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Case Number 328,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JASON WHITE,	:	
	:	
Defendant-Below,	:	
Appellant,	:	
	:	
v.	:	No. 328, 2020
	:	
STATE OF DELAWARE,	:	
	:	
Plaintiff-Below,	:	
Appellee.	:	

Upon Appeal from the Superior Court of the
State of Delaware in and for New Castle County
to the Supreme Court of the State of Delaware

REPLY BRIEF
OF APPELLANT JASON WHITE

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Dated: April 5, 2021

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ARGUMENT I

THE SUPERIOR COURT ABUSED ITS DISCRETION BY RULING THAT THE TEXT MESSAGE EVIDENCE WAS ADMISSIBLE.

The State argues that it laid a sufficient foundation for the admission of the text message evidence.[1] However, the State's attempts to authenticate the text message evidence lacked sufficient indicia of reliability in several important respects.[2] When these shortcomings are considered, they demonstrate that the trial court committed an abuse of discretion in admitting the text messages.

As noted in the Appellant White's Opening Brief, the State did not obtain subscriber information for the ZTE phone in question.[3] The State argues that subscriber information is not a "condition precedent for using text messages recovered from [a cell phone]."[4] Appellant does not argue that the subscriber information is required for admission. Appellant argues that the lack of subscriber information is relevant and the absence of the information is one of several important factors that should have led the trial judge to conclude that the State failed to make a *prima facie* showing under Delaware Rule of Evidence, ("DRE"), 901 to authenticate the text messages. While "no specific type of evidence is required" to

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1 State's Answering Brief at pages 14-15.
2 Appellant White's Opening Brief at pages 20-23.
3 Appellant White's Opening Brief at page 22.
4 State's Answering Brief at page 14.

authenticate text messages, the proponent of text message evidence "must explain the purpose for which the text messages are being offered and provide sufficient direct or circumstantial evidence corroborating their authorship to satisfy the requirements of DRE 901".[5]

The State contends that Detective Miller's testimony about how data was extracted from the ZTE cell phone was sufficient to authenticate the text messages.[6] Yet, all of Detective Miller's testimony regarding a foundation for admission of the text messages was based upon second-hand knowledge. As noted in Appellant White's Opening Brief, Detective Miller did not testify exactly where each cell phone was found in the home that was searched.[7] No first-hand testimony was presented by the State concerning how the text messages were extracted from the ZTE cell phone. Detective Miller only testified to the process, as he understood it, that the tech crimes detective would use to extract the information.[8] The State did not present any first-hand testimony or evidence that the procedure was done regarding the ZTE cell phone in this case and that the report generated, from which the text message evidence was gleaned, originated from the ZTE cell phone found

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5 *State v. Zachary*, 2013 WL 3833058, at *2 (Del. Super. July 16, 2013)(ORDER).

6 State's Answering Brief at pages 14-15.

7 (A62).

8 (A62).

in the bedroom associated with Appellant White. All testimony regarding the text messages was provided by Detective Miller, not the tech crimes detective.

In contrast, in *Moss. v. State*, this Court, under a plain error standard of review, affirmed the admission of text message evidence where the State did present the testimony of the tech crimes detective who extracted the data, including text messages, from the cell phone in that case.[9] This Court found that the State provided sufficient evidence from which the jury could infer that Moss authored the outgoing messages.[10] The State presented other extensive, direct, and first-hand knowledge to authenticate the texts in *Moss*. The authentication evidence in *Moss* included: (1) contacts from the phone in question that matched the contacts from a phone that admittedly belonged to Moss; (2) text messages that were addressed to the intended recipient using the defendant's first name or nickname; (3) the defendant's fingerprints were on the car where the phone was found; and, (4) the tech crimes detective who extracted the data from the phone testified at trial how the extraction was done and how the device used to do the extraction generated the report.[11] This Court, under plain error review, found all of that evidence provided a sufficient foundation for admission of the text messages in the *Moss* case.[12]

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[9] *Moss v. State*, No. 416, 2016, at ¶10, ¶12 n.26, 2017 WL 2806269 (Del. June 28, 2017) (ORDER).

[10] *Id*. at ¶ 10.

[11] *Id.*

[12] *Id.*

Given the lack of subscriber information, the lack of direct testimony about where exactly the cell phones were found, and the lack of direct testimony about how the text message data was extracted from the phone, the authentication evidence presented by the State fell short of what is required under D.R.E. 901. As a consequence, the trial court committed an abuse of discretion in admitting the text messages.

