EFiled: Oct 05 2020 04:53PM EDT
Filing ID 65990554
Case Number 75,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AJ MCMULLEN,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	**No. 75, 2020**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

APPELLANT'S OPENING BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND FOR

NEW CASTLE COUNTY

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DATE: October 5, 2020

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NATURE AND STAGE OF THE PROCEEDINGS

AJ McMullen ("McMullen") was indicted on charges of murder first degree, possession of a firearm during the commission of a felony ("PFDCF") and possession of a deadly weapon by a person prohibited ("PDWBPP"). (Indictment). McMullen waived his right to a jury and elected to proceed with a bench trial. (D. I. #63). Trial began December 9, 2019 and concluded on December 17, 2019.

At trial, the State introduced out-of-court statements pursuant to 11 *Del.C.* § 3507 from multiple witnesses. Despite defense counsel's repeated objections, the trial court admitted the statements. (A-119). At the conclusion of the State's case-in-chief defense counsel moved for a Motion for Judgement of Acquittal. (A-571). The court denied said Motion on January 3, 2020 when it rendered its verdict in this case. (Ex. B). The court concluded beyond a reasonable doubt that McMullen was guilty of murder first degree and PFDCF. (A-738).

McMullen was sentenced on February 21, 2020 to life without possibility of probation or parole. (Ex. C). McMullen filed a timely Notice of Appeal. This is his Opening Brief as to why his convictions must be reversed.

SUMMARY OF THE ARGUMENT

1. The trial court erroneously permitted the admission of out-of-court police interrogation statements from two of the State's crucial witnesses that incriminated McMullen even though the witnesses had recall of the relevant events, were not contradicting the out-of-court statement and the prior statement simply buttresses the in-court testimony. Because 11 *Del.C.* § 3507 prohibits the introduction of an out-of-court statement when it allows a party to double the impact of the witnesses' evidence, the police interrogation statements implicating McMullen were inadmissible. Thus, reversal is now required.

2. The Court should vacate the defendant's conviction for murder because there was insufficient evidence to establish beyond a reasonable doubt that the death was caused by the defendant.

STATEMENT OF THE FACTS

On November 16, 2016 at approximately 11.30 p.m. a passing motorist discovered the body of the decedent, Darrin Gibbs ("Gibbs"), on West Monroe Street in Millsboro, Sussex County, Delaware. (A-29). The decedent appeared to be dead from a gunshot wound to the back of his head. (A-37). The motorist called 911 and police arrived within minutes.

At approximately 3:00 a.m. on November 17, 2016, lead investigating officer, Detective Mark Csapo ("Csapo") arrived at the scene. (A-42). Csapo testified that the approximate time the crime was committed was undeterminable. (A-59). As part of the investigation, police recovered certain pieces of evidence at the scene which included: a live 9-millimeter bullet, shell casing and Gatorade bottle. (A-63, 70). The items were processed for fingerprints and DNA, however neither fingerprints nor DNA were recovered from the ammunition. (A-105). The Gatorade bottle returned a positive result for fingerprints from an individual that was identified at trial. Csapo testified that no follow up was done with that person in connection with the investigation. (A-71-72). Also found at the scene on the decedent were various colored glycine wax baggies with names printed on them consistent with drug usage and distribution. (A-108).

In June of 2018 police recovered a 9mm semiautomatic pistol inside of a black bag from the waterway on Williams Pond near Seaford. (A-401). Testing on the firearm concluded that the shell casing found at the scene was fired from the recovered weapon. (A-434). However, testing could neither eliminate or identify that the bullet and metal fragments recovered from the decedent were linked to the same firearm. (A-438, 450). Moreover, police failed to conduct any sort of trajectory analysis of the bullet to determine potential angles and height of the alleged shooter. (A-610).

The investigation in this case lasted roughly 3 years and comprised over 50 interviews. (A-607). This stemmed from the fact that there were no eyewitnesses to the crime and no forensic analysis linking any suspect. The State was left with uncorroborated testimony from various witnesses.

The State called Keshawn Gibbs, ("Keshawn"), the decedent's cousin, in its case-in-chief. (A-113). Keshawn testified that he did not know McMullen and that he only met him on one prior occasion. (A-134). Keshawn is a heroin addict and had purchased drugs a few days prior to the murder from Kenton Williams ("Williams"), a mutual friend of McMullen and the decedent. (A-139). According to Keshawn, a few days prior to the murder, during a drug transaction, a conversation took place with Williams and the decedent about a rumor that the decedent, Williams and McMullen

had robbed a drug dealer. (A-135). Csapo testified pursuant to 11 *Del.C.* § 3507 that Keshawn told him that the decedent was planning on informing the individual who was robbed who was responsible for the robbery. (A-123).

