RECENT DEVELOPMENTS IN CRIMINAL LAW: 2014 DELAWARE SUPREME COURT DECISIONS

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In 2014, the Delaware Supreme Court issued a number of decisions that covered a wide variety of criminal law issues. This article briefly summarizes some of those evidentiary decisions and decisions in areas of significance. Readers are directed to the Court's opinions for the complete statement of the facts and legal analysis of the Court.

I. EVIDENCE DECISIONS

A. Proof Of Bad Acts By Third Party To Support Misidentification Defense-*Norwood V. State*

In *Norwood v. State*[1], Defendant Norwood was tried for a robbery at a Family Dollar store in Dover on September 4, 2012. At trial, Norwood claimed that he was not one of the three men who committed the crime, but instead that the perpetrator was someone who had been involved in prior robberies of the store.[2] The Court held that a defendant could offer "reverse 404(b) evidence" about another person to support his defense of misidentification.[3]

Within two weeks before Norwood's alleged crime, thieves robbed or attempted to rob the store twice. On August 18, at around 9:00 p.m., two men wearing masks over their faces, armed with a handgun and a large knife, obtained $1,451.11 from the register. On August 27, just before 9 p.m., a 5'3" tall, thin man wearing a handkerchief over his face, waving a handgun, tried to get into the store, but failed because the clerks had locked the door early, and refused to open it.[4]

Norwood's alleged crime occurred on September 4th, just before 7 p.m. This time, three men entered the store. One man wore a mask on his face and held a gun. A second man wore a green shirt and camouflage shorts. The third man wore a black ski mask. The robbers took money, cigarettes, and cigars from the store.

On hearing a dispatch about the robbery, an officer responded to a nearby path. He observed three or four men on the path, one of which had on a green shirt and camouflage shorts. That man ran, however, the officer was able to arrest Norwood. As Norwood was getting down on the ground, he threw away a black ski mask, which police recovered. They also found a black long sleeve t-shirt along the path. Police returned to the store with Norwood, and a store employee identified the ski mask Norwood had as the one used in the robbery.

During the trial, Norwood attempted to offer evidence that the third man involved in the September 4th robbery was Khalil Dixon. The other two suspects in the September robbery had implicated Dixon as being their accomplice in the earlier August 18, 2012 robbery of the same store. Dixon's physical build more closely matched the description of the third

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1. 95 A.3d 588 (Del. 2014).

2. *Id*. at 590-91.

3. *Id*. at 598-99.

4. *Id*. at 591.

man, whom store employees described as being between 5'4" and 5'8," while Norwood was closer to 5'11". Norwood was also wearing a white tank top when arrested, while the third man was wearing a dark short sleeve shirt during the robbery. Norwood argued that the evidence of Dixon's involvement in the August 18, 2012 and August 27, 2012 was relevant to prove that Dixon committed the robbery on September 4, 2012. The Superior Court sustained the State's objection to this evidence, and Norwood was convicted.[5]

On appeal, the Delaware Supreme Court found that the use of the reverse 404(b) evidence to prove identity is a proper purpose under the Rule.[6] The Court addressed how similar the prior crimes must be to the crimes in question, and noted a split among courts regarding whether a defendant offering reverse 404(b) evidence must meet the same strict test for admissibility under the Rule or a lower standard of similarity.[7] In considering this question of first impression, the Court adopted the position of the Second and Third Circuits which applied a reduced standard for admissibility, "because prejudice to the defendant is not a factor."[8] The Supreme Court stated that:

> in a situation involving so-called reverse 404(b) evidence, the trial judge should examine: (1) whether the evidence is being offered for a purpose permitted by Rule 404(b); (2) whether the evidence is relevant under Rule 402; and (3) any argument by a party that the probative value of the evidence is substantially outweighed by potential prejudice, undue delay, or confusion of the issue under Rule 403.[9]

The Court further held that unless there is a specific request, no limiting instruction is needed.[10]

Applying this test to the evidence proffered by Norwood, the Court ruled that the evidence of the other robbery and attempted robbery was probative to the defense of misidentification.[11] The robberies were unusually similar and the evidence was highly probative and material to the defense raised by Norwood. Under Rule 403, there was no risk of unfair prejudice to Norwood as he was the one seeking to introduce the evidence and there was no serious risk of delay or confusion to the jury. The Court concluded that the evidence should have been admitted at trial, reversed the conviction, and remanded for a new trial.[12]

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5. *Id*. at 591-92.

6. 95 A.3d at 595.

7. 95 A.3d at 596 (*comparing* United States v. Stevens, 935 F.2d 1380, 1404-05 (3d Cir. 1991) and United States v. Aboumoussallem, 726 F.2d 906, 911 (2d Cir. 1984) ("We believe the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword.") *with* United States v. Lucas, 357 F.3d 599 (6th Cir. 2004)); Agushi v. Duerr, 196 F.3d 754 (7th Cir. 1999).

8. 95 A.3d at 596-7 (quoting United States v. Stevens, 935 F.2d 1380, 1404-05 (3d Cir. 1991)).

9. *Id*. at 598.

10. *Id*.

