE STATE'S MOTION (EXHIBIT D-*STATE V. WHITE*, 2017 DEL. SUPER. LEXIS 356 (DEL. SUPER. CT., JULY 20, 2017).

B. THE STANDARD AND SCOPE OF REVIEW IS THIS COURT REVIEWS A TRIAL COURT'S EVIDENTIARY RULINGS FOR AN ABUSE OF DISCRETION. *HORSEY V. STATE*, 2006 WL 196438 (DEL. JAN. 24, 2006).

C. MERITS OF ARGUMENT:

A. Background.

Prior to trial, the State moved *in limine*, pursuant to D.R.E. 404(b), to admit into evidence at trial a picture of a tattoo located on Mr. White's body that stated "Duct Tape Bandit." (A180-A188) The State argued that (1) the term "duct tape" was relevant to the method used to restrain the victim, while the term "bandit" was relevant to the attempted robbery; (2) the tattoo linked Mr. White to the crime by identity; (3) the tattoo was plain, clear and conclusive; (4) the tattoo was not too remote in time, as it was presently located on Mr. White's person; and (5) the tattoo was probative because it was directly relevant to the way the crime at issue was committed. (A118-A166)

Mr. White opposed the State's motion, and argued that (1) the tattoo was prohibited character evidence, and thus, inadmissible pursuant to D.R.E. 404(a), as allowing evidence of the tattoo to be admitted into evidence at trial would demand wild, unfair, and prohibited speculation by the jury as to Mr. White's character and prior conduct; (2) the tattoo was impermissible character evidence under D.R.E. 404(b), and thus, inadmissible pursuant to *Getz v. State*, 538 A.2d 726 (Del. 1988); (3) the tattoo, even if relevant, was inadmissible under D.R.E. 403, as the probative value of the tattoo was wildly outweighed by the danger of unfair prejudice to Mr. White; (4) the tattoo was inadmissible hearsay; and (6) allowing the tattoo to be admitted into evidence at trial would violate Mr. White's rights under the Confrontation Clauses of

the Sixth Amendment to the United States Constitution and Article I, Section 7 of the Delaware Constitution. (A175-A179, A118-A166)

The Trial Court issued a Memorandum Opinion and Order on July 20, 2017, granting the State's Motion. [Exhibit D- *State v. White*, 2017 Del. Super. LEXIS 356 (Del. Super. Ct., July 20, 2017)]. The Trial Court held that (1) the proper analysis for the admissibility of the tattoo was not pursuant to D.R.E. 404(b), as the tattoo was not a prior crime, wrong or act; (2) the tattoo constitutes an admission by Mr. White, and thus, the tattoo is considered non-hearsay under D.R.E. 801; (3) the admission of the tattoo into evidence at trial would not violate Mr. White's rights under the Confrontation Clauses of the United States and Delaware Constitutions; and (4) the tattoo was admissible pursuant to D.R.E. 403, as the potential for unfair prejudice did not substantially outweigh the probative value of the evidence. [Exhibit D- *State v. White*, 2017 Del. Super. LEXIS 356 (Del. Super. Ct., July 20, 2017)].

Ultimately, the Trial Court held that the tattoo was admissible "for the limited purpose of proving identity, intent, and motive." [Exhibit D- *State v. White*, 2017 Del. Super. LEXIS 356 (Del. Super. Ct., July 20, 2017)].

A. Tattoo Not Relevant Under D.R.E. 401., Not Admissible Under D.R.E. 403, and Not Admissible as an Admission By Party Opponent.

