

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BEVERLY A. BAKER, )  
 ) No. 132, 2009  
 Defendant Below, )  
 Appellant, ) Court Below: Superior Court  
 v. ) of the State of Delaware in  
 ) and for New Castle County  
 )  
 STATE OF DELAWARE, ) PN07-08-0134, IN07-08-0135  
 )  
 Plaintiff Below, )  
 Appellee. )

Submitted: November 18, 2009

Decided: December 9, 2009

Before **STEELE**, Chief Justice, **HOLLAND** and **RIDGELY**, Justices.

***ORDER***

This 9<sup>th</sup> day of December, it appears to the Court that:

(1) Beverly Baker appeals from her convictions for Manslaughter and Possession of a Firearm During the Commission of a Felony. Baker asserts that the trial judge erred by denying her motion for a new trial after the State had prejudiced her by preventing her from responding to arguments the State raised for the first time in its rebuttal summation. We find no merit to Bakers's argument and **AFFIRM**.

(2) Baker and Carl Block engaged in a romantic relationship for several years. In June 2007, Block quietly commenced another romantic affair that Baker

discovered by calling recently dialed numbers on his phone. After a woman answered her investigative call, Baker hid Block's phone and returned her key to his apartment. Block changed the locks.

(3) Late at night, during the following month, Baker and Block met in the Town & Country Shopping Center parking lot. Gun shots rang out and several witnesses saw a person lying on the ground. As she stood over Block, Baker told another witness that he "just slipped." Unsettled by Block's predicament, this witness later asked a restaurant employee to call 911. When police officers arrived at the parking lot, Block lay on the ground with a gunshot to his chest and blood visible on his back. Baker had left, and the police could not find the gun.

(4) The State charged Baker with First Degree Intentional Murder and Possession of a Firearm During the Commission of a Felony. Baker claimed that depression over financial issues drove Block to commit suicide.

(5) At the end of trial, the parties presented their closing arguments. A prosecutor presented the initial argument, without objection, lasting 11 transcript pages. After Baker's lawyer presented her 42 transcript page summation, another prosecutor presented the rebuttal argument and new arguments for 16 transcript pages. The trial judge repeatedly overruled Baker's objections to the State's raising new arguments, and denied Baker's motion for a mistrial. The jury

convicted Baker of the lesser included offense, Manslaughter, and Possession of a Firearm During the Commission of a Felony.

(6) We review the trial judge’s denial of Baker’s motion for a new trial for abuse of discretion.<sup>1</sup> Baker claims that the State sandbagged her, thus we must determine whether (1) the State fairly stated its position in its initial closing argument; (2) the defendant waived her objection by her argument or failure to properly preserve the issue; and (3) the defendant suffered any prejudice under all the circumstances.<sup>2</sup>

(7) Sandbagging occurs when “a prosecutor omits from his opening summation a salient argument of the State’s case only to bring forth the argument in closing after the defense has arguably been induced to avoid the subject in closing.”<sup>3</sup> Due process and fundamental fairness dictate that “it is unfair and often highly prejudicial for plaintiff’s or State’s counsel to avoid treatment of certain issues in the opening summation so as to deprive defense counsel of the opportunity to reply.”<sup>4</sup> This generally prevents the State from “convert[ing] its rebuttal into its argument in chief upon the issue.”<sup>5</sup> However, “this general rule

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<sup>1</sup> *Michaels v. State*, 970 A.2d 223, 229 (Del. 2009).

<sup>2</sup> *Id.*

<sup>3</sup> *De Shields v. State*, 534 A.2d 630, 645 (Del. 1987).

<sup>4</sup> *Bailey v. State*, 440 A.2d 997, 1002 (Del. 1982).

<sup>5</sup> *Id.*

has evolved to allow trial courts some discretion in permitting a more substantial rebuttal not so narrowly tailored to the scope of the defense summation.”<sup>6</sup>

(8) In *Bailey v. State*, the trial judge abused his discretion by “permitting the State to utilize the inherently prejudicial ‘sandbagging’ trial strategy.”<sup>7</sup> The State, following its five-minute, three-and-one-half-transcript-page initial summation, presented its rebuttal summation, including the “bulk of the State’s final argument to the jury” and testimony of numerous witnesses not mentioned in the opening or defense summations, for over an hour.<sup>8</sup> The contrast between the initial and rebuttal summations illuminated and exposed that prosecutor’s tactic.

(9) Baker alleges that the State deliberately omitted critical issues from its opening summation and deprived her of the opportunity to reply in her summation. The trial judge found, in his review of the record, that she had adequate opportunity to respond and the State fairly stated its position during its initial summation. Baker responded to the State’s 11-page initial summation with 42 pages of summation. Although not every statement in the State’s rebuttal argument responded to Baker’s arguments, the record shows that the vast majority

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<sup>6</sup> *Id.* at 1003.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 1000-01.

responded to points made in the defense’s closing summation. Additionally, Baker fails to establish any unfair prejudice suffered from the alleged sandbagging.

(10) We concluded that the State did not sandbag Baker. The tactics here did not create the same prejudicial effect as those in *Bailey*, where the State unfolded most of its argument in its rebuttal summation. We agree with the trial judge’s fundamental finding – the State’s tactic did not deprive Baker of the “opportunity to” reply.

(11) NOW THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Myron T. Steele  
Chief Justice