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Case Number 47,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RANDON WILKERSON,	)	
	)	
Defendant Below-Appellant,	)	No. 47, 2024
	)	
	)	ON APPEAL FROM
v.	)	THE SUPERIOR COURT OF THE
	)	STATE OF DELAWARE
STATE OF DELAWARE,	)	ID Nos. 2104013901, 2104013877,
	)	2104013945
Plaintiff Below-Appellee.	)	
	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR SUSSEX COUNTY

OPENING BRIEF

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Dated: April 29, 2024

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NATURE OF THE PROCEEDINGS

Arrest and indictment

In the early morning hours of April 25, 2021, Delmar Police Corporal Keith Heacook responded to a 911 call at 11773 Buckingham Drive.[1] Charles Meagher had called 911 to report that one of the residents was assaulting people in the house.[2] As time went by, the dispatch center tried to reach Corporal Heacook, to no avail. Other police agencies went to the scene. There, they found Corporal Heacook unconscious in the house, having sustained blunt force trauma injuries.[3] State Police officers arrested Randon Wilkerson, one of the many occupants of the Buckingham Drive house.[4]

Further investigation revealed that an elderly couple across the street had also been assaulted. Stephen Franklin told police that Mr. Wilkerson knocked on his door and told him there were problems across the street at his house. Once in the residence, Mr. Wilkerson assaulted Mr. Franklin and his wife Judith Franklin.[5]

Police then charged Mr. Wilkerson with Attempted Murder First Degree as to Corporal Heacook, who had not yet succumbed to his injuries.[6] Police also

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[1] A38.
[2] A58.
[3] *Id.*
[4] A39.
[5] A44.
[6] A36-40.

charged Mr. Wilkerson with two counts of Assault First Degree and associated weapons charges as to the Franklins.[7]

When arrested, Mr. Wilkerson was clearly under the influence of drugs. When a phlebotomist, Sara Emory, attempted to draw blood pursuant to a search warrant, Mr. Wilkerson kicked her, resulting in an Offensive Touching charge.[8]

The Court of Common Pleas held a preliminary hearing,[9] resulting in Mr. Wilkerson's case being transferred to Superior Court.

A Sussex County grand jury approved an indictment on June 14, 2021, charging Mr. Wilkerson with:

I. Murder First Degree (intentional murder)
II. Possession of a Deadly Weapon During Commission of a Felony (PDWDCF)
III. Murder First Degree (recklessly killed officer in line of duty)
IV. PDWDCF
V. Possession of Deadly Weapon by Person Prohibited (PDWBPP)
VI. Assault First Degree (Steven Franklin)
VII. PDWDCF
VIII. Assault First Degree (Judith Franklin)
IX. PDWDCF
X. PDWBPP
XI. Burglary First Degree (Franklin residence)
XII. PDWDCF
XIII. PDWBPP
XIV. Assault Third Degree (Charles Meagher)
XV. Terroristic Threatening (Steven Franklin)[10]

[7] A41-46.
[8] A47-51.
[9] A52-111.
[10] A112-117. The State filed an Information as to the Offensive Touching charge. A141.

The Court grants the State's Motion* in Limine *to exclude a defense.

The Superior Court issued a scheduling order with a trial date of May 9, 2022.[11] Due to the volume of discovery and complexity of the case, the trial was rescheduled at the parties' request.[12]

On November 30, 2022, the trial judge held an office conference to discuss scheduling issues.[13] Defense counsel explained that a potential defense of involuntary intoxication had arisen. This involved the hiring of experts and efforts to have Mr. Wilkerson's blood sample independently tested.[14] Counsel advised the Court that the State had already lined up an expert and planned to file a motion *in limine* regarding the involuntary intoxication defense.[15]

The Court suggested a joint trial continuance request so that the motion could be heard on the original trial date.[16] Mr. Wilkerson executed a Waiver of Speedy Trial Rights due to the continuance of the trial.[17] He also waived his speedy trial rights after a colloquy with the Court.[18]

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[11] A2; D.I. 13.
[12] A4; D.I. 33.
[13] A142-152.
[14] A146.
[15] *Id.*
[16] A148.
[17] A153.
[18] A161-169.

The State filed its Motion *in Limine* on March 24, 2023.[19] The gist of the motion was that Mr. Wilkerson was "not entitled" to the involuntary intoxication defense due to his voluntary consumption of illegal drugs.[20] The State also argued that the two defense experts should be excluded, claiming that they did not pass muster under the *Daubert* standard.[21]

The defense filed its response to the motion on May 2, 2023.[22] The defense argued that granting the motion would deny Mr. Wilkerson his constitutional right to present a defense.[23] The response further argued that Mr. Wilkerson should be permitted to present evidence in his defense and then the Court would decide whether to grant a request for the involuntary intoxication jury instruction. Finally, the defense asserted that the defense's two well-qualified experts should not be excluded.[24]

The State filed its Reply on May 26, 2023.[25] Both parties requested that the Court decide the motion without a hearing.[26] The trial judge held a teleconference

[19] A170-319.
[20] A186.
[21] A192-193.
[22] A320-424.
[23] A328.
[24] A337-338.
[25] A425-447.
[26] A338, A441.

to confirm that, at the parties' request, the motion would be decided without a hearing or oral argument.[27]

On June 16, 2023, the trial judge granted the State's motion.[28] In addition to precluding Mr. Wilkerson from presenting a defense, the Court also found that the defense's experts were unqualified, and their testimony was inadmissible.

Left without a defense, Mr. Wilkerson opts for a stipulated fact bench trial.

Defense counsel, now bereft of a defense, proposed a stipulated fact bench trial. The Court convened a colloquy hearing with Mr. Wilkerson on September 25, 2023.[29] Mr. Wilkerson affirmatively waived his right to a jury trial and agreed to proceed to a stipulated fact trial.[30] He also signed a Waiver of Jury Trial form.[31]

The Court held the trial on October 16, 2023.[32] The Court read the Trial Stipulation of Facts into the record. The Stipulation was also admitted as evidence.[33] The judge then rendered a verdict, finding Mr. Wilkerson guilty of all counts.[34]

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[27] A339-451.
[28] Exhibit B.
[29] A464-479.
[30] A471-476.
[31] A480.
[32] A495-536.
[33] A537-558.
[34] A531-532; A559-560.

Sentencing

The Court held a sentencing hearing on December 8, 2023.[35] The judge sentenced Mr. Wilkerson to two life sentences plus 238 years.[36]

Mr. Wilkerson, through counsel, filed a Notice of Appeal. This is his Opening Brief.

[35] A561-601.
[36] Exhibit A.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING THE STATE'S MOTION *IN LIMINE*, DEPRIVING MR. WILKERSON OF HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.