1. Tattoo Not Relevant Under D.R.E. 401.

The Trial Court erred by ruling the tattoo was admissible as relevant evidence to prove identity, intent, and motive. In order to be admissible at trial, evidence must be relevant. D.R.E. 401. Evidence is relevant if it has any tendency to make a fact in consequence more or less probable than it would be without the evidence. *Id.*

The tattoo was not probative as to identity, as Mr. White confessed to his role in the home invasion and robbery. (A55-A57) Indeed, the circumstances, and propriety, of Mr. White's multiple statements to the police confessing to his involvement and culpability in the home invasion and robbery were heavily contested and litigated in the pre-trial phase of the case, and the Trial Court ultimately ruled that Mr. White's statements were admissible at trial. [Exhibit E- *State v. White*, 2017 Del. Super. LEXIS 224 (Del. Super. Ct., May 8, 2017)]. As such, the State was aware that, prior to trial, Mr. White's confession would be admitted into evidence.

In addition, the State presented evidence of Mr. White's DNA and fingerprints being located at the scene of the crime. (A66-A68)

Moreover, no witness testified as to identifying Mr. White as a participant in the home invasion and robbery through identification of the tattoo.

Given that the State presented evidence of Mr. White's confession as to his involvement in the home invasion and robbery, as well as evidence of Mr. White's DNA and fingerprints being located at the scene, *and given that Mr. White could not be identified by any witness based on the tattoo,* the tattoo had very little "probative force," and the State had very little "need for the evidence" of the tattoo, in establishing identity. *Deshields v. State*, 706 A.2d 502 (Del. 1997) (analyzing the fifth *Getz* factor, from *Getz v. State*, 538 A.2d 726 (Del. 1988)). *State v. Steele*, 510 N.W.2d 661 (S.D. 1994) (evidence of defendant's tattoos not relevant where identification of defendant not an issue).

As the tattoo was not relevant for the purposes of proving identity, it was inadmissible at trial under D.R.E. 401.

In addition, the tattoo was not probative as to intent and motive, as there was no evidence presented as to the circumstances surrounding the tattoo being inked on Mr. White's person. Specifically, there was no evidence presented as to *when the tattoo was inked on Mr. White's person*, no evidence presented as to the *identity of the person that did the inking of the tattoo,* much less t*hat individual's state of mind at the time of the inking*, and no evidence presented as to the *purpose of the inking*. Further, there was no evidence

presented as the *meaning of the tattoo*, and no evidence linking the tattoo *to this specific, particular incident*.

During trial, the State admitted a photograph of the tattoo through the testimony of Detective Dwight Young. (A58-A60), as follows:

Prosecutor:	Officer, I show you what has been marked as State's Exhibit 26. Do you recognize that?
Officer:	Yes, I do.
Prosecutor:	What's that photo from?
Officer:	It's from a mugshot that I took of Abdul White on December the 2nd, 2015.
Prosecutor:	And by "mugshot," are you talking about also any identifying features on his body?
Officer:	Yes. In addition to the basic mugshot photo of the straight-on face, the left side, right side, we also take what's called scars, marks and tattoos in that particular section.
Prosecutor:	What is depicted in that photo?
Officer:	What's depicted is a tattoo on the stomach of Abdul White.
Prosecutor:	Can you read that for us?
Officer:	I can. It says "Duct Tape Bandit."

During cross-examination, the following exchange took place with regard to the tattoo: (A61-A62)

Defense Counsel:	Focusing on the Duct Tape Bandit tattoo, did you inquire of Mr. White, did you get this after this offense? Were you bragging about where it occurred and got a tattoo to indicate that after where it occurred in August of 2015? Did you ask him that question?
Officer:	Did I ask him – I'm sorry, repeat the question.
Defense Counsel:	Did you ask him when he got that tattoo?

Officer:	No. I asked him if he had any scars, marks or tattoos, which is a normal procedure, and I took a photo of the same.
Defense Counsel:	And then you saw that it said, "Duct Tape Bandit," correct?
Officer:	That's correct.
Defense Counsel:	And after you saw what it said, knowing that duct tape had been used in this case, did you ask him any questions about when did you get this tattoo? What does it mean?
Officer:	No, I did not.

The failure to adduce any evidence concerning the circumstances under which the tattoo was inked on Mr. White's person, such as when the inking was made, the identity and state of mind of the person that did the inking, or the purpose and meaning of the tattoo, rendered the tattoo not probative for the purpose of establish intent and motive, and thus, inadmissible.

Moreover, the failure to provide any evidence linking the tattoo to *this specific, particular incident* of August 8, 2015, rendered evidence of the tattoo inadmissible for the purpose of establishing intent and motive. *State v. Tolson*, 2005 Del. Super. LEXIS 5 (Del. Super. Ct., Jan. 3, 2005)(rap lyrics composed by defendant that described drug activities not admissible as evidence of defendant's state of mind or intent because the lyrics did not contain specific enough references to the specific, particular drug related crimes the defendant was charged with). *Joynes v. State*, 797 A.2d 673 (Del. 2002)(rap lyrics composed by defendant admissible to show intent and state

of mind, where defendant was charged with holding a knife to the victim's throat, and the day after the incident, defendant composed rap lyrics that threatened violence toward the victim). *Salazar v. State*, 2011 Tex. App. LEXIS 6835 (Tex. App. – Dallas 2011)(in murder prosecution, tattoo of "187" located on defendant's hand admissible to show state of mind where defendant did not have the tattoo at the time of the murder, but later acquired it in prison in connection with the murder charge). *United States v. Newsom*, 452 F.3d 593 (6th Cir. 2006)(evidence of defendant's tattoos depicting firearms not relevant and not probative to whether defendant committed specific, particular charge of possessing a firearm on a specific date).

In *State v. Tolson*, 2005 Del. Super. LEXIS 5, the Superior Court considered the admissibility of rap lyrics, composed by the defendant, that described drug dealing activities, as evidence of state of mind or intent with regard to proving that the defended intended to sell or deliver drugs. *Tolson* was arrested and charged with possession intent to deliver drugs. *Id*, at *1. The drugs were located in the basement of Tolson's grandmother's house, adjacent to a room where Tolson slept and where the lyrics were located. *Id*. The lyrics made a number of references to selling drugs and cooking drugs in Tolson's grandmother's kitchen. *Id*, at *2.

However, the lyrics made no refence to the specific charges Tolson was facing, nor the specific drugs located in the basement. *Id*, at *3-4. In addition, there was no evidence produced as to when Tolson composed the lyrics. *Id*, at *4. In holding that the content of the lyrics was inadmissible, the Superior Court's analysis focused on the fact that there was "no evidence to show when the lyrics were written or that they related to the specific incident in question," and that, without that information, it was impossible to determine how closely related the lyrics were to the underlying crime. *Id*, at *5-6. Further, the Court held that "[r]ap lyrics written by a defendant about selling drugs are not proof that the defendant dealt drugs on a certain occasion or at all." *Id*, at *7.

Moreover, the Superior Court also held that, even though the issue of whether Tolson possessed the drugs with the intent to deliver them was a central issue in the case, as there was "less prejudicial proof available to the State to show [that intent]," the State's "need for this particular evidence" was outweighed by the prejudicial effect the lyrics would have on Tolson's defense. *Id*., at *7-8. As such, the Superior Court ruled the probative value of lyrics was outweighed by the danger of unfair prejudice, and thus, the content of the lyrics was inadmissible. *Id*.

Although *Tolson* addressed the admissibility of rap lyrics, the facts, and the Superior Court's analysis, are applicable to Mr. White's case. As in

Tolson, there was no evidence produced as to when the tattoo was inked on Mr. White's body. As in *Tolson*, there was no evidence produced that linked the tattoo to *this specific, particular incident* of August 8, 2015. As in *Tolson*, having a tattoo that states "Duct Tape Bandit" is not proof that Mr. White previously robbed people with duct tape, or engaged in that conduct on August 8, 2015. Also, as in *Tolson*, the State had less prejudicial proof available to establish intent and motive in Mr. White's case.

