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State v. Doyle, 235 A.3d 482 (R.I. 2020)

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Evidence. *State v. Doyle*, 235 A.3d 482 (R.I. 2020). An ousted manager may not assert attorney-client privilege on behalf of the corporation when the attorney's testimony is limited to the corporation's representation. A trial justice does not abuse her discretion by allowing a police investigator to offer opinion evidence that is rationally based on her own personal observations and training. A trial court justice does not abuse her discretion by permitting evidence of prior uncharged bad acts when the evidence has independent evidentiary value. Finally, a defendant waives any argument on appeal that is not properly raised before the trial court.

FACTS AND TRAVEL

The Defendant, Daniel Doyle (Doyle), was the former Executive Director of the Institute for International Sport (the Institute).[1] The Institute was founded in 1987 to "expand[ ] the opportunities for young people around the world to participate in sports activities in order to improve and develop their capabilities."[2] Originally, the Institute was located in Adams Hall at the University of Rhode Island (URI) but, after several years, its offices were relocated to the "Hall of Fame Building" in Kingston, Rhode Island.[3] In the early 2000s, Doyle decided that the Institute had outgrown the Hall of Fame Building and that a second building for the Institute, the "Leadership Building," was necessary.[4]

To fund the construction of the Leadership Building, Doyle obtained donations from, among others, Alan Hassenfeld (Hassenfeld).[5] In January 2007, Doyle sent a letter to Hassenfeld thanking him for his $550,000 that would go towards "the

1. State v. Doyle, 235 A.3d 482, 489 (R.I. 2020).
2. *Id.*
3. *Id.* at 490.
4. *Id.*
5. *Id.* Alan Hassenfeld is the former chairman and CEO of Hasbro, Inc. *Id.*

construction of the Center for Sports Leadership Building on the URI campus."[6] In 2007, Doyle also secured two grants from the Rhode Island General Assembly's Joint Committee on Legislative Services (JCLS) in the amount of $575,000.[7] Trial evidence established that the two JCLS grants were enough to cover the cost of the Leadership Building project.[8] In 2009, and again in 2011, the director of JCLS noticed that the project was still not complete, prompting an investigation by the state Auditor General.[9]

After the Auditor General completed his investigation and issued his report, a grand jury investigation into Doyle and the Institute followed.[10] Doyle waived the Institute's attorney-client privilege so attorney William Lynch (Lynch) could provide relevant documents to the Rhode Island State Police.[11] While attorney Lynch had represented Doyle in a personal capacity at one point, Lynch's testimony to the grand jury was limited to his representation of the Institute.[12] The grand jury investigation resulted in an eighteen-count indictment.[13]

Before the twelve-week trial, Doyle filed a pretrial motion *in limine* to exclude wholesale evidence regarding the "JCLS grant for the construction of the Leadership Building, the Institute's financial transactions (and indebtedness) to [URI], and events occurring in the '1990s and 2000s[ ]'" because it constituted "'uncharged bad character evidence' under Rule 404(b)" Rhode Island Rules of Evidence.[14] In a preliminary ruling, the trial justice denied the motion because the state's planned evidence appeared to have independent relevance and it would be "impossible and

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6. *Id*. at 515.
7. *Id.* at 490.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 501.
12. *Id.*
13. *Id.* at 490. The eighteen-count indictment included:

> [S]even counts of embezzlement in violation of R.I.G.L. 1956 § 11-41-3, one count of obtaining money under false pretenses under §§11-41-4 and 11-41-5, five counts of forgery in violation of G.L 1956 § 11-17-1, and five counts of giving false documents to an agent, employee, or public official in violation of G.L. 1956 § 11-18-1.

Id.

14. *Id.* at 492, 496.

inequitable" to rule on the motion without hearing a word of testimony or to completely exclude a witness from appearing at trial.[15] Doyle made a "continuing objection" to the admission of the state's witnesses' testimony on the issue.[16] He also moved to dismiss the indictment, arguing that attorney Lynch had testified to matters beyond the scope of the attorney-client privilege waiver.[17] The trial justice determined that no attorney-client privilege existed between Doyle and Lynch personally and denied the motion.[18]

Before trial, a Superior Court justice also ousted Doyle as director and placed the Institute into a temporary receivership.[19] Attorney Jonathan Savage (Savage) was appointed and subsequently waived the Institute's attorney-client privilege for attorney John Partridge (Partridge), who assisted the Institute when it was incorporated in the 1980s.[20] Doyle attempted to withdraw the previous waiver of attorney-client privilege for attorney Lynch, but the trial judge allowed both attorneys to testify based on her earlier ruling that no privilege existed between Doyle

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15. *Id.* at 492–93.

