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Case Number 538,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID BUCKHAM	:	
	:	No. 538, 2016
Defendant Below-Appellant,	:	
	:	ON APPEAL FROM
	:	THE SUPERIOR COURT OF THE
v.	:	STATE OF DELAWARE
	:	IN AND FOR NEW CASTLE
	:	COUNTY
STATE OF DELAWARE,	:	I.D. No. 1509012122A & B
	:	
Plaintiff Below-Appellee.	:	

APPELLANT'S OPENING BRIEF

FILING ID: 60385427

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Dated: March 24, 2017

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NATURE OF THE PROCEEDINGS

On October 26, 2015, David Buckham was arrested and charged with Attempted Murder in the First Degree and firearm-related offenses. (A-144). On December 7, 2015, a grand jury returned a six-count Indictment against Mr. Buckham, charging him with Attempted Murder in the First Degree, Possession of a Firearm During the Commission of a Felony ("PFDCF"), Possession of a Firearm by a Person Prohibited ("PFBPP"), Possession of Ammunition by a Person Prohibited, Aggravated Menacing, and Conspiracy Second Degree. (A-1).

Prior to trial, Mr. Buckham filed a Motion to Suppress Evidence. (A-4). That Motion was denied. (A-5). However, his Motion to Sever was granted. (A-3-4). Therefore Mr. Buckham faced a jury trial on the Attempted Murder, PFDCF, Aggravated Menacing, and Conspiracy. (A-6). Mr. Buckham elected for a bench trial on the severed Possession of Ammunition by a Person Prohibited and PFBPP, with the understanding that should he prevail on Appeal the Judge's verdict would be withdrawn. (A-11). Prior to his jury trial, the State agreed and the Court was aware that part of Mr. Buckham's nickname, "Gunner Montana," would be redacted from evidence and testimony so as not to prejudice the jury. (A-4, A-193).

Jury trial began on June 14, 2016 and concluded on June 16, 2016. (A-6). The Honorable William C. Carpenter, Jr. presided over Mr. Buckham's trial. (A-6). The jury returned a guilty verdict on the charges of Assault in the First Degree (a

lesser included offense of Attempted Murder in the First Degree), PFDCF, Aggravated Menacing, and Conspiracy Second Degree. (A-6). At the subsequent bench trial, Judge Carpenter entered findings of guilt on the two severed charges: Possession of Ammunition by a Person Prohibited and PFBPP. (A-11).

On June 23, 2016, Mr. Buckham filed a Motion for a New Trial and a Motion for Judgment of Acquittal. (A-7). The Motion for Judgment of Acquittal was granted and the conviction for Aggravated Menacing was dismissed. (A-8). However, the Motion for a New Trial was denied. (A-8).

Mr. Buckham was sentenced by Judge Carpenter on October 21, 2016. (A-8). The Court sentenced Mr. Buckham to five years at level five supervision each on the Assault First Degree and the PFDCF charges; and, six years at level five supervision on the PFBPP charge. (Exhibit A). The Court sentenced Mr. Buckham to eight years of level five supervision suspended for twelve months at supervision level three on the Possession of Ammunition by a Person Prohibited charge and to two years at level five supervision suspended for twelve months at supervision level three on the Conspiracy Second Degree charge. (Exhibit A).

On November 7, 2016, Mr. Buckham filed a timely Notice of Appeal. This is his Opening Brief.

SUMMARY OF THE ARGUMENT

I. The trial court abused its discretion by allowing a recess specifically for a witness to confer with his attorney about the inconsistencies in his testimony during his direct examination. During trial, Imean Waters, the State's witness, was not testifying consistently with his prior statement to Detective Gifford. Mr. Waters was previously a co-defendant with Mr. Buckham in this case. Mr. Waters had accepted a plea agreement and had been sentenced prior to testifying at Mr. Buckham's trial. During Mr. Waters direct examination, the State requested that Mr. Waters meet with his counsel to discuss his testimony during his direct examination. After the recess for Mr. Waters to discuss his testimony with his attorney, Mr. Waters testimony changed. Because the witness was able to regroup and confer with counsel, the ultimate truth seeking process of testimony was hindered, and resulted in prejudice against Mr. Buckham at trial.

II. The trial court erred by denying Mr. Buckham the opportunity to cross-examine the State's witness about the discussion he had with his attorney about his inconsistent testimony during the recent recess. The court allowed a recess specifically for the State's witness to confer with counsel about his testimony. After the recess, the witness' testimony changed, which would indicate a motive or bias resulted as part of the discussion. Therefore, the jury was required to know about such bias, so they could have accurately assessed the credibility of the witness. By not allowing this cross-examination, the court violated Mr. Buckham's

right to confront witnesses against him, and such action resulted in prejudice against Mr. Buckham because the jury lack sufficient facts to determine the bias and credibility of the witness.

III. The trial court erred in finding that the combination of nondescript social media posts after the alleged incident and for a cell phone to have the ability to be a GPS monitor created enough of a nexus to show probable cause to search Mr. Buckham's cell phone for evidence of Attempted Murder and Possession of a Firearm. Because the affidavit of probable cause amounted to an Officer's hunch that information would be found on the cell phone, the warrant was constitutionally deficient.

IV. The trial court committed plain error by allowing into evidence cell phone data that was seized as part of a general warrant that did not include a temporal limit, therefore violating the particularity requirement of both the United States and Delaware Constitution.

V. The trial court abused its discretion by denying Mr. Buckham a new trial after the lead Detective used Mr. Buckham's prejudicial nickname of "Gunner" in front of the jury when both parties had agreed that the name would be excluded from evidence. Because of the nature of the proceeding, Attempted Murder as well as firearms charges and the nickname including the word "gun," the prejudicial effect on the jury is substantial, therefore requiring a mistrial.