The State argues that any error in admitting the messages was harmless.[13] Appellant contends that the error was not harmless beyond a reasonable doubt. As the State observed in its Answering Brief, it offered the text messages into evidence in effort to prove that Appellant White was dealing drugs.[14] The State points to the quantity of drugs found, that several different drugs were found, along with the scales and bags as being "more consistent with drug dealing than drug use."[15] The State also points to White being the last person seen in the room where drugs were found, and his asking to wash his hands, his admission of ownership of the drugs during his statement, his identification of approximate amounts of the drugs found, and his statements made during a wiretap call during which he admits trying to "dump" drugs, in support of its argument.[16]

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13 State's Answering Brief at page 17.
14 State's Answering Brief at page 17.
15 State's Answering Brief at page 18, (citing A94-95).
16 State's Answering Brief at pages 18-19.

Many of the facts the State cites can certainly be viewed as evidence that Mr. White possessed the drugs. However, evidence of possession is not necessarily evidence of drug dealing. Mr. White's admission that he possessed the drugs along with where he was located when police entered the residence and his admission that he tried to dispose of the drugs can reasonably be viewed as evidence that he knowingly possessed drugs; but, that is not evidence of drug dealing. Given that much of the evidence the State references in arguing that the admission of the texts was harmless is evidence that tends to prove possession more so than drug dealing, the admission of the text messages evidence was not harmless beyond reasonable doubt. Accordingly, Appellant White's convictions for the Drug Dealing offenses must be reversed.

ARGUMENT II

THE PROSECUTOR'S COMMENTS DURING THE STATE'S REBUTTAL ARGUMENT WERE IMPROPER AND AMOUNTED TO PLAIN ERROR REQUIRING REVERSAL OF APPELLANT'S CONVICTIONS.

A. The Prosecutor Made an Improper First-Person Comment about the Wiretap Recording that Constituted Plain Error.

In its Answering Brief, the State admits that "first person arguments 'are extremely dangerous and should be assiduously avoided.'"[17] As the State notes, "[t]he prohibition [against first person arguments] is aimed, not at the words, but at the prosecutor 'personally endorsing or vouching for or giving his opinion.'"[18] The State argues that the prosecutor's first-person comment, while possibly improper, was not misconduct because he had just "quoted" a piece of evidence and was connecting that evidence to another piece of evidence.[19]

The piece of evidence that the State claims the prosecutor was "directly quoting" was the wiretap phone call. As the Trial Court observed and as Appellant noted in his Opening Brief, the wiretap call was of poor quality: "I'll be candid with you. If you think anybody in this courtroom heard anything that was on this tape, I

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17 State's Answering Brief at page 24 (quoting *Brokenborough*, 522 A.2d 851, 859 (Del. 1987)).

18 *Id.* (quoting *Brokenborough*, 522 A.2d at 859).

19 See State's Answering Brief at pages 24-25.

assure you that they didn't because it was almost inaudible."[20] The prosecutor was not "quoting" the wiretap call. The prosecutor was arguing to the jury what, from the State's perspective, was said in an "almost inaudible" call.

The State argues that the call was audible and points to the fact that Appellant did not object to the prosecutor "quoting" those recordings in rebuttal.[21] In summation, both parties are permitted to argue and make reasonable inferences based upon the evidence presented.[22] No objection was made to the State presenting its perspective on what was said in the recorded call because it is permissible in summation for the State to argue about what was said on the call. However, what the prosecutor did afterwards in commenting on the evidence in the first person and vouching for its importance was misconduct. "The prosecution must refrain from using language in a trial that smacks of personal opinion, superior knowledge, or vouching."[23] The prosecutor's comment, "I think right there that pretty much explains where the stuff [drugs] went …[,]"[24] unquestionably constituted personal opinion and vouching. It was improper for the prosecutor to make that comment.

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20 (A81). See also Appellant White's Opening Brief at page 15.

21 State's Answering Brief at page 26.

22 *Trala v. State*, No. 480, 2019 at *17, 2020 WL 7585642 (Del. Dec. 22, 2020) (citing *Hooks v. State*, 416 A.2d 189, 203 (Del. 1980)("Counsel, in closing arguments, enjoy a certain latitude to discuss the evidence, the reasonable inferences therefrom, and the appropriate law and its application to the evidence.")).

23 *Moreta v. State*, No. 304, 2018, ¶ 9, 201 A.3d 142 (Del. 2019)(TABLE).

24 (A123).