16. *Id.* at 494. Rule 51 of the Superior Court Rules of Criminal Procedure governs the use of "continuing objections." R.I Super. R. Crim. P. 51 (2016) (amended 2017). At the time of trial, Rule 51 provided:

> Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which the party desires the court to take or his or her objection to the action of the court and his or her grounds therefor if requested; *and if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party. With the consent of the court a party may object to an entire line of testimony, or to the entire testimony of a witness, or to testimony on a single subject matter, and if such objection shall be overruled, it shall not be necessary for the party to repeat his or her objection thereafter, but every part of such testimony thereafter introduced shall be deemed to have been duly objected to and the objection overruled.*

Id. (the emphasized portion was eliminated in 2017).

17. *Doyle*, 235 A.3d at 501.

18. *Id.*

19. *Id.*

20. *Id.* at 502.

and Lynch and that the receiver had authorized Partridge to testify.[21]

Finally, at a pre-trial hearing, Doyle moved to have the court suppress evidence that, he argued, was illegally obtained by the state.[22] Two former employees provided investigators with materials that they had collected during their time at the Institute, apparently to protect themselves as whistleblowers in the event that the Institute came under investigation.[23] The investigators were not aware that the former employees had such materials before speaking with them and they overturned the evidence voluntarily.[24] The Institute's secretary at the time also provided a thumb-drive with Institute-related documents in response to a grand jury subpoena *duces tecum*.[25] The trial justice denied the motion because the former employees were private individuals and the investigators did not "contort[ ] or misuse[ ] or abuse[ ]" the subpoena authority.[26]

During the twelve-week trial, the jury heard evidence that established, *inter alia,* that Doyle had taken an unauthorized second salary from the Institute totaling $501,538.52, embezzled $251,157.92 from the Institute in the form of unauthorized loan repayments and bonuses, used $117,274.41 of the Institute's funds for personal projects and business ventures, put $145,332.36 on the Institute's American Express Credit Card, made unauthorized tuition payments to his daughters' colleges amounting in $98,947.97, made unauthorized donations to his alma mater in the amount of $22,300, and "diverted almost $550,000 of the money that Mr. Hassenfeld pledged for the Leadership Building for [Doyle's] personal benefit."[27]

On appeal, Doyle challenged the admissibility of various evidence. Based on her extensive review of Doyle's credit card

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21. *Id.*
22. *Id.* at 507.
23. *Id.* at 508, 510 n.14.
24. *Id.* at 508.
25. *Id.* A subpoena *duces tecum* is "[a] subpoena ordering the witness to appear in court and to bring specified documents, records, or things." *Subpoena Duces Tecum*, BLACK'S LAW DICTIONARY (Bryan A. Garner et al. eds., 10th ed. 2009).
26. *Doyle*, 235 A.3d at 508.
27. *Id.* at 491.

charges and interviews with vendors, Detective Courtney Elliot of the Rhode Island State Police testified that Doyle had incurred at least $145,332.36 in unauthorized personal expenses on the Institute's American Express credit card.[28] At trial Doyle objected to the evidence, alternating between arguing that Detective Elliot was giving opinion evidence as a lay witness in violation of Rule 701 and that she was giving expert testimony without being properly qualified as an expert witness in violation of Rule 702.[29]

Furthermore, Robert Zagrodny (Zagrodny), the Institute's accountant from 2008 to 2011, testified on cross-examination that he resigned from the Institute because of multiple "red-flags."[30] On redirect, when the state inquired into the referenced red-flags, Zagrodny testified that he suspected that Doyle had forged a signature on a donation pledge because he did not know that the grand jury investigation had determined that the signature was indeed valid.[31] Doyle's counsel did not object to the testimony at the time.[32]

Finally, after the state concluded its direct examination of a key witness, defense counsel declined to cross-examine, to which the prosecutor responded, "[w]ow."[33] A week later, defense counsel brought the comment to the trial justice's attention and said the comment "is one that merits *serious concern* and *consideration* as to whether or not it's grounds for a mistrial."[34] Doyle's counsel asked for a limiting instruction to be given in the final jury charge, but he did not object when the trial justice failed to give such an instruction.[35] The prosecution did not comment on the issue.[36]

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28. *Id.* at 499.
29. *Id.* Rhode Island Rules of Evidence, Rule 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions is limited to those opinions which are (A) rationally based on the perception of the witness and (B) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

