IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHANNON A. THOMPSON,	§	
	§	No. 435, 2006
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for Sussex County
v.	§	
	§	
STATE OF DELAWARE	§	ID # 0503015897
	§	
Plaintiff Below, Appellee.	§	
	§	

Submitted: November 28, 2006
Decided: February 27, 2007

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

O R D E R

(1) Appellant Shannon Thompson appeals the Superior Court's decision affirming his Court of Common Pleas conviction of Violation of Privacy.[1] Thompson makes several arguments in this appeal. He claims that the trial court erred when it denied various motions for judgment of acquittal, sanctions, dismissal or to strike certain testimony. He also claims the trial court infringed upon his constitutional rights when it instructed the jury on a duty to reconcile

[1] 11 *Del. C.* § 1335(a)(1).

conflicting testimony if reasonably possible. We find no reversible error in this case and affirm.

(2) On March 19, 2005, Joseph Andrews, his wife, and their 15 year old daughter went to the Brew Ha Ha Restaurant in Rehoboth Beach, Delaware. After finishing their drinks, Joseph and his daughter had to use the restroom. The restaurant had a separate bathroom for men and women situated next to each other with the door to the woman's room perpendicular to the door to the men's room.[2] When the two approached the restrooms, both doors were locked. Approximately three to four minutes later, a woman exited the ladies room and Joseph's daughter entered. After Joseph's daughter exited the restroom, two more women entered and exited the ladies bathroom. Meanwhile, the door to the men's room remained locked. At that point, Mr. Andrews knocked on the door and got no response. Believing the door to be jammed, he yanked on the handle and the door popped open.

(3) When Mr. Andrews initially entered the bathroom, he saw no one. When he looked up, however, he saw two legs dangling from the ceiling. Thompson had moved the ceiling tiles closest to the ladies room out of the way and was resting his body on the support wall separating the two bathrooms. Thompson explained to

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[2] Mr. Andrews testified regarding the layout of the bathrooms. "[T]he doorway into the ladies' room and the doorway into the men's room are very close. They're perpendicular. Nobody can come in or out of either of these doors at this point without me knowing about it."

Andrews that while he was using the toilet, a ceiling tile fell on his head and he decided to fix it. Andrews then left the restroom to find out if Thompson worked for the restaurant. Meanwhile, Andrew's wife called the police.

(4) Corporal Hudson and Officer Letenoff of the Rehoboth Police Department responded to the call. Thompson told Hudson that he was simply standing on the toilet to fix some ceiling tiles that had buckled. Hudson testified that the ceiling above the toilet was in poor condition but the remainder of the ceiling was fine. He also testified that he noticed no scuffmarks on the walls. Hudson also stated that Andrews was very loud and disorderly. Not believing that Thompson could have peered into the ladies room from the men's bathroom, Hudson told Thompson that he was free to leave.

(5) Unsatisfied with Hudson's investigation and his decision not to arrest Thompson, Andrews telephoned the City of Rehoboth Police Chief, who sent Officer O'Bier to investigate the matter further. Andrews explained to O'Bier that Thompson was bent over the wall separating the two bathrooms, with the wall supporting Thompson's weight. O'Bier noticed marks, possibly from a shoe, above a handicap bar fastened to the support wall. Using a ladder, O'Bier then placed himself in the position Andrews described Thompson to be in when he entered. He found that the support wall would hold Thompson's weight and that the insulation above the ladies bathroom had been pushed away from the tiles

closest to the support wall. O'Bier concluded that it was possible to see into the ladies room from that position. Thompson was later arrested and charged with Violation of Privacy.

(6) Thompson was convicted on November 22, 2005 and sentenced to one year at Level V. He appealed his conviction to the Superior Court. On July 27, 2006, the Superior Court affirmed his conviction and this appeal followed.

