



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GUY JONES,)	
)	
Defendant Below - Appellant,)	Supreme Court No. 489, 2018
)	
v.)	On appeal from Superior Court
)	ID No. K1701006494
THE STATE OF DELAWARE,)	
)	
Plaintiff Below - Appellee.)	

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I. THE FAILURE TO SEVER THE TRIAL SUA SPONTE WAS PLAIN ERROR WHICH WAS SO CLEARLY PREJUDICIAL TO SUBSTANTIAL RIGHTS AS TO JEOPARDIZE THE FAIRNESS AND INTEGRITY OF THE TRIAL PROCESS.

MERITS:

The Defendants' respective redacted statements constitute plain error depriving Jones of his constitutional right to a fair trial despite agreement of defense counsel regarding the proposed redactions. While the State is correct that the redactions eliminated any concerns under *Bruton*,¹ other problems were created which the parties did not identify or consider. Namely, what was the jury to make of each respective co-defendant's statement in which both are admittedly present for the shooting, but fail to acknowledge the presence of the other co-defendant? How was the jury expected to harmonize the obvious deficiencies inherent in each statement – the conspicuous failure to acknowledge the presence of the other – without believing that they were attempting to conceal facts from their consideration? What impact did this absurdity have upon the jury as it evaluated the exculpatory portions of Jones' statement? It was plain error for the trial court to fail to identify this issue and consider its impact upon the fairness of a joint trial.

¹ *Bruton v. United States*, 391 US 123 (1963)

A likely inference from this error was that one or both defendants were trying to conceal important facts from the jury. How else can the lack of acknowledgement by one co-defendant of the other co-defendant's presence be explained? Any inference that Jones was attempting to conceal the presence of Wilson at the scene from the jury likely undermined the credibility of Jones and diminished the exculpatory aspect of his statement. The State does not dispute that this inference was created by the redacted statements.

It is clear that neither the trial court nor counsel considered this likely inference flowing from the redacted statements as they were focused on resolving a *Bruton* problem. While the *Bruton* problem was resolved, the State fails to acknowledge the creation of the separate problem precipitated by the redactions. The State fails to address the likelihood that the jury reached inferences of defendant(s) concealment resulting from the sanitized statements. The State's argument wrongfully assumes that once the *Bruton* problem was eliminated no other evidentiary issues existed with respect to the redacted statements.

The redacted statements likely had an improper influence on the jury, especially in the context of evaluating the credibility of the exculpatory portion of Defendant's statement. It is at least probable, if not likely, that the outcome of the trial would have been different if Defendant's unredacted statement was presented

in a severed trial to the jury. Severance was the proper remedy to avoid the confusing absurdity created by the redacted statements.

The jury instructions were ineffective in resolving the prejudice created by the redacted statements. The jury did not know what was redacted. They did not know that each co-defendant's statement provided that the other co-defendant was present at the shooting, but was redacted for *Bruton* considerations. Regardless of the instructions, the jury was left with the ineluctable inference that both defendants were intending to conceal a fact by failing to admit the presence of the other defendant at the shooting. This inference undermined any credibility in the exculpatory portion of Defendant's statement. The instruction could not have cured this improper inference.

II. PROSECUTOR MISCONDUCT CONSTITUTED PLAIN ERROR WHICH WAS SO CLEARLY PREJUDICIAL TO SUBSTANTIAL RIGHTS AS TO JEOPARDIZE THE FAIRNESS AND INTEGRITY OF THE TRIAL PROCESS.

MERITS:

A. Detective Statements During Jones' Custodial Interrogation

With respect to the detective's opinion indicating that Jones was not being honest, the State denies that the detective's comment could be construed as a comment on his credibility. The State's position is rejected. A reasonable juror would likely interpret the officer's comments for the assertion that Jones was either not telling the truth, or concealing certain facts. Conversely, there is no interpretation of the officer's statement that can be interpreted as not indicating his belief that Jones was not telling the truth, or the entire truth.

The failure of defense counsel to object is overcome because this amounted to plain error causing fundamental prejudice to the Defendant stemming from the officer's improper comment on his credibility. It is well-established that witnesses, including police officers, are precluded from commenting on the credibility of a defendant. The reason for the rule is that such a comment invades the fact finding function of the jury, and will likely be misused by a jury, especially when made by a police officer. The improper comment was a clear violation of the rule and

caused prejudice because it was likely misused by the jury to doubt Defendant's credibility.

With respect to the detective's statements signaling Jones' prior criminal experience, the State disregards the likely jury interpretation of the officer's statement. The comment that "you know this game and you know it well[,] [y]ou know it pretty well," can only be interpreted as a prohibited character reference. Although the State denies that it was an improper reference to character, it does not explain what other proper meaning it might have. The comment, in the context of this interview, could only have one meaning – that Defendant has a criminal character/prior criminal history based upon "knowing this gamewell."

Defense counsel's waiver is excused by the fact that this egregious error is plain causing fundamental prejudice to Defendant's constitutional rights to a fair trial, including his constitutional right to a presumption of innocence.

The reason for the rule is that such a comment will be misused by a jury to draw the criminal character inference and deprive a defendant of his presumption of innocence. The improper comment was a clear violation of the rule and caused prejudice because it was likely misused by the jury to determine that Defendant was likely guilty due to his criminal character.

