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Case Number 56,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MCARTHUR RISPER,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 56, 2020
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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DATED: October 15, 2020

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I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PERMITTED THE STATE'S WITNESSES TO TESTIFY ABOUT FACTS REGARDING PRIOR BAD ACTS ABOUT WHICH THEY HAD NO PERSONAL KNOWLEDGE AND WHEN IT PERMITTED THE INTRODUCTIOIN OF OTHER CRIMES WITHOUT VALUE APART FROM THEIR RELEVANCE AS CHARACTER EVIDENCE.

The only 404(b) evidence on appeal that the State attempts to defend is Weldon's testimony relaying second-hand information regarding the owner of the illegal drugs and gun that Bailey stole and Waples' testimony relaying the events related to the home invasion.[1] The State does this by erroneously characterizing Weldon's testimony as "eyewitness testimony" when the record reveals she had no first-hand knowledge whether Risper was the victim of the theft. While accurately reciting Waples' testimony about the home invasion, the State essentially concedes it has no independent relevance because the property stolen from the trailer "was not significant to the State's theory of the case." Thus, the State essentially concedes its case.

The State erroneously claims that the record supports the trial court's conclusion that Weldon's "eyewitness" testimony supports proof of the theft because she "testified that she participated in the theft of marijuana and a gun from a trailer in Bridgeville. At the time, Bailey told Weldon that Risper

[1] The State does not defend the prejudicial statements of Yonta Clanton, Deavon Sheppard and certain statements of Oshea Waples which were allowed in at the State's request and over defense objection.

would likely 'be after' him for the theft."[2] Premised on that argument, the State continues with its argument in support of the introduction of Waples' testimony recounting the home invasion. The State's entire argument that flows from this assertion collapses upon a review of two simple exchanges in the record that reveal that Weldon did not have personal knowledge at the time of the theft that Risper was the victim or target:

Prosecutor:	Did Corey ever indicate to you that there may be a consequence for stealing the drugs and marijuana – I'm sorry the marijuana?
Weldon:	Yeah. After we left, he kind of explained what he thought would happen.
Prosecutor:	He explained to you. And what did he explain to you?
Weldon:	He pretty much told me that there was going to be people after us for doing what we did.
Prosecutor:	Did he say which people?
Weldon:	Yes.
Prosecutor:	And which people were they?
Weldon:	That would be his cousin and his cousin's friend.
Prosecutor:	Do you know who his cousin is?
Weldon:	Yes.
Prosecutor:	Who was it?
Weldon:	McArthur. [3]

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Defense Counsel:	Now, Ms. Weldon, you indicated that Corey told you that there may be, I guess, repercussions for stealing that marijuana and

[2] State's Ans. Br. at p. 12.
[3] A202.

	stealing the gun in the shopping bag; is that right?
Weldon:	Yes.
Defense Counsel:	And you didn't know who owned the house or the mobile home that you broke into, right?
Weldon:	No.
Defense Counsel:	Okay. And you didn't know who owned the weed, did you?
Weldon:	No, I only knew what Corey told me.
Defense Counsel:	Right. So you didn't have any personal knowledge as to whose weed you were stealing, right?
Weldon:	Correct.
Defense Counsel:	You didn't have any personal knowledge as to whose gun you were stealing, right?
Weldon:	Correct.
Defense Counsel:	And you didn't have any personal knowledge as to whose home you were even breaking into, right?
Weldon:	Correct. [4]

Thus, while Weldon may have had personal knowledge that Bailey committed a theft, she did not have personal knowledge that he stole from Risper. Specifically, she did not have personal knowledge that he stole drugs and a gun from Risper, i.e. that Risper was in possession of illegal drugs and a weapon. Thus, the State failed to "satisfy *Getz*'s third guideline, which is that the proof of the prior crimes must be 'plain, clear and conclusive'"[5]

While "the testimony of an eyewitness or other witness with personal knowledge typically satisfies the 'plain, clear and conclusive'

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[4] A217-218.

[5] *Chavis v. State*, 2020 WL 2747969 *3 (Del. May 26, 2020).

requirement[,]"[6] testimony of a witness with only secondhand knowledge does not. "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter…."[7] If prior crimes are relevant, clear and convincing evidence must be supported by the witness's personal knowledge of the prior events.[8]

Here, Weldon's testimony regarding the owner of the illegal drugs and the gun should not have been admitted because it was not based on her personal knowledge.[9] Thus, the trial judge erred by allowing Weldon to testify about facts to which she had no personal knowledge.

The State's assertion that "the object of the theft was not significant to the State's theory of the case [but rather] the fact that Bailey stole the items from Risper was" is quite perplexing.[10] If that is the case, then one need go no further to establish that the home invasion had "no independent logical

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[6] *Chavis*, 2020 WL 2747969 *4.
[7] D.R.E. 602.
[8] *McDonald v. State*, 1989 WL 68314, *10 (Del. 1989) ("the State proved the prior sexual attack by McDonald through the testimony of an eyewitness to that attack").
[9] *See Renzi v. State*, 320 A.2d 711, 712-13 (Del. 1974) (finding that evidence of defendant's prior drug sale was not "plain, clear and conclusive" where the only evidence at trial regarding the sale was the testimony of officer who did not witness the sale). *See also* 1 McCormick on Evidence § 10 (8th ed. Jan. 2020) ("The common law system of evidence embodies a strong preference for admitting the most reliable sources of information.").
[10] State's Ans.Br. at p.13.

relevance" and, that evidence must be deemed inadmissible. According to the State, Risper and Mike Lewis went to Waples' house in search of the marijuana and guns that were purportedly stolen from Risper by Bailey. If the property stolen from the trailer is not relevant then the evidence of the home invasion becomes evidence of another crime of the same or similar character as the charged offenses without evidentiary value apart from [its] relevance as character evidence, which makes [it] inadmissible under D.R.E. 404(a)." [11] That is because there is no link to the State's underlying retaliation theory. Assuming, *arguendo*, Bailey stole a T.V. from Risper, then Risper invaded a third party's home looking for marijuana, the State would not have the same motive argument.

In any event, due to the State's failure to prove by plain, clear and conclusive evidence that Risper was the victim of the theft also left the evidence of the purported home invasion with "no independent logical relevance. Without such facts, [it] simply become[s] evidence of [an]other crime[] of the same or similar character as the charged offenses without evidentiary value apart from [its] relevance as character evidence, which makes [it] inadmissible under D.R.E. 404(a)." [12]

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[11] *Chavis*, 2020 WL 2747969 *4.
[12] *Id.*

In assessing the prejudice to Risper, the State conveniently fails to consider the damage created by the statements of Clanton and Sheppard, as well as the additional statements by Waples, that it could not defend on appeal. This is significant as the State apparently found no probative value to those statements. Thus, the prejudicial value contributed by those statements are significant. Further, a significant portion of the trial was dedicated to the introduction and recitation of these statements, thus, evidence that Risper was involved in dangerous activity such as home invasions is likely to have been significant to a jury. One cannot conclude with assurance that the jury was not swayed by the admission of the hearsay evidence designed to establish his involvement in prior bad acts.[13] Thus, the introduction of evidence of the home invasion was unfairly prejudicial.

[13] *See Buckham v. State*, 185 A.3d 1, 13 (Del. 2018) (en banc) ("Not all errors call for reversal. But to deem an error harmless—and safely disregard it—we must have a 'fair assurance ... that the judgment was not substantially swayed by the error.' That is necessarily a case-specific inquiry;' one that requires us to 'scrutinize[ ] the record' to evaluate 'both the importance of the error and the strength of the other evidence presented at trial.' " (alteration and omission in original) (footnotes omitted)); Super. Ct. Crim. R. 52(a) ("Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." (emphases omitted)).

II. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT REFUSED TO DISMISS RISPER'S CASE IN RESPONSE TO THE STATE'S FAILURE TO DISCLOSE BOTH EXCULPATORY AND IMPEACHMENT EVIDENCE AS REQUIRED BY *BRADY V. MARYLAND*.

The State does not contest that it committed two *Brady* violations below. Instead, it erroneously claims that Risper was able to make effective use of the belatedly provided information and that the trial court's remedies were appropriate. In making its arguments, the State makes short shrift of Risper's right to cross examination and misunderstands the appropriate remedies available to Risper when there is a *Brady* violation.