(7) Thompson first contends that the trial court erred by failing to grant his motion for judgment of acquittal because a public bathroom does not fit the definition of a "private place" as defined by the Criminal Code. Because a public bathroom is not a private place, he argues that he could not, as a matter of law, have violated the violation of privacy statute. He also argues that the trial court committed reversible error by denying his request for a jury instruction on the statutory definition of "private place." We review the trial court's interpretation of the statute *de novo*.[3]

(8) "A person is guilty of violation of privacy when, except as authorized by law, the person . . . trespasses on property intending to subject anyone to eavesdropping or other surveillance in a private place."[4] "Private place" is defined in the same subchapter as "a place where one may reasonably expect to be safe

[3] *Wien v. State*, 882 A.2d 183, 186 (Del. 2005).
[4] 11 *Del. C.* § 1335(a)(1).

from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group thereof has access."[5]

(9) While the bathroom in this case is open to the public in the sense that any patron of the establishment is permitted to use it, the occupant who uses the bathroom and closes and locks the door behind him or her may "reasonably expect to be safe from casual or hostile intrusion or surveillance."[6] As the Superior Court noted, "once a person enters the public restroom stall and closes and latches the door, any 'access' which the public might have had is cut off. . . . [T]he enclosed stall is again a private place under the statute, during the period in which it is used."[7] Thus, the simple fact that many people are allowed to use the restroom does not make it any less private when one person is occupying it and has locked the door to prevent the entry by others.

(10) Thompson does not cite any case law to support his argument that an occupant of a public restroom does not have a legitimate expectation of privacy. Instead, he argues that the language of the violation of privacy statute supports a

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[5] 11 *Del. C.* § 1337(b).

[6] *Id.*; *see People v. Abate*, 306 N.W.2d 476 (Mich. App. 1981) (finding that a public bathroom met the definition of a "private place"). The statute at issue in *Abate* is nearly identical to 11 *Del. C.* 1337(b), defining "private place" as, "a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance but does not include a place to which the public or substantial group of the public has access." *Id*. at 478.

[7] *Thompson v. State*, Del. Super., ID No. 0503015897, Bradley, J. (July 27, 2006) (citing *Abate*, 306 N.W.2d at 479).

different result. Specifically, Thompson points to 11 *Del. C.* § 1335(a)(6), which expressly includes a "bathroom" as a place where someone has a legitimate expectation of privacy, and argues that if the legislature intended a bathroom to be included in Section 1335(a)(1), it would have used the term in that section.[8]

(11) Thompson's argument is unavailing. The different subsections of Section 1335 address different conduct in different contexts. Subsection (a)(6) addresses the photographing or filming of someone "in any place where persons normally disrobe."[9] That subsection provides a non-exhaustive list of places where people normally disrobe, including a bathroom. Subsection (a)(1) does not require such a list because it is not limited to a place where someone normally disrobes. Instead, subsection (a)(1) applies to any "private place."

(12) While the trial court correctly denied Thompson's motion for judgment of acquittal, we agree with Thompson that the trial court erred by failing to instruct the jury on the statutory definition of private place.[10] The trial court found that the definitions in Section 1337 did not apply to Section 1335 because Section 1337 is

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[8] Thompson also points to 11 *Del. C.* § 221 for the proposition that definitions employing the word "means" require a definition limited to the meaning given. *See* 11 *Del. C.* § 221 ("In this Criminal Code when the word "means" is employed in defining a word or term, the definition is limited to the meaning given.").

[9] 11 *Del. C.* § 1335(a)(6).

[10] This argument was raised in Thompson's appeal to the Superior Court but was not addressed in the court's July 27, 2006 Memorandum Opinion. In lieu of remanding for the Superior Court to decide the issue fairly presented to it, we will exercise our discretion and decide the issue Thompson has raised.

titled, "[d]efintions related to riot, disorderly conduct and related offenses." However, Section 1335, is part of Subpart A of Subchapter VII, which the General Assembly entitled "Riot, Disorderly Conduct and Related Offenses." We find that the General Assembly intended the definitions within Section 1337 to apply to the offense of Violation of Privacy. The jury instruction given should have included this statutory definition.[11]

(13) This error, however, is harmless beyond a reasonable doubt. There was no evidence presented at trial to suggest that the bathroom at the time of the alleged offense was anything other than a private place. In other words, the "overwhelming and uncontroverted" evidence showed that the statutory definition

[11] The portion of the jury instruction detailing the elements of the offense provided:

> Information has charged the defendant with violation of privacy. The statute of this State, Title 11, Delaware Code Section 1335(a) provides in relevant part that a person is guilty of violation of privacy when, one, the person trespasses on property intending to subject anyone to eavesdropping or other surveillance in a private place.
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> In order to find the defendant guilty of violation of privacy, you must find that all of the following elements have been established beyond a reasonable doubt. First, that the defendant trespassed on property, and second, that the defendant did so with the intent to subject anyone to eavesdropping or other surveillance. And third, that the eavesdropping or surveillance occurred in a private place.'
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> Now, with reverence to the word intent, Delaware law provides that a person acts intentionally when it is the defendant's conscious object or purpose to cause the prescribed act. With reference to the word trespass, Delaware law provides that a person criminally trespasses when he knowingly enters or remains unlawfully upon real property.

of private place was satisfied in this case.[12] Therefore, a reversal based on the omission within the jury charge is not warranted in this case.

(14) Thompson next contends that a mistrial should have been granted when it was revealed through cross-examination that the prosecutor made attempts to "recreate" the crime. Thompson claims that the prosecutor's inability to position herself in the ceiling as alleged against Thompson constituted exculpatory evidence and should have been revealed to the defense prior to trial pursuant to *Brady v. Maryland*.[13] We review the denial of a mistrial for abuse of discretion.[14]

(15) During cross-examination, Officer O'Bier was asked whether he had ever witnessed any individual attempt to climb into the ceiling tiles at the Rehoboth Beach Brew Ha Ha. He answered in the affirmative, explaining that the prosecutor made such an attempt and, in doing so, was unable to reach the ceiling. The jury was then excused. Officer O'Bier later explained that he was mistaken, and that the prosecutor made such an attempt not at the Brew Ha Ha, but in the restroom at the Attorney General's office. The prosecutor admitted, however, that the day before the trial began, she did in fact attempt to climb up into the ceiling at

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[12] *Neder v. United States*, 527 U.S. 1, 9 (1999) (citing *Johnson v. United States*, 520 U.S. 461, 470 (1997)) (applying harmless error analysis to the failure of the trial court to instruct the jury on an element of the offense).
[13] 373 U.S. 83, 87 (1963).
[14] *Hendricks v. State*, 871 A.2d 1118, 1121 (Del. 2005); *Taylor v. State*, 827 A.2d 24, 27 (Del. 2003).

the scene of the crime in the presence of a different officer. Thompson moved for a mistrial, arguing that these actions should have been revealed to the defense. In the alternative, the defense wanted to call the prosecutor as a witness to impeach the credibility of O'Bier.

(16) The Court of Common Pleas determined that the State was not required to disclose the actions of the prosecutor in either the Attorney General's office or the Brew Ha Ha. The trial court reasoned that the prosecutor never attempted to pull herself into the ceiling at the Attorney General's office, and thus, it was not an attempt to recreate the crime. In addition, the trial court concluded that the State did not have to disclose the prosecutor's actions at the Brew Ha Ha because the prosecutor was in fact able to recreate Thompson's conduct. Thus, it was not exculpatory evidence. The trial court further found that the actions of the prosecutor were part of an internal investigation and constituted work product.[15] Therefore, Thompson could not call the prosecutor to testify because the details of her internal investigation were not discoverable. The Superior Court affirmed these rulings.[16]

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[15] *State v. Thompson*, Del. CCP, ID No. 05031801, Clark, J. (Sept. 9, 2005), at 9.
[16] *Thompson v. State*, Del. Super., ID No. 0503015897, Bradley, J. (July 27, 2006), at 10.

(17) In *Brady v. Maryland*, the United States Supreme Court held that State has a duty to disclose exculpatory evidence to the accused prior to trial.[17] "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[18] Evidence is material when there is a reasonable probability that its introduction could lead to a different result. Reversal under *Brady* is required only when the defendant is able to show "that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."[19]

(18) Efforts by a prosecutor, instead of an investigator, to recreate alleged conduct of a defendant are problematic.[20] We need not decide whether the prosecutor's efforts at the Attorney General's office and at the Brew Ha Ha were work product because this evidence, even if disclosed and used at trial, would not have reasonably undermined confidence in the verdict. The inability of this

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[17] *Brady*, 373 U.S. at 87.
[18] *Id*.
[19] *Jackson v. State*, 770 A.2d 506, 516 (Del. 2001) (citing Kyles *v. Whitely*, 514 U.S. 419, 434 (1995)).
[20] *See* Del. Lawyers' Rules of Prof'l Conduct R. 3.7(a), which provides:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) the testimony relates to an uncontested issue;
> (2) the testimony relates to the nature and value of legal services rendered in the case;
> (3) disqualification of the lawyer would work substantial hardship on the client.

prosecutor to accomplish what Thompson was alleged to have done in a different bathroom was irrelevant. Moreover, the prosecutor was able to get into the ceiling tiles at the crime scene. We conclude that any discovery violation was harmless beyond a reasonable doubt.

