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Case Number 460,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIC C. LLOYD,	)	
	)	
Defendant Below,	)	
Appellant,	)	No. 460, 2019
	)	
v.	)	ON APPEAL FROM THE
	)	SUPERIOR COURT OF THE
STATE OF DELAWARE,	)	STATE OF DELAWARE
	)	ID No. 1710006739
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE

APPELLANT'S CORRECTED REPLY BRIEF

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I. THE SUPERIOR COURT DID ABUSE ITS DISCRETION BY DENYING LLOYD'S MOTION TO SEVER HIS CASE FROM DWAYNE WHITE

The Appellee argues that the charges against Dwayne White of attempted murder, conspiracy to commit murder, and subsequent bribery attempts, were properly left in the case against Eric Lloyd, because these charges were "directly related to the drug dealing enterprise.[1]" The Appellee writes, "Stanford's continued attacks on the enterprise members interrupted business and brought the unwanted attention of police investigators prompting some in the enterprise to, in their view, resolve the problem."[2] The Appellee further writes, "In an effort to eliminate the criminal conduct shining a light on the drug distribution, Stanford 'had to go.'"[3]

The Appellee argues that the attempts on the life of Markevis Stanford were undertaken specifically because Stanford was interrupting the enterprises' drug dealing business, and garnering police attention. The Appellee forms its argument this way, because it must. This version of events is necessary to make the charges against Dwayne White admissible as **related** predicate acts. Otherwise, they are

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[1] Resp. Brf. At 25

[2] Resp. Brf. At 20. A search of the trial record reveals that no witness ever testified the attacks by Stanford interrupted the drug business. A search of the trial record reveals that no witness ever testified that the unwanted attention of police prompted enterprise members to take action against Stanford.

[3] Resp. Brf. At 7

isolated acts outside of the common purpose of the enterprise, requiring severance. The Appellee's argument must fail, as the record is devoid of testimony upon which the argument relies. The Appellee's "facts" amount to artistic liberties.

No witness told the jury that the motivation to kill Stanford stemmed from a desire by the enterprise members to avoid law enforcement attention. The Appellee's reconstituted evidence stems from a few lines of testimony given by cooperating co-defendant witness Tyrone Roane[4]. There, Roane testifies that Dwayne White had become afraid that Markevis Stanford was repeatedly trying to kill White, and White was left with no choice but to kill Stanford. The State followed with a direct question, "was shooting in the projects, was that bad for business in Riverside?"[5] Roane agreed that shootings brought police around. However, Roane **never** stated that the enterprise members had any concerns over police coming and interrupting their drug business. He **never** stated that interruption to drug dealing was the motivation to kill Stanford. No witness did.

In fact, Roane and other witnesses clearly provide the reasons and motivations for the attempts on Stanford's life. Those reasons supplied were never

[4] The Appellee cites to page 850 of the Appellant's Appendix.
[5] While the Appellant did not specifically object to this leading question, the Appellant did repeatedly object to leading during the trial. Twice the Appellant requested that the Court note a continuing objection and instruct the prosecution to question witnesses in accordance with the court rules. While the Court did admonish the prosecution for leading, the Court declined the approach requested by the Appellant. A.861, A.1082, A.1083

to protect the drug enterprise, but reasons of revenge and personal vendettas. On redirect examination, Roane states that the original "beef" was between Stanford, Buck 50 and Fine Wine[6] it was "their issues, it is their beef, and they can't get to him, so there is word out there is a check on him."[7] Further, Roane and other's repeatedly testified that the attempts on the life of Stanford were the result of "beef" between Stanford and the "Big Screen Boys" stemming from rap video disses. It was only the "Big Screen Boys" and "The Four Horseman" who had issues with Stanford.[8]

The Appellee is bound by the record below, not the record it wishes had been made. The Appellee framed its argument in this manner, because there otherwise is no argument. Without evidence that the attempts to kill Stanford were motivated by a desire to prevent Stanford from drawing law enforcement attention to the drug enterprise, the predicate acts are unrelated and required severance.

The Appellee may have hopes that its assertions will be taken by this Court reasonable inferences from the facts, but this should not occur. The testimony directly and explicitly provided the reasons for the "hit" on Stanford, as explained by Roane above and as detailed throughout the record.[9]

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[6] A. 1078
[7] A. 1079
[8] This testimony, and the non-existent connection to Llloyd, are outlined in the Appellant's opening brief.
[9] Outlined in Appellant's opening brief pages 5 and 6.

