EFiled: Jul 31 2024 07:44AM EDT
Filing ID 73858537
Case Number 148,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN BRISCO,	)	
	)	
Defendant Below,	)	
Appellant,	)	No. 148, 2024
	)	
v.	)	ON APPEAL FROM THE
	)	SUPERIOR COURT OF THE
STATE OF DELAWARE,	)	STATE OF DELAWARE
	)	ID No. 1502007987
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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Dated: July 31, 2024

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The Appellee argues that trial counsel understood the GPS report, and made a strategic choice to put forth an alibi defense based upon a "plain" or "strict" reading of that report. Counsel's strategy, Appellee submits, was to "argue that this evidence, which seemed inculpatory, could in reality exonerate Brisco if the jury were to construe the report strictly."[1] Such a decision, says Appellee, was risky but not objectively unreasonable. Brisco's probation officer, through whom the report was introduced, testified that the actual location of an individual could be anywhere within a 30-meter range of the reported location. Appellee argues that the jury could have found the officer not credible, and believed counsel's alibi.

Appellee's argument must fail. No reasonable jury could believe trial counsel's alibi. Even a "plain reading" of the GPS report made it clear that the report relayed approximate, not actual, locations. For example, it was undisputed that Brisco ultimately returned to his residence, where he spent the night. The GPS report, however, placed him at a location 262 feet from his home. All parties agreed Brisco was home; the report listed him at a location close by – his

[1] Answering Brf. at 19-20

approximate location. At the time of the homicide, the GPS report registered Brisco a mere 102 feet away from the crime scene, even closer than the discrepancy between his actual residence and reported location. Additionally, the report showed gaps of over half a mile between recorded locations. For example, the report showed Brisco near the crime scene, then next reported him to be near his own residence. Obviously, Brisco did not teleport between the two recorded addresses. A plain reading of the report would indicate that Brisco must have physically been in locations not listed in the report as he traveled between the locations that were listed. By the time of Brisco's direct appeal, even trial counsel had to admit that the records could not be interpreted to mean that Brisco had remained statically 102 feet from the crime for the entire 16 minutes captured by the report.[2]

In preparation for Brisco's direct appeal, this Court studied the GPS report and noted that a common sense reading of the report revealed approximate and not exact locations.

> "I guess what I'm saying is, at the time of the murder, does it show where he is, or does it show the vicinity of where he was during that general period? Where he is exactly, we don't know because, frankly, when the last couple of things register, the last one registers on Tatnall Street and the next one registers on Madison Street. Unless he- he's got a backpack drone that just lifted him in a second, he was in transit between the two, right?"[3]

[2] A.52
[3] A. 316

"Well, […] just by making a common sense inference that, as you would concede, when he went back to home and he was there for many many hours, that he does not – did he do as the, um, the old fashioned term was burglary, now it's home invasion. Did he make a home invasion at [the address close by]?"[4]

This Court easily recognized that the report, even when viewed plainly, could not be interpreted to show Brisco's exact location during the time of the murder. What was clear to this Court was made clear to the jury at trial. The jury did not need to make, as Appellee argues, a credibility finding between the probation officer's testimony and trial counsel's alibi. On its face, the report did not and could not support an alibi. The probation officer's testimony served only to guild an already indisputable fact. Even trial counsel's cross-examination of the officer, which discussed waves bouncing off of phone towers, only supported the fact that the report could not provide pinpoint precise locations.

No reading of the report could reasonably allow a jury to believe Brisco was located at, and did not move from, a point 102 feet from the crime during the time of the crime. No determination could be made that counsel's alibi argument was more credible than the testimony of the probation officer. Simply, the records did not, and could not, serve as an alibi. Counsel's choice to further an alibi defense was not made after a thorough investigation of the law and facts relevant to plausible options. Even a minor investigation into the GPS report would have demonstrated that it, in no way, supported an alibi defense.

