



IN THE SUPREME COURT OF THE STATE OF DELAWARE

GREGORY WING,)
)
Defendant Below,)
Appellant,) No. 320, 2023
)
v.) ON APPEAL FROM THE
) SUPERIOR COURT OF THE
STATE OF DELAWARE,) STATE OF DELAWARE
) ID No. 2105000987
Plaintiff Below,)
Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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ARGUMENTS

I. AN OBJECTION WAS MADE REGARDING THE INTRODUCTION OF KENNETH GRIFFIN'S PRIOR STATEMENT UNDER DELAWARE RULE OF EVIDENCE 103.

Defense counsel preserved the claim of error regarding the admission of witness Kenneth Griffin's out of court statement under §3507 as is evidenced by the exchange in Court.

Delaware Rules of Evidence Rule 103 states:

- (a) Preserving a claim of error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:
 - (1) If the ruling admits evidence, a party, on the record:
 - (A) Timely objects or moves to strike; and
 - (B) States the specific ground, unless it was apparent from the context; or
 - (2) If the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.
- (b) Not needing to renew an objection or offer of proof. Once the court rules definitively on the record — either before or at trial — a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

In Pierce v. State, the Delaware Supreme Court found that the Defendant waived a claim of error when (1) there was a failure to object and (2) defendant's counsel made an affirmative statement to the court agreeing to the admission of the

evidence. Pierce v. State, 270 A.3d 219, 2022 Del. LEXIS 1 (Del. 2022).

On day 10 of trial, the government called witness Kenneth Griffin. (A254) During Mr. Griffin's direct testimony, the government asked permission from the Court to have Mr. Griffin step down and have Detective Kane take the stand to read Mr. Griffin's prior out of court statement into evidence. (A258) When asked by the Court whether there were any objections to the foundational requirements of section 3507 being met, defendant Coffield's attorney spoke up first and objected that the state did not lay a proper foundation showing the Griffin's statement was voluntary:

[Coffield]: I don't think it's voluntary. He was in cuffs and in custody, and it doesn't sound like it was voluntary to me. I know he did contact them but also, I think he's just talking about not the offense that occurred but just hearsay.

The Court: That's a different objection.

[Coffield]: Okay. All right.

The Court: Okay, but talking about the foundation to 3507.

[Coffield]: That's it.

[Wing]: In all honesty.

The Court: 3507 is not in your neighborhood.

[Wing]: No it's not, I didn't know how much I can get into on the examination.

The Court: That's a statute that's in Delaware.

[Wing]: Yeah.

The Court: So anyway, the requirement has to be that the statement be made voluntary, and I think that's what the focus of your objection is, Mr. Heyden.

[Coffield]: Right.
(A267-68)

The Superior Court subsequently overruled Coffield's objection and found the State had established that Griffin's statement to police was voluntary. (A268) Throughout the trial, the attorneys for both Wing and Coffield were working in tandem, alternating asking questions and presenting arguments. Coffield's counsel was asked first whether he had an objection to the foundation of §3507 being established. Coffield's attorney stated the objection to the voluntariness of the foundation. Defendant Wing's attorney also participated in the side bar conversation regarding the voluntary objection. (A267-268) Defendant Wing's counsel asked several questions of Detective Kane and witness Griffin regarding the voluntariness of the statement. (A266) Defendant avers that although Wing counsel did not specifically announce his same objection on the record it was clear that he joined in co-defendant's objection and argument.

Defendant avers that the admission of the statement was preserved first because the admission of the statement affected defendant Wing's rights for the reasons argued in Argument II supra. Second, counsel for co-defendant clearly stated the objection at the sidebar discussion and stated the specific ground of

voluntariness.

It was also apparent from both defense counsel's questions that other bases for the objection to the admission of the statement were being raised. Defendant avers that there is no requirement for counsel for Wing to reiterate the same objection during the sidebar when he had already participated in the questioning of the foundation for the statement. See Rule 103(d). Moreover, considering Pierce, defendant avers that, based upon the argument above, co-defendant did object to the admission of the statement and defense counsel did not make affirmative statements to the court agreeing to the admission of the statement.