Randon Wilkerson, in a drug-fueled frenzy, killed Corporal Keith Heacook. He also assaulted Stephen and Judith Franklin, an elderly couple who lived across the street. Mr. Wilkerson had gotten it into his mind that everyone around him was involved in a child trafficking scheme and that children were being raped in his house. His delusional beliefs focused on Henry Proctor, a sometime "sugar daddy" of his girlfriend, Amanda Rooks. He thought Corporal Heacook was Proctor or another predator in disguise.

Mr. Wilkerson is a longtime drug abuser. He knows the effects of cocaine, heroin, and methamphetamine. This was different. Evidence began to emerge that the last batch of meth that Rooks injected into Mr. Wilkerson was actually cathinones, more commonly known as bath salts. The defense began to build a possible involuntary intoxication defense, hiring two highly qualified experts. One would testify as to the additional testing for bath salts that could have been done that the Delaware lab did not do. Unfortunately, the vial of Mr. Wilkerson's blood broke in transit to the private lab the defense had engaged for further testing. The other expert would testify as to the chemical makeup of cocaine, methamphetamine, and bath salts, and compare and contrast their effects.

The State, learning of a possible involuntary intoxication defense, filed a motion *in limine* to exclude the entire defense as well as the defense experts.

The Superior Court granted the motion. Left without a defense, Mr. Wilkerson opted for a stipulated fact bench trial.

The Superior Court's decision deprived Mr. Wilkerson of his constitutionally guaranteed due process right to present a complete defense. He never got the chance to present his evidence and then to apply for the involuntary intoxication defense.

The holdings underpinning the Superior Court's exclusion of the defense are rife with legal error. The Superior Court should be reversed, and Mr. Wilkerson should be granted a new trial.

STATEMENT OF FACTS

A drug-fueled frenzy leads to Corporal Heacook's death and injuries to Mr. and Mrs. Franklin.

Midnight on April 25, 2021 marked the start of Mr. Wilkerson's birthday. Leading up to midnight, he started banging on the doors within 11773 Buckingham Drive to get people to celebrate with him.[37] Everyone in the house were drug addicts.[38] Mr. Wilkerson began drinking vodka and using drugs, along with other residents.[39] Mr. Wilkerson's girlfriend, Amanda Rooks, told police that they used heroin and crack cocaine.[40] Rooks injected him with methamphetamine, although she said she watered it down because he does not handle it well.[41] She "shot him up" into both his arms.[42]

Mr. Wilkerson's behavior became increasingly erratic. Rooks told police that he became angry about "Henry" being in Delmar, Henry being Rooks' "sugar daddy."[43]

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[37] A545.
[38] A175.
[39] A547.
[40] A546.
[41] *Id.*
[42] A234.
[43] A229.

Mr. Wilkerson's behavior became increasingly erratic and bizarre. He threw a dumbbell through one of the bedroom doors.[44] As Mr. Wilkerson became more aggressive and verbally abusive, Rooks went into Monique Windsor's room and hid under the bed.[45] Rooks told police, "I've never seen him act this way before."[46]

Monique Windsor, another drug-using resident of the house, corroborated Mr. Wilkerson's erratic behavior. He berated and screamed at Rooks, but then would minutes later say he loved her. [47] Windsor saw Mr. Wilkerson punch Charles Meagher in the eye.[48] But after that, Mr. Wilkerson began talking to an imaginary person, saying he was a rap star, and rapping to a chair in the room.[49]

Windsor went upstairs after Mr. Wilkerson assaulted Meagher. But she heard a "snoring" sound and crept down the stairs to look.[50] She saw a police officer laid out on the floor. Then Mr. Wilkerson entered the room and stomped on the prone Corporal Heacook. She ran back upstairs and called 911.[51]

Steven Franklin and his wife Judith lived across the street. Around 5:00 AM, Mr. Wilkerson knocked on the back door. He told Mr. Franklin that Meagher had

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[44] A545.
[45] A230.
[46] A237.
[47] A547.
[48] *Id.*
[49] A548.
[50] A549.
[51] A549.

said he could be of help. Mr. Wilkerson further explained that there was a rape of a child going on across the street.[52] Then Mr. Wilkerson asked Mr. Franklin about his AR-15s. Mr. Franklin had previously owned two such weapons.[53]

Mr. Franklin permitted Mr. Wilkerson to have a seat on the couch. Then suddenly Mr. Wilkerson attacked Mr. Franklin and his wife. He struck them with glass figurines that were in the house.[54]

Other police agencies responded to the Buckingham Drive residence, as Corporal Heacook was not answering radio calls. They found Corporal Heacook lying in a pool of blood.[55] Nearby were his asp baton, his flashlight, and a 20-pound dumbbell.[56]

Lifesaving measures were deployed. Corporal Heacook expired at the hospital on April 28, 2021.[57]

The police put a recording device in Mr. Wilkerson's cell.[58] He was ranting uncontrollably. Listed in the trial stipulation are various statements he made, such as, "I killed him," "I smashed him across the head with a weight," and "I killed that

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[52] A551.
[53] *Id.*
[54] *Id.*
[55] A539.
[56] A543.
[57] *Id.*
[58] A432.

police officer that walked in that house."[59] Not included in the trial stipulation were other contemporaneous statements Mr. Wilkerson made while in the holding cell:

- "I will be a legend for killing a child molester."
- "Help. I did nothing wrong. I only killed that man because he touched on those children. Sick."
- "I have been kidnapped. Well not kidnapped but I killed a child molester."
- "I saved those kids. That wasn't a police officer. They were getting raped."[60]

Later that same day, when interviewed by the police, Mr. Wilkerson explained that Meagher told him children were getting raped in the house. He told the officers that kids were getting molested. He asked why a police officer would rape a child.[61]

Mr. Wilkerson's account of the incident

At sentencing, Mr. Wilkerson explained that he had been addicted to drugs since the age of 16.[62] But he had never had a reaction to drugs like he had that night.[63] He explained that his reality that night was that there was a sex trafficking

[59] A544.
[60] A580.
[61] A581.
[62] A584.
[63] A585.

ring and that a sexual predator was on the loose.[64] He believed that Meagher and his neighbors across the street were all part of the sex trafficking ring.[65]

Other relevant evidence

Corporal Heacook was struck multiple times by a heavy object. There were at least ten impact sites.[66] Mr. Wilkerson's DNA was found on Corporal Heacook's asp baton and on his notepad. Corporal Heacook's DNA was found on the 20-pound dumbbell. Mr. Wilkerson also left DNA on the Franklins' residence back door.[67] The State lab tested Mr. Wilkerson's blood. It was positive for the presence of marijuana, cocaine, fentanyl, and methamphetamine.[68]

A potential defense emerges.