(19) Thompson claims the trial court improperly handled the inconsistent testimony of Officer O'Bier. "A mistrial is mandated only when there are 'no meaningful and practical alternatives' to that remedy."[21] A jury instruction will normally cure prejudicial error.[22] The trial court found O'Bier's testimony in the presence of the jury to be both irrelevant and privileged. The trial court struck it in its entirety from the record and gave a curative instruction.[23] We find no abuse of discretion by the trial court in denying Thompson's motion for a mistrial.

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[21] *Dawson v. State*, 637 A.2d 57, 62 (Del. 1994) (citing *Bailey v. State*, 521 A.2d 1067, 1077 (Del. 1987)).
[22] *Id*.
[23] The trial judge gave the following curative instruction:

> You will recall, ladies and gentlemen, that at the close of testimony last Tuesday, near the close of testimony, the defense elicited certain testimony from Detective O'Bier regarding an attempt, that he was testifying about, by Miss Davis to enter the ceiling of the men's room at the Brew Ha Ha Restaurant, in the way that the State alleges that the defendant did in this action.
>
> Ladies and gentlemen of the jury, you are hereby instructed to disregard that part of the detective's testimony and not to consider it in any way for the trust of the matter stated regarding that claimed attempt. The Court hereby instructs you that that portion of the detective's testimony was indeed incorrect.
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> Ladies and gentlemen of the jury, you may consider the fact that that portion of his testimony was incorrect in weighing the credibility of the detective's overall testimony. But otherwise, you are to disregard that portion of the testimony for the truth of the matter stated.

(20) Thompson makes one more argument related to the prosecutor's investigation. He argues that the prosecutor convinced Officer O'Bier to change his story during the brief recess. This argument is not supported by the record and is without merit.

(21) Thompson next contends that trial court erred in giving only a spoliation instruction to the jury after the State failed to produce a copy of a telephone call between Andrews and Officer Hudson. He argues the case should have been dismissed. Although Thompson subpoenaed the tape approximately one month before trial, the State did not begin to look for the tape until the morning of trial and did not find it.

(22) The conversation at issue took place on March 19, 2005. Andrews and his wife telephoned Hudson at the Rehoboth Police Department to complain about his investigation. Normally, phone calls are automatically recorded and are backed up every five minutes. On March 28, 2005, the archive system had been upgraded and the old hard drives, which originally recorded the conversation, were destroyed. In the process of upgrading the system, some conversations, including this one, were inadvertently destroyed.

(23) The trial court first determined that Court of Common Pleas Criminal Rule 26.2 was inapplicable because the State was not at fault for the missing tape and because the State did not have possession, it was not in a position to choose

whether to disclose it to the Defendant. The trial court then performed a *Deberry* analysis[24] and concluded that a *Deberry* instruction was an appropriate sanction for failing to preserve the evidence because the prejudice to the defendant was minimal at best. The Superior Court agreed.[25]

(24) In *Deberry*, this Court outlined a three-step analysis to determine "what should be done when the State takes possession of exculpatory (or potentially exculpatory) evidence and then loses or destroys it before or in response to the defendant's discovery request."[26] First, the court looks to whether the "requested material, if extant in the possession of the State at the time of the defense request, [has] been subject to disclosure under Criminal Rule 16 or *Brady*?"[27] If it is subject to disclosure, the next question is "whether the government had a duty to preserve the material."[28] Finally, if such a duty existed, "was the duty breached, and what consequences flow from a breach."[29] The phone recording was subject to disclosure under *Brady* and the State had a duty to preserve the recording.[30] The issue in this case lies in the third step of the analysis.

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[24] *Deberry v. State*, 457 A.2d 744 (Del. 1983).
[25] *Thompson v. State*, Del. Super., ID No. 0503015897, Bradley, J. (July 27, 2006), at 11.
[26] *Deberry*, 457 A.2d at 749.
[27] *Id.* at 750.
[28] *Id.*
[29] *Id.*
[30] As we held in *Deberry*, "[t]he obligation to preserve evidence is rooted in the due process provisions of the fourteenth amendment to the United States Constitution and the Delaware

(25) In applying *Deberry's* third-step, the court "draw[s] a balance between the nature of the State's conduct and the degree of prejudice to the accused."[31] We analyze the nature of the State's conduct by employing a separate three-step analysis: "(1) the degree of negligence or bad faith involved (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction."[32] The loss of the recording in this case can be classified as an accident. Several days after the phone call was made, the Rehoboth Police upgraded their systems. After the upgrades, the original hard drives that stored the phone calls were destroyed. During the phone calls, some phone calls were unexplainably lost. The way the system was designed, no one could delete any particular recording.

