



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARTH HEALD,)
)
Defendant-Below,)
Appellant,)
)
v.) No. 108, 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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I. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED HEALD HIS RIGHT TO A FAIR TRIAL WHEN IT ALLOWED THE STATE TO INTRODUCE IRRELEVANT AND UNFAIRLY PREJUDICIAL HEARSAY AND WITNESS OPINIONS THROUGH THE TESTIMONY OF THE COMPLAINANT'S PARENTS IN ORDER TO BOLSTER HER CREDIBILITY AND TO ELICIT SYMPATHY FOR HER.

At trial, the prosecutor claimed that the reason for introducing the testimony of Ann's parents was to: 1) explain how the investigation unfolded;¹ and 2) counter an anticipated credibility argument arising from Ann's decision not to report the alleged "touch" to anyone in the Heald household by showing that she immediately went home and told someone she trusted.² Significantly, on appeal, the State does not contest that: 1) it could have explained how the investigation unfolded in a manner not unfavorable to the State without revealing Ann's prior consistent statement; and 2) Heald never attacked Ann's credibility based on a claim that she should have told someone at the Heald household about the alleged "touch." Thus, the State does not defend the purposes for the introduction of the evidence as provided by the prosecutor at trial. Instead, the State claims the evidence was actually offered for the purpose of explaining "why Houghton did not immediately report the incident to the authorities."³ The State also claims that the demeanor

¹ A12.

² A13.

³ State's Answering Brief at 13.

testimony surrounding Ann’s statement was “helpful to the jury because Ann herself seemed very uncomfortable describing what had happened to her.”⁴ As neither of those purposes were offered by the State below, they should not be considered by this Court. However, to the extent this Court chooses to consider them, it must conclude that they also are improper.

The State appears to be under the misguided understanding that “bolstering” only occurs when someone specifically says that a witness is telling the truth. What the State fails to understand is that prior consistent statements of a witness have no relevance, absent certain exceptions that do not apply in our case, precisely because the United States Supreme Court has deemed them to be a form of bolstering. No qualification under the “excited utterance” exception to the hearsay rule changes that.

The “applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made before [the time when a party alleges a] source of the bias, interest, influence or incapacity originated.”⁵ This principle is embodied in *Delaware Rule of*

⁴ State’s Answering Brief at 13.

⁵ *Tome v. United States*, 513 U.S. 150, 156 (1995) (quoting E. Cleary, McCormick on Evidence § 49, p. 105 (2d ed. 1972) (internal quotation marks omitted)).

Evidence 801 (d) (1) provides, in relevant part, that a prior out-of-court statement of a witness is not hearsay and can be admissible if

[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (B) consistent with his testimony and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive....

Here, Ann did testify and was subject to cross-examination. However, she had not testified at the time Smith relayed her interpretation of her statement. Thus, it was not yet clear whether his interpretive narrative was consistent with her testimony. Ann's later testimony does seem to be consistent with Smith's interpretation. Thus, if this Court chooses to give the State a pass on the "consistency" requirement, it still must conclude that the hearsay was inadmissible as the final requirement of *D.R.E.* 801 (d) (1) (B), an "express or implied charge of recent fabrication or improper influence or motive," was not satisfied.

Prior to the introduction of a consistent out-of-court statement under *D.R.E.* 801 (d) (1) (B), opposing counsel, through an opening statement, during cross examination or through the introduction of a prior inconsistent statement, must make a "suggestion of a conscious alteration" in the witness' account of events. While, as the State notes, defense counsel made a general credibility argument, the record in reveals that defense counsel made no

suggestion that Ann altered her account of events. No one, including Ann, testified prior to her father. Nothing had been done by way of cross examination to suggest fabrication when the State elicited the hearsay. Nor was any such suggestion made when defense counsel did cross examine Ann and other witnesses later in the trial.

Here, defense counsel did attack Ann's credibility but this was far from an "express or implied charge of recent fabrication or improper influence or motive[.]" "Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited."⁶ Thus, the State's asserted purpose below, i.e. countering what turned out to be a non-existent credibility argument, did not provide a proper purpose for the introduction of the prior consistent statement. Nor is the prior consistent statement relevant to the State's newly asserted purpose of explaining Houghton's delay in reporting the incident to police.

Finally, the State did not dispute Heald's statement in his Opening Brief that "Ann's statement was not necessary to establish how the investigation unfolded. All the State needed to introduce was that Ann left the Heald's

⁶ *Tome*, 513 U.S. at 157–58.

house and immediately told her parents that something happened and that this triggered the investigation.”⁷

As the State notes, “[p]ursuant to D.R.E. 802, hearsay is inadmissible unless otherwise provided in the Rules.”⁸ Thus, even if this Court were to find Ann’s statement to her father to be an “excited utterance” it is still subject to Rules 401, 402 and 403. Here, the admission of this out-of-court statement was cumulative and served no purpose “other than to simply bolster” Ann’s forthcoming testimony. The State’s own explanation as to how the testimony about Ann’s demeanor was helpful to the jury to assess her credibility highlights the level of prejudice accompanying the evidence. This is essentially a concession that the testimony was used improperly. In fact, the prosecutor did argue to the jury in her closing precisely that which defense counsel predicted, that because Ann told the same story to multiple adults- an inference could be drawn that she was telling the truth.⁹ Thus, Heald’s convictions must be reversed.