[4] A.317

In arguing that the GPS records exonerated his client, trial counsel made the grave and unreasonable error of arguing a false alibi to the jury. As the Second Circuit found in *Henry v. Poole*, "there is nothing as dangerous as a poorly investigated alibi […] a poorly prepared alibi is worse than no alibi at all."[5]

The Appellee argues that this case is distinguished from *Poole*, because here, trial counsel "did not try to create a false alibi for Brisco."[6] To be clear, neither did counsel in *Poole* try to create a false alibi.[7] As in the instant matter, Poole's counsel misunderstood information that should have been clear to him and, in doing so, mistakenly and ineffectively presented a false alibi. Poole's counsel confused the *early morning* of August 10th (the 12:10AM time that the murder occurred) with the *night* of August 10th (the time for which he obtained information about his client's whereabouts). While counsel thought he was presenting an alibi for the time of the murder, he was actually presenting one for hours after the crime. The *Poole* Court found that trial counsel was ineffective when he elicited and emphasized an alibi that was clearly based on incorrect information. Counsel here

[5] *Henry v. Poole*, 409 F.3d 48, 65 (2d Cir. 2005)
[6] Appellee's brief, page 21
[7] In *Poole*, trial counsel affirmed that he had made an "honest mistake" in calling the alibi witness because he had confused the 12 am "early morning hours of August 10th" (when the crime occurred) with the "evening hours" of August 10th. He made it clear that he would not, under any condition, attempt to create a false alibi, as that would not only be unethical but be a foolish strategy. It was the State that, in trying to argue that defense counsel was effective, tried to convince the Court that trial counsel sought to create a false alibi as part of an acceptable trial strategy. The Court did not agree that this is what trial counsel had done and found the State's argument in that vein to be conjecture.

was equally ineffective for telling the jury Brisco had an alibi that "exonerated him" when the records he relied upon in no way established such an alibi.

The Appellee attempts to lessen the blow of the fatally flawed alibi by arguing that trial counsel relied on strategies beyond the GPS evidence. It is correct that trial counsel had many other viable arguments for defense; some of which he argued and some of which, as outlined in Appellant's Opening Brief, he failed to raise. If anything, the fact that trial counsel had numerous other plausible options for a defense demonstrates that the evidence against the Appellant was not overwhelming and that the false alibi was more damaging than it might have otherwise been. As the *Strickland* Court found, "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support."[8] Counsel had substantially more to lose by raising a false alibi in light of more powerful and credible arguments. Presenting the false alibi told the jury that trial counsel needed to mislead and deceive them in order for them to reach a verdict of not guilty. The false alibi called into question the credibility of trial counsel in a case that hinged on credibility determinations.

As to the trial stage, Appellee argues there was no prejudice because of the weight of the State's evidence. The Appellee cites the this Court's Opinion in

[8] *Strickland*, 466 U.S. at 696.

Brisco's direct appeal, "there is overwhelming evidence… that placed [Brisco] in the vicinity of the [Kostikidis] murder at the relevant time."[9] To be clear, this Court found that there was overwhelming evidence Appellant was in the area of the murder, not that he committed the crime. The issue on appeal was limited to the range of the GPS locations. This Court never reviewed the entirety of the evidence against the Appellant, nor made determinations about its weight. Brisco does not dispute that the evidence placed him in the area. His mere presence was not overwhelming evidence of guilt. As outlined in the Appellant's Opening Brief, and not addressed by the Appellee, only two witnesses tied Appellant to the murder. Both witnesses had motive and opportunity to lie, and their statements were riddled with inconsistencies.[10] The evidence of guilt was far from overwhelming.