The admissibility of rap lyrics composed by a defendant, as evidence of intent or state of mind, was also considered by this Court in *Joynes v. State*, 797 A.2d 673 (Del. 2002). In *Joynes*, the defendant was arrested and charged with several offenses stemming from the defendant holding a knife to a classmate's throat. *Id*, at 675. The day after the incident, the defendant composed rap lyrics that specifically named the victim as being on the defendant's "hit list," and made remarks about severing the heads of his enemies and placing them on a shelf. *Id*, at 677.

In contrast to *Tolson*, this Court held that the rap lyrics in question in *Joynes* were admissible as evidence of the defendant's intent or state of mind. *Id*., at 676-77. In holding that the lyrics were admissible, this Court's analysis focused on the timing of the defendant's authorship of the lyrics (the very next day after the incident), and the content of the lyrics (specifically mentioning

the victim's name on the defendant's "hit list") as being relevant and probative to the defendant's intent and state of mind. *Id*., at 677.

Although *Joynes* addressed the admissibility of rap lyrics, this Court's analysis applies to Mr. White's case. In *Joynes*, the evidence established that the rap lyrics were authored the very next day after the incident. In contrast, there was no evidence admitted at Mr. White's trial as to the timing of the tattoo inking. In *Joynes*, the evidence established a direct factual link between the rap lyrics and the incident, with the defendant making a direct reference to the victim being on the defendant's "hit list" and threatening to remove the heads of the defendant's enemies. In contrast, the was no evidence admitted at Mr. White's trial providing a direct factual link between the incident of August 8, 2015, and the tattoo. As such, an application of the *Joynes* rationale would render the tattoo inadmissible, as the tattoo was not relevant and probative to Mr. White's intent and motive.

Finally, as stated above, the State presented evidence of Mr. White's confession as to his involvement in the home invasion and robbery. (A55-A57) The evidence the State presented was plain, clear, and conclusive as to intent and motive (A57):

> Officer: [Mr. White] stated that the plan was just to rob John Harmon.

As the State presented clear evidence of intent and motive, the evidence of the tattoo was unnecessarily cumulative, and prejudicial. Moreover, as the tattoo was not relevant, and not probative, for the purposes of proving intent and motive, it was inadmissible at trial under D.R.E. 401.

2. Even if Relevant, Tattoo Not Admissible Under D.R.E. 403.

Even if the tattoo was relevant, the Trial Court erred by admitting the tattoo into evidence at trial, as the probative value of the tattoo was substantially outweighed by the danger of unfair prejudice. D.R. E. 403. Relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice…" *Id*. "The determination of whether the probative value of a particular piece of evidence is substantially outweighed by the danger of unfair prejudice is a matter which falls particularly within the discretion of the trial judge…" *Gallaway v. State*, 65 A.3d 564, 571 (Del. 2013).

Given that Mr. White was charged with various crimes of violence, the potential for unfair prejudice resulting from the admission into evidence of a tattoo that "bespeaks guilt, violence of depravity" was "obvious." *State v. Starling*, 2017 Del. Super. LEXIS 45 (Del. Super. Ct., Jan. 26, 2017), citing to *United States v. Famer*, 583 F.3d 131, 136 (2nd Cir. 2009). *United States v. Newsom*, 452 F.3d 593 (6th Cir. 2006)(evidence of defendant's tattoos

depicting firearms unfairly prejudicial because it suggested to the jury that the defendant had a hostile, criminal disposition). *Brooks v. State*, 903 So. 2d 691 (Miss. 2005)(where the victim had been repeatedly stabbed in the neck with a fork, evidence that defendant had a tattoo that depicted a "grim reaper" armed with a pitchfork should not have been admitted). *United States v. Thomas*, 321 F.3d 627 (7th Cir. 2003)(defendant was charged with possessing a .357 revolver while being a prohibited felon; admission of evidence of defendant's tattoo depicting crossed revolvers was abuse of discretion). *United States v. Smith*, 348 Fed. Appx. 636 (2nd Cir. 2009)(court erred in admitting evidence of defendant's tattoo of a skeleton firing a gun, with shell casings ejecting from the gun and flames coming from the barrel, as court's rationale – that defendant made affirmations of violence by having the tattoo on his body – implicitly relied on an impermissible propensity inference).