STATEMENT OF FACTS

On August 3, 2015 at 1:51 a.m. the Wilmington Police Department received calls about a shooting. (A-92–93) Officer Nolan responded to the 700 block of West Street in the City of Wilmington. (A-92–93) Gerald Walker, the victim, had been shot in his upper abdomen area. (A-93) He was laying in the entrance way of 704 West Street. (A-93) The police did not locate any weapon, shell casings, bullet holes, witnesses, video surveillance, or any other physical evidence related to the shooting. (A-93, A-99-102, A-142) Mr. Walker was lucid and coherent, and told Officer Cancila the shots came from a dark SUV, but that he didn't see who fired at him. (A-99, A-103, A-145) The investigation stopped because there was no other evidence to examine until September 16, 2015. (A-142)

On September 16, 2015, Officer Nolan responded to 1104 West Fourth Street in the City of Wilmington for an Aggravated Menacing complaint made by Gerald Walker. (A-94–95) Mr. Walker alleged that David Buckham drove by with Imean Waters in the car pointing a gun at him. (A-94–95) Imean Waters was arrested that same day for Aggravated Menacing. (A-97) There was no weapon found on Mr. Waters at the time of his arrest. (A-97)

Detective Gifford interviewed Gerald Walker, Imean Waters, and Dariya Wilson (Imean Waters' girlfriend) on September 16, 2015. (A-143) During that interview, Gerald Walker told Detective Gifford that on August 3, 2015, Imean Waters said "shoot," and then Mr. Walker "just jumped up and started

running." (A-129) Mr. Walker further stated to Detective Gifford that he did not see the gun fire, but only heard and felt the shots on August 3, 2015. (A-129, A-149) On September 16, 2015, Imean Waters told Detective Gifford that David Buckham was in the car with him on August 3, 2015 and that Mr. Buckham shot at Gerald Walker from the car. (A-164, A-174) Also, Mr. Waters told Detective Gifford that Mr. Buckham's nickname is "Gunner" or "G." (A-164–165) Imean Waters was arrested on September 16, 2015 for Aggravated Menacing and Conspiracy. (A-151)

After those interviews, an arrest warrant was issued for David Buckham. (A-143) On October 26, 205, Mr. Buckham was arrested in Camden, NJ by Sergeant Perna of the Bellmawr Police Department. (A-144, A-149) Incident to arrest, the police seized a cell phone from Mr. Buckham's person, placed that cell phone in an envelope, and turned the evidence over to Delaware authorities. (A-149) Detective Gifford then applied for a search warrant for the cell phone and a warrant was granted. (A-31, A-35, A-185)

The warrant was for: "any and all store data contained within the internal memory of the cellular phones, including but not limited to, incoming/outgoing calls, missed calls, contact history, images, photographs and SMS (text) messages. Which said property . . . represents evidence of . . . Attempted Murder 1st Degree [and] Possession of a Firearm By Person Prohibited" (A-31–32) Detective Gifford stated as probable cause that he knew Mr. Buckham's nickname to be "Gunner,"

and that Mr. Buckham was making social media postings during the time he was wanted by police, but the police did not know his location. (A-33–34) The search of the cell phone yielded social media chats between "Gunner Montana" and various other people. (A-190–192, A-238–258) The chats discussed how people, "BG" aka Gerald Walker, told on Mr. Buckham. (A-131, A-190–192, A-194)

Prior to trial, Imean Waters was offered a plea agreement to Conspiracy Second Degree in exchange for his testimony at the trial of David Buckham, which he accepted on March 14, 2016. (A-151) On February 1, 2016, Mr. Waters and his attorney, Mr. Meyer, signed a cooperation agreement, which purported that Mr. Waters' statement he gave to Detective Gifford on September 16, 2015 about the shooting was truthful. (A-152–154) Mr. Waters was sentenced prior to Mr. Buckham's trial. (A-171)

At trial, Gerald Walker gave an inconsistent statement from his prior statement to Detective Gifford by testifying that he saw Mr. Buckham with a gun on August 3, 2015. (A-108) He further testified that he did not see Mr. Buckham fire the gun. (A-131)

Imean Waters took the stand as the State's witness against Mr. Buckham and his testimony was inconsistent with his prior statement. (A-153) Mr. Waters testified that he did not see Mr. Walker on August 3, 2015 nor did he hear any gun shots. (A-153) The State's prosecutor then asked for a sidebar conference, where they asked for a break in direct testimony of Mr. Waters so he could consult with

his attorney about his testimony. (A-153) Defense counsel immediately objected because he was in the middle of testimony. (A-153) The trial court allowed Mr. Waters, the State's witness, to meet with his attorney about the inconsistencies in his testimony. (A-153) The court then denied the defense's request to cross examine Mr. Waters about the discussion he had during the break with his attorney because it would violate the attorney-client privilege. (A-154–155) Defense counsel again objected to this ruling. (A-154–155)

After the break for Mr. Waters to speak with his attorney about his testimony, Mr. Waters testimony regarding the shooting of August 3, 2015 was that he did not remember. (A-155) The court then admitted Mr. Waters prior statement into evidence under § 3507. (A-161–162, A-164, A-259–290) During cross-examination, Mr. Waters denied he was present during the shooting on August 3, 2015, denied he said "shoot him," and that he had lied to Detective Gifford when he gave his statement. (A-169, A-172)

David Buckham's nickname was "Gunner Montana." (A-187) Prior to trial, the State had agreed and the court was aware that part of the nickname, "Gunner," would be redacted and that witnesses were instructed to not use that nickname when referring to Mr. Buckham. (A-193, A-221, A-224–227) During direct examination of Detective Gifford about the social media chats that were seized from Mr. Buckham's cell phone, Detective Gifford referred to the nickname "Gunner Montana." (A-192–193) Defense counsel objected and moved for a

mistrial because of the prejudicial effect of the nickname "Gunner" in a firearms case involving a shooting. (A-193) The State asked for the court to give a curative instruction. (A-193) The court denied the mistrial and did not given a curative instruction. (A-193) Over seventy chats with the name "Gunner Montana," with the first part "Gunner" redacted, were admitted into evidence. (A-192, A-238–258)

I. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING A RECESS SPECIFICALLY FOR A WITNESS TO CONFER WITH HIS COUNSEL ABOUT HIS TESTIMONY DURING HIS DIRECT EXAMINATION.