As to the plea stage, Appellee argues that the Appellant has not shown deficiency because his "bald statements do not substantiate that counsel failed to fully inform him of the State's evidence."[11] The Appellee cites, *Davis*[12] to argue that "Brisco's conclusory contention that he would have accepted the plea offer" does not automatically establish prejudice.[13]

Firstly, Brisco's claims are not bald assertions. Brisco indicates that he was informed there was an alibi defense available to him at trial. Appellee admits that

[9] Answering Br. at 24
[10] Opening Br. at 24 - 27
[11] Answering Br. at 23
[12] *United States v. Davis*, 210 WL 724370 (D. Del Mar. 2, 2010)
[13] Answering Br. at 24

trial counsel argued an alibi defense to the jury. It is sensible that trial counsel would have informed his client of the defense he raised at trial and the defense he continued to cling to on Appeal. Yet, as argued above, no alibi actually existed. In informing his client of a nonexistent alibi, trial counsel did fail to fully inform his client of the State's evidence, which implicated Brisco rather than exonerated him.

Secondly, Brisco's case is highly differentiated from the *Davis* case. In *Davis*, the court was unpersuaded by the defendant's argument that he would have pled guilty but for counsel's deficient advice. There, *Davis* argued that his attorney failed to advise him that he could enter a conditional guilty plea to preserve his acceptance of responsibility while still challenging the Court's denial of his motion to suppress. The Court was not persuaded by the defendant's assertions because conditional guilty pleas can only be entered with the consent of the Court and prosecution. The record before the *Davis* court showed it was highly unlikely that the Government would have agreed to a conditional plea. Meaning, the plea Davis claimed he would have entered if not for the deficient advice never would have actually existed. Here, the guilty plea in question was in writing and the prosecution had agreed to recommend the plea to the Court.

For these reasons given in reply, and for all of the reasons given in Appellant's Opening Brief, the Superior Court abused its discretion in denying Appellant relief on this claim.

II. THE SUPERIOR COURT DID ABUSE ITS DISCRETION BY DENYING BRISCO POSTCONVICTION RELIEF ON HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IMPERMISSIBLE EXPERT TESTIMONY.

The Appellee argues that all of Detective Flaherty's testimony was admissible either under D.R.E. 701 or D.R.E 702, and so counsel was not deficient in failing to object. Further, Appellee argues that trial counsel was not deficient in allowing the comingled dual-witness testimony because "there was no controlling precedent *requiring* bifurcation."[14]

Appellee is wrong. Much of Flaherty's testimony was not admissible under either D.R.E. 701 or D.R.E. 702. To the extent portions of his testimony were admissible, the manner in which his testimony was elicited exceeded the permissible bounds of dual witness testimony, blurring his roles and confusing the purpose of his evidence.

The Dual Witness Testimony:

Appellee argues that trial counsel was not deficient for failing to seek bifurcation of Flaherty's lay and expert witness testimony because, "as the Superior Court concluded, Brisco has not demonstrated that there is any controlling precedent requiring bifurcation."

[14] Answering Br. at 37

Appellee's argument rests on an incorrect legal standard. The standard does not require existing precedent which mandates particular action by trial counsel. Such a standard would be impossible for any defendant to meet as the law can rarely, if ever, dictate the actions of defense counsel. In fact, the Supreme Court in *Strickland* explicitly found that it is not feasible to create rules for conduct that can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant.[15] While no Delaware precedent holds defense counsel *must* seek bifurcation in any case where there is dual witness testimony, neither does the law indicate that counsel should always permit such testimony to occur without limits or question.

The cases where this Court has permitted dual witness testimony allowed for such testimony in situations that were significantly more limited in scope than the matter at hand. In the cases previously decided, it was clear that the jury would not be confused by the dual testimony, and that the officer's factual testimony would not be bolstered by his expert role. Each of the cases decided by this Court permitting dual witness testimony were drug distribution cases. There, the officer was permitted to provide lay testimony about his observations made during the