A defense investigator interviewed Amanda Rooks on July 19, 2022. Rooks told the investigator that Monique Windsor procured the meth for them that night.[69] She said she injected Mr. Wilkerson with a lot of meth and injected a small amount into herself. Rooks said that right after that, Mr. Wilkerson "started acting weird."[70] Mr. Wilkerson became violent and sexually aggressive towards Rooks. He tried to check on Jeffrey Taylor, and when he could not get into the room, he

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[64] *Id.*
[65] A584.
[66] A556.
[67] *Id.*
[68] A557.
[69] A215.
[70] *Id.*

threw a dumbbell at the door.[71] Mr. Wilkerson then became focused on Henry Proctor, one of Rooks' "tricks," and began searching the house for him.[72]

A few days after the homicide, Rooks began to question people in the drug community about Mr. Wilkerson's behavior. She spoke to a drug dealer named Jay, who explained that they could have taken bath salts and not meth.[73] This tracked for Rooks, who had taken a small amount, and knew that it felt different from her prior meth experiences.[74]

Rooks and Monique Windsor sought out Windsor's drug dealer, Travis. They bought more "meth" and brought it to Jay, who confirmed the substance was bath salts. Travis also believed the substance was bath salts.[75]

After reviewing the defense investigator's report, the police re-interviewed Amanda Rooks. She told the detective that she believed the substance they took that night was bath salts. She explained she had done meth before and the "high" was different with the substance they took.[76] She further explained that she had talked to Windsor's drug dealer, who admitted that his supplier cut the meth with

[71] A216.
[72] A217.
[73] A218.
[74] *Id.*
[75] A219.
[76] A354.

bath salts.[77] Rooks confirmed that Mr. Wilkerson did not inject himself, but rather,[78] she injected him.[79]

The defense then contracted with NMS Labs to have Mr. Wilkerson's remaining blood sample tested.[80] Arrangements were made with the Delaware Division of Forensic Sciences for the shipment of the blood to NMS, using NMS Labs packaging.[81] The vial broke during shipment to NMS, so no testing could be conducted.[82]

The defense then retained two expert witnesses. The first was a board certified toxicologist named Andrew Ewens, Ph.D.[83] Dr. Ewens holds a doctorate degree in molecular pharmacology and has over a decade of experience in that field.[84] The defense tasked Dr. Ewens with reviewing the panel of tests done by the State lab and the panel that could have been done by NMS Labs if the blood had been preserved. His report[85] simply compares and presents the two panels.[86] He was not asked to examine Mr. Wilkerson or anything of the sort; he was just tasked

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[77] *Id.*
[78] A355-356.
[79] A356.
[80] A212.
[81] A206-211.
[82] A204-206.
[83] A373-400 (curriculum vitae).
[84] *Id.*; *see also*, A268-269.
[85] A268-308.
[86] A270-272.

with comparing the two lists. His only opinion reached was not controversial: "without the testing of Mr. Wilkerson's blood by NMS labs, the possibility of Mr. Wilkerson having consumed bath salts can't be ruled out."[87]

Wilkie Wilson, Ph.D, was a doctorate-level academic in pharmacology (among other disciplines) at Duke University.[88] He taught, lectured, and published in the field of pharmacology since the 1970s.[89] The defense asked him to use that experience to explain, as a subject matter expert, the differences in effects among various drugs. He was *not* asked to opine whether Mr. Wilkerson took bath salts – he was merely to explain to the jury the differences among bath salts and other illicit drugs. Accordingly, he furnished an expert report on that topic.[90]

The State files a motion to exclude the involuntary intoxication defense.

On March 24, 2023, the State filed a Motion *in Limine*.[91] Generally, the motion argued that Mr. Wilkerson was not entitled to present the defense of involuntary intoxication because he voluntarily and intentionally took cocaine and methamphetamine.[92] Moreover, the State argued that the "foundation of the

[87] A270.
[88] A402-423 (curriculum vitae). Dr. Wilson is now deceased.
[89] *See*, A310.
[90] A310-312.
[91] A170-319.
[92] A186.

defense lacks credibility."[93] Much of this argument was based on Amanda Rooks' purported lack of credibility.

The State next argued that both defense experts failed to meet the *Daubert* standard for admissibility.[94] This is apparently because neither doctor is a medical practitioner who treats patients suffering from drug addiction. The State further argued that the defense experts should be disqualified because they did not read the police reports or listen to the recorded interviews.[95] The State argued that Dr. Wilson should not be allowed to testify about the effects of bath salts without any proof that Mr. Wilkerson took bath salts.[96]

The State presented an expert report of Christopher P. Holstege, MD.[97] He is the Chief of the University of Virginia's Division of Medical Toxicology and the Director of the UVA Blue Ridge Poison Center.[98] His report is heavily critical of the defense experts because they are not clinicians like himself and have not managed drug-addicted patients in clinical settings.[99] Dr. Holstege did not explain how he as a clinician was in a better position to opine since he did not treat Mr. Wilkerson clinically.

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[93] A188.
[94] A190.
[95] A192.
[96] A193.
[97] A314-319.
[98] A314.
[99] A318.

Dr. Holstege opined that cocaine, methamphetamine, and bath salts all have similar effects, and much depends on the dosage. As such, Dr. Holstege opined there was no evidence that Mr. Wilkerson took bath salts.[100]

The defense response points out that criminal defendants have a due process right to present a complete defense.

The defense argued that Mr. Wilkerson had due process rights, which the State was attempting to circumvent by eliminating his defense with a pretrial motion.[101] The response pointed out that no Delaware case had decided that a person who took one drug voluntarily but then involuntarily took another was precluded from the involuntary intoxication jury instruction.[102] Finally, the response argued that the well-qualified defense expert opinions are not barred by *Daubert* or any other standard. They were subject matter experts opining about non-controversial topics.[103]

***The Superior Court grants the State's Motion* in Limine.**

Acknowledging that no Delaware case was squarely on point,[104] the Court held as a matter of Delaware law, that "if a defendant voluntarily ingests illegal drugs, and the illegal drugs were either different than the drugs the defendant

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[100] A319.
[101] A328-333.
[102] A336.
[103] A338.
[104] Exhibit B at 15.

thought he or she was taking, or were laced with additional substances, the defendant is not entitled to present an involuntary intoxication defense."[105] The Court found that Mr. Wilkerson's defense "falls on its face because of his *voluntary* consumption of illegal drugs."[106]

After considering case law critical of the judicial exclusion of a defense in derogation of the defendant's due process rights, the Court found that granting the motion would not violate Mr. Wilkerson's rights.[107] Finding that Mr. Wilkerson's defense was not merely dubious or tenuous but rather legally invalid, the Court found the State's use of a motion *in limine* justified.[108]

As to the experts, the Court excluded them both. The Court found that the two Ph.Ds were not qualified by knowledge, skill, training or education. The Court found that they reviewed literature instead of having real world experience. The Court found they did not review interview recordings or police reports, ignoring the fact that they were not asked to do so. The Court found their opinions were not the product of sound approaches, since both expert opinions assume that Mr. Wilkerson took bath salts.[109] The Court did not acknowledge that neither defense expert opined or was asked to opine whether Mr. Wilkerson took bath salts.