Moreover, Tyrone Roane, the only witness the Appellee relies upon for this argument, directly states that Eric Lloyd was not involved in the drug enterprise. He stated that Lloyd's involvement in drug dealing had ended twelve years ago.[10] He further stated that he did not know of any reason why Mr. Lloyd should have been charged in this case.[11]

[10] A. 1101
[11] A. 1115

II. THE SUPERIOR COURT DID ABUSE ITS DISCRETION BY DENYING LLOYD'S MOTION FOR A MISTRIAL BASED ON ERRONEOUS EYEWITNESS IDENTIFICATION

First, the Appellee argues that the defense failed to "contemporaneously address" the prejudicial testimony, thereby waiving the issue. The Appellee is incorrect. The cases cited by the Appellee, *Chezech* and *Wainwright*[12], as well as Rule 103 of the Delaware Rules of Evidence require the parties to raise **timely objections** to evidence in the trial court or risk losing the right to raise evidentiary issues on appeal. *Wainwright* elaborates that the logic behind the rule is to ensure contentions raised on appeal have been fairly presented to the trial court for a decision. *Id*. at 1100, (*citing* Supreme Court Rule 8; *Jenkins v. State*, Del.Supr., 305 A.2d 610 (1973).

In both *Chzech* and *Wainwright*, defense counsel failed to make objections at the trial court level, and attempted to raise the issue for the first time on appeal. Here, the issue was fairly presented to the trial court. Most importantly, defense counsel not only timely objected, but attempted, in good faith, to find other alternatives prior to moving for a mistrial. Defense counsel adhered to the appropriate legal standard acknowledging that a mistrial should not be considered if there are other alternatives which can properly remedy an issue.[13] The record,

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[12] *Chzech v. State*, 945 A.2d 1088 (Del. 2008) and *Wainwright v. State*, 504 A.2d 1096 (De. 1986) – Resp. Brf. At 23

[13] *Phillips v. State*, 154 A.3d 1146, 1154 (Del. 2017)

both on the day of the false identification and during the motion for mistrial, makes it clear that defense counsel was attempting to work with the State to find a satisfactory cure for the wrongful identification. First, there was clearly a conversation between the State and defense after the testimony of Joshua Potts where it was indicated that an attempt for a cure would be made through the testimony of the remining relevant witnesses.[14] When a cure did not occur through the witnesses,[15] defense counsel placed on record that the parties were in agreement that further curative measures would need to be taken and hoped to fashion a sufficient jury instruction or charge. The court requested that the parties attempt to agree upon a stipulation.[16] When the discussions surrounding an instruction were not leading to a sufficient cure, the defense moved for a mistrial.

As to the motion, the Appellee writes, "Lloyd agreed that a stipulation *would cure* the issue. But the following day, Lloyd nevertheless moved for a mistrial." [17] The actual statement on the record was that there needed to be a stipulation or jury

[14] A.358, A. 392
[15] A.358 the State did not disagree with defense counsel's summary for the court of the conversation between the parties that the parties agreed that the witnesses did not cure the misidentification and an instruction or stipulation would be needed. It was not until after the Defense's motion for a mistrial that the State argued that the misidentification had been cured by the witnesses.
[16] Id.
[17] Resp. Brf. At 25

instruction *that cures* the issue. The ultimate stipulation read to the jury did not so cure the issue.

Though the Appellee writes that a stipulation was read to the jury "in which White assumes full responsibility for attempting to bribe the Banner family,"[18] the stipulation did not amount to "full responsibility", and did not actually correct the misidentification. The stipulation did not say that the testimony of Joshua Potts's was incorrect; the stipulation did not say that Appellant Lloyd himself **never** contacted any member of the Banner family; nor did it say that law enforcement confirmed through its investigation that the Appellant was not involved in any bribes of the Banner family. Most importantly, the stipulation did not tell the jury to disregard Joshua Banner's identification of Appellant Lloyd on the record as false.

The stipulation did not cure the Appellant's concerns that the jury may have been led to believe that not just Dwayne White, but Lloyd as well, made attempts to bribe the Banner family, or that the Banner family had some reason to connect Lloyd and White in this regard.[19]

Moreover, the Appellant, in its opening brief, pointed to cumulative concerns. The shooting of Jashawn Banner was the most prominent portion of the

[18] Resp. Brf. At 22
[19] A. 391

State's opening and closing, and was woven into all aspects of the trial. Given the emotional and constant focus upon Banner and his family, the misidentification became one which could not be cured by the instruction.