[15] *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984)

defendant's arrest, and then expert testimony as to how the drugs were packaged.[16] The Appellant notes that drug expert testimony is one of the most common, if not the most common, forms of permissible expert testimony in this country. This clear, simple, and traditional dual-role testimony is a far cry from the testimony presented in Appellant's trial. This Court has never written any Opinion nor given any indication that the law of Delaware grants the prosecution carte blanche to introduce whatever it cares to through a dual witness. In fact, in *Hudson v. State*, this Court found that it was proper for the trial court to educate the dual witness on his role in order to avoid undue prejudice, which would result from mixing the detective's fact and expert testimony[17]. Counsel should have recognized that Flaherty's testimony exceeded the bounds of dual witness testimony previously permitted by this Court. That is not, as Appellee argues, "mandating that counsel should have pursued a change in the Delaware law.[18]" This objection would have been squarely within Delaware law.

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[16] *Hardin v. State*, 844 A.2d 982, 988 (Del. 2004) citing, *Morris v. State,* No. 687, 2002, 2003 WL 22097056, at 1, 2003 Del. Lexis 444, at 4 (Del. Sept. 8, 2003) (ORDER) (recounting the trial at which one of the arresting officers testified both as a fact witness and as an expert witness on the issue of intent to distribute drugs); *Norwood v. State,* No. 274, 2002, 2003 WL 29969, at 2, 2003 Del. Lexis 3, at 3–5 (Del. Jan. 2, 2003) (ORDER) (reviewing the expert testimony of a police officer who gave expert testimony regarding intent to distribute drugs and also testified as a fact witness); *Morales v. State,* 696 A.2d 390, 392 (Del.1997) ("At trial, Detective Rodriguez testified both as an eye witness and as a drug expert. In his capacity as an expert, Detective Rodriguez opined that the drugs that were found in Morales' apartment were consistent with the conclusion that Morales possessed the drugs with the intent to sell them.").

[17] *Hudson v. State*, 956 A.2d 1233 (Del 2008)

[18] Answering Br. at 38

To put it simply, if this Court previously ruled that fish are permitted to swim in Lake Gerar, that ruling does not equally grant the same permissions to an alligator dressed as a fish. Competent counsel would have recognized Flaherty was not serving in the permissible role of a dual witness just as easily as one would recognize and alligator is not a fish.

The 704, 701 and 702 Arguments:

The Appellant argued that Flaherty impermissibly testified to the ultimate issue of guilt when he told the jury that he had tied Brisco to the commission of three homicides. Brisco stood trial for each of the homicides. Additionally, the homicides were listed as predicate acts underlying the gang participation charge.

Appellee argues that Flaherty's testimony embracing the ultimate issue was not objectionable because such testimony is permissible under D.R.E. 704.[19] This is incorrect. D.R.E. 704 allows an opinion on the ultimate issue only if the opinion is properly admissible under D.R.E. 701. Here, it is not. Opinion testimony by a lay witness is only admissible Under Rule 701 if it is "rationally based on the witness's perception." In lay terms, Rule 701 means that a witness is only permitted to give his opinion or interpretation of an event when he has some personal knowledge of that incident. In other words, lay opinion testimony is permitted under Rule 701 because it has the effect of describing something that the

[19] Answering Br. at 31

jurors could not otherwise experience for themselves by drawing on the witnesses' sensory and experiential observations that were made as a first-hand witness to a particular event.[20] Courts have found opinion testimony embracing the ultimate issue admissible in situations where the witness made first-hand observations of a drug deal or where the witness engaged in a first-hand review of wiretap calls utilizing coded language.[21] Unlike those situations, Flaherty's testimony is not admissible under 701 and, therefore, cannot be admitted under 704. Flaherty's opinion that the Appellant was involved in three predicate homicides does not qualify as an opinion rationally based on his perception. Flaherty did not perceive the homicides at issue; he was not a first-hand witness to these events.

