IN THE SUPREME COURT OF THE STATE OF DELAWARE

TYRONE MILES,	§	
	§	No. 257, 2009
Defendant Below,	§	
Appellant,	§	
	§	Court Below: Superior Court
v.	§	of the State of Delaware,
	§	in and for Kent County
STATE OF DELAWARE,	§	
	§	Cr. No. 0709015392
Plaintiff Below,	§	
Appellee.	§	

Submitted: September 9, 2009
Decided: November 23, 2009

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

O R D E R

This 23rd day of November 2009, on consideration of the briefs and arguments of the parties, it appears to the court that:

1) Tyrone Miles appeals from his convictions, following a jury trial, of attempted first degree murder and possession of a deadly weapon by a person prohibited. He argues that the trial court erred by: 1) denying his motion to suppress his statement to the police; 2) failing to redact a police officer's comments in a tape recorded interview; and 3) admitting a witness's out-of-court statement.

2) On September 11, 2007, Asmi Patel was shot in the abdomen while working as a cashier at the Duncan Depot, a convenience store in Dover, Delaware. The store's security cameras videotaped the shooting. Patel survived, and testified at trial that Miles walked into the store and asked for a pack of cigarettes. He told Patel that he would pay for the cigarettes when his ride arrived. After a few minutes, Miles removed a gun from his waistband, pointed it at Patel, and pulled the trigger. But the gun misfired, and Miles walked away from the counter. He then returned to the counter and shot again. This time the gun fired, and Patel was struck in the stomach.

3) After the shooting, the police released a still photograph of the shooter, taken from the store videotape. The photograph showed a man in a black T-shirt, jeans and a "do rag". The police also took a palm print from a door handle that Miles had touched shortly before the shooting. The photo appeared in the newspaper on September 12th, and someone tipped the police that the shooter was Miles. Based on that tip, the police requested that the State Bureau of Identification compare the palm print from the crime scene with Miles' prints. The Bureau confirmed that the prints were a match.

4) The police then tried to apprehend Miles where he worked, at Harris Manufacturing in Smyrna. Miles was not at work, but the police got a description of Miles' car and later spotted him in Clayton. A Clayton police officer stopped Miles

and brought him to Dover for questioning. Detective Richardson informed Miles of his *Miranda*[1] rights before beginning the interrogation, and Miles waived his rights. The interrogation lasted about 1 ½ hours, during which time Miles denied being in the store on the day of the shooting. Miles claimed that he had been in the store the day before the shooting. He also claimed that he had worked on the day of the shooting, and that Linda Robbins, his supervisor, had been at her nearby desk when he clocked in. Miles told Richardson that on the day of the shooting he was wearing a white T-shirt, jeans, and a baseball hat. He said that he rarely wears a "do rag" on his head.

5) At the end of the interrogation, Miles was placed in an individual cell while the police executed several search warrants. About 5 hours later, Richardson returned to Miles' cell and took him to be booked. During that process, Miles asked Richardson about the strength of the State's case against him. Richardson said he believed it was a very strong case. Miles then said, "She was in on it." Richardson responded by suggesting that, if Miles wanted to talk, they could go back upstairs. They did, and during the second interrogation, Miles admitted shooting Patel. He explained that she wanted him to shoot her, because she wanted to commit suicide. He also said that she offered him $10,000 and provided the gun. Finally, Miles said that Patel put $500 on the counter as payment after he shot her.

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

6) Richardson followed up by questioning Robbins about Miles' claim to have been at work on the day of the shooting. Robbins confirmed that Miles came to work, but said that he was wearing the same clothes and "do rag" seen on the still photograph from the crime scene videotape. At trial, Robbins testified that she did not remember seeing Miles at work that day. She recalled speaking to Richardson, however, and testified that she answered his questions truthfully.

7) Miles first argues that he should have been given his *Miranda* warnings again before he gave his second statement to Richardson. In *Ledda v. State*,[2] this Court identified several factors that bear on whether *Miranda* warnings must be readministered: ". . . the time lapse since prior warnings, change of location, interruptions in interrogation, whether the same officer who gave the warning also interrogated, and significant differences of statements."[3] The time lapse here, although greater than in *Ledda*, was less than the 7 hour delay cited with approval in that case. There was no change of location, and the second interrogation was conducted by the same officer who gave the warnings initially. The only factor weighing in Miles' favor is that his second statement was significantly different from his first.