⁷ Opening Brief at 15.

⁸ State’s Answering Brief at 14.

⁹ A56-57.

II. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT PERMITTED THE FORENSIC INVESTIGATOR WHO TOOK THE COMPLAINANT’S STATEMENT TO TESTIFY ABOUT HER OWN TRAINING AND EXPERIENCE IN INTERVIEW TECHNIQUES AND ABOUT THE CAC INTERVIEW PROCESS.

The State does not dispute that neither the CAC forensic investigator’s testimony about her experience and training in interviewing children nor her testimony about the process used to obtain statements from children in sex abuse cases was within the scope of the purpose for which she was called to testify- to authenticate Ann’s recorded statement under 11 Del.C. §3507. Thus, the State did not defend the relevance of this evidence. Rather, the State once again demonstrates its lack of understanding of improper vouching or bolstering by claiming it did not occur here because the investigator did not specifically opine that Ann told the truth in her statement.¹⁰

In *Richardson v. State* this Court emphasized what the State continues fails to fully comprehend, “**improper vouching includes testimony that directly or indirectly provides an opinion on the veracity of a particular witness’** and that [t]he **admission of such testimony constitutes plain and reversible error.**”¹¹ This principle was also discussed in *Capano v. State*¹²

¹⁰ State’s Answering Brief at 20.

¹¹ 43 A.3d 906, 910 (Del. 2012).

¹² 781 A.2d 556, 596 (Del. 2001).

where the State presented the testimony of a witness' attorney to explain the impact of his advice on the witness' state of mind at the time the witness made a statement. While the State argued, as it similarly does today, that the attorney-witness "did not vouch for [the witness] and did not express an opinion on the veracity of [the witness'] testimony[,]" this Court found that it is "implicit" in the testimony that the attorney-witness "believed his own admonitions to have been effective"¹³ and his testimony was "a subtle and indirect version of vouching for [witness'] credibility."¹⁴ The Court also concluded that the problem was "compounded by the State's elicitation" from the attorney-witness of his credentials.¹⁵ This "testimony highlights the potential that [the attorney-witness'] status as an experienced lawyer may have imparted credibility to [the witness'] testimony—owing not to [the witness'] believability but to the credentials of the lawyer-witness vouching for him."¹⁶

Similar to the attorney-witness in *Capano*, Kendall's credentials as an experienced forensic interviewer who is well trained in the methods of

¹³ *Id.* at 595.

¹⁴ *Id.*

¹⁵ *Id.* at 596.

¹⁶ *Id.* See *Graves v. State*, 648 A.2d 424 (Del. 1994) (reversing, in part, because lawyer for two prosecution witnesses testified as to his impressive credentials and that he urged the witness to cooperate with investigators and tell the truth).

interviewing children “may have imparted credibility to [Ann’s] testimony—owing not to [her] believability but to the credentials of [Kendall.]”¹⁷ This testimony, like the investigator’s testimony in *Richardson*, “served no purpose other than to validate the interview process, and its ability to draw out the truth from child victims.”¹⁸ Essentially, Kendall told the jury that it could believe the statements she obtained because she is trained to obtain trustworthy statements and the questioning technique employed is designed to obtain trustworthy statements.

Since the admission of improper vouching necessarily constitutes plain and reversible error[,],” Heald’s convictions must be reversed.

¹⁷ *Capano*, 781 A.2d at 596.

¹⁸ *Richardson*, 43 A.3d at 911.

III. IN THIS CREDIBILITY CASE, THE PROSECUTOR'S REPEATED COMMENTS WHICH DIRECTLY AND INDIRECTLY VOUCHED AND ELICITED SYMPATHY FOR THE COMPLAINANT WERE IMPROPER AND JEOPARDIZED THE FAIRNESS AND INTEGRITY OF HEALD'S TRIAL.

1. The Prosecutor's Improper Argument During Her Opening Statement Was Designed To Bolster The Credibility Of Ann's CAC Statement.

In the State's repeated demonstration of its misunderstanding of indirect bolstering, it claims that a lengthy description of the CAC interview training and techniques and the actual interview process by the prosecutor in her opening statement was not improper. Simply stated, the prosecutor told the jury that despite any nervousness Ann might demonstrate in court, the jury could trust her statement due to the manner in which the statement was taken by the "experienced interviewers." The prosecutor's comments were even more egregious as they formed the basis of a preemptive, if indirect, argument urging the jury to place more weight on the CAC statement.¹⁹ Thus, the prosecutor's improper argument in her opening statement was prosecutorial misconduct.

¹⁹ A15.