Moreover, Flaherty's opinion served only to tell the jury what result to reach, a purpose which is barred by Rule 701. Rule 701 is carefully designed to exclude lay opinion testimony that amounts to little more than choosing sides, or that merely tells the jury what result to reach. It seeks to protect against testimony that usurps the jury's role as fact finder. While opinion testimony that "embraces an ultimate issue to be decided by the trier of fact is not *per se* inadmissible, such testimony is barred when its primary value is to dictate a certain conclusion. The purpose of the foundation requirements of the federal rules governing opinion

[20] *United States v. Fulton*, 837 F.3d 281, 291 (3d Cir. 2016)
[21] *United States v. De Peri*, 778 F.2d 963, 977 (3d. Cir. 1985)

evidence is to ensure that such testimony does not so usurp the fact-finding function of the jury."[22]

Flaherty's testimony that he had tied the Appellant to the three homicides for which he was charged was not admissible under 701 or 704.

In his Opening Brief, Appellant argued that it was improper for Flaherty to testify that Brisco's rap lyrics "reminded" Flaherty of particular homicides. Appellee argues Flaherty's testimony in that vein was proper under Rule 701.[23] To support this position, the Appellee relies on only two unpublished State court cases, *Brown* from the Maryland Court of Appeals and *Vance*, from the Supreme Court of Kentucky.[24] The Appellee cites these cases as though they give authority to Flaherty for his testimony; for many reasons, they do not. These cases are not binding on this Court and no reason has been offered for why these two unpublished decisions, cherry-picked from a nation of cases which may hold differently, should offer guidance to this Court.

In *Brown*, the rap lyrics found on the defendant's person at the time of his arrest, which described drug dealing, served as a basis for the expert witnesses' opinion that the defendant's possession of marijuana was for the purpose of distribution, not merely personal consumption. Brown's admission related to

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[22] *Id.* 291–92 (3d Cir. 2016)
[23] Answering Br. at 34
[24] *Brown v. State*, 2016 WL 5720590 (Md. Ct. App. Sept. 30, 2016) and *Vance v. Commonwealth,* 2004 WL 2364790 (Ky. Oct. 21, 2004)

expert opinion does not support Appellee's arguments that Flaherty's statement was admissible under 701.

In *Vance*, the detective testified to his personal knowledge of details in a robbery investigation that were not released to the public. He was then able to give the opinion that the rap lyrics, which included those unreleased details, were about the robbery in question. That is not what occurred here. Here, Flaherty was simply telling the jury what conclusion to reach. Appellant's case is not analogous to *Vance*, but to *United States v. Harris*, a Third Circuit case. [25] In *Harris*, the Third Circuit found that the introduction of lay witness testimony was contrary to the rules of evidence when the detective made interpretations that he was no better suited to make than the jury. The testimony in Harris violated rule 701 when it interpreted non-coded conversations to imply criminal conduct.

Here, Flaherty did the same. The jury had already heard the details of each of the alleged homicides; they were then provided the rap lyrics. It was up to the jury, not Flaherty, to decide if the lyrics "reminded" the jury of the homicides described, i.e., if Brisco was rapping about homicides he committed.

In his Opening Brief, Appellant argued that it was improper for Flaherty to serve as a "summary witness" for the State. The Appellee responds that the use of Flaherty "as a summary witness to link Brisco to certain incidents as predicate

[25] *United States v. Harris*, 788 Fed. Appx. 135 (2019)

offenses was not objectionable in view of [the case's] complexity."[26] The Appellee ignores the issue that was raised. The complaint is not with summary witnesses generally but with the State's expert serving as its summary witness. Not only was Flaherty permitted to testify as both a lay and expert witness, with no demarcation of his opinions, but he was additionally allowed to summarize the State's case for the jury. Flaherty was the State's final witness and testified for almost a full day.

Using Flaherty as a lay witness, an expert witness, and a summary witness unfairly provided the State with an additional summation delivered by an "expert" and served to usurp the function of the jury. As Flaherty's testimony moved from interpreting individual code words to providing an overall conclusion of criminal conduct, the process tended to more closely resemble the grand jury practice, an improper display at trial.

