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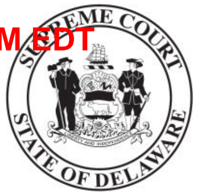

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAIQUAN BORDLEY	)	
Defendant below,	)	
Appellant	)	
	)	
V.	)	
	)	No. 564, 2018
STATE OF DELAWARE,	)	
Plaintiff below,	)	
Appellee	)	

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

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. BORDLEY'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION WERE VIOLATED BY PROSECUTORIAL MISCONDUCT

In the Answering Brief, the State argued that Trial Counsel did not object to the State's request for a colloquy and that, therefore, the plain error standard applies.[1] Bordley respectfully disagrees. To say that trial counsel did not object to the State's request that the Court engage in a colloquy is a misinterpretation of what transpired. While Trial Counsel did not say the words "I object" it is clear when he said "I would hate to see the State try to threaten this particular witness to silence him so he can't give information in Mr. Bordley's case"[2] and "I think we have a lot of – there was a similar incident of intimidation, possible intimidation of another witness by the State"[3] that Trial Counsel was questioning the State's motives and objecting to the dialogue in front of the potential witness. Furthermore, the Court then engaged in a discussion with the State about the timing and difference in treatment of Alexis Golden so it is clear that the Court acted on Trial Counsel's objection. Accordingly, Bordley argues that *de novo* review applies.

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[1] *Ans. Br.* at 11.
[2] A333.
[3] A334.

The State seems to think that Bordley objects to the colloquy itself. This is not the case. Bordley's issue is the *timing* by the State and the fact that the whole discussion as to why the colloquy was needed happened in front of the witness. While the State suggests that it did not make a difference whether the discussion happened in front of the witness because "Gartner-Hunter was subsequently advised by the trial judge of the same information,"[4] Bordley argues that the State's comment that "he is still a suspect and he has not been arrested *at this time*"[5] (emphasis added) was meant to send a chilling message to Mr. Gartner-Hunter. While the State argues that it was possible that Mr. Gartner-Hunter was still a suspect, the point is that the State had already charged and entered into plea agreements with the two people they were most interested in (Braunskill and Harmon). They did not charge Alexis Golden. It is a reasonable inference that they had moved on from Christopher Gartner-Hunter and that he was no longer really a suspect, that is, until he was going to testify for the defense.

The State's argument that Bordley cannot establish error because "it is unknown what Gartner-Hunter may have said on the witness stand"[6] and subsequent conjecture that his testimony did not involve a central issue (whether Bordley was the shooter) only strengthens Bordley's argument. Because of the State's actions to

[4] *Ans. Br.* at 12.
[5] A332.
[6] *Ans. Br.* at 13.

silence this witness Bordley missed an opportunity to present a full defense and to present valuable testimony that would have attacked *Harmon's* credibility.

Pointing out that Harmon and Braunskill both identified Bordley as the shooter to demonstrate that this was not a "close case"[7] completely discounts that both Harmon and Braunskill had powerful motive to identify Bordley as the shooter. Either one of them could have been convicted of Murder First Degree for their roles in the homicide. Bordley argues that they engaged in damage control by pleading guilty to lesser charges so that they did not spend the rest of their lives in prison. Being able to attack the credibility of either of these witnesses was critical to Bordley's defense.

Finally, while the State points out that there was no repetitive improper conduct, Trial Counsel believed, and articulated to the Court, that the State intimidated witness Alexis Golden. While the Court did not find any misconduct on the part of the State related to Alexis Golden, there are two significant issues that are worth noting: (1) at the time Trial Counsel objected about Garner-Hunter, the Court was aware that Trial Counsel's objection to the State's interference with a witness was a *second* occurrence and (2) the Court treated the two objections differently. When Trial Counsel pointed out the potential interference with Alexis Golden, the witness was immediately removed from the courtroom so that she did not hear the

[7] *Ans. Br.* at 14.