A. Question Presented

Whether the trial court abused its discretion when, at the request of the State, the court allowed the State's witness to confer with counsel about his testimony during his direct examination.[1]

B. Standard and Scope of Review

The standard of review is an abuse of discretion.[2]

C. Merits of Argument

The court abused its discretion by allowing, at the request of the State, the State's non-party witness, Imean Waters, to meet with his counsel during his direct examination specifically about his testimony. While there is no direct Superior Court Criminal Rule of Procedure regarding this issue, the Court can refer to the Superior Court Civil Rules of Procedure as well as the Delaware Rules of Evidence. Also, reasoning from rules created regarding defendant-witnesses meeting with counsel during direct testimony is instructive.

Superior Court Civil Rule of Procedure Rule 30(d)(1) as well as Delaware Rule of Evidence Rule 615 can assist with this issue.[3] Rule 30(d)(1) discusses an

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[1] Issed preserved at A-153

[2] *Smith v. State*, 913 A.2d 1197, 1228 (Del. 2006).

[3] Superior Court Civil Procedure Rule 30(d)(1); D.R.E. 615.

attorney's ability to confer with a deponent during breaks in depositions.[4] The rule states that:

> "From the commencement until the conclusion of a deposition, including any recesses or continuances thereof…, attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of their testimony…except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any question should be answered."[5]

This civil rule can be applied to a witness in a criminal trial through Superior Court Rules of Criminal Procedure Rule 57(d).[6]

Further, under DRE 615, the court may, upon request of counsel, exclude witnesses from hearing the testimony of other witnesses.[7] Witnesses can be instructed to not discuss their testimony with third parties and be sequestered until the trial is complete in order to reduce the likelihood of undue influence and instead promote the truth finding process.[8]

The U.S. Supreme Court in *Perry v. Leeke* examined the constitutionality of instructing a defendant, who was on direct examination, that he could not consult

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[4] Superior Court Civil Procedure Rule 30(d)(1).

[5] *Id*.

[6] Superior Court Rules of Criminal Procedure 57(d). ("Procedure Not Provided. In all cases not provided for by rule or administrative order, the court shall regulate its practice in accordance with the applicable Superior Court civil rule or in any lawful manner not inconsistent with these rules or the rules of the Supreme Court.")

[7] D. R. E. 615.

[8] *Perry v. Leeke*, 109 S.Ct. 594, 600-01 (1989); *Webb v. State*, 663 A.2d 452, 457 (Del. 1995).

with his counsel during a brief fifteen minute recess.[9] The Court held that "in a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice."[10] When a defendant becomes a witness, he has an absolute right to consult with his lawyer before he begins to testify.[11] However, once the defendant begins direct examination, "neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice."[12] "The reason for the rule is one that applies to all witnesses . . ."[13] This Court in *Webb v. State* elaborated beyond *Perry* by noting how allowing a witness to consult with counsel on what to say or how to say it during testimony would hinder the truth seeking process.[14]

In *Chambers v. State*, the Court examined whether allowing a State's witness to meet with the lead investigating officer during direct examination at the request of the witness was grounds for a mistrial.[15] The Court held that allowing such a break in direct examination at the request of the witness was not an abuse of

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[9] *Id*. at 596.

[10] *Id*. at 602.

[11] *Id*. at 600.

[12] *Id*.

[13] *Id*.

[14] *Webb v. State*, 663 A.2d 452, 459 (Del. 1995).

[15] *Chambers v. State*, 930 A.2d 904, 905-06 (Del. 2007).

discretion, and that in this specific case no prejudice resulted from their conversation.[16]

In *Chambers*, the State's witness requested to speak with the lead investigating officer, Detective Armstrong.[17] The witness was not represented by counsel.[18] After speaking with the witness, the detective put on the record the contents of the discussion.[19] The substance of the testimony was not discussed, but rather the discussion was about the witness' safety.[20] The Court was silent on whether the witness' testimony changed after the break.[21] The Court noted that because the witness' prior statement wold have been admissible under § 3507, the defendant did not suffer any prejudice.[22] Therefore, the trial court did not abuse its discretion by allowing the witness a break in direct examination to confer with Detective Armstrong.[23]

While the *Chambers* court neither found the opinion in *Webb* controlling nor any Delaware rule regarding the issue, the facts surrounding the *Chambers*

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[16] *Id*. at 909.

[17] *Id*. at 907.

[18] *Id*. (The opinion did not indicate that the witness had counsel.)

[19] *Id*. at 907-08.

[20] *Id*.

[21] *Id*.

[22] *Id*. at 909.

[23] *Id*.

decision are notably different than Mr. Buckham's case.[24] In *Chambers*, the witness requested to meet with the lead detective, here, the State requested that their witness, Imean Waters, meet with his attorney. Mr. Waters never asked to speak with his counsel nor did he invoke any privilege. Further in *Chambers*, the State argued that the break in testimony would not be for the purpose of rehabilitating the witness' testimony; here, that was the main purpose for the State's request since Mr. Waters was not testifying consistently with his prior statement.

Also in *Chambers*, after the break to speak with the witness, the detective put on the record the substance of the conversation which was not related to the witness' testimony; here, the trial court would not allow the contents of the discussion to be put on the record, as it could violate the attorney-client privilege between Mr. Waters and his counsel. In Mr. Buckham's case, the State's witness', Mr. Waters', testimony changed after he spoke with his counsel. Prior to the recess, Mr. Waters denied seeing the victim on the day of the shooting and denied hearing any gun shots. After the recess, Mr. Waters was asked the same questions about his recollection of the events from August 3, 2015 to which he responded, "I don't know." For these reasons, the ruling in *Chambers* should not apply to the question presented here.

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[24] *Id*. at 907.

Allowing a witness to confer with counsel about their testimony during direct examination violates the Superior Court Civil Rule of Procedure Rule 30(d)(1) as well as the Delaware Rule of Evidence Rule 615. Further, the Court should follow the logic of *Perry v. Leeke* and *Webb v. State* when deciding whether the trial court abused its discretion by allowing a break in the direct examination of a State's witness specifically for the purpose of having the witness consult with his attorney about his testimony. If a defendant-witness, who is constitutionally guaranteed the right to consult with counsel during their trial, is excluded from consulting with their counsel during a brief recess where nothing but testimony would be discussed; then a non-party witness must certainly be forbidden from consulting with counsel about their testimony during their direct examination.

It is immaterial that in this case the witness' testimony did not drastically change after meeting with his counsel or that his prior statement was admitted into evidence. The testimony was nonetheless altered after the witness had time to talk about the testimony and regroup with counsel. The witness' change in testimony after consulting with counsel was significant to the State's case because their was no other evidence besides this witness' testimony and the testimony of the victim, Mr. Walker, which placed the Mr. Buckham at the scene of the shooting. Therefore, the testimony of Mr. Waters was crucial to the State's case, and the manner in which his testimony was delivered to the jury is significant. Thus, allowing a State's request for their critical witness to confer with counsel during

direct examination is a highly prejudicial abuse of discretion which should result in a reversal.

II. THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL THE OPPORTUNITY TO CROSS EXAMINE THE STATE'S WITNESS ABOUT HIS DISCUSSION WITH HIS ATTORNEY REGARDING HIS TESTIMONY DURING A RECESS DURING HIS DIRECT EXAMINATION.

A. Question Presented

Whether the trial court violated the defendant's right to confront witnesses by limiting the scope of the cross examination of Imean Waters to exclude discussions he had with his attorney about his testimony during a break in his direct examination.[25]

B. Standard and Scope of Review

On a claim of a constitutional violation, the standard of review is de novo.[26]

C. Merits of Argument

The United States and the Delaware Constitution guarantee an accused the right to confront witnesses against him in all criminal prosecutions.[27] "The United States Constitution provides that 'in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .'"[28] "The

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[25] Issue preserved at A-154—155.

[26] *Filmore v. State*, 813 A.2d 1112, 1116 (Del. 2003).

[27] *Franco v. State*, 918 A.2d 1158, 1161 (Del. 2007) (citing *McGriff v. State*, 672 A.2d 1027, 1030 (Del. 1996)).

[28] *Id*. (citing U.S. Const. amend VI).

Delaware Constitution provides that 'in all criminal prosecutions, the accused hath a right . . . to meet the witnesses in their examination face to face . . .'"[29]

The right to cross-examination is the primary interest protected by the Confrontation Clause of the U.S. and State Constitutions.[30] "Cross-examination is the 'principal means by which the believability of a witness and the truth of his testimony are test[ed].'"[31] This Court has recognized that trial judges retain wide latitude to impose reasonable limits on cross-examination, but that discretion is not absolute.[32]

This Court has identified factors to guide discretion in limiting cross-examination.[33] The factors are: "(1) whether the testimony of the witness being impeached is crucial; (2) the logical relevance of the specific impeachment evidence to the question of bias; (3) the danger of unfair prejudice, confusion of the issues, and undue delay; and (4) whether the evidence of bias is cumulative."[34]

In *Weber v. State*, the Court held that when determining whether the limit on cross-examination related to impeachment evidence violated the confrontation

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[29] *Id*. (citing Del. Const. art. I, § 7).

[30] *Snowden v. State*, 672 A.2d 1017, 1024 (Del. 1996) (citing *Douglas v. Alabama*, 380 U.S. 415, 418 (1965)).

[31] *Id*. (citing *Davis v. Alaska*, 415 U.S. 308, 316 (1974)).

[32] *Id*. at 1025 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

[33] *Id*.

[34] *Id.* (citing W*eber v. State*, 457 A.2d 674, 681 (Del. 1983)).

clause, the court must look at whether the jury had "sufficient information to appraise the biases and motivations of the witness . . ."[35] "More specifically, [the Court] look[s] to the cross-examination permitted to ascertain (1) if the jury was exposed to facts sufficient for it to draw inferences as to the reliability of the witness and (2) if defense counsel had an adequate record from which to argue why the witness might have been biased . . ."[36] "'The bias of a witness is subject to exploration at trial and is "always relevant as discrediting the witness and affecting the weight of his testimony."'"[37]

In *Snowden v. State*, the defendant was not permitted to cross examine the police officer witness about why he no longer worked for the Wilmington Police Department.[38] The Court held that this restriction "on further cross-examination regarding the reasons why [the officer's] employment had ended violated the defendant's confrontation rights under the Sixth Amendment and . . . the Delaware Constitution."[39]

Here in Mr. Buckham's case, the defense was not permitted to cross examine the State's witness regarding a conversation he had with his attorney during a break

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[35] *Id*. (citing *Weber v. State,* 457 A.2d 674, 682 (Del. 1983)).

[36] *Id*.