The State called Ashley Donaway ("Donaway"). She testified she did not know McMullen. On the evening of November 16, 2016, Donaway, who was homeless, had planned to stay with Williams at the Classic Motel in Georgetown, Delaware. (A-143-144). Donaway was in a friends-with-benefits relationship with Williams and they spent the evening partying with heroin, cocaine and alcohol. (A-318). According to Donaway, she left the hotel on multiple occasions on the evening of and the day after the alleged murder. Williams had asked Donaway to be his alibi and she agreed. (A-193).

She testified that she and Williams made 3 trips to the Millsboro Village Apartments and a trip on November 17, 2016 to a motel in Seaford. (A-186). The first trip to the apartments involved getting clothes from "Little Bro", who was not known to her. While she was getting high, she made a second trip with Williams to pick up "Little Bro". Finally, on the third trip she took Williams to pick up his vehicle. (A-151-159).

Donaway testified that she drove Williams to an unknown residence where he returned with a duffel bag. (A-165). Inside the bag, Donaway saw what looked like an assault rifle and ammunition, none of which matched the type of weapon allegedly used in the decedent's murder. (A-166). Donaway testified that Williams told her about a robbery he had committed and threatened to kill her if she told anyone. (A-195).

The State called Kenton Williams. Williams, a convicted felon, was friends with both the defendant and McMullen. (A-250, 287). Williams testified that he and McMullen had committed a robbery of a drug dealer named "Cos" in which they obtained heroin and money. (A-256). According to Williams, on November 16, 2016, he met with McMullen and Keshawn to discuss the robbery that took place in the weeks prior. (A-253). During this conversation, Williams learned that the decedent was going to expose those who committed the robbery. (A-255). Williams testified that McMullen expressed that the decedent "got to go". (A-257). Williams testified that during the course of the evening in question McMullen contacted him to pick him up at the Millsboro apartments. (A-260). Afterwards, McMullen and Williams went to the Classic Motel and continued to get high. (A-268). Williams testified that the following morning he drove McMullen to the Super 8 Motel in Seaford. According to Williams, McMullen threw a black

bag over a bridge which he told McMullen contained a gun. (A-270). Williams was interviewed by police the same day and on multiple occasions over the course of 2 years and each time denied his involvement in the alleged crime. (A-274). Williams testified that McMullen told him that another individual later identified as Albert Green was with him at the scene of the murder. (A-274).

In exchange for William's testimony, the State granted him immunity and agreed not to file any charges involving the murder of the decedent. In addition, Williams was also not going to be arrested or charged in connection with the robbery of Cos to which he admitted. (A-297-298).

The State called Shernell Mills ("Mills"). Mills was McMullen's girlfriend. Mills testified that on the evening in question, the decedent, Green and McMullen were loitering outside her apartment. (A-498). Mills testified that she was interviewed by Detective Csapo in May 2019 regarding information she had about the decedent's death. During the interview Mills implicated McMullen in the shooting based on statements he had confessed to her. (A-507). At the time of the interview Mills was pregnant with McMullen's child. (A-521). Moreover, Mills who had been convicted on forgery and theft charges in 2015, had just recently been arrested. (A-537, 570). Mills testified that at the time of the interview she was also in the

process of trying to get her children back from the Department of Family Services and needed assistance in that regard (A-537). In exchange for her statement, Mills received benefits as a result of being in the witness protection program which included payments, a cell phone and having her son's rent paid. (A-526). Mills testified that Green could be the one that shot the decedent given that he was with McMullen and Williams the night of the shooting. (A-535).

The State called Albert Green, a drug associate and friend of the decedent. (A-334). Green confessed that he was with the decedent on the night of his murder. Green testified that he, the decedent, and McMullen left the Millsboro Village Apartments to purchase drugs. (A-348). Video footage from the apartments show all the subjects walking in the direction of where the decedent's body was later found. (A-241). According to Green, he was not present when the decedent was murdered as he broke off from the group in a different direction to purchase more drugs. (A-339).