11. *Id*. at 598-99 (citing Kiser v. State, 769 A.2d 736, 740 (Del. 2001).

12. *Id*. at 600.

B. Unrelated Bad Acts Evidence Of Victim Of Domestic Assault-*Banks V. State*

In *Banks v. State*,[13] the Delaware Supreme Court denied a defendant's attempt to introduce prior bad acts by the victim of a domestic assault, finding that alleged statements made by the victim to others did not show any bias or motive to testify falsely.[14]

The defendant Banks was involved in a romantic relationship with the victim Saunders for about a year.[15] Banks returned from a weekend trip out of state, and Saunders confronted him about alleged infidelities. During the conversation, Banks became agitated and pointed his finger in Saunders' face in a threatening manner. When Saunders told Banks to leave immediately, he then threatened her with a knife, and then punched her in the forehead multiple times. Saunders' son came into the room and screamed at Banks, who then pushed the boy and exited the house. Saunders suffered injuries to her lip, forehead, the back of her neck, and the loss of hair from the left side of her head.[16]

At trial, Banks claimed that he only pushed Saunders against a door or wall in self-defense.[17] Banks sought to introduce evidence that Saunders had several threatening conversations regarding Banks, both before and after the incident at issue.[18] First, the defense sought to introduce evidence that,, one month prior to the incident, Saunders had a conversation with Marjorie Westcott, during which Saunders purportedly said that she had access to Banks' Facebook password, email and photographs. Second, the defense moved to admit an alleged statement that Saunders made to Shalontay Fews one month prior to the incident, in which Saunders threatened her and told her to stay away from Banks. The trial court allowed Fews to testify to a conversation with Saunders but not to the content of any threats.[19] Finally, the defense also sought to introduce evidence of a conversation that occurred one or two months after the incident, during which Saunders allegedly told Westcott that Banks "was going to get what he deserved or whatever." The trial court excluded that statement.[20]

Banks was convicted at trial of Assault in the Third Degree, Carrying a Concealed Deadly Weapon, and two counts of Endangering the Welfare of a Child. Banks appealed.[21]

On appeal, the Supreme Court affirmed, ruling that the character evidence pertaining to the victim was properly excluded. The evidence that Saunders had threatened Fews and told her to stay away from Banks did not support the defendant's claim of proper bias evidence under DRE 608(b).[22] The Court reasoned that Saunders' anger toward the other

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13. 93 A.2d 643 (Del. 2014).

14. *Id*. at 649-51.

15. *Id*. at 645.

16. *Id*. at 646.

17. *Id*.

18. *Id*. at 647.

19. *Id*. at 647-48.

20. *Id*. at 647-48.

21. *Id*. at 644, 646.

22. *Id*. at 649 (citing Weber v. State, 457 A.2d 674 (Del. 1983)).

women on other occasions did not make it more likely that she caused the attack on Banks on the night in question. The evidence was being offered by the defendant for propensity purposes to attempt to prove that Saunders had made threats in the past, and acted in the same manner with regard to Banks. The Court found that the evidence was not admissible under Rule 608(b) to establish that the witness had a motive to testify falsely, as the evidence was not probative of Saunders' bias against Banks or her motive to testify falsely.[23]

The Court also rejected defendant's argument that the exclusion of the bad acts evidence violated his Sixth Amendment rights under *Holmes v. South Carolina*[24] for two reasons. First, Banks never raised this argument in the trial court, and the Court noted its general practice to decline to address constitutional arguments not raised at trial.[25] Second, the claim had no merit because the record demonstrated that Banks was permitted to present evidence in support of his self-defense claim at trial.[26]

C. Wiretap Evidence–*Ayers V. State*

In *Ayers v. State*,[27] the Court held that wiretap statements from police drug investigation were not testimonial under *Crawford v. Washington*,[28] and were properly admitted as co-conspirator statements.[29]

Defendants Ayers and Demby, along with several other defendants, were indicted on a number of drug charges resulting from a multi-agency investigation in Kent County that targeted Galen Brooks, using wiretaps to gather evidence.[30] On May 26, 2012, the police heard a conversation between Brooks and Demby which tipped them to a drug sale that would take place at McKee Crossing Shopping Center. The police followed Demby to the shopping center and watched an exchange with defendant Ayers, who drove off and later evaded police. Later calls from Demby to Brooks indicated that the deal had gone well and that Demby was to be rewarded both financially and with a cut of cocaine.[31] The defendants were convicted of various drug offenses.

On appeal, the defendants, challenged the State's use of the wiretap evidence under several theories. First, the defendants alleged that the wiretap evidence violated their Sixth Amendment confrontation rights. The Court found that the wiretap statements were not testimonial under *Crawford v. Washington*[32] or *Jones v. State*.[33] The admission of the

23. *Id*. at 649-50. The Court found the decision in *Weber* was not controlling where the trial judge in that case excluded evidence that prosecution witnesses had received money directly from the murder victim's family and the evidence bore directly on the credibility of the witnesses. *Id*. (citing *Weber*, 457 A.2d at 678-84).

24. 547 U.S. 319, 326 (2006).