II. THE COURT COMMITTED PLAIN ERROR BY ALLOWING MR. GRIFFIN'S OUT OF COURT STATEMENT TO BE ADMITTED INTO EVIDENCE UNDER 11 DELAWARE CODE §3507.

Even if the Court finds that defendant was not included in the stated objection to the §3507 foundation, the Court can review a court ruling a to determine if the Court committed plain error. Delaware Rules of Evidence Rule 103 states:

- (e) Taking notice of plain error. A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.
D.R.E. §103

Here, the Court committed plain error by admitting Griffin's out of court statement. Plain error review requires the error complained of be "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process," and the error must be "basic, serious and fundamental .

. . and clearly deprive an accused of a substantial right, or which clearly show manifest injustice." Woody v. State, 2019 Del. LEXIS 437, *14-15; Small v. State, 51 A.3d 452, 456 (Del. 2012) (quoting Wainwright v. State, 504 A.2d 1096, 1100 (Del. 1986)).

Defendant avers that the admission of Kenneth Griffin's out of court statement was plain error for a multitude of reasons. In Ray v. State, 587 A.2d 439 (Del.1991) the Delaware Supreme Court summarized:

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. This Court has consistently and unequivocally held "a witness' statement may be introduced **only** if the two-part foundation is first established: the witness testifies about **both** the events and *whether or not they are true*." Accordingly, in Ray we held that "in order to conform to the Sixth Amendment's guarantee of an accused's right to confront witnesses against him, the [witness] must also be subject to cross-examination on the content of the statement *as well as its truthfulness*."

Id. at 1083 (quoting Ray, 587 A.2d at 443)

First, defendant avers that the statement given on October 30, 2020 was not voluntary because Mr. Griffin only spoke to detectives to get his bail lowered, something the detective testified he did not have the power to do. (A270) Second, Griffin testified that he did not want to speak with the Detective Kane:

A. I told Mr. Kane I didn't want to speak to him.

Q. You didn't want to speak to him?

A. Yeah.

Q. Okay. But you spoke to him?

A. But we spoke. Yeah.
(A257)

Detective Kane seemed to agree when he testified:

Q. So Detective Kane, you spoke to Mr. Griffin on October 30 and that was portions of the recording we heard?

A. Yes. That was the recordings that we just listened to.

Q. And did you try to speak to him again in -- other than the instance you

talked about with trial prep?

A. Yes. We went to Media, to Delaware County and attempted to talk to him, **but again**, he wouldn't speak with us.

Q. Okay. And then you spoke to him substantively with trial preparation. Correct?

A. Yeah.

Q. So two substantive conversations and then an attempt in between?

A. Yes.

Q. And that in between attempt was unsuccessful?

A. Correct.
(A278-279)

Third, the case at bar is not a situation where the witness testified that he could not remember his prior out of court statement or refused to answer any questions. Fourth, defendant avers that much of Griffin's statement was not based on anything that he witnessed, but instead, was based upon things that he heard from other people. (A264-A265) Fifth, Griffin testified several times that his out of court statement was not true. Griffin even testified to several reasons as to why the statement was completely unreliable and what portions of the statement were false. For example, Griffin made several claims inculcating defendant involving 'Butter' that the prosecutors insinuated was Olleir Henry. (A263) However, Griffin told Detective Kane in the statement that 'Butter' was Sharif Hamilton. (A274) He

testified:

A. ... But a lot of that right there [Griffin's statement] is botched though.

Q. A lot of it's what?

A. It's botched. It's botched because the reality is man, I don't even -- that young boy, Leir, I don't even know him. I don't know who that is so when I say that I know the name Butter and then a person may say maybe you may be talking about Leiry, now what you doing is if you give me an insinuation that I may be saying the wrong name. So it's like everything -- anybody that been up on this stand 90 percent of the time is because of motive. It's because of a benefit. I was supposed to get a benefit from them, but, you know, it's Delaware, so you know what I'm saying. I don't know.
(A282-283)

