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Case Number 201,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRIAN WILSON	)	
	)	
Defendant Below/Appellant,	)	**CASE NO. 201, 2020**
	)	
	)	**On appeal from the**
v.	)	**Superior Court of Delaware**
	)	**in and for New Castle County**
STATE OF DELAWARE,	)	**DUC 1901009072**
	)	
Plaintiff Below/Appellee.	)	

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE**

CONSTITUTIONS, STATUTES & COURT RULES **PAGE**

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY SUSTAINING THE STATE'S OBJECTION REGARDING REPUTATION OF STATE WITNESS TIMOTHY KEYES

In its Answering Brief, the State argues that the trial court properly sustained the State's objection to exclude evidence that State witness Timothy Keyes had a reputation as a "snitch." The evidence came in the form of testimony by defense witness Thomas Wisher. Thomas Wisher was an inmate and would have testified that Keyes' had a reputation in prison as a snitch.[1]

The State relies upon *State of Ohio v. Spence*[2] and said reliance is misplaced. First, to state the obvious: *Spence* is non-controlling authority from an out-of-State jurisdiction. This Court does not have to follow *Spence*. In fact, this Court should disregard the *Spence* court's rationale. The *Spence* court was wrong to refuse to accept that cooperation with the authorities was tantamount to untruthfulness. "In order for this court to find that [witness'] testimony was admissible pursuant to Evid. R. 608(a), we would be required to accept the notion that cooperation with authorities in the criminal prosecution of fellow inmates equates to being untruthful. We do not accept this proposition."[3]

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[1] A74-76.
[2] 2006 WL 3438668 (Ohio Ct. App. Nov. 30, 2006).
[3] *State of Ohio v. Spence*, 2006 WL 3438668 at HN 18 (Ohio Ct. App. Nov. 30, 2006).

In fact, being a "snitch" is inherently dishonest and untruthful – at least in the context in Appellant's case. Appellant's case hinged in part upon the argument that Appellant would not have made admissions to a snitch. The key word is admissions. The solicitation of admissions from another inmate pending trial implies a level of trust. Of course, the declaration to the snitch was premised upon the understanding that the snitch would not tell. It is not the cooperation with authorities that is untruthful. What is untruthful is the implied or express communication to the declarant who makes the statement against interest that the snitch will keep the admissions confidential.

Second, Appellant's case is factually distinguishable from *Spence* in a crucial respect. The *Spence* court's ruling hinged on the fact that there was no evidence of motive to lie in the record of that particular case.[4] "Even if [witness'] reputation as a jailhouse snitch proves that he has provided information to authorities in other cases, it does not equate to proof of a motive for [witness] to lie during his testimony against appellant."[5] In *Spence*, the fact that there was no evidence of motive to lie was fatal to Spence's argument for admissibility under evidence rules 404(b), 405, 608 and 616.

[4] *State of Ohio v. Spence*, 2006 WL 3438668 at HN 19 (Ohio Ct. App. Nov. 30, 2006).
[5] *State of Ohio v. Spence*, 2006 WL 3438668 at HN 19 (Ohio Ct. App. Nov. 30, 2006).

However, in Appellant's case, Keyes' motive to lie (at least) in his 3507 statement is brought front and center by the issues attendant to the motion for a new trial: the Federal Offer to Keyes' immediately prior to his statement to Detective Fox. As a result, the evidence of Keyes' reputation is admissible in Appellant's case under DRE 404(b), 405, 608 and 616.

In his Second Amended Opening Brief, Appellant's Argument III applies the facts attendant to Keyes' undisclosed Federal Offer to the issue of a new trial. The facts attendant to Keyes' undisclosed Federal Offer are also crucial to this issue: the admissibility of Keyes' reputation as a snitch. In Appellant's case, unlike the witness in *Spence*, Keyes did have a motive to lie.

The United States District Attorney wrote that "Portions of Keyes' statement were recorded by Sergeant Robert Fox of the Wilmington Department of Police. Prior to that recording, Cloud told Keyes that, if he testified in Appellant's state trial, his cooperation would factor into the government's ultimate sentencing recommendation in Keyes' federal case."[6] This Federal Offer was made to Keyes immediately prior to Keyes' statement to Fox. That statement would ultimately be entered as affirmative evidence pursuant to 3507 at Appellant's trial.

[6] A90

Moreover, after making the statement to Fox, Keyes' was afforded pre-sentence release for "good cause" at a bail hearing in District Court where the Assistant United States Attorney who made the Federal Offer was present.[7]

Evidence that Keyes had a motive to lie at least in his 3507 statement is abundant. The fact that he does in fact lie is evident simply by comparing his 3507 statements to his testimony. His reputation was admissible pursuant to DRE 404, 405, 608, and 616.

[7] A103

II. ADMISSION OF UNAVAILABLE WITNESSES' TEXT MESSAGES WAS ABUSE OF DISCRETION BECAUSE THE STATEMENTS WERE HEARSAY WITHIN HEARSAY.