R.I. R. EVID. 701.
30. *Doyle*, 235 A.3d at 504–05.
31. *Id.* at 505.
32. *Id.*
33. *Id.* at 510–11.
34. *Id.* at 511 (emphasis in original).
35. *Id.*
36. *Id.*

After the jury returned a guilty verdict on all eighteen charges, Doyle moved for a new trial.[37] He presented "over a dozen arguments" in support of his motion, none of which raised the issue of elements of the crime of embezzlement.[38] He also made a motion in arrest of judgement.[39] The trial judge denied both motions, concluding that the offenses had been proven beyond a reasonable doubt, and that no "infirmities in the indictment," deficiencies in jurisdiction, nor violations of the attorney-client privilege occurred.[40] After Doyle was sentenced—to "seven concurrent terms of fifteen years, with seven years to serve, and six terms of ten years, with five years to serve, with the remainder of those terms suspended with probation; five terms of one year, suspended with probation; and restitution"—this appeal followed.[41]

On appeal, Doyle raised eight issues:

> (1) the trial justice improperly allowed the use of prejudicial evidence in violation of Rule 404(b); (2) the trial justice improperly permitted a Rhode Island State Police detective to provide expert opinion testimony as a lay witness; (3) the trial justice erroneously allowed an improper waiver of the attorney-client privilege; (4) the State of Rhode Island knowingly or recklessly presented false evidence at trial; (5) the trial justice erred when she denied [Doyle's] motion to suppress evidence he claimed was illegally obtained by state action; (6) the trial justice erred when she failed to grant a mistrial after a prosecutor made an improper remark in the courtroom; (7) the embezzlement convictions contravene the weight of the evidence; and (8) the evidence is insufficient to support the charges of embezzlement and larceny by false pretenses.[42]

However, because Doyle's arguments were either not preserved for appeal or did not have merit, the Supreme Court affirmed the judgment of conviction on all counts.[43]

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37. *Id.* at 513.
38. *Id.*
39. *Id.* at 492.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*

ANALYSIS AND HOLDING

Despite most of the arguments not being properly preserved for appeal, the Rhode Island Supreme Court addressed each of Doyle's contentions.[44] As for the first issue, whether the trial judge erred by allowing the state to present evidence that Doyle claimed was related solely to his bad character in violation of Rule 404(b),[45] Doyle argued that Rule 404(b) evidence "should be used sparingly and only when reasonably necessary."[46] However, the Court held that Doyle did not properly preserve his Rule 404(b) argument when he set forth a "continuing objection" to wholesale evidence relating to the "JCLS grant for the construction of the Leadership Building, the Institute's financial transactions (and indebtedness) to [URI], and events occurring in the 1990s and 2000s."[47] But, even if the issue had been properly preserved, the Court held that the trial judge did not abuse her discretion in admitting the challenged evidence.[48]

However, because the continuing objection was so expansive and lacked specific grounds to support exclusion, the trial justice was not empowered to determine whether each piece of the "bad acts" evidence had appropriate independent relevance under Rule 404(b).[49] Additionally, the trial justice could not balance relevance against potential unfair prejudice as required by Rule 403. Therefore, the court did not have an adequate record for review.[50] However, even if there was an adequate record for review, the evidence was still properly admitted.[51] The "independent

44. *Id.*

45. *Id.* Rhode Island Rules of Evidence, Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or to prove that defendant feared imminent bodily harm and that the fear was reasonable.

R.I. R. EVID. 404(b).

46. *Doyle,* 235 A.3d at 496.

47. *Id.* 492.

48. *Id.* at 495.

49. *Id.* at 493–94.

50. *Id.* at 494.

51. *Id.* 493–94.

relevance" standard applies to non-sexual crimes,[52] and the challenged evidence established Doyle's "intent and motive to prolong his 'far-flung chicanery' and coverup, as well as his consciousness of guilt."[53]

As for the second issue, Doyle argued that Detective Courtney Elliot provided expert opinion testimony as a lay witness.[54] The Court held that the trial justice did not abuse her discretion when she permitted the detective to offer her opinion as to whether Doyle's credit card charges were legitimate business or illegitimate personal expenses.[55] Because Detective Courtney's opinion was rationally based on her own "extensive review of thousands of defendant's transactions and her follow-up interviews, calls, and e-mail exchanges with parties involved in the transactions," and her opinions were "helpful to a clear understanding of the facts at issue," it was permitted under Rule 701.[56] Furthermore, the Court rejected Doyle's contention that the testimony was "expert testimony" because opinion testimony regarding the type of expenses on a credit card "is not the type of scientific, technical, or other specialized knowledge contemplated by Rule 702."[57]