25. 93 A.3d at 651 (citing Turner v. State, 5 A.3d 612, 615 (Del. 2010); Del. Supr. Ct. R. 8)).

26 97 A.3d 1037 (Del. 2014).

27. 97 A.3d 1037 (Del. 2014).

28. 541 U.S. 36 (2004).

29. 97 A.3d at 1040-41.

30. *Id*. at 1038.

31. *Id*. at 1038-39.

32. 541 U.S. 36 (2004).

33. 940 A.2d 1 (Del. 2007). In *Jones*, the Court held that:[A] statement is testimonial and implicates the Confrontation

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wiretap statements at trial did not violate the Sixth Amendment because "the declarants obviously did not expect their statements to be used against them, and because the statements were made in furtherance of a conspiracy."[34] The fact that a Special Agent interpreted some of the phrases on the wiretap did not make the statement testimonial. The agent's testimony was subject to attack during cross-examination and Ayers could have called his own witnesses to challenge the agent's interpretations.[35]

Second, the Court rejected the argument that DEL. CONST. ART. I, § 7 required that the defendants have the right to confront each witness "face to face." The Court had considered and rejected this same argument in *McGriff v. State*,[36] noting that a literal reading of "face to face" would virtually eliminate the State's ability to admit hearsay testimony at trial.[37]

The Court similarly rejected a challenge to the admission of the wiretap evidence under the co-conspirator exception in DRE 801(d)(2)(e). The State established the conspiracy through *voir dire* testimony regarding the content of the wiretaps, the police surveillance, and circumstantial evidence of the drug transactions. The trial court properly found the existence of a conspiracy based on this evidence by a preponderance of the evidence.[38]

D. Admission Of Public Records–*Ozdemir V. State*

In *Ozdemir v. State*,[39] the Court ruled that it was error to admit unredacted Family Court orders in a Superior Court case alleging felony interference with custody, where the orders contained hearsay and inflammatory statements that were not relevant to the elements of the charged offenses.[40]

Ozdemir started a relationship with Douglas Riley in 2005, and the couple had two children.[41] Ozdemir moved from New York to Delaware during their time together. In June, 2009, Ozdemir told Riley that she was going to New York for two weeks with the children. They never returned. In dual New York and Delaware Family Court proceedings, Delaware accepted jurisdiction over custody and awarded Ozdemir sole legal custody and primary residency of the children. Riley was awarded limited visitation rights, and the Family Court held Ozdemir in contempt for failing to bring the children to scheduled visits. A guardian *ad litem* was eventually appointed to represent the children, as Ozdemir refused

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Clause where it is given in non-emergency circumstances and the declarant would recognize that his statements could be used against him in subsequent formal proceedings. By contrast, a casual remark to an acquaintance is a nontestimonial statement. Similarly, … statements made in furtherance of a conspiracy are nontestimonial. *Id.*

34. 97 A.3d at 1040.

35. *Id*. The agent testified that the phrase "'Take three germs and put it on the scizzy'" referred to "three grams of cutting material that is added to the cocaine before sale, and that a 'scizzy' is a scale." *Id.*

36. 781 A.2d 534 (Del. 2001).

37. 97 A.3d at 1040-41 (quoting *McGriff*, 781 A.2d at 541-42).

38. *Id*. at 1040 (citing Harris v. State, 695 A.2d 34, 42 (Del. 1997); D.R.E. 801(d)(2)(e)).

39. 96 A.3d 672 (Del. 2014).

40. *Id*. at 675-76.

41. *Id.* at 673.

to cooperate with any Family Court orders. In February, 2013, Family Court issued a warrant for Ozdemir's arrest after she failed to appear with her two children. Federal Marshals took Ozdemir into custody and brought her to Delaware, where she was indicted on two counts of felony interference with custody.[42]

At trial, the State introduced five Family Court orders to establish that Riley was entitled to custody of the children, and that Ozdemir had intentionally interfered with his rights to custody.[43] The unredacted orders contained factual findings by the Family Court and the guardian *ad litem* and other statements that were very prejudicial to the defendant. Ozdemir was convicted on both counts.

On appeal, Ozdemir claimed the admission of the Family Court orders was prejudicial error.[44] The Court first noted that D.R.E. 803(8) does contain an exception for "records, reports, statements, or data compilation in any form" of a public agency recording "activities or matters observed pursuant to duty imposed by law."[45] The Court found that the orders included double hearsay that was not independently admissible. Examples included hearsay statements of the guardian *ad litem* in the orders. Although the orders were public records, the Court found that the trial court erred in either not excluding them completely or redacting the inadmissible evidence.

Ozdemir also argued, for the first time on appeal, that the orders should have been excluded because they contained irrelevant and inflammatory factual findings. The Court addressed this claim under a plain error standard.[46] The orders did contain prejudicial statements about Ozdemir's lack of cooperation with the Family Court and general disregard for the judicial system. The Supreme Court found these statements had no probative value and were inflammatory as they were made by a Family Court judge and would carry significant weight.[47] The Court held that this information in the orders should have been excluded under D.R.E. 403, and reversed Ozdemir's conviction.[48]

II. OTHER SIGNIFICANT DECISIONS

A. Defendant's Outburst In Presence Of Jury-*Copper V. State*

In *Copper v. State*,[49] the Court held that defendant's outburst during jury selection did not warrant new trial where the outburst was comprised of a single comment, and the trial court gave a timely curative instruction and conducted individual *voir dire*.[50]

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42. *Id*. at 674-75.