III. THE SUPERIOR COURT DID ABUSE ITS DISCRETION BY DENYING LLOYD'S MOTION TO LIMIT OR EXCLUDE THE TESTIMONY OF AND ABOUT HIS PRIOR ATTORNEY.

The Appellee refers to the testimony of attorney Joseph Benson as "relevant" to establishing the existence of an enterprise. Relevancy and admissibility are separate standards, with the latter being the prerequisite for introduction at trial. The Appellee writes, "In a racketeering case, the fact that several associates of the enterprise employ the services of the same attorney is relevant and may be offered to prove the existence of the enterprise"[20]

Firstly, the cases cited by the Appellee to support this assertion are not the law of this Court and are not binding on this court[21] [22] Moreover, these cases dealt

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[20] Resp. Brf. At 32

[21] *United States v. Castellano*, 610 F. Supp. 1151 (S.D.N.Y 1985) and *United States v. Barnes*, 604 F.2d. 121 (2d Cir. 1979) are both second circuit federal cases. *United States v. Turkette*, 425 U.S. 576 (1981), does not address attorney witnesses. The Appellant could not find dispositive Delaware Supreme Court law on this issue.

[22] The Appellant argues that, not only are these cases not binding on the Court, but the Court should take care in applying the law reasoned for a much larger jurisdiction, New York, to Delaware. The idea that there would be evidentiary value to multiple defendants utilizing the same attorney is more sensible in a jurisdiction like New York, where there are significantly more attorneys admitted to the bar. In fact, *pro hac vice* counsel in this case was appointed at the request of Office of Conflict Counsel because there were a limited number of conflict-free attorneys given the large number of indicted defendants. In *Barnes*, a case cited by the Appellee, the Court noted the relevance of multiple defendants utilizing an attorney who was "quite a distance away" to prepare their taxes. Benson was not a distance away, and was one of a limited number or qualified, barred criminal defense practitioners in Delaware. 2016 data from the Bureau of Labor Statistics

more specifically with the reasons for conflicting an attorney from representation and marginally about the possibility of the attorney being called as a witness. Given that the attorneys did not appear to ultimately testify at these trials, the cases cited provide little guidance to this Court.

Should this Court find these cases persuasive, it must note that the law holds that the fact that several associates of the enterprise employ the services of the same attorney is **only** relevant if there are other "suspicious circumstances." [23] Therefore, even if the cases cited in the reply were binding, or this court relies upon them for guidance, the testimony of Joseph Benson went far and above the bounds permitted by the Second Circuit.

The Second Circuit has continuously held that evidence that a single attorney represented members of an alleged conspiracy, on its own, has no probative force. It is not the representation of multiple co-defendants which is relevant, but the representation coupled with other "suspicious circumstances."[24]. The purpose of such evidence is to show that, when other suspicious circumstances are present, the decision of a number of persons to retain the same lawyer may be **probative of an association** among them."[25] Typically, those suspicious

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and State Government Labor Departments listed Delaware as having 3,270 employed lawyers, as opposed to 84,230 lawyers in New York.

[23] *Id.*

[24] *Id.*

[25] *United States v. Castellano*, 610 F.Supp. 1151, 1160 (S.D.N.Y. 1985)

circumstances are the fact that an attorney received payment for his services to the co-defendants from a "benefactor" suggesting that the attorney served as so-called "house counsel" to the criminal enterprise. The key is that the Second Circuit considered this relevant **association** evidence. In that vein, even if this Court found testimony of Benson admissible in theory, the actual testimony was far afield from this concept, went well beyond evidence of association, and should not have been permitted.

Benson's testimony that he represented Stanford should not have been permitted because Stanford was not a member of the enterprise whom the State was required to prove association.

Benson's policy that he did not represent "snitches" should not have been admitted because there was no indication that this was a policy put in place to benefit the alleged enterprise. It appeared this was Benson's general practice, which he utilized in all cases, not just those involving alleged enterprise members.

The question to Benson about why he believes the State now gives more discovery under protective orders was irrelevant and highly prejudicial.

The questions to Benson about the LLCs were not relevant to prove association.

Further, the assertion that use of attorney Benson was evidence of an "association" was thoroughly addressed through other witnesses. Therefore, the

probative value of Benson's testimony, was substantially outweighed by the prejudicial effect.