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[105] Exhibit B at 25.
[106] *Id.* (Emphasis in original).
[107] Exhibit B at 32.
[108] *Id.*
[109] Exhibit B at 33.

The Court found both opinions speculative and inadmissible,[110] although neither expert speculated. One expert listed other testing for bath salts that could have been done. The other described the effects of various illicit drugs. In any event, the Court decided this testimony would mislead and confuse the jury.[111] The Court did not explain how this straightforward testimony would confuse or mislead the jury.

The Court found that Dr. Holstege's opinion was admissible because he is a clinician who treats patients.[112]

Finally, although acknowledging that questions of credibility are normally jury questions, the Court exercised its "responsibility" under 11 *Del. C.* § 303 to exclude evidence pertaining to the defense, because the Court found Amanda Rooks' narrative not credible.[113] The Court did not acknowledge that § 303 pertains to the jury's consideration of a defense, not the admissibility of evidence.

[110] Exhibit B at 34.
[111] *Id.*
[112] Exhibit B at 35.
[113] Exhibit B at 35-37.

ARGUMENT

I. THE SUPERIOR COURT ERRED IN GRANTING THE STATE'S MOTION *IN LIMINE*, DEPRIVING MR. WILKERSON OF HIS DUE PROCESS RIGHT TO PRESENT A DEFENSE.

A. Question Presented

Did the Superior Court commit error of a constitutional dimension when it granted the State's motion to exclude Mr. Wilkerson's defense of voluntary intoxication? This issue was preserved when the defense filed a response in opposition to the State's Motion *in Limine*.[114]

B. Scope of Review

This Court reviews legal and constitutional issues *de novo*.[115] This Court reviews a trial judge's exclusion of expert testimony for abuse of discretion.[116]

C. Merits of Argument

Due process and the right to present a complete defense

The United States Supreme Court has held:

> Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.[117]

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[114] A320-424.
[115] *Burroughs v. State*, 304 A.3d 530, 539 (Del. 2023).
[116] *Bowen v. E.I. DuPont de Nemours & Co., Inc.*, 906 A.2d 787, 798 (Del. 2006).
[117] *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

This principle applied to *Crane v. Kentucky*, a state case in which the trial judge denied a motion to suppress the juvenile defendant's confession. At trial, Crane sought to introduce testimony about the physical and psychological environment in which the confession was extracted.[118] Crane had been held in a windowless room for hours, surrounded by police officers, and denied permission to contact his mother.[119]

The defense lawyer argued in opening that the circumstances of the confession made it unworthy of belief. After opening statements, the prosecutor moved *in limine* to exclude any evidence of the circumstances of Crane's confession. The trial judge excluded all evidence pertaining to the length of the interrogation and the individuals in the room.[120]

Reversing, the Supreme Court held, "we have little trouble concluding…that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial."[121] "We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard."[122]

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[118] *Id.* at 684.
[119] *Id.* at 685.
[120] *Id.* at 686.
[121] *Id.* at 690.
[122] *Id.*

The Supreme Court has similarly reversed convictions when the defendant was denied the ability to present a defense due to arbitrary rules in various states. In *Holmes v. South Carolina*,[123] the rule prohibited a defendant from presenting evidence of another person's guilt if there was forensic evidence against the defendant.[124] In *Washington v. Texas*,[125] a state statute barred the testimony of a co-participant in a crime in a defendant's trial unless the co-participant had been acquitted.[126]

The *Holmes* Court did confirm that courts do have the authority to use well-established rules of evidence that is "repetitive, only marginally relevant, or pose[s] an undue risk of harassment, prejudice, or confusion of the issues."[127]

With the due process right of a defendant to present a complete defense in mind, whether the trial judge can exclude an entire defense by granting a pretrial motion is a different question. Several state courts have held that exclusion of an entire defense is an inappropriate use of a motion *in limine* in a criminal case. The Supreme Judicial Court of Massachusetts held, "the purpose of a motion *in limine* is to prevent irrelevant, inadmissible, or prejudicial matters from being

[123] 547 U.S. 319 (2006).
[124] *Id.* at 321-322.
[125] 388 U.S. 14 (1967).
[126] *Id.* at 16.
[127] *Holmes*, 547 U.S. at 326-327 (internal citations omitted).

admitted into evidence…"[128] In that case, *Commonwealth v. Hood*, the defendants were charged with trespass; they were protesting and distributing leaflets at a laboratory because due to religious beliefs, the defendants were trying to halt the development of nuclear weapons.[129] The judge granted several prosecution motions *in limine*, one of which excluded any evidence of why the defendants were on the property. This of course eliminated the defendants' ability to present defenses of necessity and competing harms.[130] The *Hood* Court, although in this case finding no prejudice to the defendants, cautioned:

> It is, perhaps, more prudent for the judge to follow the traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense. If, at that time, the defendant has failed to produce some evidence on each element of the defense, the judge should decline to instruct on it.... In that event, the judge may, if appropriate, give curative instructions to caution the jury against considering evidence not properly before them.[131]

In a concurrence, Justice Liacos noted a body of law has developed "condemning the use of motions in limine to 'choke off a valid defense in a criminal action,' or to knock out the entirety of the evidence supporting a defense before it can be heard by a jury."[132] Indeed, "if the defendant's right to have his

[128] *Com. v. Hood*, 425 N.E. 2d 188, 196 (Mass. 1983).
[129] *Id.* at 583.
[130] *Id.* at 590.
[131] *Id.* at 595.
[132] *Id.* at 596 (internal citations omitted).

day in court is to be guaranteed, he must be given the opportunity to establish even a tenuous defense."[133]

This last quote is from *People v. Brumfield*,[134] a rape case from Illinois in which the defendant sought to establish an involuntary intoxication defense at trial. The State filed a motion *in limine* to exclude any reference to the defendant's intoxicated state, because whether voluntary or involuntary, it was not a defense to rape.[135] The defense argued this was not a correct statement of the law (as to involuntary intoxication). The defense planned to introduce evidence that Brumfield voluntarily used marijuana on the night of the offense but was unaware it was laced with "angel dust."[136] The Court granted the State's motion to exclude.

