



IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|----------------------|---|---------------------------|
| YONY MORALES-GARCIA, |) | |
| |) | |
| Defendant Below- |) | |
| Appellant, |) | No. 311, 2024 |
| |) | |
| |) | ON APPEAL FROM |
| v. |) | THE SUPERIOR COURT OF THE |
| |) | STATE OF DELAWARE |
| STATE OF DELAWARE, |) | ID No. 2201010642 |
| |) | |
| Plaintiff Below- |) | |
| Appellee. |) | |

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

REPLY BRIEF

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Appellant Yony Morales-Garcia, through the undersigned counsel, replies to the State's Answering Brief as follows:

ARGUMENT

I. THE STATE COMMITTED PROSECUTORIAL MISCONDUCT BY REFERENCING EMNER MORALES-GARCIA'S GUILTY PLEA DURING ITS CASE-IN-CHIEF AND THE SUPERIOR COURT COMMITTED PLAIN ERROR BY FAILING TO *SUA SPONTE* ISSUE A CAUTIONARY INSTRUCTION TO THE JURY REGARDING THE PROPER PURPOSE OF MR. MORALES-GARCIA'S CODEFENDANT'S GUILTY PLEA EVIDENCE.

The Opening Brief argued that the State committed prosecutorial misconduct when it elicited testimony during its case-in-chief regarding Emner Morales-Garcia's ("Emner") guilty plea. The Opening Brief also argued that the Superior Court committed plain error when it failed to *sua sponte* issue a cautionary instruction to the jury regarding the proper purpose of Emner's guilty plea evidence. The State's improper introduction of this evidence in its case-in-chief and the Court's failure to give a cautionary instruction constituted plain error and violated Mr. Morales-Garcia's right to a fair trial. This Court must reverse.

Factual disputes

Although the State asserts that Ely saw an object that was small enough to conceal "that could have been a gun," there was no evidence presented that it was a

firearm.¹ Ely denied seeing Mr. Morales-Garcia, or Emner, with a gun.² The firearm involved in this homicide was recovered weeks late from another individual (not Mr. Morales-Garcia or Emner) during a traffic stop.

The State incorrectly summarizes Mr. Morales-Garcia’s argument and he did not waive appellate review.

In its Answering Brief, the State argues “trial counsel’s strategic decision not to object to Emner’s prior statements constituted a waiver.”³ The State further contends that trial counsel made a tactical decision not to object to Grassi’s hearsay testimony regarding Emner’s statements and that counsel’s failure to object to Grassi’s testimony about Emner’s guilty plea “was likely part of the same tactic.”⁴ First, this mischaracterizes Mr. Morales-Garcia’s argument, which is not whether there was error with the introduction of Emner’s prior statements. Mr. Morales-Garcia’s argument focuses on the introduction of Emner’s guilty plea during the State’s case-in-chief. Second, there is nothing in the record to support the assertion that this was a strategic decision by trial counsel and thereby waived on appeal.

This Court has held that it is “incumbent upon the State to prove waiver” in the criminal context.⁵ This Court “indulge[s] every reasonable presumption

¹ A610.

² A679; A606.

³ Ans. Br. at 18. *See also* Ans. Br. at 3.

⁴ A19-20.

⁵ *Purnell v. State*, 254 A.3d 1053, 1101 (Del. 2021) (internal citation omitted).

against finding waiver in the criminal context.”⁶ This Court also views “affirmative statements as a stronger demonstration of waiver than mere absence of an objection.”⁷ Forfeiture, in contrast, is “the failure to make the timely assertion of a right” and can be reviewed for plain error.⁸

The State’s argument regarding waiver is misplaced as Mr. Morales-Garcia does not appeal trial counsel’s decision to permit Emner’s hearsay statements. During the State’s direct examination of Detective Grassi, the State elicited hearsay testimony related to statements made by Emner.⁹ The Superior Court called a sidebar and assumed that trial counsel’s failure to object was a tactical decision.¹⁰ Trial counsel confirmed the defense would be calling Emner as a witness and made no objection to the hearsay testimony.¹¹

In its Answering Brief, the State goes on to contend that trial counsel knew that Emner’s guilty plea would be permissible evidence on cross examination and counsel “evidently chose not to emphasize that plea by lodging an objection that may have been overruled.”¹² These assertions are not supported by the record. Trial counsel’s tactic was to attack the identification of the shooter. Trial counsel

⁶ *Burrell v. State*, 2024 WL 4929021, at *11 (Del. Dec. 2, 2024).

⁷ *Id.* (internal quotations omitted).

⁸ *Purnell*, 254 A.3d at 1101 (internal citations omitted).

⁹ A288-292.

¹⁰ A293.

¹¹ *Id.*

¹² Ans. Br. at 20.

attempted to cast doubt on Ely's version of events and frame him as an alternate suspect.

The record does not reflect that trial counsel made a tactical decision not to object to the State's improper introduction of Emner's guilty plea evidence. Counsel's tactical decision not to object to a certain portion of testimony does not mean that he made a tactical decision not to object to other portions of it. Nothing in the record reflects that such a decision was made. There were no affirmative statements by trial counsel that his failure to object was a tactical decision. Mere absence of an objection to the guilty plea evidence does not constitute waiver.

Trial counsel did not waive appellate review of this issue; rather, this Court must review for plain error.

The State committed prosecutorial misconduct by improperly introducing Emner's guilty plea.

