IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM A. BRISCOE a/k/a WILLIAM A. BROWN,	§	
	§	No. 26, 2006
Defendant Below, Appellant,	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
STATE OF DELAWARE,	§	Cr. I.D. No. 0308005901
Plaintiff Below, Appellee.	§	

Submitted: July 12, 2006
Decided: July 28, 2006

Before **HOLLAND, BERGER** and **JACOBS**, Justices.

O R D E R

This 28th day of July 2006, upon consideration of the briefs of the parties and the record in this case, it appears to the Court that:

1. William A. Briscoe appeals from his convictions of Arson in the Second Degree, Possession of an Incendiary Device, and Conspiracy Second Degree. Briscoe claims that the Superior Court reversibly erred by: (1) refusing to *voir dire* the entire jury panel after two jurors reported that certain jurors were uncomfortable because Briscoe was not incarcerated during the trial; and (2) overruling Briscoe's objection to allegedly improper comments, made during the

State's closing argument, that were designed to evoke sympathy from the jury.[1] Because the Superior Court did not abuse its discretion in either respect, we affirm.

2. On August 5, 2003, Terrell Mable bumped into defendant Briscoe in the Southbridge area of Wilmington. A fistfight ensued. Mable and his friend, Kahiem Redden, beat up Briscoe, who threatened retaliation as he left the scene.

3. Shortly after 11:00 p.m. that evening, Mable and Redden, while at Redden's home, noticed a maroon Ford Taurus with three persons inside, driving slowly by the house. Redden recognized Briscoe in the back seat. Also mingling outside Redden's house at that time were Mabel, Redden's brothers, Stephon Mason and Mackenzie Laws, and Redden's cousin Ahmon Noel. Concerned because Briscoe was not usually seen in his neighborhood, Redden warned everyone that Briscoe had passed by the house. Mable quickly moved his car away from the house to make it appear that Mable and Redden had departed.

4. The maroon car passed by the house several times. Anticipating trouble, Redden, Mable and Mason armed themselves with guns. When the Taurus returned, Redden heard gunfire coming from the vehicle and fired back. Mable chased the maroon car, shooting at it until the Taurus drew near to Mable's own

[1] In his Opening Brief, Briscoe presented a third claim of error; namely, that the trial court erred by failing to instruct the jury on the lesser included offense of Reckless Burning. Briscoe concedes in his Reply Brief, however, that that claim is moot given the jury's ultimate finding of guilt of Arson Second Degree. Thus, we need not, and do not, address Briscoe's third claim of error in our decision.

car. At that point, someone jumped out of the front seat of the Taurus, threw a Molotov cocktail into Mable's car, got back into the Taurus, and then drove away. Mable's car erupted in flames in the front and back seats and two windows were broken. Fortunately, Mable was able to throw out the gas containers and stop the fire. He then drove his car away and disposed of his weapon.

5. After the gunfight was over, Redden learned that his fourteen year-old cousin, Ahmon Noel, had been shot. Noel later died from a gunshot to the chest. The police were called. Mable and Redden surrendered to the police and gave voluntary statements about the shooting, and they later pled guilty to a charge of manslaughter in exchange for agreeing to testify at Briscoe's trial.

6. Briscoe was indicted and tried in the Superior Court on charges of Murder Second Degree, Possession of a Firearm During the Commission of a Felony (PFDCF), Arson Second Degree, Possession of an Incendiary Device, and Conspiracy Second Degree. On the third day of trial, Juror Number 8 told the bailiff that one of the courtroom spectators had approached her in the court elevator and asked, "Don't I know you?" In response the juror denied that she knew the woman, but later realized that she might know her and another female spectator at the trial. The trial judge examined the juror outside the presence of the other jury members and the courtroom spectators. During that examination, the juror expressed concern about participating in the trial, stating:

> I would be fair. I mean, fair is fair, but it's just I've never been on a trial, I've never been in a courtroom, and this is really serious.
>
> The other jurors, because we all were getting on the elevator, and the defendant was out there, and everybody's face is like (indicating) because I guess – well, I thought myself that he would come from prison, and then be escorted or something. I don't know what I expected. I just didn't expect to just be in the same community with him, you know. That's probably how it goes. I've never done it before. That's why.