In reversing and remanding for a new trial, the appellate court held:

> A motion *in limine* should be used with caution, particularly in criminal cases. When used in the manner of its application in this case, it has the potential to deprive a criminal defendant of his day in court. That a defendant may have a tenuous defense is an insufficient justification for prohibit him from trying to establish that defense…the trial court's order granting the State's motion *in limine* before the admission of any evidence deprived the defendant of his fundamental right to defend himself in a criminal trial. Summary judgments are allowed on rare occasions in civil cases, but never in criminal cases.[137]

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[133] *Id.*
[134] 390 N.E. 2d 589 (Ill. App. 3d 1979).
[135] *Id.* at 110.
[136] *Id.* at 111.
[137] *Id.* at 593-594.

In *State v. Ward*,[138] the defendant broke into an oil pipeline facility, closed a valve, and placed sunflowers atop the valve. This shutoff disrupted the flow of tar sands oil from Canada into the United States, temporarily.[139] Ward sought to present a common law defense of necessity in that his actions were necessary to help prevent climate change.[140] The trial judge granted the State's motion *in limine* to exclude all evidence pertaining to the necessity defense.[141]

Ward appealed on due process grounds. The appellate court, reversing, held:

> The fundamental due process right to present a defense is the right to offer testimony and compel the attendance of a witness. [I]n plain terms the right to present a defense [is] the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[142]

The Court noted that a defendant has no right to present irrelevant evidence and the proposed evidence is subject to the rules of procedure and evidence.[143] The

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[138] 438 P.2d 588 (Wash. Ct. App. 2019).
[139] *Id.* at 592.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 593.
[143] *Id.*

Court held, however, whether Ward's belief that he could help stop climate change by closing the valve was a question for a jury.[144]

As the foregoing jurisprudence demonstrates, motions *in limine* seeking to exclude a defense are disfavored because they violate a defendant's due process right to present a defense.

The trial court's exclusion of Mr. Wilkerson's defense violated his due process right to present a complete defense to the charges.

The Superior Court disregarded these established principles when it granted the State's motion to eliminate Mr. Wilkerson's defense. The great weight of authority cautions against the elimination of a defense by way of a prosecutorial pretrial motion. As this Court has held, a defendant has the right to present evidence of defenses that are not very believable or highly improbable.[145] The trial court should have admitted the evidence, then heard an application as to whether Mr. Wilkerson's jury would be instructed on involuntary intoxication. But the Court's ruling on the State's motion short-circuited that process, to the derogation of Mr. Wilkerson's rights.

In part, the Superior Court excluded the defense because its probative value was outweighed by other factors such as unfair prejudice, confusion of the issues,

[144] *Id.* at 594.
[145] *Gutierrez v. State*, 842 A.2d 650, 653 (Del. 2004).

or potentially misleading the jury.[146] But the Court does not explain how any of those things would happen. Mr. Wilkerson's evidence, had it been allowed, would have been simple and straightforward. There is nothing confusing or misleading about it. And the only instance of prejudice occurred when Mr. Wilkerson was precluded from presenting his defense.

The other reasons the Court excluded Mr. Wilkerson's defense were based on a misapprehension of 11 *Del. C.* § 303 and a conclusion that Mr. Wilkerson's defense was legally invalid. Each will be discussed in turn.

The "some credible evidence" requirement of 11 Del. C. § 303.

Defendants seeking to avail themselves of a statutory defense must present "some credible evidence" to establish each element of the defense.[147] If that threshold is met, the defense is entitled to a jury instruction that "the jury must acquit the defendant if they find that the evidence raises a reasonable doubt as to the defendant's guilt."[148]

This Court has defined "some credible evidence" as evidence capable of being believed. Sworn testimony is some credible evidence because the jury must assess the credibility of each witnesses' sworn testimony.[149]

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[146] Exhibit B at 34.
[147] 11 *Del. C.* § 303.
[148] 11 *Del. C.* § 303(c).
[149] *Brown v. State*, 958 A.2d 833, 838 (Del. 2008)(reversing conviction when the trial court denied a request for an alibi instruction).

In *Gutierrez v. State*,[150] this Court considered whether some credible evidence existed to instruct the jury as to self-defense. This Court held that the judge must determine whether that the defense evidence "describes a situation that is within the realm of possibility," and whether the defense evidence would legally satisfy the requirements of the defense.[151]

This Court cited favorably to courts in other jurisdictions have held that the credible evidence standard requires an instruction even when the defendant's evidence is "not very believable."[152] The Colorado Court of Appeals held that when the defendant offers evidence in support of a defense, the instruction must be given "even if the supporting evidence consists of highly improbable testimony by the defendant."[153] The Mississippi Supreme Court has held that the trial court can only deny a request for the instruction if, taking the evidence in the light most favorable to the accused, and considering all reasonable favorable inference to the accused, no hypothetical jury could find the facts the accused presents.[154]

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[150] 842 A.2d 650 (Del. 2004).
[151] *Id.* at 653.
[152] *Id.*
[153] *Id.*, citing, *People v. Garcia*, 1 P.3d 214, 221 (Colo. Ct. App. 1999).
[154] *Id.*, *citing*, *Anderson v. State*, 571 So.2d 961, 964 (Miss. 1990).

The trial court erred by misapplying 11* Del. C. *§ 303 to the admissibility of evidence.

The Superior Court held:

> Even if Defendant could pass the threshold issue of whether he could present an involuntary intoxication defense when he voluntarily took illegal drugs, his evidence does not meet the credibility requirements of Delaware law. Issues of credibility are normally jury questions. However, 11 *Del. C.* § 303 gives me the responsibility to make at least entry level credibility determinations.[155]

This legal finding is erroneous. The admissibility of evidence is governed by D.R.E. 401-403. Whether the defendant is entitled to a jury instruction on a statutory defense is governed by 11 *Del. C.* § 303. That statute empowers the trial judge to determine whether the defense evidence meets the "some credible evidence" standard sufficient to entitle the defendant to a jury instruction. By placing the cart before the horse and excluding all the evidence, the trial judge erred as a matter of law. Mr. Wilkerson never got his chance to present evidence in support of his defense.

This misapprehension of § 303 permitted the trial judge to substitute the Court's credibility determination for the jury's, whose sole province it is to decide questions of credibility. The trial court was on the right track when it noted that credibility questions are for the jury. Had the judge simply permitted the trial to play out, the judge could have then at the prayer conference exercised authority

[155] Exhibit B at 35.

granted to the Court by operation of § 303. The judge could have instructed the jury on involuntary intoxication or not. By circumventing the process, the Court violated Mr. Wilkerson's due process rights.

The defense evidence was sufficient for a jury instruction on involuntary intoxication.