Mr. Griffin further testified that some of the information in the statement was given to him by the detectives and that he said things that were not recorded by the investigators:

Q. And Mr. Wing never told you that he killed

--

A. I never even --

Q. Olleir Henry --

A. I never even knew that name until he told me that name. They recorded later. I never knew that name Ollier. I never knew that name ever. I never knew that name. So until he told me the name I said another name, then he corrected me on the name and then they record -- they let you talk, then they ask you do you remember what you talked about, then they press record. So if you got 80 people that come up and get on the stand and everybody statement is in sink and in chronicity with each other, they not pressing record from the door. They listen to you, take what they want to take out of it, write it down and then ask you questions in

regard to what they writing down. So now everybody's statement could sound like it blend together. When we talked before that, you press record. I never knew who Leiry was until he told me who that was. And because of the benefit that I was getting out why I said the name Leiry.
(A289-290)

Griffin further testified:

Q. And you were told in the beginning you didn't know anything about Olleir and Coffield had nothing to do with the Dash In and none of that was taped. Correct?

A. Correct. That wasn't taped.

Q. And then they were correcting you or changing you or prompting you?

A. Later. This was later. This is what I'm telling you. They said this to me later after the first conversation, then they corrected me with the name I kept saying.
(A295-296)

...

Q. Okay. Now, is it fair to say that what you told them, you weren't telling them the truth, you are just trying to get out of jail? Is that correct?

A. For sure. Yeah. (A296)

The statement played for the jury after the Court overruled defendant's objection contained many highly incrimination statements that Griffin alleged were made by both defendants regarding shootings and killings. (A298-299) Therefore, it is obvious that Griffin's out of court statement was very important to the prosecution's case.

The Court determined that the statement was admissible under 3507 and reasoned:

The evidence is that [Griffin] reached out to Special Agent Hnat and that she reached out to Detective Kane. Sounds through the questions you elicited that he ... may have been trying to have his bail reduced, which makes a lot of sense, which would also be ... tending to sell a voluntary statement, but the evidence is that he was given his Miranda warnings and waived them and consented to make a statement, so that means it was a voluntary statement in my view.

So for that reason, and we've touched on the issue of truthfulness here and on the topics of the conversation, so I think the 3507 requirements have been met.

(A268)

Defendant avers that, based upon the evidence presented during trial, the admission of the out of court statement under §3507 was so clearly prejudicial to defendant's substantial rights that it jeopardized the fairness and integrity of the trial process. The government should not have been permitted to introduce a statement that the witness testified was (1) not correct, (A296) (2) made with the hope of lower bail and a more lenient sentence, (A295) (3) only part of a larger conversation that included exculpatory information not on the tape, (A289-290) and (4) allegedly contained answers suggested to the witness by the Detectives. (A289-290) Moreover, the error was basic, serious and fundamental and clearly deprived defendant of his rights.

III. DEFENDANT DID PRESERVE HIS RIGHT TO APPEAL THE COURT'S RULING PRECLUDING HIM FROM FULLY CROSS EXAMINING TYRIE BURTON

The government objected to co-defendant counsel's line of questioning regarding Tyrie Burton's involvement in prior murders. (A224) After argument by both defense counsel, the Court sustained the objection. (A227) Under D.R.E. Rule 103, a claim of error is preserved '[I]f the ruling excludes evidence, a party [must inform] the court of its substance by an offer of proof, unless the substance was apparent from the context.' Here, both defendant and co-defendant's counsel argued that they should be permitted to continue their line of questioning and informed the court of the substance of their line of questioning. Moreover, the substance of the evidence sought to be introduced was apparent from both the questions leading up to the objection and the arguments made by both counsel after the objection. (A224-A227) Specifically, defendant's attorney stated:

MR. WOODWARD: May I interject?

THE COURT: Yes.