[37] *Snowden v. State*, 672 A.2d 1017, 1025 (Del. 1996) (citing *Van Arsdall v. State*, 524 A.2d 3 (Del. 1987) (quoting 3A J. Wigmore, *Evidence*, § 940 (Chadbourn rev. Ed. 1970))).

[38] *Id*. at 1024.

[39] *Id*. at 1026.

on direct examination. The trial court reasoned that this would violate the witness' attorney-client privilege. In *Snowden*, the basis of the witness' employment was a significant fact that created a bias which the jury did not know; therefore, warranting a ruling that Mr. Snowden's right to confront witnesses had been violated. Here, the State's witness, Mr. Waters, met specifically with his attorney to discuss his testimony. If any discussion could lead to impeachment and evidence of bias, it would be that type of discussion. Without defense counsel being able to explore the contents of that discussion, the jury did not have sufficient facts to draw inferences about the reliability of Mr. Waters and defense counsel did not have an adequate record from which to argue Mr. Waters' bias. Therefore, the trial court's denial of defense counsel's request to cross examine the witness about the discussion with his attorney concerning his testimony violated Mr. Buckham's constitutional right to confront the witnesses against him, and his convictions should be reversed.

III. THE TRIAL COURT ERRED IN HOLDING THAT A SEARCH WARRANT WAS SUPPORTED BY PROBABLE CAUSE WHERE THERE WAS NO NEXUS BETWEEN THE ALLEGED CRIME COMMITTED AND THE CELL PHONE TO BE SEARCHED.

A. Question Presented

Whether police officers illegally searched Mr. Buckham's cell phone when there was no nexus demonstrated in the search warrant affidavit between the alleged crime committed and the cell phone to be searched.[40]

B. Scope and Standard of Review

The standard of review of constitutional violations is de novo.[41]

C. Merits of Argument

Police Officers illegally searched Mr. Buckham's cell phone when there was no nexus between the alleged crime committed and the cell phone to be searched. The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."[42]

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[40] Issued preserved at A-36-45 (Defendant's Motion to Suppress); A-46-60 (State's Response to Defendant's Motion to Suppress); A-62-79 (Hearing on Motion to Suppress).

[41] Wheeler v. State, 135 A.3d 282, 295 (2016) (citing Bradley v. State, 51 A.3d 423, 433 (2015) (citing Swan v. State, 28 A.3d 362, 382 (Del .2011); LeGrande v. State, 947 A.2d 1103, 1107 (Del. 2008))).

[42] U.S. Const. Amend IV. *See also* Del. Const. Art. I § 6.

Police may lawfully search a person's property upon the issuance of a search warrant by a neutral magistrate in response to a specific and delineated request supported by probable cause.[43] Upon issuance of a search warrant, a magistrate must have reasonable belief that "an offense has been committed and the property to be seized will be *found in a particular place*."[44] Satisfying a warrant's particularity requirement becomes challenging when the warrant is for digital information stored on electronic devices, like a cellular telephones ("cell phones"), because of the "unprecedented volume of private information stored on [such] devices."[45]

Cell phones differ from other types of property, like a wallet or purse, because they have the capacity to hold "vast quantities of personal information literally in the hands of individuals," and therefore, implicate greater privacy concerns.[46] Because cell phones are essentially "minicomputers" that serve multiple functions,[47] officers must obtain a warrant prior to searching a cell phone, including phones that are obtained incident to arrest.[48] "Allowing police to

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[43] 11 Del. C. § 2306.

[44] State v. Holden, 2011 WL 4908360, at *3 (Del. Super. Ct. Oct. 11, 2011). *See also* 11 Del. C. § 2306 (delineating the requirements of search warrant applications) (italicized for emphasis).

[45] Wheeler v. State, 135 A.3d 282, 299 (Del. 2016) (citing Riley v. California, 134 S.Ct. at 2494-95.)

[46] Riley v. California, 134 S.Ct. 2473, 2485-89 (2014).

[47] Id. at 2488-89.

[48] Id.

scrutinize . . . [cell phone] records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case."[49] Therefore, the court must bring to bear a "heightened vigilance" to protect against invasive and "unjustified" searches of electronic devices.[50]

The Court uses a "four corners test" to determine if, within the four corners of the affidavit of probable cause, there are sufficient facts to create a reasonable belief that evidence exists within a particular place.[51] "An affidavit establishes probable cause to search only where it contains a nexus between the items sought and the place to be searched."[52] A mere statement by a police officer that probable cause exists based on the officer's own knowledge and training is insufficient to establish probable cause.[53] A search warrant must allege specific facts to adequately support an invasion of a person's expectation of privacy.[54]

In *State v. Ada*, the court invalidated a search that was supported by an officer's assertion, based on training and experience, that drug dealers often keep separate supplies of drugs.[55] In *Ada*, the affidavit of probable cause 1) contained a

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[49] Id. At 2490.

[50] *Wheeler v. State*, 135 A.3d 282, at 307 (Del. 2016).

[51] *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

[52] *State v. Adams*, 13 A.3d 1162, 1173 (Del. Super. Ct. 2008).

[53] *State v. Cannon*, 2007 WL 1849022, at *6 (Del. Super. Ct. June 27, 2007).

[54] *Id.*

[55] 2001 WL 660227 at *1 (Del. Super. Ct. June 8, 2001).

report from a "'concerned citizen'" and informants that the defendant was selling drugs, 2) identified the defendant as coming and going from a home with a key to the front door, and 3) alleged that another drug dealer may have been living on the same block as the defendant.[56] The court held that there was insufficient nexus between the residence and the alleged crime of drug dealing "given that police observed no illegal or suspicious activity occurring at the residence."[57] Because all of the facts correlated to the defendant himself or other individuals or locations, the court concluded that the search warrant lacked probable cause to search the home.[58]

In *State v. Cannon*, the court invalidated a search that lacked a sufficient nexus because police lacked sufficient information that criminal activity had taken place at the specific location to be searched.[59] In *Cannon*, a confidential informant ("CI") told police that the defendant was involved in drug distribution.[60] While conducting surveillance, the police observed the defendant conduct multiple suspicious stops in his vehicle.[61] The police subsequently executed a traffic stop of a suspected drug purchaser that had met with the defendant during one of the

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[56] *Id*. at *5.