Had the Court not excluded Mr. Wilkerson's defense, he would have presented some credible evidence in support of his defense:

- Mr. Wilkerson is a long-time user of cocaine, heroin, and methamphetamine.
- He is fully aware of the effects of these drugs, both singly and in combination.
- On the night of the incident, Mr. Wilkerson ingested these substances, along with alcohol.
- Late in the night, Monique Windsor ordered more methamphetamine from her drug dealer. No one ordered bath salts.
- Amanda Rooks injected the substance into Mr. Wilkerson and herself.
- Rooks told the police she injected Mr. Wilkerson with a "little bit" of it.
- Rooks later told an investigator that she gave Mr. Wilkerson a lot, and herself a little bit.
- After receiving this last injection, Mr. Wilkerson lost his mind.
- Mr. Wilkerson has taken drugs, including methamphetamine and cocaine, all his life. He never took any drug that produced the effects he experienced that night.
- Mr. Wilkerson had never before taken bath salts.

- He became convinced that there was a cabal of child predators on the loose, led by Henry Proctor.

- Henry Proctor is one of Rooks' "sugar daddies."

- Mr. Wilkerson became increasingly erratic. His affect swung from verbally and sexually aggressive to playful, such as stating he was a rapper and rapping to a vacant chair.

- Mr. Wilkerson was convinced that Proctor was raping children in the house. He became convinced that Charles Meagher was in on it, so he assaulted Meagher.

- Mr. Wilkerson thought Corporal Heacook was not a police officer, but rather a child rapist, so he attacked him.

- He then ventured across the street to the Franklin residence. Meagher had told him that Mr. Franklin had AR-15s and to go to him if there was any trouble.

- The Franklins took in Mr. Wilkerson, who at first was seeking help. But then he got it in his mind that the Franklins were part of the conspiracy and attacked them too.

- Upon return to the residence, Mr. Wilkerson assaulted Corporal Heacook again, causing his death.

- Rooks gave an initial statement to the police, likely while still high on all the drugs she had taken. She did, however, tell the police that she had never seen Randon act that way before.

- Rooks also took the substance, albeit not as much. She had never felt that way before from a drug either.

- Rooks and Windsor performed their own investigation and became convinced that the substance they took was bath salts (cathinone) not methamphetamine.

- The Chief Forensic Toxicologist at the Delaware Division of Forensic Science is Jessica Smith.

- Mr. Wilkerson's blood was positive for methamphetamines, cocaine, and fentanyl.

- The DFS tested for some bath salts, but not all.

- Ms. Smith assisted the defense with sending the remaining blood sample to NMS Labs, following NMS protocols and using NMS packaging.

- In transit to NMS Labs, the vial broke, leaving insufficient blood for retesting.

- Dr. Ewers reviewed the bath salts panels from Delaware DFS and NMS Labs.

- Dr. Ewers opines that there are a number of bath salt/cathinone compounds that NMS Labs could have tested for that the DFS Lab did not. He cannot rule out the possibility that Mr. Wilkerson ingested bath salts for which the Delaware DFS does not test.

- Dr. Wilson opines that bath salts/cathinones are different than other drugs such as methamphetamine.

- Dr. Wilson opines that bath salts cause the body to release dopamine and norepinephrine, which increase arousal, paranoia, euphoria, rage, and the fight or flight response.

- Dr. Wilson opines that bath salts cause the body to release almost no serotonin, the chemical that produces feelings of calm and peace and a feeling that problems are less serious.

- Dr. Wilson opines that bath salts are far more potent than cocaine and last in the system for longer.

- Dr. Wilson opines that bath salts cause feelings of paranoia, hallucination, and excited delirium.

Of course, this evidence would be subject to vigorous cross-examination. Rooks would be questioned about her inconsistent prior statements. The State would establish that Dr. Wilson is an academic and his fund of knowledge does not come from treating drug addicts. Dr. Holstege would testify in rebuttal that Dr. Wilson's opinion is not to be believed. He would testify that it is impossible to determine if bath salts were involved, particularly because no one knows the dosages of the other drugs Mr. Wilkerson took. Dr. Holstege would testify that the drugs Mr. Wilkerson took voluntarily produce similar effects to bath salts, in the right dosage. Dr. Holstege would testify that he should be believed because he treats drug-addicted patients. On cross-examination, he would have to admit that he did not treat Mr. Wilkerson.

The foregoing is how the trial should have played out. The evidence presented, under the permissive legal standard of "some credible evidence," would have been sufficient to instruct the jury on involuntary intoxication. At the very minimum, the evidence was sufficient to form the basis for the request for the instruction at the prayer conference. Instead, the Court usurped the jury function and made pretrial credibility determinations, depriving Mr. Wilkerson of due process.

The involuntary intoxication defense

Our criminal code provides:

> In any prosecution for an offense it is a defense that, as a result of intoxication which is not voluntary, the actor at the time of the conduct lacked substantial capacity to appreciate the wrongfulness of the conduct or to perform a material element of the offense, or lacked sufficient willpower to choose whether the person would do the act or refrain from doing it.[156]

The Commentary to this code section states, in relevant part:

> Section 423 recognizes that a man should not be held criminally responsible for conduct which he did not freely choose to do. The section is meant to cover cases in which the actor is forced to take intoxicants, as well as cases in which he was unaware of the intoxicating nature of the substance taken…As with the defense of insanity, the relationship between the circumstance disabling the defendant from controlling his actions and the act charged is specified. The defendant must present some credible evidence that his conduct resulted from the intoxication and that the intoxication was so severe that (1) he could not appreciate the wrongfulness of his conduct, (2) he lacked substantial capacity to perform a material element of the offense, or (3) he lacked sufficient will power to choose whether he would do the act or refrain from doing it.[157]

This Court has not had occasion to address the issue of whether a person who has already taken intoxicants but then involuntarily takes a different intoxicant is entitled to a § 423 instruction. The Superior Court had not done so either until this case. In *Upshur v. State*,[158] the Superior Court granted the defendant's request

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[156] 11 *Del. C.* § 423.
[157] *Delaware Criminal Code with Commentary*, 90-91 (1973).
[158] 420 A.2d 165 (Del. 1980).

for an involuntary intoxication instruction when the defendant testified the combination of alcohol and prescription medication had an "unexpected synergistic effect."[159] This Court found that the trial court's intoxication instructions were clear and adequate, despite Upshur's request for a modified instruction.[160]

In *Polk v. State*,[161] the defendant sought to present an involuntary intoxication defense on the basis that he was addicted to crack cocaine so his ingestion was involuntary. He also argued that crack cocaine he ingested may have contained unknown impurities.[162] This Court affirmed the trial court's holding that an addiction to crack cocaine does not make ingestion of it involuntary.[163] Likewise, this Court affirmed the trial court's ruling that unknown impurities in the crack cocaine would not allow Polk to avail himself of the defense.[164] In *Polk*, the defendant only claimed to have ingested one substance.