2. The Prosecutor Made Several Improper Comments During Her Closing Arguments.

a. Vouching For Ann's And Her Parent's Action Through Improper Expression Of Opinion.

The State is mistaken in its claim that the prosecutor was justified in countering the defense argument that questioned Houghton's delay in contacting police with her personal opinion. The prosecutor was entitled to respond by providing the facts that were in the record, not by providing her opinion that Ann and her parents did the "right thing" or that the "system worked." Those were conclusions for the jury. And, contrary to the State's claim, the prosecutor's comments did suggest personal knowledge of the witness's credibility.²⁰ A prosecutor is telling the jury that the alleged victim's mother did the "right thing" in the way in which she reported the incident.

b. The Prosecutor Improperly Urged The Jury To Believe Ann Because She Told A Consistent Story Multiple Times.

The State claims that because "it was factually correct" it was not improper to tell the jury that Ann made multiple statements.²¹ Further, it concedes that the prosecutor erroneously stated that Ann told her story "multiple times" to "a number of adults" and said, "the same thing."²² Yet,

²⁰ State's Answering Brief at 27.

²¹ *Id.* at 28.

²² *Id.* at 28-29.

it argues that the comments were not improper because they were used to combat a credibility argument. This is precisely why the comments were improper.

Time and again, the State fails to address the law of prior consistent statements - absent an express or implied charge against the declarant of recent fabrication or improper influence or motive, a prior consistent statement is not admissible for purposes of credibility.²³ The record reveals that defense counsel's strategy at trial in no way involved any such charge against Ann.²⁴ Thus, the prosecutor's argument was improper as it urged the jury to believe Ann simply because she gave prior consistent statements. And, it was not even accurate to say she gave multiple consistent statements to a number of adults.

c. The Prosecutor Improperly Expressed Her Own Subjective Observation To Elicit Sympathy From The Jury For Ann.

The State concedes that "it is improper for an attorney to ask the jury to sympathize with a victim."²⁵ It claims, however, that because the prosecutor made her statement in the context of pointing out the biases of the various witnesses, the prosecutor's statement was not a solicitation of sympathy. That

²³ D.R.E. 801 (d) (1) (B). *See Tome*, 513 U.S. at 156-157; *Stevenson v. State*, 149 A.3d 505, 511 (Del 2016). *See* Opening Brief at 30-31.

²⁴ *See Baker v. State*, 213 A.3d 1187, 1191 (Del. 2019).

²⁵ State's Answering Brief at 30.

the prosecutor's solicitation was in the context of a bias argument makes a call for sympathy no less improper or harmful. Further, the State fails completely to address, much less defend, the fact that the prosecutor's comment was based solely on her own subjective opinion:

It looked like this was probably one of the more painful things this ten-year-old had ever had to have done in her life up to this point.²⁶

d. The Prosecutor Improperly Based An Argument On Facts Not Supported By The Record And Sought To Inflame The Passions Of The Jury Through Her Characterization Of The Charges.

The prosecutor's characterization of the alleged "touch" as "heinous" is more than mere of hyperbole. It is a term of art that is generally a consideration at sentencing "to describe a particularly offensive crime."²⁷ In fact, it can be an aggravating circumstance for purposes of imposing the death penalty. In other words, not even all murders are considered heinous, let alone a brief touch on a private part over clothes.

Further, it was permissible for the prosecutor to argue that family members may have had an interest in testifying favorably for Heald and even that they had spent time with him on occasion. But, contrary to the State's assertions, nothing in the record supports the State's arguments that "no one

²⁶ A56.

²⁷ *Cartwright v. Maynard*, 822 F.2d 1477, 1485 (10th Cir. 1987), *aff'd*, 486 U.S. 356 (1988).

wants to believe a family member could do something like this” and that certain State witnesses were under Heald’s “influence.”

3. The Prosecutor’s Repetitive Errors Require Reversal.

The State fails to support its contention that any error resulting from the prosecutor’s comments did not deprive Heald of a substantial right or clearly show manifest injustice. To the contrary, since the State’s improper comments in our case went to the central issue at trial –credibility – they constitute plain and reversible error.²⁸

Assuming, *arguendo*, this Court does not find plain error, it should still reverse under *Hunter* because, contrary to the State’s assertion, this is not “a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential.”²⁹ The improper comments began during the State’s opening statement and continued through the State’s rebuttal.

²⁸ *Richardson*, 43 A.3d at 910.

²⁹ *Berger v. United States*, 295 U.S. 78, 89 (1935).

IV. THE ERRORS AT TRIAL CUMULATIVELY PREJUDICED HEALD AND DEPRIVED HIM OF A FAIR TRIAL.

The errors set forth in Arguments I-III so permeated the trial from start to finish that they were actually a feature of the trial. Thus, assuming this Court finds error in each of the previous arguments but does not find that each error, standing alone, warrants reversal, it must conclude that their cumulative impact requires reversal.

CONCLUSION

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

Respectfully submitted,

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DATED: November 12, 2020