At trial, the State argued to the trial court that Artie Pratt's hearsay statements were admissible as business records.[8] Now, the State admits that the hearsay statements were not business records but argues that they are admissible under DRE 804(b)(3) as statements against interest of an unavailable witness. The State cannot simply shift theories for admissibility now at the appeal level that were not raised below to the trial court. As the proponent of the evidence, the State failed in its burden to establish admissibility.

"To preserve an objection, the objector need only state the specific ground for the objection – here the ground was hearsay. The objector need not negate the applicability of exceptions to the rule; it is the evidence's proponent's obligation to identify any applicable exceptions."[9]

Here, Appellant objected to the admissibility of out-of-court statements pursuant to DRE 802. The objection shifted the burden to the State, as the proponent of the statements, to identify an exception. [10] At trail, the State failed to meet its burden to establish admissibility.

The State argued that the messages were business records and the court admitted them on that basis. The State now admits that the messages were not admissible as business records. However, there was no other exception to the hearsay rule identified by the State.

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[8] A36.

[9] *Husbands v. Del. Department of Education*, 227 A.3d 558 at HN 11 (Del. 2019).

[10] See *Husbands v. Del. Department of Education*, 227 A.3d 558 at HN 9 (Del. 2019).

DRE 804 [and DRE 803], by its very terms, addresses exceptions to the rule against hearsay – not hearsay itself. The burden of invoking DRE 804 – and proving that it applies – should therefore be on the proponent of the evidence."[11]

In Appellant's case, Pratt's text messages were admitted even though Appellant objected to them as hearsay and even though the State did not establish an exception for admissibility. The trial court admitted the evidence without a proper foundation. The State cannot revise its argument for admissibility now in lieu of satisfying its burden at trial before the evidence is admitted.

Likewise, the State cannot argue now that the messages were not hearsay in the first place. The State did not argue to the trial court that the messages were not offered for the truth of the matter asserted. The entire argument on admissibility presupposed that the statements were hearsay – focusing on the application of a hearsay exception. [12]

Besides, the text message statements of Artie Pratt certainly were introduced for the truth of the matter asserted. The declarant parties to the text message conversation were discussing the shooting of the victim and an admission by Pratt that he was laying low. The State's theory of the case was that the victim was murdered in retaliation for a robbery in which he participated with Pratt.

[11] *Husbands v. Del. Department of Education*, 227 A.3d 558 at HN 10 (Del. 2019).
[12] A35-A38.

III. THE MOTION FOR NEW TRIAL SHOULD HAVE BEEN GRANTED BECAUSE UNDISCLOSED FEDERAL OFFER TO WITNESS TIMOTHHY KEYES UNDERMINES CONFIDENCE IN THE TRIAL AND IS MATERIAL.

Immediately prior to Keyes giving his statement to Sergeant Fox of the Wilmington Police Department about the murder of Allen Cannon, Assistant United States Attorney Whitney Cloud told Keyes that "if he testified in Wilson's [Appellant's] State trial his cooperation would factor into the governments ultimate sentencing recommendation in Keyes' federal case."[13]

If Appellant was aware of the Federal Offer, the presence of United States Assistant Attorney Cloud at the Fox interview, and the subsequent pre-sentence release on Cloud's case, the defense would have used that information to cross-examine Keyes' 3507 statement to Fox. As the State points out in its Answering Brief, some generalized impeachment questions were posed to Keyes at trial. However, those questions were general enough to apply in any case where a witness gives a statement to police. There was no specific information available to the defense. The specifics would have changed the cross examination entirely.

Defense counsel asked Keyes why he even bothered to speak with Detective Fox. Immediately, Keyes noted the pending bail hearing.[14] Armed with the information from the United States Attorney letter, the defense would have cross examined Keyes

[13] A90

[14] A150-A152.

on his interactions with Cloud, Cloud's presence at his statement to Fox, his pending bail hearing, his conversations with his attorney. The State assumes that the only benefit Keyes could have expected was sentencing consideration. The State ignores the fact that Keyes actually received a benefit: pre-sentence release from custody in a case pending in federal court.

The State cannot argue that there was no *Brady* violation because the State did not know about Cloud's statement to Appellant until after trial. The State's knowledge is imputed through Detective Fox. The State has an affirmative duty to learn of and disclose *Brady* material – including information known to other government agents, including any agents or officers involved in the investigation.[15]

Further, of course Cloud's federal offer impacted what statements Keyes made to Fox. Fox was incarcerated at the time of his statement. He was pending federal sentencing. His prosecutor told him that his cooperation would factor into the sentencing recommendation. Only a month later, his prosecutor was present at the hearing where Keyes' was release pre-sentence for cause. Once released, Keyes testimony differed from his statement to Fox. In his testimony, he identified the bail hearing when he was asked why he spoke with Fox. If jurors had known about the federal offer, they would have not given any weight to Keyes' 3507 statement.

[15] *Kyles v. Whitley*, 514 U.S. 419 (1995).

CONCLUSION

The Court abused its discretion in admitting excluding the reputation of a key State witness and admitting hearsay statements without exception. Keyes' undisclosed federal offer undermines confidence in the verdict. The conviction must be vacated.

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