43. *Id.* at 674.

44. *Id.*

45. *Id*. at 675 (citing D.R.E. 803(8)). The trial court had relied on Trawick v. State, 845 A.2d 505 (Del. 2004), but the *Ozdemir* Court found that *Trawick* did not permit the admission of a public record outside the rules of evidence. 96 A.3d at 675.

46. *Id*. at 676 (citing Bullock v. State, 775 A.2d 1043, 1046-47 (Del. 2001)).

47. *Id.* at 677.

48. *Id*..

49. 85 A.3d 689 (Del. 2014).

50. *Id*. at 694-96.

The Wilmington police arrested Copper after observing him discard a gun and baggies of cocaine as he walked down the street.[51] Copper went to trial on a number of drug-related charges. During jury selection, his attorney twice stated that she was content with the jury. Copper disagreed with his lawyer and, in front of the jury, stated that he did not like the jury panel. After the alternates were picked and the sworn jury was leaving the courtroom, the trial judge asked Copper about his issue with the jury. Copper then said that "you can just give me the deal for three years, I'll sign it now." The trial judge later denied a defense motion for a mistrial, but did provide a curative instruction to the jury. On the second day of the trial, the trial court conducted individual *voir dire* with all of the jurors about the defendant's comments and two jurors were excused after stating that they could not fairly decide the case in light of the outburst. The jury found Copper guilty of several drug and weapon offenses.[52]

On appeal, Copper claimed that the trial judge violated his constitutional right to an impartial jury by denying the motion for a mistrial. The Supreme Court first noted that the trial court does not abuse its discretion in denying a mistrial due to a defendant's own outburst.[53] The Court applied the four factor test of *Taylor v. State*,[54] namely: "(1) 'the nature, persistency, and frequency of the witness's outburst'; (2) 'whether the witness's outburst created a likelihood that the jury would be misled or prejudiced'; (3) 'the closeness of the case'; and (4) 'the curative or mitigating action taken by the trial judge.'"[55] On the first factor, the Court noted that the defendant's outburst was not frequent nor persistent, and occurred only one time prior to the start of the trial.[56] Second, the Court found the defendant's comments to be "relatively benign" and did not highlight any particular juror.[57] The comment about the plea agreement was prejudicial but was cured by the acts of the trial judge. Third, the Court also found that the case was not close as the defendant was "'caught red-handed with crack cocaine and a fully-loaded gun.'"[58] Finally, the Court weighed the actions of the trial judge in issuing a timely curative instruction and conducting individual *voir dire* that eliminated any prejudice to the plaintiff.[59] After analyzing all of the *Taylor* factors, the Supreme Court found that the trial judge did not err in denying the mistrial motion and did not violate the defendant's right to a fair trial.[60]

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51. *Id.* at 690.

52. *Id.* at 690-92.

53. *Id.* at 693 (citing Alomari v. State, 1991 WL 22374 (Del. Feb. 14, 1991); Verdijo v. State, 1990 WL 109885 (Del. June 29, 1990)).

54. 690 A.2d 933 (Del. 1997).

55. 85 A.3d at 694 (quoting *Taylor,* 690 A.2d at 935).

56. *Id.* at 694.

57. *Id.*

58. *Id.*

59. 85 A.3d at 695-96 (citing Revel v. State, 956 A.2d 23, 27 (Del. 2008); Lynch v. State, 588 A.2d 1138, 1140 (Del. 1991); Hughes v. State, 490 A.2d 1034, 1041 (Del. 1985)).

60. *Id.* at 696.

B. Amendment To DUI Statute Requiring Sentencing As Felony For Third Offense Did Not Violate *Ex Post Facto Clause-Chambers V. State*

In *Chambers v. State*,[61] the Court ruled that defendant could be sentenced as a third offense felon under the current DUI statute, even if the conduct would not have qualified as felonious under the statute as it existed at the time the defendant committed his two prior offenses.[62]

Chambers had prior DUI convictions in 1989 and 2008. On April 26, 2013, Chambers was arrested again after his blood alcohol test result was more than twice the legal limit.[63] The State noticed Chambers for sentencing as a third offense DUI, subject to the felony provisions of 21 *Del. C.* § 4177(d)(3).