[57] *Id*.

[58] *Id*.

[59] 2007 WL 1849022 at *4 (Del. Super. Ct. June 27, 2007).

[60] *Id*. at *1.

[61] *Id*. at *1-2.

suspicious stops.[62] The police found cocaine on the individual's person.[63] The individual then admitted to police that he obtained the cocaine from the defendant.[64]

As a result of their observations, police obtained a search warrant for the defendant's home.[65] Because neither the informant's tips nor the police observations related to the defendant's home, the officers lacked a sufficient nexus of illegal activity to search the residence.[66] The court granted the defendant's motion and all evidence seized as a result of the search warrant was suppressed.[67]

In *State v. Westcott*, the court invalidated a search of cell phones because the affidavit lacked sufficient facts to establish probable cause for the search and because the warrant did not meet the constitutional requirement for particularity.[68] In *Westcott*, the defendant was arrested for Attempted Murder in the First Degree, Robbery in the First Degree, and various other charges arising out of a shooting.[69] The police received a search warrant to search 'data and cellular logs' from cell

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[62] *Id*.

[63] *Id*.

[64] *Id*.

[65] *Id*.

[66] *Id*. at *5.

[67] *Id*. at *7.

[68] 2017 WL 283390 at *1 (Del. Super. Ct. Jan. 23, 2017).

[69] *Id*.

phones believed to belong to the defendant.[70] "The affidavit alleged that a shooting had occurred and [the defendant] had committed it."[71]

During a consent search of the apartment where the defendant was staying, the police found drugs and three cell phones.[72] During that search, the defendant was not present and the ownership of the cell phones was questioned.[73] "[T]he detective sought to search 'the three phones to look for physical evidence or confession of the shooting or the illegal distribution of heroin contained therein.'"[74] The Detective "did not expressly state any nexus between [the defendant's] ownership of the [cell] phone and the existence of evidence of the crimes [to be found] on that [cell] phone."[75] Therefore, the affidavit lacked probable cause for a search, and the court reasoned that the mere fact a defendant owns a cell phone is insufficient "to warrant an inference that evidence of any crime he or she commits may be found on that [mobile] phone."[76]

In the case *sub judice*, police lacked any information that evidence of Attempted Murder and/or Possession of a Firearm would be found on Mr.

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[70] *Id*.

[71] *Id*.

[72] *Id*.

[73] *Id*. (part of the affidavit alleged the need to search the data and cellular logs to determine who the phones belonged to)

[74] *Id*.

[75] *Id*. at *2.

[76] *Id*.

Buckham's cell phone. Instead, the police asserted that in the affiant's "training and experience" there was sufficient probable cause because cell phones are used to communicate," etc.[77]

The cell phone at issue is akin to the residences in *Cannon* and *Ada*, and the facts in this case and the warrant at issue are similar to those found in *Westcott*. Like in *Cannon* where the police officers may have had probable cause to arrest the defendant for drug dealing based on their observations, but had no reason to search the defendant's home because there was no evidence of drug activity at the residence itself; here, the officers may have had probable cause to arrest Mr. Buckham after Mr. Walker identified Mr. Buckham as the shooter. However, Mr. Walker's identification of Mr. Buckham does not provide any particularized information or implication that evidence of criminal activity would be located on Mr. Buckham's cell phone, which was found on his person months after the shooting.

Like in *Ada* where the police observed no suspicious activity in the home and the evidence of criminal activity came from a "tip;" here, the police had observed no suspicious activity as well as no other information that the cell phone was related to or contained evidence of Attempted Murder or Possession of a

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[77] This assertion alone does not establish any particular indicia of probable cause, as there has been no suggestion that there were any communications related to criminal activity in this case. Other than stating the obvious, the suggestion that a phone is used to communicate is akin to saying a car is used to drive. In and of itself the fact that a car provides transportation does not establish probable cause of criminal activity unless it is relevant in come way to a crime at issue.

Firearm. The officer's assertions based on his training and experience, alone, amounts to a hunch, which is insufficient to establish probable cause in and of itself.[78]

There were no facts in the affidavit of probable cause that suggested that Mr. Walker and Mr. Buckham had previously communicated via phone. Neither was there information that a phone was found at the scene nor that a phone had been used as an instrumentality of the crime. Rather, like the defendant in *Westcott*, Mr. Buckham merely owned a cell phone at the time there was probable cause to arrest him for the shooting. Simply possessing the phone was the basis for the search warrant, which is insufficient as a matter of law to establish probable cause to search. Therefore, the search violated Mr. Buckham's right to be free from unreasonable searches and seizures. The Superior Court erred by denying his Motion to Suppress, and later by allowing damaging evidence located on that cell phone to be used at trial.

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[78] *See State v. Ranken*, 25 A.3d 845, 863-64 (Del. Super. Ct. 2010) (quoting a Sixth Circuit decision describing that "[w]hile an officer's training and experience may be considered in determining probable cause, it cannot substitute for the lack of evidentiary nexus.) (internal quotations omitted).

IV. THE TRIAL COURT COMMITTED PLAIN ERROR BY ALLOWING INTO EVIDENCE CELL PHONE DATA AND MESSAGES THAT WERE SEIZED AS PART OF A GENERAL WARRANT.

