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Case Number 232,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

COREY REYES,	)	
	)	
Defendant—Below,	)	
Appellant	)	
	)	
v.	)	No. 232, 2023
	)	
	)	
	)	
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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DATE: October 30, 2023

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I. IN THIS CLOSE CASE WHICH HINGED ON THE JURY'S CREDIBILITY DETERMINATION, THE PROSECUTOR JEOPARDIZED THE FAIRNESS AND INTEGRITY OF THE TRIAL BY REPEATEDLY AND IMPERMISSIBLY VOUCHING, BOLSTERING, ELICITING SYMPATHY FOR THE COMPLAINANT, MISREPRESENTING THE RECORD, AND ENCOURAGING THE JURY TO DRAW IMPERMISSIBLE PROPENSITY INFERENCES[1].

Reyes' Opening Brief explicitly limited his first claim to "the single allegation (related to Deems) for which Reyes was convicted" and made clear that the relief sought was "[r]eversal of [his] Assault Second Conviction." Op. Br. at 13, 22. Rather than responding to the claim, the State's Answer proceeds as if Reyes had challenged all the convictions. In doing so, the State inappropriately relies on the strength of the case regarding the (unchallenged) resisting arrest allegations, and fairs no better when it comes to the claims Reyes did make.

[1] Beyond addressing the merits, the (appellate) prosecutor also suggests (at 15) that I should be sanctioned for arguing that prosecutorial misconduct occurred during trial. Despite the gravity of his suggestion, he has not identified a single claim which lacks support in either law or evidence, and even concedes numerous claims. Answer at 18, 21, 24. Criminal defendants (whose rights this prosecutor is supposed to be protecting) are entitled to zealous advocacy, and as a corollary, criminal defense attorneys are required to pursue these claims on appeal.

1. The prosecution encouraged the jury to consider evidence of Reyes' state of mind during the police incident, as propensity evidence of his state of mind during the earlier Deems incident.

The State counters this claim by suggesting that

> *[a]ll the prosecutor did in referring to the police videos was point out that this evidence of Reyes' violent and threatening interaction with Dover Police was an example of his continued domestic behavior the evening of the defendant's arrest.* Answer at 15—16.

The State's description of the facts is not wrong but does reveal a basic misunderstanding of the law. "[P]oint[ing] out" that Reyes engaged in "violent and threatening interaction with Dover Police" as evidence that he acted in conformity (with the corresponding character trait) in a separate incident, at a previous time, with different people and completely different motivations, is the definition of propensity evidence. Reyes does not dispute that the evidence was relevant to the disorderly conduct or resisting arrest charges, but as the State admits, the prosecutor used the evidence more expansively. Secondly, although the police incident occurred immediately outside of the home, it is certainly not "domestic behavior" in the same sense as the alleged domestic assault involving Reyes' girlfriend.

2. The prosecution, on numerous occasions, expressed their personal opinions to the jury about Reyes' guilt.

The Opening Brief (at 16—17) identified five statements in support of the above contention. The State does not dispute that the three of the statements were in fact impermissible expressions of the prosecutor's belief but argues that they "do not establish sufficient prejudice to constitute plain error." Answer at 18. In support of this position, the State cites to evidence of Ms. Deems' injuries. This evidence is basically irrelevant because, as made clear during trial and in Reyes' Opening Brief, the challenge to the assault second conviction was limited to the injuries' cause and Reyes' *mens rea* (Op. Br. at 14), and at least one of the (now conceded to be impermissible) statements was explicitly directed at those elements. A106 ("*Absolutely* his conscious objective to cause harm to her, to cause serious physical injury").

As to the two "we know" statements, the Answer argues these statements were permissible because of the context in which they were made. Answer at 20—21. The contexts identified by the State – one statement referred to a fact the prosecutor believed could be inferred from testimony, and the other followed a rhetorical question – make no difference. Even in context, each "we know" statement continues to be an impermissible expression of personal knowledge as to a factual conclusion the State wished the jury to adopt.