Other courts have had occasions to rule on the issue. In a Nebraska case, *State v. Bigelow*,[165] the defendant had taken methamphetamine. His behavior caused him to be brought to a hospital, where three drugs were administered.

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[159] *Id.* at 167.
[160] *Id.* at 169.
[161] 567 A.2d 1290 (Del. 1989).
[162] *Id.* at 1292.
[163] *Id.*
[164] *Id.*
[165] 931 N.W. 2d 842 (Neb. 2019).

Bigelow then assaulted an off-duty police officer and was arrested.[166] At trial, one doctor opined that the assault was precipitated by the voluntary use of methamphetamine. Bigelow's doctor opined that the three hospital-administered drugs caused a temporary drug-induced impairment.[167] The trial judge instructed the jury on voluntary and involuntary intoxication.[168]

The Nebraska Supreme Court affirmed, finding that the jury could have found that the intoxication was voluntary from the methamphetamine, or by the hospital drugs in conjunction with the methamphetamine, or it could have been the three drugs and not the methamphetamine. Finally, the jury could have found that none of these scenarios occurred. The Court held, "because each of these findings was cognizable under Nebraska law and because each finding could be supported by the evidence, it was proper for the court to instruct the jury on these options.[169]

In the aforementioned *People v. Brumfield*,[170] the defendant smoked marijuana, unaware that it contained "angel dust."[171] The trial judge erroneously ruled that involuntary intoxication was not a defense to a rape charge.[172] On appeal, the State conceded the judge was incorrect, but changed tactics to argue that the

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[166] *Id.* at 844.
[167] *Id.* at 844-845.
[168] *Id.* at 846.
[169] *Id.* at 849.
[170] 390 N.E. 2d 589 (Ill. App. 3d 1979).
[171] *Id.* at 592.
[172] *Id.*

defendant's proffer of facts was insufficient to obtain an involuntary intoxication instruction.[173] Reversing, the *Brumfield* Court held that the defendant had no obligation to lay out its defense prior to trial. It was the evidence at trial that mattered, and the trial court's decision "precluded the opportunity to establish the defense."[174]

Other jurisdictions have gone the other way. In *Minnesota v. McClenton*,[175] for example, the defense made a pretrial proffer that McClenton smoked marijuana that, unbeknownst to him, was laced with an unknown substance.[176] The trial court sought a legal memorandum from defense counsel, who did not file one. As such, the trial proceeded without the defense.[177] At sentencing, the defense attorney argued for leniency based on the argument that the marijuana was "likely laced with PCP."[178]

The appellate court held that the defense attorney's arguments at sentencing could not be construed as the required pretrial prima facie showing that the defense was viable.[179] Moreover, the Court joined other jurisdictions holding that the involuntary intoxication defense is not available for defendants who smoke

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[173] *Id.* at 593.
[174] *Id.*
[175] 781 N.W.2d. 181 (Minn. Ct. App. 2010).
[176] *Id.* at 185.
[177] *Id.* at 185-186.
[178] *Id.* at 186.
[179] *Id.* at 190.

marijuana not knowing it was laced with another substance.[180] The Court reasoned that to do so would permit the defense to be available to any defendant who claimed to have consumed "less pure" drugs.[181]

In *State v. Sette*,[182] a New Jersey case much relied upon by the Superior Court,[183] the defendant sought – and was granted – a jury instruction regarding his involuntary intoxication.[184] The Court instructed the jury that if it found that Sette was rendered temporarily insane because of his voluntary use of marijuana, cocaine, and Co-Tylenol, then the defense of "pathological intoxication" was not available to him. Moreover, if these drugs combined with Sette's employment-related exposure to pesticides caused temporary insanity, then the defense was not established. However, if Sette proved by clear and convincing evidence that he was insane due to pesticides, he would be absolved of criminal responsibility.[185]

Having not objected to this instruction at trial, Sette's claim that the instruction was incorrect was reviewed on appeal on a plain error standard.[186] Much of the Court's analysis focused on pathological intoxication, defined in the New Jersey statute as an intentional ingestion of a substance that, unknown to the

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[180] *Id.* at 190-192.
[181] *Id.* at 192.
[182] 611 A.2d 1129 (N.J. Super. Ct. App. Div. 1992).
[183] *See*, Exhibit B at 22-23.
[184] *Sette*, 611 A.2d at 172.
[185] *Id.*
[186] *Id.* at 169-170.

defendant, produces an extreme and unusual result.[187] Sette claimed the pesticides were such a substance. After reviewing jurisprudence from other jurisdictions, the Court concluded that "a court should resist allowing consideration of a pathological intoxication defense when intoxication results from a combination of voluntary ingestion of illegal intoxicants…"[188]

The Superior Court erred in finding Mr. Wilkerson's proposed defense invalid.

This Court reviews questions of law, including the interpretation of statutes, *de novo*.[189] When interpreting a statute, this Court attempts to ascertain and give effect to the General Assembly's intent.[190] If a statute is not ambiguous, then the plain meaning of the statutory language controls and no further interpretation is warranted.[191] A statute is ambiguous if it is "reasonably susceptible to different interpretations, or if giving a literal interpretation to the words of the statute would lead to an unreasonable or absurd result that could not have been intended by the legislature."[192] The United States Supreme Court and this Court have held, "the

[187] *Id.* at 174.
[188] *Id.* at 179.
[189] *Rehoboth Bay Homeowners' Association v. Hometown Rehoboth Bay, LLC*, 252 A.3d 434, 441 (Del. 2021).
[190] *ACW Corp. v. Maxwell*, 242 A.3d 595, 599 (Del. 2020).
[191] *Wiggins v. State*, 227 A.3d 1062, 1066 (Del. 2020).
[192] *Arnold v. State*, 49 A.3d 1180, 1183 (Del. 2012).

meaning of a statute must, in the first instance, be sought in the language in which the act is framed."[193]

The involuntary intoxication statute is not ambiguous. It provides a defense in situations when the actor, because of involuntary intoxication, lacked substantial capacity to appreciate the wrongfulness of his or her conduct, or lacked the willpower to refrain from committing the act.[194] The Commentary makes clear that the statute applies to those unaware of the nature of the substance taken.[195] The Commentary also imposes a requirement that the defendant present some credible evidence that the conduct resulted from the intoxication.[196]

The Superior Court's holding that the defense is not available to someone who had voluntarily taken illicit drugs[197] finds no support in the plain language of the statute or its commentary. The Court's stated reasoning is that it would "raise significant public policy concerns and open a Pandora's box of criminal defense litigation."[198] This Court has held that public policy decisions are best left to the legislative process.[199] And, there is nothing wrong on its face with criminal defense

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[193] *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *Friends of H. Fletcher Brown Mansion v. City of Wilmington*, 34 A.3d 1055, 1059 (Del. 2011).
[194] 11 *Del. C.* § 423.
[195] *Delaware Criminal Code with Commentary*, 90-91 (1973).
[196] *Id.*
[197] Exhibit B at 25.
[198] *Id.*
[199] *Shea v. Matassa*, 918 A.2d 1090, 1092 (Del. 2007).

litigation; certainly, limiting criminal defense motion practice is not a legitimate aim of determining a statute's applicability.