A. Question Presented

Whether under the Fourth Amendment of the United States Constitution and Art. I § 6 of the Delaware Constitution, the search of Mr. Buckham's phone was based on a general warrant which lacked a temporal limit and specificity of the data to be searched.[79]

B. Standard and Scope of Review

The standard of review is *de novo* on such alleged constitutional violations.[80]

C. Merits of Argument

As previously stated above, the Fourth Amendment of the United States Constitution protects people from unreasonable searches and seizures and the issuance of general warrants.[81] Beyond the Fourth Amendment, Article I § 6 of the Delaware Constitution provides people broader protection from unreasonable searches and seizures and includes a particularity requirement for warrants to be issued.[82] Further under 11 *Del*. *C*. § 2307(a), "[t]he warrant shall designate the

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[79] A-31-32.

[80] *Wheeler v. State*, 135 A.3d 282, 295 (2016) (citing *Bradley v. State*, 51 A.3d 423, 433 (Del. 2012) (citing *Swan v. State*, 28 A.3d 362, 382 (Del. 2011); *LeGrande v. State*, 947 A.2d 1103, 1107 (Del. 2008))).

[81] U.S. Const. amend IV.

[82] Del. Const. art. I, § 6.

house, place, conveyance or person to be searched, and shall describe the things or persons sought *as particularly as possible*."[83]

There has been a "long-standing hostility towards general warrants."[84] "The United States Supreme Court has characterized 'the specific evil' of the general warrant abhorred by the colonists as 'a general, exploratory rummaging in a person's belongings.'"[85] "The Delaware Supreme Court has cautioned against the 'substantial' risk that 'warrants for digital and electronic devices [may] take on the character of 'general warrants.'"[86] "This reality necessitates heightened vigilance, at the outset, on the part of judicial officers to guard against unjustified invasions of privacy."[87]

The Delaware Supreme Court stated in *Wheeler* that: "warrants, in order to satisfy the particularity requirement, must describe what investigating officers believe will be found on electronic devices with as much specificity as possible under the circumstances."[88] "[G]eneric classifications in a warrant are acceptable

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[83] 11 *Del. C.* § 2307(a). (emphasis added)

[84] *Wheeler v. State,* 135 A.3d 282, at 296 (Del. 2016).

[85] *Id*. (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (citing *Boyd v. United States*, 116 U.S. 616, 624-30 (1886); *Marron v. United States*, 275 U.S. 192, 195-96 (1927); *United States v. Christine*, 687 F.2d 749, 753-54 (3d Cir. 1982))).

[86] *State v. Wescott,* 2017 WL 283390 at *3 (citing *Wheeler v. State*, 135 A.3d 282, 307 (Del. 2016)).

[87] *Id*.

[88] *Wheeler v. State*, 135 A.3d 282. at 304 (Del. 2016).

only when a more precise description is not possible."[89] If investigators have available to them a more precise description of the alleged criminal activity that is the subject of the warrant, then they should use that description, and the search should also be narrowed by the relevant time frame, if known, in order to reduce the likelihood of constitutional violations.[90] "A warrant's description meets the particularity requirementt if it 'limit[s] the officer's search of the cell phones to certain types of data, media, and files that [are] "*pertinent to th[e] investigation*."'"[91] "Such a description 'effectively limit[s] the scope of the warrants, and prevent[s] a boundless search of the cell phone[ ].'"[92]

In *Wheeler v. State*, the State executed a search pursuant to two warrants related to witness tampering.[93] The warrants had generalized language covering the defendant's "entire digital universe and essentially had no limits."[94] During the search, the State found no evidence of witness tampering, but the State did find files containing child pornography.[95] The defendant's Motion to Suppress was

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[89] *Id*. (citing *United States v. Bright*, 630 F.2d 804, 812 (5th Cir. 1980) (citing *James v. United States*, 416 F.2d. 467, 473 (5th Cir. 1969), *cert. denied*, 397 U.S. 907, 90 S.Ct. 902, 25 L.Ed.2d 87 (1970))).

[90] *Id*. (citing *Bright*, 630 F.2d at 812; *United States v. Ford*, 184 F3d 566, 576 (6th Cir. 1999)).

[91] *State v. Westcott,* 2017 WL 283390 at *3 (Del. Super. Ct. Jan. 23, 2017) (citing *Starkey v. State*, 2013 WL 4858988, at *4) *emphasis added*.

[92] *Id*.

[93] *Wheeler v. State*, 135 A.3d 282, at 284 (Del. 2016).

[94] *Id*.

[95] *Id*.

denied in the Superior Court, but the Supreme Court reversed the decision.[96] The Court found that the warrants issued were not particular and thus, unconstitutional because they failed to limit the search to the relevant time frame and because they failed "to describe the items to be searched for and seized with as much particularity as the circumstances reasonably allow…"[97]

In *Starkey v. State,* the warrants were issued for the search of "any and all data stored by whatever means, . . . of said telephone, to include, but not limited to . . . any other information/data pertinent to the investigation within said scope."[98] The Court held that the warrants were not vague because the search was limited to certain types of data on the cell phones that would be "pertinent to this investigation."[99]

In *State v. Westcott*, the search warrant was issued for "all data and cellular logs" of the defendant's cell phones.[100] There was also no time limit on the data to be searched.[101] The officers knew the alleged crime took place on a certain date.[102] The court held that the description did not limit the scope of the officer's search

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[96] *Id*. at 284-85.

[97] *Id*. at 304-05.

[98] *Starkey v. State*, 2013 WL 4858988 at *4 (Del. Sept. 10, 2013).

[99] *Id.*

[100] 2017 WL 283390 at *3 (Del. Super. Ct. Jan. 23, 2017).

[101] *Id*.