7. Briscoe's counsel requested *voir dire* of the entire jury panel to determine whether the jurors had a specific fear of the defendant, or merely a generalized fear of the serious nature of that particular criminal trial. The trial judge, based on his questioning of Juror Number 8, declined to *voir dire* the entire panel. The reason is that the judge was convinced that the juror had only a generalized apprehension about the proceedings, rather than a specific fear of the defendant that could prejudice his right to a fair trial.

8. That same day, Juror Number 2 informed the bailiff that a spectator at the trial came up to her and said, "We're not supposed to talk to you." That juror also indicated that "others" (whom the bailiff understood to mean other jurors), were uncomfortable because they kept encountering the defendant and courtroom spectators in the courthouse cafeteria and the elevator. As Juror Number 2 said, "We keep running into these people everywhere we go, and it is a bit unsettling, because … this isn't a traffic stop, so it isn't our everyday thing. This is a little different for some of us in there." After examining Juror Number 2, the trial judge

denied defense counsel's second request to *voir dire* the entire panel, because the judge concluded that Juror Number 2's concerns were much the same as those of Juror Number 8—the awkwardness of encountering courtroom spectators and the unincarcerated defendant in and around the courthouse during a serious criminal trial.

9. The trial judge instructed the bailiff to advise the jury that: (1) the bailiff would escort the jurors out before court was adjourned and before the spectators had left; (2) the judge would tell the spectators to have no contact whatsoever with the jurors, and to take a different elevator if they saw a juror on an elevator; (3) the jurors should have lunch outside the courthouse if possible, but if they chose to eat in the courtroom cafeteria, to do so quickly and avoid contact with others; and (4) that this was standard procedure for major criminal trials. The trial court also admonished the courtroom spectators to avoid any contact with the jurors.

10. At the close of trial, the jury was unable to reach a unanimous verdict on the Murder charge, and on that charge the trial judge declared a mistrial. The jury did, however, find Briscoe not guilty of PFDCF, guilty of Arson Second Degree, and guilty of Possession of an Incendiary Device and Conspiracy Second Degree. The State decided not to retry the Murder charge and a *nolle prosequi* was entered. On the Arson and related offenses, Briscoe was sentenced to eight years

in jail, suspended after three years for six months at Level 4, followed by two years at Level 3 probation. Briscoe appeals from those judgments of conviction.

11. Briscoe first contends that the trial court erred by refusing to *voir dire* the entire jury panel after two jurors had expressed fear and discomfort about encountering Briscoe and courtroom spectators in and about the courthouse. Briscoe claims that he was denied a fair trial because based on the jurors' *voir dire* comments, it was possible that individual jurors were biased against him. This Court reviews a trial judge's *voir dire* examination for abuse of discretion.[2]

12. A defendant's right to a trial by a jury of his peers is fundamental to our criminal justice system.[3] "An essential ingredient of that right is that the jury consist of impartial or indifferent jurors."[4] The issue confronting us is whether the statements made by Jurors Number 2 and 8 raise a presumption that the jury was biased against the defendant, thereby requiring the trial judge to *voir dire* the entire jury, or risk depriving him of a fair trial.

13. In our view, there is no evidence supporting Briscoe's claim that the trial judge deprived him of a fair trial by denying his request to *voir dire* the entire jury panel. First, the trial judge properly conducted *voir dire* of the two

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[2] *Hughes v. State*, 490 A.2d 1034, 1041 (Del. 1985).

[3] *Id.* at 1040 (citing *Irvin v. Dowd*, 366 U.S. 717, 721 (1961)); *see also Flonnery v. State*, 778 A.2d 1044, 1052 (Del. 2001).

[4] *Hughes*, 490 A.2d at 1040 (citing *Turner v. Louisiana*, 379 U.S. 466 (1965)). *See also Flonnery*, 778 A.2d at 1052.

complaining jurors—the only jurors who came forward and expressed any concern—and even then, concern only about having contact with courtroom spectators and the defendant. Having reviewed the testimony of the two jurors in their *voir dire* examinations, we find nothing to suggest that the jurors (individually or collectively) were biased against, or in fear of, the defendant himself, or that they were otherwise unable to serve as fair and impartial jurors. Second, the trial judge instructed the courtroom spectators and the jury in a manner designed to address any potential concerns about participating in a large criminal trial. Third, both the jury's inability to reach a verdict on the Murder charge, and its verdict acquitting the defendant of the weapons charge, evidences that the jury was not biased against Briscoe. Therefore, we find no abuse of discretion by the trial judge in declining to *voir dire* the entire jury panel.