The Superior Court's concern is that any defendant using illicit drugs can then claim the drugs were laced with other substances.[200] But that is not this case. Perhaps it is some future case. At that time, the court having jurisdiction can decide that issue. But to base the decision in Mr. Wilkerson's case on some theoretical avalanche of future criminal defense motions was clear error.

It is true that courts in other jurisdictions have placed some gloss on their involuntary intoxication statutes; the cases go both ways. This Court has not. The General Assembly's clear intent controls. If the General Assembly wanted to exclude a subset of the populace – those who use illicit drugs – from access to the involuntary intoxication defense, it would have done so. It did not.

The Superior Court committed legal error in deciding that § 423 was unavailable to defendants who voluntarily consumed drugs, then involuntary ingested another substance. Its reasoning had nothing to do with Mr. Wilkerson's case and was instead based on the Court's public policy concerns.

[200] Exhibit B at 25.

Admissibility of expert testimony

The admissibility of expert opinion testimony is governed by D.R.E 702, which states:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
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> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
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> (d) the expert has reliably applied the principles and methods to the facts of the case.[201]

The trial judge acts as gatekeeper to ensure that scientific expert testimony is relevant and reliable.[202] The court should focus on the principles and methodology the expert used rather than the conclusions that result.[203]

Consistent with *Daubert v. Merrill Dow Pharmaceuticals, Inc.*,[204] Delaware courts consider the following factors:

> (1) whether a theory or technique has been tested;
>
> (2) whether it has been subjected to peer review and publication;

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[201] D.R.E 702.
[202] *Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 794 (Del. 2006).
[203] *Id.*
[204] 509 U.S. 579 (1993).

> (3) whether a technique had a high known or potential rate of error and whether there are standards controlling its operation; and
>
> (4) whether the theory or technique enjoys general acceptance within a relevant scientific community.[205]

This Court has adopted a five-factor test to determine the admissibility of scientific testimony:

> (1) the witness is qualified as an expert by knowledge, skill experience, training or education;
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> (2) the evidence is relevant;
>
> (3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field;
>
> (4) the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and
>
> (5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.[206]

A strong preference exists for admitting expert opinions "when they will assist the trier of fact in understanding the relevant facts or the evidence."[207]

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[205] *Bowen*, 906 A.2d at 794.
[206] *Id.*
[207] *Norman v. All About Women, P.A.*, 193 A.2d 726, 730 (Del. 2018).

The Superior Court abused its discretion when it excluded two well-qualified defense experts.

The Superior Court excluded the defense experts for several reasons, none of which comport with *Daubert* or this Court's jurisprudence. The Court found that the experts:

- Were not qualified as experts by knowledge, skill, experience, training or education;
- Are not clinicians;
- Did not based their opinions on information reasonably relied upon by experts in the field;
- Did not read the police reports or recordings of Mr. Wilkerson, and did not interview Mr. Wilkerson;
- Did not review Amanda Rooks' audio interview with the police or interview Rooks;
- Dr. Ewens' report is not admissible because it is built upon the variable Rooks' narrative;
- Dr. Wilson failed to review any case-specific information;
- The testimony would only confuse the jury because it is generalized and conjectural.[208]

Each one of these findings is either wrong or has nothing to do with the admissibility of the defense experts' testimony. Both Dr. Ewens and Dr. Wilson are qualified experts holding Ph.Ds in their respective fields. One only need review

[208] Exhibit B at 33-34.

their *curricula vitae* to see that.[209] Dr. Ewens has testified 16 times in court.[210] Dr. Wilson testified many times in a number of state and federal courts.[211] True, they are not clinicians, but that is obviously no basis to exclude their testimony. Our courts do not require that all experts be clinicians. If they did, most of the medical and scientific experts would be excluded.

The doctors surely used information reasonably relied upon by experts in their fields. Dr. Ewens merely compared two sets of test panels: Delaware DHS and NMS Labs. Dr. Wilson applied his decades of pharmacology experience to provide descriptions of various substances relevant to the case. Nothing was controversial about their methods or opinions.

The doctors did not review case specific information because they were not asked to opine as to whether Mr. Wilkerson took bath salts – and they did not offer an opinion on that subject. The fact that the doctors were not asked by the defense to comment on the specifics of the case has nothing to do with whether their testimony is admissible.

It is true that the doctors did not interview Mr. Wilkerson. Neither did Dr. Holstege. Mr. Wilkerson has Fifth Amendment rights. There was no need for the

[209] Dr. Ewers' CV is at A373-400. Dr. Wilson's CV is at A402-423.
[210] A373.
[211] A310.

experts to interview Mr. Wilkerson because they were not asked to opine as to whether Mr. Wilkerson took bath salts.

Dr. Ewens' opinion was not based on the "variable Rooks narrative."[212] It was not based on any narrative. He was simply asked to determine what bath salt testing could have been done by NMS Labs had the test tube not shattered in transit.

Dr. Wilson did not need to review any case-specific information to provide subject matter expert testimony about the effects of various substances. He did not "ignore the fact that Defendant's toxicology screening was negative for bath salts and that Rooks did not mention that she thought Defendant used bath salts to the police."[213] He did not consider it. He, again, was only asked to provide, based on his expertise, a description of the effects of certain intoxicants.

The Superior Court's flawed and result-oriented exclusion of the defense experts finds no support in *Daubert* or our jurisprudence on experts. These were highly qualified experts who have studied, taught, published, and testified on matters related to their respective fields. Had the Court not excluded Mr. Wilkerson's defense, they would have offered relevant testimony. Dr. Ewers would have testified that Delaware DFS did not use all the bath salt tests that NMS Labs

[212] Exhibit B at 34.
[213] *Id.*

could have. Dr. Wilson would have explained the effects of bath salts as compared to other drugs such as cocaine and methamphetamine.

The Superior Court's exclusion of their testimony was a clear abuse of discretion.

CONCLUSION

The Superior Court's exclusion of Mr. Wilkerson's defense violated his due process rights. As discussed in this brief, the Court's decision on the State's motion *in limine* was rife with legal error. Mr. Wilkerson respectfully seeks the remedy of a reversal and a remand for a new trial.

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