I. THE SUPERIOR COURT COMMITTED REVERSIBLE ERROR BY PERMITTING THE STATE TO RELY UPON 11 *DEL.C.* § 3507 TO INTRODUCE THE PRIOR OUT-OF-COURT STATEMENT FROM TWO KEY WITNESSES WHICH ALLOWED THE STATE TO DOUBLE THE IMPACT OF THEIR EVIDENCE.

Question Presented

Whether an out-of-court statement of a witness can be introduced into evidence under 11 *Del.C.* § 3507 when the witness has recall of the relevant events, is not contradicting the out-of-court statement and the prior statement simply buttresses the in-court testimony? The issue was preserved by defense counsel's objection to the admissibility of the out-of-court statement. (See Exhibit A).

Standard and Scope of Review

This Court "review[s] a trial judge's decision on the admissibility of a 3507 statement for abuse of discretion." *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006).

Argument

The trial court erroneously permitted the admission of out-of-court police interrogation statements from two of the State's crucial witnesses that incriminated McMullen even though the witnesses had recall of the relevant events, were not contradicting the out-of-court statement and the prior

statement simply buttresses the in-court testimony. Because 11 *Del.C.* § 3507 prohibits the introduction of an out-of-court statement when it allows a party to double the impact of the witnesses' evidence, the police interrogation statements implicating McMullen were inadmissible. Thus, reversal is now required.

The State in its case-in-chief, called Keshawn Gibbs and Shernell Mills, two key witnesses. Keshawn and Mills were interviewed by Detective Csapo in connection with the investigation of this case and their statements were documented. Keshawn and Mills testified concerning their conversations with McMullen and his admissions therefore this testimony was critical to the State's case due to the inculpatory nature. During their direct examinations neither witness had a lack of recall pertaining to the events in question or recanted making the statements in the first place. If anything, "the extent of the State's direct examination of each of the [] witnesses was laconic." *Blake v. State*, 3 A. 3d 1077, 1081 (Del. 2010).

After Keshawn and Mills' direct examination was completed, the State moved for the admission of their out of court statements under section 3507. (A-119, 509). Defense counsel objected on the basis that the out of court statements were cumulative and the testimony had not properly developed into a situation which permitted the admission pursuant to section

3507. (A-119, 509). The trial court denied the objection and permitted the State to introduce the statements. (A-513).

Title 11, section 3507 of the *Delaware Code* provides:

> (a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.
>
> (b) The rule in subsection (a) of this section shall apply regardless of whether the witness' in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.
>
> (c) This section shall not be construed to affect the rules concerning the admission of statements of defendants or of those who are codefendants in the same trial. This section shall also not apply to the statements of those whom to cross-examine would be to subject to possible self-incrimination.

In order to offer the out-of-court statement of a witness, the State, pursuant to *11 Del.C. §* 3507, is statutorily required to engage in direct examination of its witness as to both the events perceived or heard it alleges incriminates the defendant and the out-of-court statement itself. *Keys v. State*, 337 A.2d 18, 20 (Del. 1975). "The Sixth Amendment requires an entirely proper foundation, if the prior statement of a witness is to be admitted under section 3507 as independent substantive evidence against an accused." *Blake v. State,* 3 A.3d 1077, 1083 (Del. 2010).

More importantly, and too often overlooked, is that "whenever a § 3507 is offered into evidence, the only consideration is whether a proper foundation has been established". *Richardson v. State,* 43 A.3d 906, 909 (Del. 2012). However, where as in the instant case, the witnesses testified in similar detail about the same statements made during the police interrogations, the out-of-court statements "would appear to be cumulative and subject to being excluded on that ground." *Id.* This Court made clear in *Richardson* that § 3507 does not trump all other rules of admissibility. § 3507 was enacted to address the problem of a "turncoat" witness. *Blake v. State,* 3 A.3d 1077, 1082 (Del. 2010). "Where a witness has full recall of the relevant events, and is not contradicting the out-of-court statement, the prior statement simply buttresses the in-court testimony. The statute was not intended to allow parties to double the impact of the witness's evidence." *Richardson,* 43 A.3d at 909.

Here, the record reflects that both witnesses did not fail to have a recall of the relevant events and their testimony was not contradictory to the out of court statements. Moreover, the witnesses testified consistent with the questions that were asked. The prior statements were cumulative and simply buttressed the in-court testimony. Section 3507 was not intended to allow the State to double the impact of the witnesses' evidence which is what

occurred in this case. Thus, the out of court statements were cumulative and subject to being excluded on those grounds. *Richardson,* 43 A.3d at 909.