3. The prosecution misrepresented the record to the jury on numerous occasions.

The State concedes that the prosecutor misstated the record to the jury by claiming – without any support in the record – that Reyes called Deems a "white bitch" in front of Ms. Carter. Answer at 21. The Answer's attempt to minimize the prejudice from the misstatement ignores that the prosecutors themselves specifically informed the judge that, in their view, profanity was especially impactful. A16. Secondly, this misrepresentation involved a third-party witness (Ms. Carter), and thus had heightened significance in resolving the credibility issue central to the case.

4. The prosecution impermissibly vouched for Deems by suggesting that the jury consider the prosecutor's subjective view that Deems exhibited "remarkable" consistency.

The Answer's treatment of this claim misrepresents or misunderstands Reyes' clearly described argument. According to the Answer, this claim should be denied because "[p]ut simply, saying a witness's trial testimony is consistent is neither improper nor plain error." Answer at 23. This is a straw man. Reyes did not argue that describing testimony as "consistent" is problematic. Reyes argued that describing consistent testimony as "*remarkably* consistent" was impermissible. Op. Br. at 20 (emphasis in original). And, since the State did not respond to this argument, it should be deemed waived.

5. The prosecution impermissibly attempted to influence the jury by appealing to their biases and sympathies as parents.

The State's "response" to this claim is, once again, completely unresponsive. The State argues that the prosecutor's statement that Deems

> *"cannot play with her kid the way that she should be able to …" is a reasonable inference based upon Deems' trial testimony that after Reyes broke her leg she cannot get down on the floor, kneel, run or jump.* Answer at 28.

Whether the prosecutor's statement was a reasonable inference is debatable, but more importantly, it is irrelevant to Reyes' clearly captioned claim which does not challenge the statement's support in the record, but argues it was an impermissible attempt to appeal to bias and sympathy. Op. Br. at 20. since the State did not respond to this argument, it should be deemed waived.

6. The prosecution impermissibly bolstered Deems' credibility through prior consistent statements and her apparent reluctance to testify.

Reyes' final claim argued, and provided cases supporting the proposition that, "absent a charge against the declarant of recent fabrication or improper influence or motive," it was impermissible to highlight Deems' prior consistent statements, and reluctance to testify Op. Br. at 21. The State's response does not suggest the cases cited were wrongly decided, or distinguishable. Instead, it simply points out that the testimony was "limited in nature" and "accurate." Answer at 24. These points are correct, but neither impacts the permissibility or prejudice of the statements.

II. THE TRIAL JUDGE ERRED BY AMENDING THE INDICTMENT AFTER EVIDENCE PRESENTATION BEGAN TO CHARGE REYES WITH VIOLATING A NEW CRIME WITH DIFFERENT ELEMENTS THAN THAT INDICTED BY THE GRAND JURY.

a. *Reyes did not waive, or forfeit, his constitutional right to an indictment by the Grand Jury.*

The State argues that Reyes affirmatively waived (and thus cannot pursue) this claim based on the following description of the record leading up to the challenged amendment:

> *The court pointed out that the language of Count 6 tracked the statutory provision contained in 11 Del. C. § 1257(a)(1) not § 1257(a)(3). The court stated: "So I assume, because of the language in the re-indictment, that you intended to cite – or that the State intended to cite 1257(a)(1)." After some additional discussion, the State moved "… to amend the indictment to read 1257(a)(1) of the Delaware Code."* Answer at 26—27.

The State conspicuously leaves out those portions of the record that cut against its reading. While it is true that Reyes' counsel stated that she had no objection; she did so only *after* the trial court had decided the issue, thus distinguishing this case from those where the Court has found affirmative waivers.[2]

Prior to *sua sponte* raising the issue the trial judge had already began to make the amendment on his own. A67 ("I put the (3) in brackets there"). He had also

[2] *See Bordley v. State*, 224 A.3d 575 (Del. 2020) (reviewing what seemed to be an affirmatively waived evidentiary claim based on appellant's argument that there was a "'misunderstanding' on the part of his trial counsel").

already determined, again on his own, that the amendment was permitted and justified because it was consistent with what "the State intended to cite." A67. The State's motion to amend came afterwards, and in response to the judge directly prompting the State to do so in a way that clearly reflects that the motion was a procedural technicality, rather than a meaningful opportunity for Reyes to object. A68 ("I suppose there would need to be a request by the State to amend the indictment"). In fact, even the trial prosecutor was (reasonably) confused at the judge's suggestion that she would need to request the amendment when the trial judge had already decided he would do so. A68 ("I think I'm confused Your Honor"). Because the judge had previously decided the issue *sua sponte*, Reyes' counsel's opportunity to object was a nullity, and her decision to not engage in what was telegraphed to be a meaningless disagreement with the trial judge should not waive or forfeit this constitutional claim.