Court's dialogue with attorneys – yet with Gartner-Hunter the entire exchange happened *in front of the witness*. A potential witness hearing the State make comments like "he hasn't been arrested at this time"[8] and "The State has made several attempts through Detective Grassi to interview Mr. Gartner-Hunter, and he hasn't made any statements to the State. So his level of involvement has yet to be determined"[9] sent a very strong message to this potential witness.

Bordley argues that *Hughes*[10] is applicable and that the State's conduct amounts to misconduct.

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[8] A332.
[9] A335.
[10] *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

II. BORDLEY'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION WERE VIOLATED BY THE ADMISSION OF TEXT MESSAGES INTO EVIDENCE THAT WERE NOT PROPERLY AUTHENTICATED

Merits of Argument

Bordley and the State again disagree on the standard of review that is applicable. The State argues that this argument is *waived* because Trial Counsel stated "we have no opposition"[11] to the text messages being introduced. The State has seemingly ignored the very key words that immediately followed "we have no opposition" and those words are "to texts between Ms. Braunskill and *someone else.*"[12] Trial Counsel either misunderstood what was being introduced or simply made an error. This does not constitute waiver.

While it is true that the Delaware State Police used a search warrant to retrieve the text messages from Braunskill's cell phone and that Braunskill made an in-court identification of the text messages, Bordley argues that she can only authenticate *her side* of the text messages.

[11] A244.
[12] *Id.*

Bordley argues that under *State v. Zachary*¸[13] the State had the burden as the proponent of the text message evidence, to provide sufficient direct or circumstantial evidence corroborating their authorship in order to satisfy the requirements of Del. R. Evid. 901.[14] While D.R.E. 901(b)(4) does provide that a finding of authenticity may be based entirely on circumstantial evidence,[15] Bordley submits that Braunskill's testimony that the messages were between Bordley and her is insufficient, particularly when there was testimony that Harmon used Bordley's phone[16] and that Bordley's phone did not have the other end of the conversations to corroborate Braunskill's assertion that the conversations were between Bordley and her.[17]

Bordley argues that the messages were improperly admitted and should not have been considered.

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[13]*State v. Zachary*¸2013 LEXIS 295 (Del. Super July 16, 2013)
[14]*Id.*
[15] *See* D.R.E.901(b)(4) and *Swanson v. Davis,* 69 A.3d 372 (Del. Super. June 20, 2013). Circumstantial evidence includes the documents "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances."
[16]A353-A354.
[17] A325. Q : And did his [Bordley] phone have any indication of value" A: "No."

III. BORDLEY'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION WERE VIOLATED BECAUSE THE NOTES WRITTEN BY CO-DEFENDANT HARMON WERE ADMITTED FOR A LIMITED PURPOSE AND DO NOT APPEAR TO HAVE BEEN CONSIDERED AS IMPEACHMENT OF HIS CREDIBILITY

Merits of Argument

Bordley concedes that in a bench trial the judge is presumed to have based his verdict only on the admissible evidence,[18] and that when the Court permitted the notes to be admitted that the Court indicated that it would "weigh the relevancy of [them]."[19] However, Bordley submits that human error can occur (even on the part of the Court) and that the purpose of plain error review is for just that reason. The notes were significant impeachment evidence that seriously undercut Harmon's credibility. Bordley argues that the notes were so significant that they warranted comment by the Court in the verdict because they showed one of two witnesses that unequivocally identified Bordley as the shooter to be a liar. This coupled with the fact that Harmon and Braunskill both could be considered "questionable" witnesses because both made deals to avoid being convicted of Murder First Degree for their roles in the homicide weighs in favor of Bordley and Bordley argues that the Court should have specifically addressed this important piece of evidence.

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[18] *Burke v. State,* 1997 WL 139813 at *2 (Del. Mar. 19, 1997).
[19] A374.

CONCLUSION

The right to a fair trial is among our most prized rights.[20] While any one error may not seem significant enough to warrant a reversal, Bordley submits that there were three significant errors and that the nature of the three errors, when considered together, denied him a fair trial.

[20] *See Estes v. Texas*, 381 U.S. 532, 540 (1965)(describing the right to a fair trial as "the most fundamental of all freedoms.")