As to the statements of Benson's secretary, which the Court permitted as a present sense impression, the Appellant does not disagree with the Appellee's legal definition. However, in turning to the plain meaning of the words "explanation or description of the event," the statement permitted did not qualify as either of those things.

IV. THE SUPERIOR COURT DID ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF GUNS AND RAP VIDEOS

As to the admission of the Rap music videos, the Appellant continues to rely upon his opening brief, as the Appellee has not raised any arguments which require additional response or law.

As to the admission of guns from the Search of Maurice Cooper's home, the cases cited by the Appellee tend to support the position of the Appellant.[26]

The Appellee writes, "To be sure, evidence that **members** possessed or routinely carried firearms may be offered to prove the existence of the enterprise." Firstly, all of the guns objected to were recovered from the home of Maurice Cooper. Cooper's trial pre-dated the Appellant's trial. At his trial, Maurice Cooper was found not guilty of criminal racketeering[27], i.e., the State lacks sufficient evidence to argue that Maurice Cooper is a member of enterprise.

Moreover, the cases cited by the Appellee stand for the proposition that the guns are admissible if they show that the guns were being used for the group's benefit. In *Jones*, the testimony was that the members of the enterprise stashed guns for other members' use. It was conceded at trial that there was "mutual access

[26] The Appellant notes again that the cases cited by the Appellee in footnote 175 of its reply brief are not the law of this court, and are not binding on this Court.
[27] *State v. Maurice Cooper*, Case Number 261, 2019 argued on other counts before this Court on February 12, 2020.

to firearms."[28] In *Applins*, the evidence was that the enterprise members routinely carried firearms in order to protect their territory and drug trade and to retaliate against rival gangs. All of the appellants carried guns. Enterprise members also had access to "gang guns." These guns were hidden in specific locations in the enterprise territory, such as abandoned houses, where they could be readily accessed.[29]

There was no such testimony linking the enterprise members to the guns found in Maurice Cooper's home. The testimony related to those guns was simply that a search warrant was executed at Cooper's home, and these guns were found in the process[30]. There was no testimony that these items of evidence were "enterprise guns." Again, Maurice Cooper was found by a jury to not be guilty of criminal racketeering.

The only time any defendant was accused of using any gun during the course of the trial, was in connection to the attempts to kill Stanford. An action in which Cooper is alleged to be involved. The Appellant has addressed above why this testimony should not have been admitted in his trial.

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[28] *United States v. Jones*, 873 F.3d 482, 490 (5th Cir. 2017)

[29] *United States v. Applins*, 637 F.3d 59, 68 (2d Cir. 2011)

[30] A. 585, A. 166

V. THE SUPERIOR COURT DID ABUSE ITS DISCRETION IN SENTENCING THE APPELLANT

Throughout trial, and through its reply brief, the Appellee has sought to classify the Appellant as a "king pin," justifying the lengthy prison sentence. This assertion is unsupported by the evidence.

The prosecution may argue "legitimate inferences of the appellant's guilt that flow from the evidence." However, it is "unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw."[31]

From opening through to sentencing, the prosecution argued that, "While Eric Lloyd was in federal prison he maintained a foothold in his business through thousands of e-mails"[32] This was, simply, never true.[33] When challenged on this at sentencing, the Prosecution went as far as to say that the "court was aware of other e-mails, not necessarily relevant to this case, but were less than innocuous or benign."[34] There were no such "other" emails.[35]

Essentially, the prosecution continued to prompt the Court to sentence based on vague and unsupported claims that the Appellant was a "King Pin." The

[31] *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004)
[32] A. 171, A. 444, A. 1355, A. 1394, A.1402, A.1485
[33] A. 460, A.1365, A. 1366
[34] A.1476
[35] A.1485

considerable lack of any credible evidence that the Appellant was a "King Pin" were thoroughly outlined in the Appellant's sentencing arguments, and sentencing memorandum.[36]

The Court found that the defendant's prior federal sentence had not deterred his criminal activity, and therefore a longer sentence was necessary. However, the defendant was incarcerated for the large bulk of this case. During the period of incarceration, there is no evidence he was running the drug organization through emails in the manner the prosecution repeatedly argued. And upon his release from prison, and up until the date of trial, there was no possession of drugs, buying drugs, selling drugs, tampering with witnesses, or any such conduct.[37]

[36] A.1479 to A 1519
[37] A.1487

CONCLUSION

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

Respectfully Submitted,

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