In *State v. Starling*, 2017 Del. Super. LEXIS 45, the Superior Court considered the admissibility of evidence concerning the defendant's nickname, "Smoke." *Id*., at 8-11. Starling was arrested and charged with various violent felonies, including murder first degree. *Id*, at *2-3. The State sought to introduce evidence of Starling's nickname, "Smoke," for purposes of establishing identity. *Id*, at *9-10. The Court held that the nickname "Smoke" was not admissible as evidence at trial, as the nickname itself could

conceivably cause the jury to draw prejudicial inferences and infer that Starling had committed prior acts of violence. *Id*, at *9-10. In holding the nickname was not admissible, the Court cautioned that introducing evidence that "bespeaks guilt, violence, or depravity" in cases where defendants are charged with committing violent acts, "the potential for prejudice is obvious." *Id*., at *10.

Although the *Starling* decision addressed the admissibility of a prejudicial nickname, the Superior Court's analysis is applicable to Mr. White's case. As in *Starling*, Mr. White was charged with committing acts of violence. As in *Starling*, the State sought to introduce tattoo evidence concerning Mr. White that "[bespoke] guilt, violence, or depravity." And, as in *Starling*, the potential for prejudice in Mr. White's trial was obvious. As such, an application of the *Starling* rationale would render the tattoo inadmissible, as the danger for potential prejudice against Mr. White was obvious.

In assessing the admissibility of the tattoo under D.R.E. 403, the Court must balance the probative value of the evidence against its potential for unfair prejudicial effect. *Getz v. State*, 538 A.2d 726 (Del. 1988). In making this determination, the following relevant factors are to be considered (*Deshields v. State*, 706 A.2d 502 (Del. 1997)):

(1) the extent to which the point to be proved is disputed;

(2) the adequacy of proof of the prior conduct;

(3) the probative force of the evidence;

(4) the proponent's need for the evidence;

(5) the availability of less prejudicial proof;

(6) the inflammatory of prejudicial effect of the evidence;

(7) the similarity of the prior wrong to the charged offense;

(8) the effectiveness of limiting instructions; and

(9) the extent to which prior act evidence would prolong the proceedings.

Pursuant to *Deshields*, the tattoo was unfairly prejudicial to Mr. White, and thus, inadmissible: (1) the evidence of Mr. White's involvement in the home invasion and robbery was not in dispute, as Mr. White's confession was admitted into evidence (A55-A57), and there was DNA evidence and fingerprint evidence at the scene linking Mr. White to the crime (A66-A68); (2) the proof offered was not adequate, as there was no evidence as to the timing of the tattoo inking, the identity of the individual that inked the tattoo, and the meaning or purpose of the tattoo; (3) the tattoo was not probative of identity, intent, or motive, as stated above; (4) given the other evidence available to the State, including Mr. White's statements admitting to his involvement in the home invasion and robbery, as well as the DNA evidence

located at the scene linking Mr. White to the events of August 8, 2015, the State had a greatly reduced need for the tattoo to be admitted into evidence; (5) as Mr. White admitted to his involvement, and as his DNA was located at the scene, there was less prejudicial proof available to the State; (6) the tattoo was clearly, unequivocally and undeniably inflammatory and prejudicial to Mr. White; (7) although the words of the tattoo are similar in nature to the facts of the home invasion and robbery, without testimony or other evidence as to the meaning or purpose of the tattoo, the tattoo was not admissible; (8) no limiting instruction could have been effective under these circumstances; and (9) the presentation of evidence of the tattoo would not have effected the length of the proceedings.