For guidance, this Court can look to the Second Circuit in *United States v. Dukagjini*, there the Court took issue with the expert serving as a summary witness and the testimony taking the shape of a grand jury proceeding. [27]

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[26] Answering Brief at 38

[27] *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003) "Appellants argue that [the agent's] dual roles as case agent and expert witness allowed him to serve as a summary witness, improperly testifying as an expert about the general meaning of conversations and the facts of the case. We agree that the use of the case agent as an expert increases the likelihood that inadmissible and prejudicial testimony will be proffered. While expert testimony aimed at revealing the significance of coded communications can aid a jury in evaluating the evidence, particular difficulties, warranting vigilance by the trial court, arise when an expert, who is also the case agent, goes beyond interpreting code words and summarizes his beliefs about the defendant's conduct based upon his knowledge of the case."

For these reasons given in reply, and for all of the reasons given in Appellant's Opening Brief, the Superior Court abused its discretion in denying Appellant relief on this claim.

III. THE SUPERIOR COURT DID ABUSE ITS DISCRETION IN DENYING BRISCO POSTCONVICTION RELIEF ON HIS CLAIM THAT TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE COURT'S IMPROPER WARNINGS TO THE STATE'S KEY WITNESSES.

The Appellee argues that the Court did not err in warning the witnesses that they could face consequences for criminal contempt if they continued to refuse to testify. Therefore, trial counsel was not deficient in failing to object to the court's warnings.[28]

Appellee argues that the court was not required to inform a witness of the specific punishment he may receive should he be held in contempt for refusing to testify. While it is true that a court does not need to advise a witness of the precise consequences he will face, that does not, in turn, hold that the court can threaten a witness with any consequences it wishes- consequences that cannot be imposed under the law.

The Appellee writes, "This Court has concluded that '[judges] and prosecutors do not necessarily commit a *Webb* type violation merely by advising a witness of the possibility that he or she could face prosecution for perjury if his or her testimony differs from that he or she has given previously.' In fact, the government has an obligation to warn unrepresented witnesses of the risk that the testimony they are going to give can be used against them." The Appellee,

[28] Answering Br. at 41

however, cuts off the remainder of this Court's sentiment. The next sentence of the quoted paragraph reads, "Where, however, the substance of what the prosecutor communicates to the witness is a threat over and above what the record indicates is necessary, and appropriate, the inference that the prosecutor sought to coerce a witness into silence is strong."

Here, the threat to the witness went over and above what the law would permit as punishment for refusal to testify. The words to the witness transitioned from an appropriate warning, ensuring the witness understood that they were disobeying a lawful order, to a threat that, should they not testify, they would incur punishment beyond what the law actually allows.

The witnesses at issue provided the only evidence tying Appellant to the commission of the Kostikidis murder. When they took the stand, they were each adamant in their refusal to testify. It was only after they were threatened with punishment outside of the bounds of the law that they testified enough to lay a foundation for the admission of their prior statements under §3507.

IV. BRISCO DID PRESERVE HIS CUMULATIVE ERROR CLAIM AND THE SUPERIOR COURT DID ABUSE ITS DISCRETION IN DECLINING TO HOLD AN EVIDENTIARY HEARING.

Brisco's Amended Petition for Post-Conviction Relief and Consolidated Brief in Support specifically stated that the Appellant's claims raised, "both individually and cumulatively," warranted relief and/or an evidentiary hearing.

Moreover, in his Opening brief, Appellant points to two specific claims that he argues should have been viewed cumulatively and should have afforded him an evidentiary hearing. The facts of those claims were tied together within the Rule 61 arguments, demonstrating how they impacted each other and clearly demonstrating there was a cumulative impact for the Superior Court to consider.

CONCLUSION

For the reasons and upon the authorities cited herein, Appellant Brisco's convictions must be reversed.

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 Office 365.

2. Appellant's Reply Brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4523 words, which were counted by Microsoft Word Office 365.

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Dated: July 31, 2024