Chambers contended that any sentencing under § 4177(d)(3) was barred by the *ex post facto* clause of the United States Constitution. Chambers argued that this section did not go into effect until July 1, 2012, after the date of his two prior offenses. Before that date, enhanced DUI sentencing was governed by 21 *Del. C.* § 4177B(e)(2)(b) which required that the two prior DUIs be within five years of the third offense for the third offense to be sentenced as a felony.[64]

The Supreme Court found that the amendment to section 4177(d)(3) was not "an unconstitutional retrospective criminalization of Chambers' conduct."[65] Relying on United States Supreme Court precedent, the Delaware Supreme Court noted that "'[a]n enhanced sentence imposed on a persistent offender … 'is not to be viewed as [an] additional penalty for the earlier crimes' but as a 'stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.'"[66] The Court noted that its prior decisions in *Roberts v. State*[67] and *Felix v. State*[68] also rejected claims that amendments to enhanced sentencing provisions of the DUI laws violated the *ex post facto* provision.[69] In both *Roberts* and *Felix*, the defendants had committed their predicate DUI before the passage of the enhanced sentencing statute and both were punished with an enhanced sentence.[70] The Court noted that the analysis is consistent with other state precedent and found that the enhanced felony sentencing for Chambers did not violate the *ex post facto* clause.[71]

61. 93 A.3d 1233 (Del. 2014).

62. *Id*. at 1235-36.

63. *Id*. at 1234.

64. *Id*. at 1234-35.

65. *Id*. at 1235.

66. *Id*. at 1235 (quoting Monge v. California, 524 U.S. 721, 728 (1998)).

67. 494 A.2d 156, 157 (Del. 1985).

68. 905 A.2d 746 (Del. 2006).

69. 93 A.3d at 1236.

70. *Id*.

71. *Id*. at 1236 n.13 (citing State v. Lamb, 206 P.3d 497 (Idaho 2009); State v. Stoen, 596 N.W.2d 504 (Iowa 1999); City of Norton v. Hurt, 66 P.3d 870 (Kan. 2003); State v. Hall, 648 So.2d 1 (La. Ct. App. 2d Cir. 1994); State v. Chapman, 685 A.2d 423 (Me. 1996); State v. Hansen, 605 N.W.2d 461 (Neb. 2000); Com. v. McCoy, 895 A.2d 18, 34 (Pa. Super. Ct. 2006), *aff'd*, 975 A.2d 586 (Pa. 2009)).

C. Terroristic Threatening Charge Did Not Require Proof That Defendant Intended To Carry Out The Threat-*Lowther V. State*

In *Lowther v. State*,[72] the Court held that to prove the crime of terroristic threatening, the State only needed to prove that the defendant uttered the threatening words; the State did not have to prove that the defendant intended to carry out the threat.[73]

Defendant Erin Lowther assaulted both her brother and sister-in-law at their home. She was arrested and transported to the hospital for treatment of reported injuries. During the ride, Lowther told the police officer that if she saw her sister-in-law at the hospital she was going to "F*** kill her," and repeatedly told the police officer to "go f*** yourself."[74] The jury found Lowther guilty of multiple charges, including terroristic threatening. The Superior Court denied Lowther's motion for judgment of acquittal

On appeal, Lowther claimed there was insufficient evidence to support her conviction for Terroristic Threatening, raising three main arguments. The Court noted the three elements needed for a conviction of Terroristic Threatening under 11 *Del. C.* § 621: "(1) a threat, (2) to commit a crime, (3) likely to result in death or 'serious injury' to person or property."[75] Lowther first argued that she was handcuffed in the police car when she made the statements and it was impossible for her to have any contact with her sister-in-law or try to kill her. The Court rejected this argument, finding that the defendant does not need to have an intent to carry out the threat in order to be convicted of Terroristic Threatening. Section 621 "'punishes mere words, because the statute is meant to protect against the fear threats engender.'" As such, the proof needed is the "intent to utter the words and the intent to threaten the victim."[76] Lowther's argument was also contrary to the language of section 621, which makes an ability to carry out the threat immaterial.[77]

Second, Lowther claimed that her statement was not the type that could be penalized under section 621, relying on. Lowther relied on a Pennsylvania's terroristic threatening statute. The Court found that, unlike Delaware law, the Pennsylvania law specifically exempts "spur-of-the-moment threats."[78] The Court concluded there was sufficient evidence from which the jury could infer that Lowther had the subjective intent to threaten her relative.

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72. 104 A.3d 840 (Del. 2014).

73. *Id*. at 844-47.

74. *Id*. at 842.

75. *Id*. at 843 (citing Andrews v. State, 930 A.2d 846, 853 (Del. 2007)).

76. *Id*. at 844 (citing *Andrews*, 930 A.2d at 852-53)

77. *Id*. at 44 (citing DEL. CODE ANN. TIT. 11,§ 621 (A)(1)).

78. *Id*. at 845. The Pennsylvania statute provides: "A person commits the crime of terroristic threats if the person communicates, either directly or indirectly, a threat to: (1) commit any crime of violence with intent to terrorize another." PA. C.S.A. TIT. 18 § 2706(A)(1). The official comment to the statute provides:

> The purpose of [§ 2706] is to impose criminal liability on persons who make threats which seriously impair personal security or public convenience. It is not intended by this section to penalize mere spur-of-the-moment threats which result from anger.

Pa. C.S.A. tit. 18, § 2706.

Finally, Lowther argued that the conviction was invalid because there was insufficient evidence to show that she intended to threaten her sister-in-law, because her sister-in-law was not present at the time she made the threat, and there was no evidence that she knew her sister-in-law also was going to the hospital. The Court rejected this argument, finding sufficient intent from the evidence that Lowther likely knew the police officer would tell Lowther's sister-in-law about the threat; and because there was evidence that Lowther was aware that here sister-in-law was being transported to the hospital for treatment of her injuries.[79] The Court affirmed the Superior Court's decision denying Lowther's motion for judgment of acquittal.[80]

D Leaving The Scene Of Property Damage Accident On Private Property-*Zhurbin V. State*

In *Zhurbin v. State*,[81] the Court held that a driver could be convicted for leaving the scene of a property damage accident even when the accident took place on private property.[82]

The defendant Zhurbin was asked to leave Delaware Park Casino because of his disorderly conduct.[83] The casino security guard did not want Zhurbin to drive because Zhurbin appeared to be intoxicated. Another patron agreed to drive Zhurbin home in his own car. A short time later, however, in the casino's parking lot, another patron saw Zhurbin's car hit median guards and spin into a ditch. That patron followed Zhurbin's car to a local Denny's on Route 273. When police arrived, Zhurbin first denied that the car was his, then later said that his friend was driving. Zhurbin suffered injuries consistent with the accident. Zhurbin was convicted of leaving the scene of an accident and removal of a vehicle from the accident scene.[84]

On appeal, Zhurbin contended that he could not be convicted of leaving the scene of an accident under section 4201 of title 21, since the accident occurred on private property. Zhurbin had not raised this argument at trial and the Supreme Court considered the claim under a plain error standard of review.[85] Zhurbin argued that section 4201 was modified by section 4101(a) which limits the provisions of title 21 to "the operation of vehicles upon highways except … [w]here a different place is specifically referred to in a given section." The Court noted that the language of section 4201(a) establishes the duty of a driver in a collision to immediately stop the vehicle when the collision results in property damage or injury, and it is not limited to collisions on public roadways.[86] The Court found that section 4201, and the language of Chapter 42 generally, supports an interpretation of the statute that "the driver of any vehicle involved in an accident"

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79. *Id*. at 844.

80. *Id*. at 845.

81. 104 A.3d 108 (Del. 2014).

82. *Id*. at 113-14.

83. *Id*. at 109.

84. *Id*. at 109-10.

85. *Id*. at 113-14 (citing Turner v. State, 5 A.3d 612, 614 (Del. 2010)).

86. *Id*. at 110 (quoting 21 Del. Code Ann Tit 21 § 4201(a)).

means any vehicle and is not limited to public highways.[87] The Court noted that the previous version of section 4201 was amended in 1988 to eliminate language that required the accident "on the public highways" be immediately reported, and that the synopsis to the bill amending the statute stated that drivers of "all accidents" would be required to stop and report property damage accidents.[88] The Court concluded that the obvious intent of the amendment was to eliminate the requirement that the collision be on a public highway. The Court therefore found that Zhurbin was properly convicted of the leaving the scene charge.[89]

In addition, the Court addressed an error in the jury instructions which added an element to the crime of leaving the scene of an accident. The trial court instructed the jury that to convict the defendant of the charge, the State was required to prove that the defendant was driving on a public roadway. Because the trial court added an element that was not part of the offense, the Supreme Court found the error to be harmless and affirmed the conviction.[90]

In *McKinney v. State*,[91] the Court held that there was no probable cause to issue a search warrant where a tip from a confidential informant ("CI") was not sufficiently corroborated to prove that existence of criminal activity.[92]

A CI contacted the police and stated that he had just purchased marijuana from a specific apartment in the Fenwick Park Apartments from a white female with dark hair and blue eyes, wearing sweatpants and a tank top.[93] The CI paid $20 for a gram of marijuana, wrapped in foil. The CI also told the police that he had purchased marijuana at the same apartment on prior occasions from a black male. The assigned officer knew that defendant McKinney, a black male, lived at that address. A Delaware Criminal Justice Information System search confirmed that both McKinney and his girlfriend King lived at the apartment. The CI identified King from a photo lineup as the person who sold her the drugs. Based on this information, the police obtained a search warrant and seized money, a firearm, and drugs including marijuana. After the trial court denied a motion to suppress, the defendant was found guilty of Possession of a Firearm by a Person Prohibited and was sentenced as a habitual offender.[94]

On appeal, McKinney claimed that the warrant lacked probable cause. The Supreme Court relied on *LeGrande v. State*[95] in which it had ruled that:

> An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse.

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87. *Id*. at 111. The Court noted that § 4201 refers to the duty of a driver to report, as set forth in 21 *Del. C*. § 4203(a). Section 4203(a) addresses reporting provisions for collisions resulting in death or injury to person and provides: (1) When the collision results in injury or death to any person [i.e., when section 4202 applies]; (2) When the collision *occurs on a public highway* and results in property damage to an apparent extent of $500 or more; or (3) When it appears that any collision involving a driver whose physical ability is impaired as a result of the use of alcohol or drugs or any combination thereof. 21 Del. C. § 4203(a) (emphasis added).

88. 104 A.3d at 111. Section 4201 was amended in 1988 by 66 Del. Laws 238 § 1 (1988).

89. *Id*. at 113.

90. *Id*. at 114.

91. 107 A.3d 1045 (Del. 2014).

92. *Id*. at 1048-49.

93. *Id*. at 1046-47.

94. *Id*. at 1046-47.

95. 947 A.2d 1103 (Del. 2008).

> Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. *The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.*[96]

> Examining the totality of the circumstances, the Court noted that the police did corroborate the identity of the accused but did not corroborate the CI's knowledge of the criminal activity, i.e., that someone was selling drugs from that apartment.[97] The affidavit of probable cause also did not state whether the CI was past proven reliable or whether he had contacted police face-to-face.. The Court found no precedent where a tip from a CI without any independent corroboration was sufficient to establish probable cause, and reversed the conviction.[98]

E. Bill Of Particulars-*Luttrell V. State*

In *Luttrell v. State*,[99] the Court held that defendant on trial for several counts of alleged sexual contact and rape was entitled to a bill of particulars where neither the arrest warrant nor the indictment provided sufficient notice of the charged offenses for which he was on trial.[100]

A ten year old reported to his grandmother that Luttrell, a friend of his grandmother, had touched him inappropriately over the weekend of July 14, 2012.[101] That weekend the grandmother had allowed Luttrell to sleep on the sofa in her home, while the grandmother and her husband and dog slept in the bedroom with the door open. During his interviewed at the Child Advocacy Center, the boy stated that he slept on the couch one night when Luttrell came home drunk and unsuccessfully had sexual contact with him, and then forced him to perform oral sex. The boy stated that similar acts occurred on the following night when Luttrell climbed through an open window. On that night, Luttrell reportedly removed the boy's pants and anally penetrated him. When arrested, Luttrell denied any sexual misconduct with the boy, but did have trouble remembering where he was on particular days. Luttrell was indicted on three counts of Unlawful Sexual Contact and two counts of Indecent Exposure. The Unlawful Sexual Contact charges tracked the language of the statute, section 761(f) of Title 11. The Indecent Exposure counts contained the same language with different dates for the offenses.

The trial judge declined a defense request for a bill of particulars, finding that the probable cause affidavit provided sufficient notice of the charges. There were differences between the complainant's CAC interview which listed the dates of the assault as the weekend of July 14, 2012, and the indictment which listed the dates of offenses as July 20 and 21st. The jury acquitted Lutrrell on two charges of Rape First Degree, but he was convicted on the remaining charges of Attempted Rape First Degree, Unlawful Sexual Contact (3 counts), Attempted Unlawful Sexual Contact, and Indecent Exposure

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96. *McKinney*, 107 A.3d at 1048 (quoting *LeGrande*, 947 A.2d at 1111 (quotation omitted)).

97. 107 A.3d at 1049.

98. 107 A.3d at 1047 n.18 (citing Brown v. State, 897 A.2d 748, 751 (Del. 2006); Bailey v. State, 440 A.2d 997, 1000 (Del. 1982)).

99. 97 A.3d 70 (Del. 2014).

100. *Id*. at 77-78.

101. *Id*. at 72.

(2 counts). The trial court again denied a post-trial motion challenging the indictment, finding that the arrest warrant, probable cause affidavit, police reports, and discovery had placed Luttrell on notice of the charges.[102]

On appeal, the Supreme Court ruled that the Superior Court should have granted Luttrell's request for a bill of particulars. The Court cited to *Dobson v. State*[103] a similar case where a defendant received ineffective assistance counsel when his trial attorney failed to request a bill of particulars. In *Dobson*, the Court ruled that a bill of particulars would have clarified which specific acts alleged by the juvenile complainant corresponded with the specific counts in the indictment.[104] The Court stated that the bill of particulars "is intended to supplement the information set forth in the indictment, and in so doing, it both 'protect[s] the defendant against surprise during the trial, and [precludes] subsequent prosecution for an inadequately described offense.'"[105]

The Court found that the affidavit of probable cause only contained a summary of the allegations and it did not match up with the counts charged in the indictment[106] In addition, the complaining witness alleged more acts in his interview than were in the indictment, which led to uncharged evidence being admitted in the State's case, contrary to *Getz v. State*.[107] The Court ruled that the defendant and the jury were both entitled to know what the specific charges were at the trial. The Court also stated that the trial judge should have *sua sponte* given a jury unanimity instruction under the facts of this case.[108]

III. APPENDIX

DELAWARE SUPREME COURT 2014 CRIMINAL LAW OPINIONS

Ashley v. State, 85 A.3d 81, 85 (Del. 2014) (trial court did not err in denying severance of bribery charge from rape charge where the charges were based on the same acts or transaction).

Ayres v. State, 97 A.3d 1037, 1040 (Del. 2014) (defendants' statements on wiretap recordings were not testimonial under the Sixth Amendment).

Banks v. State, 93 A.3d 643, 647-51 (Del. 2014) (evidence that victim of domestic assault may have threatened others who were romantically involved with the defendant was inadmissible under D.R.E. 404(b)).

Benge v. State, 101 A.3d 973, 977 (Del. 2014) (Superior Court did not act unreasonably in denying defendant's requests for reduction in his probation level).

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102. *Id*. at 71-75.