As evidence of the tattoo was not relevant, nor probative, to establishing identity, intent, or motive, and as any probative value of the tattoo was substantially outweighed by the danger of unfair prejudice to Mr. White, the Trial Court abused its discretion in granting the State's Motion *in limine* to admit evidence of the tattoo at trial.

3. Tattoo Does Not Constitute Admission By Party Opponent.

The Trial Court erred in holding that the tattoo constituted an admission by a party opponent, and thus, was admissible non-hearsay under D.R.E. 801.

Importantly, the State never asserted the argument that the tattoo constituted an admission by Mr. White. The Trial Court reached this conclusion independently, and not based on a theory advanced by the State. Mr. White was not on proper notice that he would have to argue against that theory. As such, it was an abuse of discretion by the Trial Court to hold that the tattoo was admissible based on a theory not advanced by the party moving its admission into evidence. *Commonwealth v. Jones*, 2018 Pa. Super. LEXIS 815 (Pa. Super. Ct., July 17, 2018)(trial court abused its discretion in suppressing evidence on grounds not raised by defendant in written motion or during oral argument).

In holding that the tattoo was an admission by Mr. White, the Trial Court found – as fact – that Mr. White either tattooed himself or allowed or instructed a tattooist to ink his body. However, there was no factual support in the record to support these conclusions.

In order to be admissible non-hearsay under D.R.E. 801(d)(2), there had to be sufficient, reliable evidence to establish that (1) Mr. White inked the tattoo himself, or directed someone to do so for him (D.R.E. 801(d)(2)(A), or (2) Mr. White specifically adopted the words of the tattoo as his own statement (D.R.E. 801(d)(2)(B).

There were no facts presented to support either of these conclusions, and as such, it was an abuse of discretion to so find.

Further, as there was no evidence presented as to *when the tattoo was inked on Mr. White's person*, no evidence presented as to the *identity of the person that did the inking of the tattoo*, much less t*hat individual's state of mind at the time of the inking*, no evidence presented as to the *purpose of the inking*, and no evidence presented as the *meaning of the tattoo*, it was an abuse of discretion to hold that the tattoo constituted an admission, or adoptive admission, by Mr. White. *Salazar v. State*, 2011 Tex. App. LEXIS 6835 (Tex. App. – Dallas 2011)(in murder prosecution, tattoo of "187" located on defendant's hand admissible as an admission by the defendant, where defendant did not have the tattoo at the time of the murder, but later acquired it in prison in connection with the murder charge, and there was testimony and evidence as to the meaning of the tattoo).

As the State did not advance the argument that the tattoo constituted an admission by Mr. White, and as there was no evidence presented surrounding the circumstances of the tattoo, it was an abuse of discretion for the Trial Court to hold that the tattoo was an admission by Mr. White, and thus, admissible non-hearsay under D.R.E. 801.

CONCLUSION

For the reasons set forth herein, it is respectfully requested that the Defendants convictions at bar be set aside.

LAW OFFICE OF
EDWARD C. GILL, P.A.

/s/ Edward C. Gill
Edward C. Gill, Esquire
Bar ID 2112
Attorney for Defendant
Below Appellant
P.O. Box 824
Georgetown, DE 19947
(302) 854-5400

Dated: 8/31/18

CURLEY, DODGE &
FUNK, LCC

/s/ Alexander Funk
Alexander Funk, Esquire
Bar ID 4955
Attorney for Defendant
Below Appellant
250 Beiser Boulevard
Suite 202
Dover, DE 19904
(302) 674-3333

Dated: 8/31/18

AFFIDAVIT OF ELECTRONIC MAILING

BE IT REMEMBERED that on this 31st day of August, 2018, Ashley Whalen, Paralegal, for the Law Office of Edward C. Gill, P.A., does state that she forwarded, via electronic filing, two copies of: Defendant Appellant's 2nd Amended Opening Brief on Appeal from the Superior Court of the State of Delaware in and for Sussex County

To: Department of Justice
102 West Water Street
Dover, DE 19901

/s/ Ashley Whalen
Paralegal