Finally, the witness statements in question were not harmless beyond a reasonable doubt because they were comprised of what essentially amounted to McMullen's confession. An error in admitting evidence may be deemed harmless only when the properly admitted evidence, taken alone, is sufficient to support a conviction. *Johnson v. State,* 587 A.2d 444, 451 (Del. 1991). The State's case against McMullen was exceedingly weak. The State offered no physical evidence connecting him to the crime charged. Instead, the State's case rested exclusively on the tenuous connection of uncorroborated witness testimony alleging that McMullen confessed to the crime. As a result, there can be little doubt that the 3507 statements contributed significantly to McMullen's conviction. For this Court to find that the effect of the error here did not cause actual prejudice and was thus harmless would be sheer conjecture against the backdrop of the State's feeble case. Therefore, the admission of the 3507 statements requires reversal of the conviction in order to ensure that McMullen is not deprived of his right to a fair trial.

II. THIS COURT MUST VACATE MCMULLEN'S CONVICTION FOR MURDER FIRST DEGREE AND RELATED CHARGES BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT THAT THE DEATH WAS CAUSED BY THE MCMULLEN.

Question Presented

Whether Defendant's conviction for murder must be vacated as there was insufficient evidence to establish beyond a reasonable doubt that the death was caused by the defendant? (A-571).

Standard and Scope of Review

The denial of a motion for judgment of acquittal is reviewed *de novo* on appeal. *Seward v. State,* 723 A.2d 365, 369 (Del. 1999). This Court, in its review, will assess an insufficiency of evidence claim as to "whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt." *Monroe v. State,* 652 A.2d 560, 563 (Del. 1995).

Argument

The trial court erred by denying McMullen's motion for judgment of acquittal by erroneously harmonizing the uncorroborated testimony of multiple witnesses including an accomplice. The Court's ruling was incongruent with the record in this case that was devoid of any direct evidence linking McMullen to the crime. The State presented a

circumstantial case comprised largely of hearsay, 3507 statements and incriminating testimony from an accomplice.

The Due Process Clause requires the prosecution to prove every fact necessary to constitute the crime beyond a reasonable doubt. *Henderson v. Kibbe,* 431 U.S. 145, 153 (1977). The State was required to prove beyond a reasonable doubt that McMullen caused decedent's death, i.e. fired the fatal shot. There were no eyewitnesses. There was no DNA or fingerprints linking McMullen. The ballistics expert testified that testing could neither eliminate or identify that the bullet and metal fragments recovered from the decedent were linked to the firearm recovered. (A-438, 450). The State offered no trajectory analysis regarding the fatal shot.

The State's case rested exclusively on the tenuous connection of uncorroborated witness testimony alleging that McMullen confessed to the crime. Especially problematic was the testimony of Kenton Williams, the State's star witness and McMullen's alleged accomplice. In his efforts to implicate McMullen, Williams admitted to being an accomplice, destroying evidence and lying to police over the course of their three-year investigation. In exchange for his testimony, Williams received immunity and a lesser sentence avoiding incarceration for not only this crime, but past ones as well.

"It is, [] universally recognized that [uncorroborated testimony of an alleged accomplice] [] has inherent weaknesses, being testimony of a confessed criminal and fraught with dangers of motives such as malice toward the accused, fear, threats, promises or hopes of leniency, or benefits from the prosecution, which must always be taken into consideration." *Bland v. State*, 263 A.2d 286, 289 (Del. 1970). "This court has also said that where it appears that the witness has hopes of reward from the prosecution, his testimony should not be accepted unless it carries with it absolute conviction of its truth." *Id.* citing *People v. Hermans* 5 Ill. 2d 277 (Ill. 1955).

The instant case is precisely the situation that this Court has disapproved. On this record, it was the duty of the trial the trial Judge to declare the evidence to be insufficient to warrant conviction. Thus, the court erred when it denied McMullen's motion for judgment of acquittal. In the interest of justice, reversal is now required.

CONCLUSION

For the reasons and upon the authorities cited herein, the undersigned counsel respectfully submits that AJ McMullen's convictions and sentences must be reversed.

Respectfully submitted,

/s/ Santino Ceccotti
Santino Ceccotti, Esquire

DATED: October 5, 2020