Even if this Court considers that the comment was made during a "transition" or as part of an "argument drawing different evidence together[,]" as the State characterizes,[25] that did not make it any less improper or any less prejudicial to Appellant White at his trial.

B. The Prosecutor's Comments About Raising Reasonable Doubt Misstated the Burden of Proof and Denigrated the Role of Defense Counsel.

The State argues that the prosecutor's comments, "Mr. [defense counsel] in doing his job for his defendant, tries to raise as much reasonable doubt as he can …" and "One of the ways Mr. [defense counsel] attempted to raise issues with reasonable doubt …" did not misstate the law as to the burden of proof or denigrate the role of defense counsel.[26]

In its Answering Brief, the State argues that the prosecutor was responding to a comment made by defense counsel in the defendant's summation: "[W]hat I'd like to do is go through some of the facts … and suggest to you where there may be some room for reasonable doubt in this case."[27] While it is entirely proper for defense counsel to argue that the State failed to meet its burden of proof, it is entirely improper and confusing for the State to argue that defense counsel is trying to "raise as much reasonable doubt as he can." As noted in the Opening Brief, the choice of

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25 State's Answering Brief at page 26.
26 State's Answering Brief at pages 27-32.
27 State's Answering Brief at page 27, citing (A118).

using the words "raise" and "reasonable doubt" together in discussing defense counsel's arguments is, as the Connecticut Appellate Court observed, "potentially confusing and misleading."[28]

While the State must present sufficient evidence to prove beyond a reasonable doubt all elements of the charged crimes, there is absolutely no burden on the defendant to "raise reasonable doubt." The State is always required to prove every element of a crime beyond reasonable doubt.[29]

The State was certainly free to respond to trial counsel's points in closing and argue that the evidence satisfied the applicable burden of proof. But arguing that defense counsel was trying to "raise as much reasonable doubt as he can" expressly implies that a defendant bears the burden of rebutting or refuting the State's case. This turn of phrase misstates the law and confuses the factfinder as to the burden of proof, which never shifts and always remains upon the State in a criminal prosecution.

The State also argues that the prosecutor did not denigrate the role of defense counsel in making these comments.[30] By using a choice of words that focused on defense counsel "doing his job for his defendant" instead on responding to the

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[28] Appellant White's Opening Brief at page 30 (citing *State v. Conyers*, 127 A.3d 1077, 1082 (Conn. App. Ct. 2015)).

[29] Title 11 *Del.C.* §301(b); *In re Winship*, 397 U.S. 358, 364 (1970).

[30] State's Answering Brief at pages 27-33.

content of the arguments themselves, the prosecutor was undercutting the legitimacy of the role of defense counsel in the judicial process. It was not proper for the prosecutor to do that. The "doing his job for his defendant" comment by the prosecutor suggests that defense counsel was presenting his arguments because it was his job, not because the content of the arguments themselves had merit that the jury seriously should weigh and consider. Though the prosecutor did not tell the jury that defense counsel was trying to "confuse and obscure the evidence", as in a past case cited by the State in its Answering Brief,[31] the choice of words used by the prosecutor strongly conveys the very same idea, namely, that defense counsel's argument should not be considered seriously by the jury because defense counsel was just "doing his job for his defendant."

For the reasons stated in Appellant White's Opening Brief, the prosecutor's improper comments in the State's rebuttal closing argument constituted plain error, and reversal of all convictions is required.[32]

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[31] See State's Answering Brief at page 30 (citing *Gregory v. State*, 2011 WL 4985654, at *3 (Del. Oct. 19, 2011)).

[32] See Appellant White's Opening Brief at pages 32-33.

CONCLUSION

For the reasons set forth above, Appellant Jason White respectfully requests as to the first argument that this Honorable Court reverse the Drug Dealing convictions. The State must either retry Appellant on the Drug Dealing charges, or proceed to sentencing on the Aggravated Possession charges that merged for sentencing purposes. As to Appellant's second argument, independent of the first argument, reversal is required on all charges.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. Appellant's Replu Brief complies with the typeface requirement of Rule 13(a) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word and reviewed by Microsoft Word for Mac Version 16.46.

2. This brief complies with the type-volume limitation of Rule 14(d) because it contains 2,274 words, as counted by Microsoft Word.

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CERTIFICATE OF SERVICE

I, John S. Malik, do hereby certify that on this 5th day of April, A.D., 2021, I have had forwarded via File and Serve Express electronic copies of Appellant Jason White's Reply Brief to the following individuals at the following addresses:

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