(26) The degree of prejudice to Thompson, if any, was slight. Both parties to the phone call were present at trial and recounted the content of the call. Thus, the tape would have been cumulative of the testimony adduced at trial.[33]

Constitution, article I, section 7 [and] extends not only to the Attorney General's office, but all investigative agencies, local, county, and state." *Deberry*, 457 A.2d at 751-52.

[31] *Id*. at 752.

[32] *Bailey v. State*, 521 A.2d 1069, 1091 (Del. 1987).

[33] *See Warren v. State*, 625 A.2d 280 (Del. 1993) (TABLE) ("[T]he record fully supports the court's finding that the officer's notes and [the other witness's] testimony was sufficient secondary evidence to overcome any arguable prejudice to [the defendant] from the statement having been erased.").

Furthermore, the trial court gave a *Deberry* instruction to the jury.[34] We find no merit to Thompson's argument that dismissal was warranted on the facts of this case.

(27) Thompson's final claim of error is that a jury instruction on reconciling conflicting evidence violated his right to trial by jury and his due process rights under the Delaware and United States Constitutions. We review this claim *de novo*.[35]

The challenged portion of the instruction reads as follows:

> Ladies and gentlemen, if you should find the evidence in this case to be in conflict, then it is your duty to reconcile the conflicts, if reasonably possible, so as to make one harmonious story of it all. But if you cannot do this, then it is your duty to give credit to that portion of the testimony which, in your judgment, is most worthy of credit and to disregard any portion of the testimony which, again in your judgment, is unworthy of credit.

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[34] The court instructed the jury:

> [I]n this case the Court has determined that the State accidentally did not preserve certain evidence, which is material to the defense. Namely, a recorded March 19, 2005 telephone conversation between the witness, Mr. Andrews and Miss [sic] Andrews, and Officer Hudson of the Rehoboth Beach Police Department.
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> The State's non-preservation of such evidence entitles the defendant to an inference that if such evidence were available at trial it would be exculpatory. This means that, for the purposes of deciding this case, the jury shall assume that the missing evidence, had it been preserved, would not have incriminated the defendant and would have tended to prove the defendant not guilty.
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> The inference does not necessarily establish the defendant's innocence, however. If there is other evidence presented which establishes the fact or resolves the issue to which the missing evidence was material, the jury must weigh that evidence along with the inference.

[35] *McGriff v. State*, 781 A.2d 534, 537 (Del. 2001).

(28) A jury instruction is grounds for reversal when, viewed as a whole, it "undermined the ability of the jury 'to intelligently perform its duty in returning a verdict.'"[36] "A defendant has no right to have the jury instructed in a particular form. However, a defendant is entitled to have the jury instructed with a correct statement of the substantive law."[37]

(29) The pattern instruction in this case is a correct statement of the law and did not infringe on Thompson's constitutional rights. The instruction did not, as Thompson suggests, admonish the jury to disregard reasonable doubt as the burden of proof. To the contrary, a review of the instructions as a while shows that the jury was told clearly that the State was required to prove Thompson's guilt beyond a reasonable doubt. An instruction to a jury to reconcile conflicting evidence, if it can, to make one harmonious story out of all the evidence has been given in Delaware since at least 1920.[38] Moreover, in *Smith v. State*,[39] we implicitly approved an instruction telling the jury to harmonize the evidence if possible and if

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[36] *Floray v. State*, 720 A.2d 1132, 1138 (Del. 1998).
[37] *Claudio v. State*, 585 A.2d 1278, 1282 (Del. 1991).
[38] *See State v. Bacon*, 31 Del. 176, 182 (Del. Ct. of General Sessions 1920).
[39] *Smith v. State*, 2006 Del. LEXIS 218, at *36 (Del. Supr.) (holding that the prosecutor's remarks in closing did not constitute reversible error when the "prosecutor was attempting to convey the essence of the trial judge's instruction to 'reconcile the conflicts' in the evidence 'to make one harmonious story' of the events by giving credit to testimony worthy of credit and disregarding that which is not.").

not, to give credit to the portions in which the jury believed to be credible. Thompson's argument is without merit.

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

BY THE COURT:

/s/Henry duPont Ridgely
Justice