103. 2013 WL 5918409 (Del. Oct. 31, 2013).

104. *Id*. at *2-3.

105. 97 A.3d at 76 (quoting Lovett v. State, 516 A.2d 455, 467 (Del. 1986)).

106. *Id*. at 77-78.

107. 538 A.2d 726 (Del. 1988).

108. *Id*. at 78 n.17 (citing Probst v. State, 547 A.2d 114, 120-22 (Del. 1988)). The Court also ruled that statements made by the detective interviewing Luttrell were improper references to the credibility of the complaining witness and should not have been played for the jury. *Id*. at 78-79.

Benson v. State, 105 A.3d 979, 984 (Del. 2014) (prosecutor's reference in closing argument to the size of defendant's gun was related to issue of intent and related to a fact in evidence).

Butler v. State, 95 A.3d 21, 38-40 (Del. 2014) (actions of trial court caused mistrial after jury was sworn and subsequent convictions were barred by double jeopardy).

Chambers v. State, 93 A.3d 1233, 1234-36 (Del. 2014) (*ex post facto* clause of United States Constitution did not bar defendant's prosecution for felony third offense DUI even though his two prior offense occurred under former statute that required the third offense be committed within five years of the first two DUIs).

Cooke v. State, 97 A.3d 513, 527, 530, 536, 541-42, 544-45, 546, 548-56, 556 (Del. 2014) (State of Delaware did not violate defendant's right to have access to counsel or his files for pretrial preparation; trial counsel did not abuse discretion in denying defendant's request for continuance; defendant forfeited his right to represent himself because of his inappropriate behavior at trial; defendant did not unequivocally waive his right to present mitigating evidence and the trial court's order that standby counsel present the mitigation case was harmless; trial court properly excluded evidence of victim's prior sexual conduct; lay witness was allowed to testify at trial to identify defendant's voice on 911 calls; trial court's ruling during jury selection and trial did not violate defendant's right to an impartial jury; imposition of death penalty was not disproportionate).

Cooper v. State, 85 A.3d 689, 693-96 (Del. 2014) (defendant's own outburst in front of the jury, including comment about taking a plea, did not warrant a mistrial where trial judge gave a curative instruction and conducted additional *voir dire*).

Fuller v. State, 104 A.3d 817, 818 (Del. 2014) ("subsequent adult conviction" for purposes of the Family Court expungement statute is a later conviction under Del. Code titles 4, 7, 11, 16, or 23, but excludes title 21).

Hoskins v. State, 102 A.3d 724, 732-33 (Del. 2014) (trial counsel's failure to request an accomplice instruction was not ineffective assistance at the time of the trial in 2009).

Lowther v. State, 104 A.3d 840, 843-44 (Del. 2014) (crime of terroristic threatening requires proof of intent to utter the words and threaten the victim, but does not require actual intent to carry out the threat).

Lum v. State, 101 A.3d 970, 971-72 (Del. 2014) (State presented sufficient evidence to support charge that defendant constructively possessed ammunition and brass knuckles recovered in his vehicle).

Luttrell v. State, 97 A.3d 70, 77 (Del. 2014) (defendant was entitled to a bill of particulars in case where the factual allegations in affidavit of probable cause did not align with the counts in the indictment, and the jury instructions did not explain what facts corresponded with each charged crime).

McKinny v. State, 107 A.3d 1045, 1048-49 (Del. 2014) (search warrant affidavit lacked probable cause where police failed to corroborate an informant's claim that drugs were sold from the defendant's apartment or that the informant was past proven reliable).

Norwood v. State, 95 A.3d 588, 595-99 (Del. 2014) (defendant should have been permitted to admit bad acts evidence that a third party committed other crimes to support his defense of misidentification).

Ozdemir v. State, 96 A.3d 672, 676-77 (Del. 2014) (Family Court records, admitted to prove charge of interference with custody, contained irrelevant and inflammatory factual findings that were hearsay and inadmissible under D.R.E. 403).

Parker v. State, 85 A.3d 682, 687-88 (Del. 2014) (social media evidence was properly admitted at trial under D.R.E. 901(b) for the jury to make the ultimate ruling on its authenticity).

Purnell v. State, 106 A.3d 337, 347-48 (Del. 2014) (trial counsel's failure to request a *Bland* instruction was deficient, but was not prejudicial where other evidence presented at trial included three witnesses who saw to defendant commit the shooting).

Williams v. State, 98 A.3d 917, 922-23 (Del. 2014) (statements by dispatcher describing suspect wanted in relation to another burglary were harmless in light of physical evidence linking defendant to the charged burglary).

Wright v. State, 91 A.3d 972, 989-94 (Del. 2014) (cumulative *Brady* evidence not disclosed at trial was material and caused violation of defendant's fair trial right).

Wynn v. State, 93 A.3d 638, 641-42 (Del. 2014) (prosecutor's statements in closing based on legitimate inferences from the evidence did not constitute misconduct).

Zhurbin v. State, 104 A.3d 108, 111-14 (Del. 2014) (defendant could be convicted for leaving the scene of an accident on private property under 21 *Del. C.* § 4201(a)).