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[2]564 A.2d 1125 (Del. 1989).

[3]*Id.* at 1130.

8) The trial court reviewed the *Ledda* factors and concluded that there was no need to readminister *Miranda* warnings. The trial court noted that Miles had been left alone during the 5 hours before the second statement; that Miles initiated the second interview; and that it was "almost all a statement by the defendant with little more than pause fillers by the investigating officer."[4] We find that the trial court acted well within its discretion in analyzing the totality of circumstances and reaching its conclusion.

9) Miles next argues that, before the second videotaped statement was played for the jury, all of Richardson's comments should have been redacted. Alternatively, if all comments were not redacted, then at least the prejudicial comments reflecting Richardson's assessment of Miles' credibility should have been removed from the tape. Specifically, Miles argues that Richardson's comment, "Looks real bad for you," is inadmissible opinion evidence about the strength of the State's case. The second comment – "You thought your were doing her a favor?" – was Richardson's mocking response to Miles' statement that he shot Patel because she wanted to commit suicide. That, too, was inadmissible because it was a comment on Miles' credibility.

10) This Court recognizes that professional interviewers may make comments, suggestions, even false statements, as a means of eliciting a response from the witness.

[4]Appellee's Appendix, B-7.

But it is settled law that "experts may not usurp the jury's function by opining on a witness's credibility."[5] Thus, any comments, questions, or responses by the interviewer that convey the interviewer's belief or disbelief must be redacted.[6] The prosecutor in this case tried to convince the trial court that a defendant's statement has "historically . . . [been] permitted to be shown . . . to a jury in its entirety."[7] As the prosecutor participated in the *Hassan-El* case, where this Court discussed at length the need to redact a police officer's credibility opinions, we question the good faith of the prosecutor's argument. In any event, the prosecutor convinced the trial court that a curative instruction would suffice in place of the two redactions.[8]

11) The trial court's failure to redact the two comments described above was an abuse of discretion. We recognize that many questions are direct, non-prejudicial, and need to be included for continuity and ease of understanding. Questions in that category do not need to be redacted. But the State's alleged difficulty in making redactions is not a factor to be considered. If the interviewer conveys a view (through comment or gesture) about the strength of the State's or the defendant's case, the

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[5]*Waterman v. State*, 956 A.2d 1261, 1264 (Del. 2008).

[6]*Ibid. See, also, Miller v. State*, 893 A.2d 937, 951 (Del. 2006); *Hassan-El v. State,* 911 A.2d 385, 398 (Del. 2006); *Holtzman v. State*, 1998 WL 666722 at *5 (Del. 1998).

[7]Appellee's Appendix, B-7.

[8]The trial court did insist that other portions of the transcript be redacted.

credibility of the witness/defendant, or any disputed facts, then that comment must be redacted at the request of the defendant. It is hoped that the process of redacting the tape will not interfere with the trial, since it is a matter that can and should be resolved before the trial begins.

12) Here, as in several prior "redaction" cases, we are satisfied that the failure to redact was harmless beyond a reasonable doubt. There was a videotape of the shooting and the victim survived, identified Miles, and recounted her ordeal in court. Given these facts, Richardson's two comments during Miles' second interview would not have had any material impact on the verdict.[9]

13) Finally, Miles argues that Robbins' statement to Richardson should not have been admitted under 11 *Del. C.* § 3507 because Robbins could not remember what she said during the interview. Robbins did recall talking to Richardson on September 13, 2007 about Miles and a photograph in the newspaper. Robbins testified that she answered Richardson's questions truthfully and voluntarily, but she could not recall the questions or her answers.

14) Before an out-of-court statement may be admitted under 11 *Del. C.* § 3507, the declarant must "touch on the events perceived and the out-of-court statement

[9] *Mason v. State*, 963 A.2d at 127.

itself."[10] Robbins did both – she testified that she gave a statement to Richardson about a newspaper photograph involving Miles.

15) Miles also argues, for the first time on appeal, that Richardson's description of Robbins' statement was inadmissible because it was his "interpretive narrative," not Robbins' actual statement. Assuming, without deciding, that Miles is correct, we find no plain error. Robbins' statement was cumulative. She knew nothing about the crime and only confirmed that Miles was wearing the clothing that was clearly shown on the security camera videotape. Thus, Richardson's description of Robbins' statement did not deprive Miles of a fair trial.[11]

[10] *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975).

[11] *Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986).

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court be, and the same hereby are, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice