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Case Number 548,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAI'YANN WHARTON, Defendant Below, Appellant.	:	
v.	:	No. 548, 2019
STATE OF DELAWARE Plaintiff Below, Appellee.	:	ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE I.D. NO. 1705016524 A&B

APPELLANT'S REPLY BRIEF

FILING ID 65840854

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I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO INTRODUCE CELL PHONE EVIDENCE THAT THE PROSECUTOR FAILED TO DELINEATE, DESPITE PROMISING TO IDENTIFY SUCH EVIDENCE, AND MISREPRESENTED TO THE DEFENSE THAT THAT IT WOULD NOT BE USED AT TRIAL.

A. Argument

The State argues that it did not commit a discovery violation, but even if it did, Mr. Wharton suffered no prejudice.[1] These claims are belied by the record.

1. Discovery Violation

First, the State denies that its' failure to delineate the relevant cell phone evidence constituted a discovery violation.[2] But to reach that conclusion, this Court must disregard the trial prosecutor's representations to both defense counsel and to the Trial Court. During the May 22, 2018 Office Conference, and in response to Mr. Wharton's *Motion to Identify Evidence*, the prosecutor pledged to "point to what [he] found on the cell phone that [the State] intend[s] to use" at trial.[3] In fact, the prosecutor admitted that "most of the stuff" was provided "out of an abundance of caution," but also recognized that this practice did not "alleviate [him] of any duty or obligation."[4]

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[1] State's Answering Brief ("State's Answer") at 16.
[2] State's Answer at 10.
[3] A80.
[4] A81.

Towards the end of the Conference, the Trial Judge specifically asked the prosecutor, "And you're going to turn over *what the relevant cell phone text messages* and calls are. Right?"[5] The prosecutor replied, "*All* identified in the PowerPoint,"[6] referencing a slideshow presentation the State created specifically for this case and offered to share with defense counsel.[7] That representation, however, proved to be inaccurate.

Glaringly absent from the State's Answer is any response to, or acknowledgment of, the prosecutor's pledge to delineate the relevant cell phone evidence. Although this manner of disclosure is not expressly contemplated by Rule 16, the prosecutor willingly undertook that duty. Having done so, "it became incumbent upon the prosecutor to exercise due diligence."[8] The State cannot now ignore the commitment it made and, instead, claim technical compliance with Rule 16.[9] "Applying a technical approach would be contrary to the purpose of modern discovery and to the spirit of the Superior Court Criminal Rules, which seek to provide for the just determination of every criminal proceeding and to secure

[5] A91 (emphasis added).
[6] A91 (emphasis added).
[7] A55–A57.
[8] *State v. Hill*, 2011 WL 2083949 at *4 (Del. Super. Ct. April 21, 2011).
[9] State's Answer at 9 ("The State provided Wharton with the above text exchange eighteen months prior to trial.")

fairness in administration."[10] If the State went "above and beyond its discovery obligations under Rule 16,"[11] it cannot now seek shelter within the four corners of Rule 16. The State cannot have it both ways.

Even if Mr. Wharton was not entitled to a specific delineation of the cell phone evidence, the Superior Court's decision to grant such disclosure comports with "discovery's goals of avoiding surprise and streamlining substantive trial preparation."[12] The crucial messages were buried within one of Mr. Baird's four cell phone dumps, which comprised 14,467 pages worth of data in total.[13] To suggest that Mr. Wharton "had ample time to review"[14] those 14,467 pages worth of data, even though the prosecutor had not discovered the incriminating messages until two weeks before trial, exposes the flaws in the State's argument. Under the State's theory of discovery, merely providing a copy of all four phone dumps compelled Mr. Wharton to review each record in its entirety, as *all or none* of the 14,467 pages could be introduced at trial. But the prosecutor did not share that responsibility; in the State's view, it could dump these records on Mr. Wharton and then—on the eve of trial—review the data for the first time to select the portions it deemed relevant.

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[10] *Valentin v. State*, 74 A.3d 645, 650–51 (Del. 2013) (internal quotations omitted); *see also*, Super. Ct. Crim. Rule 2.
[11] States' Answer at 15 (citing to the record at A147).
[12] *Hopkins v. State*, 893A.2d 922, 928 (Del. 2006).
[13] A140.
[14] State's Answer at 15.

The State does not explain how Mr. Wharton could have had "ample time", even though it possessed these phone dumps for longer and failed to discover the messages in a timely manner. The prosecution is responsible for knowing the contents of its' own discovery production; it "cannot evade its discovery obligations through ignorance."[15] The discovery of these messages was not only a surprise to Mr. Wharton, but to the State as well.

Next, the State dismisses its' misleading May 15, 2019 discovery response by categorizing it as a "misplaced" apostrophe.[16] While the error may have been typographical in nature, placement of that apostrophe had significant consequences. Mr. Wharton understood that letter to mean that *none* of his co-defendant's phone dumps would be "used during the [Yaseem] Powell Case."[17] This case does not feature a single defendant such that a "misplaced" apostrophe following the 's' in 'Defendants' would be obvious. On the contrary, this is a case where a "misplaced" apostrophe mattered a great deal. That "misplaced" apostrophe: (1) mislead Mr. Wharton as to the nature of the evidence against him; (2) misdirected Mr. Wharton away from the incriminating messages; and (3) misconstrued the intended meaning.

In fact, grammatical construction, despite seeming unimportant, has legal force and effect. For example, a Florida Appeals Court reversed an award of

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[15] *Valentin*, 74 A.3d at 651.
[16] Answer at 10.
[17] A97.

attorney's fees following an offer of judgment because "[t]he offer was apostrophe-challenged, creating ambiguities as to whether the drafter intended references to singular or plural defendants or plaintiffs."[18] And more recently, the First Circuit ruled a statute ambiguous for "want of a comma."[19] Here, too, there must be consequences for crafting a grammatically incorrect discovery response. The resulting ambiguity must be resolved in Mr. Wharton's favor.

Finally, the two cases the State relies upon as "persuasive" authority are easily distinguishable.[20] The facts of this case are unique. Neither *People v. Jennings*[21] nor *People v. Howard* [22] involved a prosecutor promising to delineate the relevant cell phone evidence, failing to do so, and then further misrepresenting (in writing) that such evidence would not be used at trial. In *Jennings*, the disputed cell phone evidence featured an internet search for articles related to a body burned inside a

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[18] *Bradshaw v. Boynton-JCP Assocs., Ltd.*, 125 So.3d 289 (Mem) (Fla. App. 4th Dist. Apr. 10, 2013).

[19] *O'Connor v. Oakhurst Dairy*, 851 F.3d 69, 70 (1st Cir. 2017) (statute exempting from overtime law employees whose work involved "canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of" perishable foods was ambiguous, thus warranting liberal construction in determining whether dairy company's delivery drivers fell within exemption's scope).

[20] State's Answer at 13–15.

[21] 2020 WL 3621285 (Mich. App. July 2, 2020).

[22] 2018 WL 4659985 (Cal. App. 1 Dist. 2018).

vehicle in Detroit.[23] Those web searches, while incriminating, did not amount to a confession.

In *Howard*, law enforcement struggled to bypass a password that protected the contents of the defendant's cell phone.[24] Once the contents were extracted, the prosecutor immediately advised defense counsel of its acquisition.[25] Although the defendant did not request a continuance, the court effectively granted a one-week continuance by delaying its ruling regarding admission of the disputed evidence.[26] Here, nothing impeded the State's ability to extract data from Mr. Baird's four cell phones and Mr. Wharton did not receive a week-long delay to cure the discovery violation.

There are no Delaware cases directly on point. But as the United States Supreme Court recognized in *Riley v. California*, "[o]ne of the most notable distinguishing features of modern cell phones is their immense storage capacity."[27] In this modern digital age, "it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate."[28] This case

[23] *Jennings,* 2020 WL 3621285 at *3.
[24] *Howard*, 2018 WL 4659985 at *9.
[25] *Id*. at 10.
[26] *Id*.
[27] 573 U.S. 373, 393 (2014).
[28] *Id*. at 395 (citing *Ontario v. Quon,* 560 U.S. 746, 760 (2010)).

presents this Court with an opportunity to address the ubiquity of cell phone evidence in criminal cases and its impact on the State's discovery obligations.