MR. WOODWARD: In his statement he's asked or he says he was not involved in any murders. So that's why I believe this line of questioning is relevant because he lies in his statement to the police.

THE COURT: Hold on one second. Mr. Heyden, let me hear your explanation of why you are offering this or asking about this. (A225-A226)

Tyrie Burton was a very important witness for the government. The Court's

ruling precluding cross examination on Burton's involvement in other murders affected defendant's Sixth Amendment right to fully confront the witness.

A decision whether to admit testimony will not be reversed absent a clear showing of an abuse of discretion. Thompson v. State, 399 A.2d 194, 198-99 (Del. 1979); Milton v. State, 2013 Del. LEXIS 292, *14

The Sixth Amendment to the United States Constitution provides for the right to confrontation: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" Further, Delaware Rule of Evidence 607 states that "[t]he credibility of a witness may be attacked by any party." Delaware Rule of Evidence 616 further explains that "[f]or the purpose of attacking the credibility of a witness, evidence of bias, prejudice or interest of the witness for or against any party to the case is admissible." Milton v. State, 2013 Del. LEXIS 292, *13. It is within the discretion of the trial judge to admit or deny this specific type of evidence. However, a trial judge "may not . . . exercise this discretion so as to defeat a party's right to effective cross-examination." Milton v. State, 2013 Del. LEXIS 292, *14, (quoting Garden v. Sutton, 683 A.2d 1041, 1043 (Del. 1996).

For all of the reasons outlined in Appellant's Opening Brief, Burton was a crucial witness for the state's case. He furnished and explained gang terms to the detectives and to the jury. This testimony and information allowed three detectives

to extensively use and define those terms to the jury. He was also crucial to providing testimony regarding several of the murders that defendant and codefendant were charged with. Moreover, his recorded statement that was played by the state included incriminating statements that Burton said came directly from co-defendant. This was highly prejudicial to defendant because the crimes that Burton claimed were admitted to by the co-defendant involved predicate acts under defendant's gang participation charge. This significant prejudice to defendant denied defendant a fair trial. Moreover, the prosecutor was permitted to rehabilitate the witness regarding Burton's statements to the police about Burton's case involving a murder with which he was charged. (A247)

Defendant avers that the Court defeated his right to effective cross-examination when the Court sustained the state's objection to the line of questioning regarding Burton's involvement in killings. Defendant avers that the Court's ruling precluded him from a full opportunity to question Burton's credibility and potentially elicit evidence that would contradict Burton's direct testimony and the §3507 evidence. (A225-A227)

Even if the Court determined that Defendant did not preserve his claim of error at trial, for the reasons stated above and in Appellant's Opening Brief, defendant avers that the Court committed plain error by precluding defendant's cross examination regarding Burton's involvement in prior murders. Plain error

review requires the error complained of be "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process," and the error must be "basic, serious and fundamental . . . and clearly deprive an accused of a substantial right, or which clearly show manifest injustice." Woody v. State, 2019 Del. LEXIS 437, *14-15; Small v. State, 51 A.3d 452, 456 (Del. 2012)(quoting Wainwright v. State, 504 A.2d 1096, 1100 (Del. 1986))

Defendant avers that sustaining the prosecutor's objection precluding further questioning of Burton regarding his participation and involvement in 'killings' was so clearly prejudicial to defendant's substantial rights that it jeopardized the fairness and integrity of the trial process. Moreover, the error was basic, serious and fundamental and clearly deprived defendant of substantial rights, including his 6th Amendment right to cross examination.

CONCLUSION

Mr. Wing respectfully requests this Honorable Court remand the case for a new trial subject to the exclusion of evidence related to the statements of Mr. Griffin played into evidence by Detective Kane under §3507 and subject Mr. Burton to full and fair cross examination pursuant to the Sixth Amendment.

Respectfully Submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT
AND TYPE-VOLUME LIMITATION**

1. Appellant’s Reply Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word.
2. Appellant’s Reply Brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 3151 words, which were counted by Microsoft Word.

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