Third, Doyle argued that the trial judge committed reversible error when she allowed the Institute's court appointed receiver to waive the Institute's attorney-client privilege so that the Institute's former legal representative and the attorney that assisted in incorporating the Institute could testify against Doyle.[58] This was the first time that the Rhode Island Supreme Court was called on to rule on the attorney-client privilege as it relates to corporate

52. *Id.* at 496. The "reasonably necessary" standard that Doyle argued applied to the Rule 404(b) evidence only applies when a defendant is charged with a sexual offense. *Id.* at 493 (citing State v. Rainey, 175 A.3d 1169, 1182 (R.I. 2018)). Uncharged sexual misconduct can only be admitted if it is relevant to proving the charged misconduct and "*reasonably necessary*." *Id* at 496 (emphasis added).

53. *Id.* at 497.

54. *Id.* at 498.

55. *Id.* at 501.

56. *Id.* at 500.

57. *Id.* Rhode Island Rules of Evidence, Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of fact or opinion." R.I. R. EVID. 702.

58. *Doyle,* 235 A.3d at 501.

clients,[59] but the Court reiterated the well-settled rule from *Upjohn Co. v. United States*:[60] the attorney-client privilege attaches to individuals as well as corporations.[61] The Court also relied on *Commodity Futures Trading Commission v. Weintraub,* where the United States Supreme Court held that "displaced managers may not assert the privilege over the wishes of the current mangers, even as to statements that the former might have made to counsel concerning matters within the scope of the corporate duties."[62] Here, the Court held that the trial justice did not commit reversible error because Doyle had been "divested of any authority to manage or to conduct the affairs of the corporation."[63] Furthermore, the testimony that the witnesses were expected to testify to concerned only the Institute as a corporate client and not Doyle personally.[64]

Fourth, Doyle argued that a new trial was warranted because the state knowingly or recklessly presented false evidence when Zagrodny testified that he thought (incorrectly) Doyle forged a signature on a donation pledge.[65] The Court held that Doyle did not properly preserve his argument that a mistrial was warranted because he merely stated that the Court "should be concerned" about whether the issue warranted a mistrial but did not timely object to the admission of the testimony in question.[66] A motion for a mistrial in a criminal case is "serious business" that requires the reasons for the mistrial to be clearly articulated and the state to be given an opportunity to respond.[67] Hence, the Court reasoned that Doyle's vague statement was not a motion to pass the case that enabled the trial justice to fully evaluate the basis for the motion, determine whether the potential unfair prejudice could be cured with a cautionary jury instruction, or to empower the state to respond.[68]

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59. *Id.* at 503.
60. *Id.* (citing Upjohn Co. v. United States, 449 U.S. 383, 394 (1981)).
61. *Id.* at 503.
62. *Id.* (citing Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985)).
63. *Id.* at 504.
64. *Id.*
65. *Id.* at 504–05.
66. *Id.* at 506–07.
67. *Id.* at 507.
68. *Id*.

The fifth issue on appeal was whether the trial justice erred by denying Doyle's motion to suppress evidence that he alleged was obtained in violation of the Fourth Amendment.[69] The Court held that the Fourth Amendment was not violated when two private individuals voluntarily provided evidence to investigators who were unaware that the witnesses had such evidence and evidence that one witness provided in response to a grand jury subpoena *duces tecum*.[70] The Fourth Amendment is meant to deter police and prosecutorial misconduct,[71] not private conduct, and so the Court reasoned that, because the voluntary and unprovoked searches were private searches that investigators did not significantly expand, the evidence was not obtained in violation of the Fourth Amendment.[72] Moreover, because the subpoenaed documents were not Doyle's personal papers, but documents produced by the witness in the course of her work as secretary for the Institute, Doyle did not have a "legitimate expectation of privacy in the materials subpoenaed," and so the Fourth Amendment was not implicated.[73]

The sixth issue on appeal was whether a new trial was warranted when the prosecutor said "[w]ow" after the defense counsel declined to cross-examine a witness.[74] The Court held that Doyle did not preserve his argument because he did not contemporaneously object to the statement, raised the issue to the judge in a "vague and uncertain" manner, and failed to object when the trial judge failed to give a limiting instruction at the close of trial.[75] Despite having ample opportunity to object, Doyle failed to bring the comment to the trial justice's attention, and so, she could not poll the jurors to determine the prejudicial effect of the statement or allow the state to attempt to explain the statement.[76]

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69. *Id.* at 507.

70. *Id.* at 509–10.