2. Prejudice

The State concedes in its Answer that the text messages "became central to the case" and "this was a fairly close case that hinged on [Benjamin] Smith's credibility."[29] However, it maintains that the Trial Judge "mitigated any claimed prejudice by permitting counsel time to interview two potential witnesses."[30] The State's claim is unavailing.

Although trial recessed for the day, the prejudice remained. Absent admission of the text messages, the State had no confession and no independent evidence to bolster Mr. Smith's credibility. The messages were a "game changer."[31] At that stage of the proceedings, the appropriate remedy was exclusion—a conclusion support by this Court's decisions in *Doran v. State*,[32] *Ray v. State*,[33] and *Oliver v. State*.[34]

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[29] State's Answer at 17.
[30] *Id*.
[31] A144.
[32] 606 A.2d 743, 746 (Del. 1992) (the centrality of defendant's prior oral statement to Detective Sparks, in view of the evidence that had been presented to that point in trial by the State, was "acute").
[33] 587 A.2d 439, 442 (Del. 1991) (by withholding co-defendant's statement, the State limited defendant's ability to prepare his defense).
[34] 60 A.3d 1093, 1100 (Del. 2013) (trial judge abused his discretion by granting a continuance of less than 24 hours for defendant to review technical laboratory test data).

At oral argument on his *Motion to Exclude Evidence*, Mr. Wharton identified two specific areas of prejudice: (1) trial preparation and (2) the opportunity to call a social media expert.[35] And contrary to the State's assertion otherwise, Mr. Wharton did not augment his "initial prejudice argument."[36] In his *Motion to Exclude Evidence*, Mr. Wharton emphasized that he "took steps to try to ascertain which portions of the discovery were significant and which portions were of no significance . . . in order to *properly prepare for trial*."[37] He further argued that the "existence of a planned utilization of these materials at trial can have an impact on the defendant's trial strategy and the defense tried to avoid this very problem by filing the above-mention motion in a timely fashion."[38] Mr. Wharton then offered, as one example, that "it may well have been a strategy of the defense to employ the services of a social media expert to explain the behavior of individuals utilizing social media . . ."[39]

The messages exchanged between Mr. Wharton and Mr. Baird were sent through Facebook Messenger. As Mr. Wharton noted at argument, "there is certainly a culture that surrounds social media and how people communicate with

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[35] A142.
[36] State's Answer at 17.
[37] A101 (emphasis added).
[38] A103.
[39] A104.

one another through social media."[40] Indeed, other courts have permitted testimony from qualified social media experts to help explain the nature of such interactions.[41] Mr. Wharton could have employed that strategy had the State identified the messages in a reasonable timeframe. Such strategy might have blunted the devastating nature of Mr. Wharton's communications, giving the fact-finder reason to believe that he exaggerated or embellished the truth.

But even more important than hiring an expert was Mr. Wharton's ability to challenge Mr. Smith's credibility. Because the messages tended to corroborate Mr. Smith's testimony, "disclosure prior to trial could have influenced"[42] Mr. Wharton's trial tactics. Consequently, the State must be held to account for its haphazard representations and disclosures.

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[40] A142.

[41] See *United States v. Bradbury*, 2015 WL 4627018 at *2 (N.D. Ind. July 31, 2015) (defendant may call a social media expert "to opine as to the general behavioral patterns of Facebook users"); *Johnston v. State*, 69 N.E.3d 507, 511 (Ind. Ct. App. 2017) (no abuse of discretion in qualifying witness as expert in forensic analysis of social media records to help the court understand evidence regarding internet technology and social media); *People v. Ware*, 2020 WL 4188100 at *3 (Cal. App. 4th Dist. July 21, 2020) (gang expert reviewed a large amount of social media evidence pertaining to gang members and explained to jury how social media worked).

[42] *Ray*, 587 A.2d at 442.

CONCLUSION

For these reasons, Appellant Dai'yann Wharton respectfully requests that this Court reverse the Superior Court's judgement and grant him a new trial.

Respectfully submitted,

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