Secondly, this claim is focused on Reyes' constitutional right to indictment, which only he can waive – let alone forfeit – such a right.[3] There is no question that he did not do so here. Most importantly, this entire interaction occurred in the judge's chambers during a prayer conference (A69), during which Reyes would not have been present. Because the issue was raised *sua sponte*, and the prosecutor was

[3] *See Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016) ("*Evidentiary issues* that are affirmatively waived are not reviewable on appeal") (emphasis added)

previously unaware, there is no reasonable possibility that Reyes' counsel had previously discussed the issue with him. And thirdly, at no time prior or after the amendment did the trial judge seek or obtain any indication from Reyes or his trial counsel that Reyes would knowingly, intelligently, and voluntarily waive that right. And finally, there was no colloquy or waiver of indictment form.

b. ***The "amendment" made by the trial court charged a different crime than that indicted by the grand jury.***

The Answer's treatment of the merits never disputes Reyes' position on the fundamental issue posed here: "the trial court authorize[d] an amendment to an indictment … [which] alter[ed] the substance of the grand jury's charge"[4] to allege a violation of the (a)(1) provision. The State has provided no rational as to how such an amendment might be constitutionally permissible. Because the originally indicted (a)(3) crime fits the facts of the case, one cannot conclude that Reyes was on notice of what "the State intended to cite." A67. And of course, the more basic prejudice comes from the fact that Reyes "los[t] the protection of being proceeded against in a felony prosecution only upon indictment by the grand jury."[5]

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[4] *Coffield v. State*, 794 A.2d 588, 591 (2002) ("This Court has clearly stated that in no instance may the trial court authorize an amendment to an indictment if that amendment would in any way alter the substance of the grand jury's charge."); *Johnson v. State*, 711 A.2d 18, 26 (1998). ("If the Superior Court could amend indictments substantively at the prosecutor's request, the State would have the power to obtain convictions based on theories or on evidence possibly rejected, or not considered, by the grand jury.")

[5] *Id.*

To be sure, while the State failed to put forth a theory of how art. I, sec. 8 might permit what occurred here, it has identified half a dozen cases which its citations and parentheticals suggest support its position. Answer at 27—28. Unsurprisingly, a closer look shows all these cases to be distinguishable. Three address court rules without considering the constitutional claim at issue in Reyes' claim.[6] Three do not address amendments to the criminal provision the indictment alleges was violated.[7] Finally, *Scott v. State*, addressed whether an indictment charging a criminally performed an abortion "contain[ed] a plain, concise and definite written statement of the essential facts constituting the offense charged;"[8] a completely different issue than that raised by *Reyes;* and ultimately, the *Scott* Court did not even rule on the merits, but instead, found the argument waived.[9]

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[6] *State v. Powell*, 208 A.2d 673, 675 (Del. Super. Ct. 1965); *Cuffee v. State*, 2014 WL 5254614 (Del. Oct. 14, 2014); *Norwood v. State*, 813 A.2d 1141 (Del. 2003).
[7] *Coffield*, 794 A.2d at 590—91 (addressing change to the name of the victim); *Norwood*, 2003 WL 29969 (addressing change to description of a bag from "brown Ace Hardware envelope" to "clear plastic bag"); *Kent v. State*, 2021 WL 4393804, at *5 (Del. Sept. 24, 2021) (addressing change to home in which indicted crime was alleged to have occurred).
[8] *Scott v. State*, 117 A.2d 831, 834 (Del. 1955).
[9] *Id.* at 836 (Del. 1955) ("We are of the opinion that under the circumstances of this case, defendant has waived her right to object to the sufficiency of the indictment.")

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

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