14. Briscoe next claims that the trial court erred by overruling his objection to statements during the State's closing argument that attempted to evoke sympathy from the jury. We review *de novo* the decision of a trial judge overruling a defense objection to remarks made during closing argument.[5]

15. During the State's closing argument, the prosecutor stated:

> But the most important thing in this case is what you have heard least about, and that is Ahmon Noel, a 14-year old boy growing up in a tough environment. According to the Medical Examiner, from the

[5] *Chapman v. State*, 821 A.2d 867, 870 (Del. 2003).

> autopsy results, he had smoked marijuana sometime before he died, but a 14-year old boy who will never have the chance….

Counsel for Briscoe interrupted by objecting to the prosecution's attempt to evoke sympathy on behalf of the victim. The prosecutor responded that he was simply trying to deal with the marijuana testimony. After concluding that the State only intended to say the obvious—that the victim would never have a chance to leave the environment in which he grew up—the trial judge allowed the prosecutor to proceed and to add the following ending: "a 14-year old boy who will never get the chance to decide whether he wants to leave the environment in which he grew up and escape the hood."

16. Briscoe claims that that remark was irrelevant to the jury's legitimate considerations, and also was prejudicial because it was aimed impermissibly to evoke sympathy for the victim. It is improper for a jury to allow sympathy for the victim to influence its decision regarding a defendant's guilt or innocence. It is also improper for the prosecution to appeal to sympathy in its closing argument.[6] Here, the prosecutor appealed to the jury's sympathy for the 14-year old victim, who would never have the chance to grow up and escape his troubled

[6] *DeShields v. State*, 534 A.2d 630, 642 (Del. 1987) ("Appeals to sympathy and jurors' emotions are impermissible because they go beyond the facts of the case and the reasonable inferences from the facts.").

neighborhood. For that reason, the prosecutor's remark, in our view, was improper.

17. In *Hughes v. State*,[7] this Court articulated a three pronged-test to determine whether an improper prosecutorial remark required the reversal of a conviction on the basis that the remark prejudicially affected the substantial rights of the accused. That test requires this Court to determine: (1) the centrality of the issue affected by the alleged error; (2) the closeness of the case; and (3) the steps taken to mitigate the affects of the alleged error.[8] Briscoe contends that the Arson charge was such a close case, because there was conflicting testimony about who threw the Molotov cocktail into Mable's car, and that but for the prosecutor's appeal to sympathy, Briscoe "could well have been acquitted of this offense."[9]

18. A review of the evidence demonstrates that although the prosecutor's remark was objectionable because it appealed to sympathy, there was overwhelming evidence sufficient to convict Briscoe as a principal or accomplice to the arson. Thus, that error was harmless. The police found an incendiary device near where Mable's car had been parked. A search of Mable's car revealed burn

[7] 437 A.2d 559, 571 (Del. 1981).

[8] *Id. See also Hunter v. State*, 815 A.2d 730, 733 (Del. 2002) (expanding the *Hughes* analysis to include a fourth prong that questions whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process). We find that the error here does not warrant reversal under *Hunter*.

[9] Appellant's Opening Br. at 13.

patterns and tested positive for gasoline. A burn mark was found on Briscoe's shirt, and police detected gasoline accelerant on a pair of his shorts. Most importantly, witnesses saw Briscoe in the maroon Ford Taurus, which remained stopped while a passenger from the front seat got out of the Taurus and threw the Molotov cocktail into Mable's car. At a minimum, that evidence supported the State having proceeded against Briscoe as an accomplice.

19. The overwhelming evidence, combined with the mitigating effect of the trial court's issuance of a standard "sympathy" instruction to the jury, and the original *voir dire* of potential jurors to rule out those who might be unable to evaluate the case fairly and impartially because of the victim's age, resulted in the prosecutor's remark not being sufficiently prejudicial to warrant reversal. Therefore, this Court finds no reversible error by the trial court in overruling Briscoe's objection to the prosecutor's closing remarks to the jury.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are **AFFIRMED.**

BY THE COURT:

/s/ Jack B. Jacobs
Justice