71. *Id.* at 509 (citing State v. Pailon, 590 A.2d 858, 861 (R.I. 1991)).

72. *Id.* at 510. The Court also noted that Doyle had failed to establish that the materials given to investigators even belonged to the him. *Id.*

73. *Id.* at 510; *see* State v. Guido, 698 A.2d 729, 733 (R.I. 1997) (holding that a defendant's Fourth Amendment rights are not violated when the defendant does not have a legitimate expectation of privacy in the seized evidence).

74. *Doyle,* 235 A.3d at 510.

75. *Id.* at 512.

76. *Id.*

Therefore, there was not an adequate record for the court to determine whether the statement warranted a mistrial.[77]

The seventh issue on appeal, whether a new trial was warranted based on the weight of the evidence, was also plagued with preservation issues.[78] On appeal, Doyle advanced a novel theory: an element of secrecy is required for the crime of embezzlement.[79] The Court denied the motion for a new trial based on the weight of the evidence because Doyle waived his argument for appeal.[80]

The Court also denied Doyle's motion for a new trial based on the sufficiency of the evidence, the eighth and final issue on appeal.[81] The Court held that the trial justice did not err when she found the evidence sufficient to support the conviction for obtaining money under false pretenses.[82] Assuming that the issue was properly preserved for appeal, the Court noted that the evidence established that Doyle told Hassenfeld that his gift would be used to construct a new building and that a "substantial amount of these funds [were] diverted for the defendant's own personal benefit."[83] Because of this, the Court reasoned that the evidence was "more than sufficient" for the jury to reasonably conclude that the essential elements of obtaining property by false pretenses were met.[84]

For the foregoing reasons, the Rhode Island Supreme Court affirmed the judgment of conviction and remanded the record to the Superior Court.[85]

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77. *Id.*
78. *Id.* at 512–13.
79. *Id.* at 513.
80. *Id.*
81. *Id.* at 516.
82. *Id.* at 515.
83. *Id.* at 516.
84. *Id.*; *see also* 11 R.I. Gen. Laws § 11-41-4 (2020) ("Every person who shall obtain from another designedly, by any false pretense or pretenses, any money, goods, wares, or other property, with intent to cheat or defraud . . . shall be deemed guilty of larceny."); State v. Letts, 986 A.2d 1006, 1011 (R.I. 2010) ("The essential elements of obtaining property by false pretense are that the accused (1) obtain property from another designedly, by any false pretense; and (2) with the intent to cheat or defraud."). *Id.* at 515.
85. *Id.* at 516.

COMMENTARY

This case stands as a cautionary tale that highlights the importance of preserving arguments for appeal. Out of the eight issues on appeal, only three passed without the Court mentioning the "raise-or-waive" rule.[86] Two issues in particular should have been preserved: the prosecutor's "[w]ow" comment and the state's presentation of false evidence. The "[w]ow" comment could have had a severe prejudicial effect on the jury, since it could be interpreted as the state vouching for the witness, or worse, violating Doyle's right to decline cross-examination of a witness. Furthermore, witness testimony that Doyle had forged a signature when he had been cleared of that misconduct could have also been extremely prejudicial.

Additionally, the issue concerning illegally obtained evidence may merit closer inspection, even if not on the specific facts of this case. By permitting evidence given to police unprovoked and voluntarily, the court may encourage police officers to lie when they violate suspects' constitutional rights by refashioning an illegal search by police as a private search. The Court did not appear to consider how police may use legal "private searches" against the falsely accused or the illegally arrested individual.

Be that as it may, the Court made clear that the weight of the evidence against the defendant and the meritless arguments properly before the Court ensured that any evidentiary error that the trial justice may have made was harmless. For example, the evidence presented established that Doyle had solicited funds from the Hassenfeld Foundation under false pretenses and that he diverted hundreds of thousands of dollars from Institute accounts for his personal benefit. Viewing this evidence in light most favorable to the state, it is difficult to see how any reasonable jury could not find that Doyle "intended to cheat and defraud" his victims.

86. *See id*. at 493, 499, 506, 511, 513; *see also* Cusick v. Cusick, 210 A.3d 1199, 1203 (R.I. 2019) ("It is well settled that a litigant cannot raise an objection or advance a new theory on appeal if it was not raised before the trial court.").

CONCLUSION

Despite the Defendant's contentions otherwise, the Rhode Island Supreme Court held that the trial justice did not commit reversible error by admitting any of the challenged evidence and that the conviction was substantially supported by the evidence. The Court affirmed the judgment of conviction.

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