B. STATE'S CLOSING STATEMENTS

With respect to the prosecution's speculation concerning the relative positions of Cale, Jones and Wilson during the shooting at the entrance of Cale's apartment, Wilson's objection should be imputed to Jones under the circumstances of this case.

Even if Jones is deemed to have waived the claim, the error is plain as there were no facts or expert testimony to support the prosecutor's speculation. The failure of defense counsel to object is overcome by this plain error causing fundamental prejudice to the Defendant stemming from the likely misuse by the jury of prosecutorial speculation asserted as fact.

With respect to the prosecutor's characterization of Jones' defense as a "story (and/or stories)," in the context of the State's argument, it was clearly meant to be synonymous with a definition meaning "a lie" or "fiction." Although there are numerous definitions of the term "story," many of the definitions connote a lie or fiction. The State is unable to rule out that the jury interpreted the prosecutor's use of the term "story" and/or "stories" as meaning a lie or fiction. Therefore, the possibility – or probability – that the jury interpreted the prosecutor's use of the term as meaning that Defendant's version of events was a lie, or fiction, was egregious error.

The State's reference to the use of the term "story" in a pattern jury instruction is not helpful as it is used in a different context than by the prosecutor in this case. In context, the prosecutor's use the term "stories/story" was meant to be derogatory and cause the jury to doubt the scenario raised by the defense.

With respect to the prosecutor's misstatement of the jury's function, Wilson's objection should be imputed to Jones under the circumstances of this case. Even if Jones is deemed to have waived the claim, the error is plain as the prosecutor's argument was contrary to jury's duty to determine if each element of each charge has been proved beyond a reasonable doubt. The State's response disregards that the jury was likely misled about the State's burden of proof in this case. The error was compounded by the lack of a corrective instruction by the trial court.

III. THE INSTRUCTIONS BY THE SUPERIOR COURT CONSTITUTE PLAIN ERROR WHICH WERE SO CLEARLY PREJUDICIAL TO SUBSTANTIAL RIGHTS AS TO JEOPARDIZE THE FAIRNESS AND INTEGRITY OF THE TRIAL PROCESS.

MERITS:

With respect to the improper jury instructions, the State relies on the fact that defense counsel agreed to the instructions given to the jury. Regardless of defense counsels' imprimatur, the trial judge had the ultimate responsibility to provide fair and accurate instructions in this case. In *Bullock v. State*,² this Court addressed a trial judge's duty with respect to instructing the jury:

“A trial court must give instructions to a jury as required by evidence and law whether the parties request the instruction or not.” Indeed, “[t]he trial judge is charged with the responsibility for instructing the jury. This is not controlled by the parties as their function and duty is to bring to the court's attention the instructions they consider applicable and the reasons why they should be given.”

The *Bullock* Court further reiterated that a defendant has an “unqualified right to a correct statement of the substance of the law,” and that “this Court will reverse if the alleged deficiency in the jury instructions ‘undermined . . . the jury’s ability to intelligently perform its duty in returning a verdict.’ ”³

² 775 A.2d 1043, 1047 (Del. 2001) citing *Zimmerman v. State*, 565 A.2d 887, 890 (Del. 1989) (citing *United States v. Cooper*, 812 F.2d 1283, 1286 (10th Cir. 1987)

³ *Bullock*, at 1047 (citations omitted).

Regardless of the agreement of the parties, the trial court had the ultimate responsibility to correctly instruct the jury. The trial court's instructions were susceptible to the erroneous assumption that the jury was required to convict or acquit defendants jointly. That assumption was not eliminated by the minimal instructions requiring an individualized assessment for each defendant in reaching a verdict. The comprehensive reference to the defendants collectively throughout the instructions likely had an overwhelming influence upon the jury despite the few sentences directing it to treat each defendant individually. It was not logical to address the defendants collectively just because they faced the same charges because of the risk that the jury would feel compelled to treat them collectively.

This error was plain and undermined the jury's ability to intelligently perform its duty in returning a verdict.

IV. PERMITTING THE JURY TO REVIEW DEFENDANTS' RECORDED STATEMENTS WAS PLAIN ERROR WHICH WAS SO CLEARLY PREJUDICIAL TO SUBSTANTIAL RIGHTS AS TO JEOPARDIZE THE FAIRNESS AND INTEGRITY OF THE TRIAL PROCESS.

MERITS:

Defendant concedes that this Court has held, in general, that the properly admitted recorded statement of a defendant should go into the jury room during deliberations, unless the probative value of the recording is outweighed by unfair prejudice.⁴ This is such a case where the probative value of the recorded statement is outweighed by unfair prejudice and should have been excluded. Namely, the nature of the redactions of each co-defendant's recorded interview created a confusing absurdity which was compounded by providing the jury with the redacted statements in the jury room. Therefore, it was plain error to provide the recorded statements to the jury during deliberations.

⁴ *Flonnory v. State*, 893 A.2d 587, 528 (Del. 2006).

CONCLUSION

Defendant respectfully requests that his convictions be reversed and that this matter be remanded for proceedings consistent with the decision of this Court.

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