With respect to AE's statement, defense counsel may have made a "somebody else did it" argument at trial, however, if Risper had the exculpatory statement in a timely manner, (i.e. when he obtained a continuance to investigate the possibility that another drug dealer was responsible for Bailey's death), he could have followed up on that exculpatory statement and made effective use of it.

Channel Gray was the only witness who claimed to have actually seen the shooting. Defense counsel's cross-examination of Gray centered around inconsistencies and other problems with her account of the events surrounding Bailey's shooting such as her claim that she was able to make eye contact for a long time. Defense counsel also pointed out that she had a theft conviction.

The State argues that Risper makes too much of his right to cross examine Gray, the State's most essential witness. The State claims that the trial court was correct in finding that the shoplifting scheme was not a material fact in the case and questioning the detective who interviewed Weldon would be an adequate remedy. This simply ignores the entirety of Risper's argument.

The impact of Gray's participation in Weldon's shoplifting scheme goes well beyond just another in the list of possible misdemeanor theft offenses. The information revealed that, on the very night of the shooting she was participating with another of the State's star witnesses in shoplifting or defrauding a store. Because the two witnesses participated together, the information may have impacted the jury's assessment of Gray's credibility and therefore the outcome of the trial.

In fact, the impact of the evidence was dampened when Weldon insisted that she never told police that Gray was the woman she shoplifted for. Once she was rehabilitated, the significance of the evidence was lost. Thus, the delay in the disclosure of the information until after she testified had already been cross examined questions whether the verdict is worthy of confidence.

Contrary to the State's assertions, assessment of the prejudice does not involve speculation as to whether there would be a "Perry Mason" moment during cross examination if the information was provided beforehand. It is the

"opportunity for cross-examination" that is "protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process. Cross-examination is 'the principal means by which the believability of a witness and the truth of his testimony are tested.'[14] Indeed, the Court has recognized that cross-examination is the 'greatest legal engine ever invented for the discovery of truth.' "[15]

In citing *Doran v. State*,[16] the State confuses the constitutional magnitude of a *Brady* violation with that of a violation of a court discovery rule. *Doran* discusses the menu of sanctions available to the trial court when there is a violation of the discovery procedures in Superior Court Criminal Rule 16. The United States Supreme Court , on the other hand, has made it clear that "suppression of material evidence justifies a new trial 'irrespective of the good faith or bad faith of the prosecution.' When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule."[17]

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[14] *Kentucky v. Stincer*, 482 U.S. 730, 736 (1987) (quoting *Davis v. Alaska,* 415 U.S. 308, 316 (1974)).
[15] *Id.* (quoting *California v. Green,* 399 U.S. 149, 158 (1970)).
[16] 606 A.2d 743, 745 (Del. 1992).
[17] *Giglio v. United States*, 405 U.S. 150, 153–54 (1972) (*quoting Brady v. Maryland*, 373 U.S. 83, 87 (1963)). *See* American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function s 3.11(a).

It certainly was not for the court to decide on behalf of the defense what version of the evidence had more value - the recorded statement or in-court testimony. That would have to be a decision for defense counsel after assessment of the evidence. Accordingly, the trial court should have granted defense counsel's request for a dismissal because the State committed a *Brady* violation when it failed to disclose "a confession by another person" that it had in its possession for seven months.[18] Short of that, granting a continuance would have been reasonable.

"Applying the *Kyles* test, it is clear that the delayed disclosure constituted a suppression of favorable evidence that would be material to impeachment of one or more key witnesses. [Gray]'s credibility would have been significant to the jury and an opportunity for effective cross-examination was essential for [Risper] to receive a fair trial. Had the [shoplifting information] been made available to defense counsel before trial, the cross-examination of [Gray] may have changed the outcome of the trial." [19]

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[18] A115.

[19] *Atkinson v. State*, 778 A.2d 1058, 1064 (Del. 2001) (citing *Kyles v. Whitley*, 514 U.S. 419 (1995).

CONCLUSION

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

Respectfully submitted,

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