The State is correct that by calling Emner as a defense witness, the prosecution was permitted to cross-examine him about his guilty plea as it went to his credibility. That is not the issue here. The issue in Mr. Morales-Garcia's trial was that the State mentioned the plea in its opening statement and questioned Detective Grassi about Emner's guilty plea all before he ever testified. If the purpose of eliciting testimony about Emner's guilty plea was to attack his credibility, the appropriate time to do so was during cross examination of Emner, not during Grassi's direct examination. At the point that Grassi testified about the

plea agreement, Emner's credibility as a witness was not at issue since he had yet to testify.

The issue in this case is one of identity – whether Mr. Morales-Garcia was the shooter. None of the witnesses inside of the restaurant identified Mr. Morales-Garcia as the shooter and Ely testified he did not see who fired the shots and did not see Mr. Morales-Garcia with a gun.¹³

In the State's opening statement, the prosecutor referenced Emner's guilty plea to the robbery immediately after stating "the defendant opened fire in the direction toward his brother to protect his brother."¹⁴ At trial, the State introduced evidence of Emner's guilty plea to the robbery charge in an attempt to have the jury conclude that if Emner pled to those charges (i.e., the underlying robbery in the Felony Murder charge), then Mr. Morales-Garcia must have been the shooter. It was used as substantive evidence of his guilt, rather than for one of the limited circumstances outlined in *Allen v. State*.¹⁵ In *Allen*, this Court noted that testimony about a guilty plea may be elicited during direct examination of the codefendant under limited circumstances or on cross-examination of the

¹³ A679-680.

¹⁴ A210.

¹⁵ 878 A.2d 447, 450-451 (Del. 2005). These limited circumstances, as outlined in the Opening Brief, include "allowing the jury to accurately assess the credibility of the co-defendant witness, to address the jury's possible concern of selective prosecution or to explain how the co-defendant witness has first-hand knowledge of the events about which he or she is testifying." *Id.* at 451.

codefendant for impeachment purposes.¹⁶ It did not contemplate the introduction of a codefendant's guilty plea through another witness, like law enforcement.¹⁷ The State's improper references to Emner's guilty plea, both in opening statements and through questioning of Detective Grassi, was contrary to existing case law and constituted prosecutorial misconduct.¹⁸

The State further argues that it had “overwhelming evidence” of Mr. Morales-Garcia's guilt and would have proven its case even without Emner's guilty plea.¹⁹ The State did not have “substantial evidence” in this case as to Mr. Morales-Garcia's guilt,²⁰ as was evidenced by the first trial resulting in a mistrial due to a hung jury. The issue at trial was identity. Although multiple witnesses testified about the events of that evening, none of the witnesses from inside of the restaurant identified Mr. Morales-Garcia as the shooter, nor did Ely see who fired

¹⁶ *Id.* at 450-451.

¹⁷ In *Charbonneau v. State*, the issue arose regarding the admissibility of a codefendant's proffer and plea agreement when that codefendant was unavailable to testify for the defense when he asserted his Fifth Amendment right to remain silent. 904 A.2d 295, 309-311 (Del. 2006). This Court found that the codefendant's guilty plea and proffer were admissible, the trial court's failure to admit these items constituted reversible error, and the trial court denied Charbonneau her right to a fair trial. *Id.* at 313.

¹⁸ See *Allen*, 878 A.2d at 450 (“Evidence of a co-defendant's conviction is not generally admissible in the trial of his or her fellow accused. The same is true that a co-defendant's plea agreement to the same offense or an offense arising out of the same set of circumstances is generally inadmissible against his or her fellow defendants.”); *Dillard v. State*, 2024 WL 5165709, *3 (Del. Dec. 19, 2024).

¹⁹ Ans. Br. At 24.

²⁰ Ans. Br. at 27.

the shots. The issue of identity was built on circumstantial evidence, which was only bolstered by the State's introduction of Emner's guilty plea evidence.

In applying the *Wainright* standard to this misconduct, it was so clearly prejudicial to Mr. Morales-Garcia's substantial rights so as to jeopardize the fairness and integrity of the trial process in this case.²¹ The error here was apparent on the face of the record. The prosecutor referencing and eliciting testimony about Emner's guilty plea was basic, serious and fundamental in character; this Court has held that evidence of a codefendant's plea is generally not admissible in the trial of his fellow accused.²² Lastly, this misconduct deprived Mr. Morales-Garcia of his right to a fair trial and was manifestly unjust.²³ Furthermore, under the *Hunter* test, the repetitive nature of the errors - both in opening statements and in direct examination of Grassi - require reversal as they cast doubt on the integrity of the trial process.²⁴

The Superior Court erred when it failed to sua sponte issue a cautionary instruction.

The trial court's failure to issue a cautionary instruction to the jury regarding the proper purpose of Emner's guilty plea evidence constituted plain error. The State cites to federal and out-of-state case law to argue that the Court's

²¹ *Saavedra v. State*, 225 A.3d 364, 372 (Del. 2006).

²² *Allen*, 878 A.2d at 450.

²³ *Id.*

²⁴ *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

failure to give an instruction was not plain error.²⁵ But this Court held in *Allen* that “a trial court *must* still give a proper cautionary instruction as to the limited use of the plea agreement and the accompanying testimony about it.”²⁶ The absence of this limiting instruction “is an important factor in determining whether the admission of the guilty plea was harmless error.”²⁷ The trial court's failure to give a limiting instruction regarding the proper purpose of Emner's guilty plea evidence left the jury to consider this testimony as substantive evidence of Mr. Morales-Garcia's guilt, rather than for the proper purpose of assessing Emner's credibility. This constituted plain error.

²⁵ Ans. Br. at 29.

²⁶ *Allen*, 878 A.2d at 451.

²⁷ *Id.*

CONCLUSION

For the foregoing reasons, and those stated in the Opening Brief, Appellant Yony Morales-Garcia respectfully requests that this Court reverse his convictions and remand for a new trial.

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