[102] *Id*.

and the officer's should have sought a more limited search to recent data.[103] This warrant did not contain the level of particularity required under the United States Constitution, the Delaware Constitution, nor the Delaware Statute.[104]

Here, in Mr. Buckham's case, the warrant issued for the search of his cell phone does not contain the level of particularity required as a matter of law. The language used in the warrant read as follows: "[a]ny and all stored data contained within the internal memory of the cellular phones, including but not limited to, incoming/outgoing calls, missed calls, contact history, images, photographs and SMS (text) messages . . . which said property . . . represents evidence of a violation of . . . Attempted Murder 1st Degree/ Possession of a Firearm By Person Prohibited."[105] At the time the warrant was issued, Detective Gifford knew the relevant timeline of the shooting and the events following the shooting, specifically being August 3, 2015 until October 26, 2015.

Like *Wheeler and Westcott*, where the warrants lacked a temporal limit when such time limit was known to the officers; here, there is no time limit to the search of the data when again such relevant dates were available to the officer at the time of requesting the warrant. Thus, the warrant is lacks particularity and violates Mr. Buckham's constitutional protections against unreasonable searches and seizures.

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[103] *Id*.

[104] *Id*. at *4.

[105] A-31-35. (State of Delaware Search Warrant In The Matter Of: David Buckham, A black in color, ZTE, model Z787 cell phone.)

Further, the warrant in this case does not describe the items to be searched with as much particularity as the circumstances reasonably allow. While, like *Starkey*, the search is limited to data pertinent to the investigation or for the specific violations, such as Attempted Murder in the First Degree and Possession of a Firearm By Person Prohibited, the description still failed because it did not describe the items to be search for and seized with as much particularity as circumstances allowed. The warrant did not specifically include Facebook messages and/or social media messages, notwithstanding that the officer knew that he was specifically looking for those types of messages. In the affidavit of probable cause, Detective Gifford noted specifically about social media posts on October 1, 2015, but yet did not include that language in the general description.

Further, Detective Gifford noted that Mr. Buckham's residence was unknown and the alleged weapon involved had not been found, but yet he did not include "GPS locations" or "wireless network data" in his description. Therefore, in addition to the lack of particularity due to the warrant not listing a temporal limit, the warrant lacks particularity because the description of items to be searched for and seized is not stated with particularity when the information was clearly available to the officer. Thus, the warrant lacked particularity on these grounds as well, and the Superior Court erred by allowing evidence seized as a result of this warrant to be admitted at trial.

V. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. BUCKHAM A NEW TRIAL AND NOT GIVING A CURATIVE INSTRUCTION AFTER THE LEAD OFFICER TESTIFIED TO THE DEFENDANT'S PREJUDICIAL NICKNAME WHICH HAD BEEN AGREED TO BE EXCLUDED FROM TRIAL.

A. Question Presented

Whether the use of Mr. Buckham's nickname, "Gunner," during his trial, for offenses related to firearms and a shooting, by the Chief Investigating Officer during direct examination had such a prejudicial effect on the jury as to warrant a mistrial.[106]

B. Standard and Scope of Review

"A decision to grant or deny a mistrial is reviewed for an abuse of discretion."[107]

C. Merits of Argument

A mistrial should be granted only "where there is a 'manifest necessity or the ends of public justice would be otherwise defeated.'"[108] The Court in *Pena v. State* set forth a "four-part analysis to determine whether the unsolicited comments of a witness require the trial judge to declare a mistrial."[109] The Court considers: "(1)

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[106] Issue preserved at A-143 (Defense counsel objection at trial); A-220-228 (Defendant's Motion for a New Trial); A-234-237 (Judge's Order Denying Defendant's Motion for New Trial).

[107] *Payne v. State,* 2015 WL 1469061, at *2 (Del. March 30, 2015).

[108] *Gomez v.* State, 25 A.3d 786, 794 (Del. 2011) (citing Banther *v. State*, 977 A.2d 870, 890 (Del. 2009)).

[109] *State v. Smith*, 963 A.2d 719, 722 (Del. 2008) (citing *Pena v. State*, 856 A.2d at 550-51).

the nature and frequency of the comments; (2) the likelihood of resulting prejudice; (3) the closeness of the case; and (4) the sufficiency of the trial judge's efforts to mitigate any prejudice."[110]

"A prompt curative instruction that does not overemphasize an improper remark is often an appropriate 'meaningful and practical alternative' to a mistrial.[111] "A trial judge's prompt curative instruction is presumed adequate to direct the jury to disregard improper statements and cure any error."[112] "Juries are presumed to follow these instructions."[113] "But, in cases where there is no meaningful and practical alternative, a mistrial is required."[114]

In *Gomez v. State*, the defendant was on trial for the rape of a nine year old girl.[115] He also had a prior conviction for a similar sexual offense against his niece, which was ruled inadmissible at trial.[116] At trial, the nine year old girl's mother referred to the prior commission, and the defense moved for a mistrial.[117] The Court determined that "a mistrial was required because 'the content of the

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[110] *Id*.

[111] *Gomez*, 25 A.3d at 793(citing Banther *v. State*, 977 A.2d 870, 890-91 (Del. 2009) (citing *Kurzmann v. State*, 903 A.2d 702, 708-09 (Del. 2006))).

[112] *Id*. (citing *McNair, 990 A.2d at 403; et al.).*

[113] *Smith v. State*, 963 A.2d 719, 722 (Del. 2008).

[114] *Gomez v. State*, 25 A.3d 786, 793 (Del. 2011).

[115] *Id*. at 786.

[116] *Id*. at 794.

[117] *Id*. at 793.

[witness]'s [testimony] was so closely related to the evidence that had been excluded from [Gomez]'s trial that prejudice from the [testimony] far exceed[ed] the threshold where a curative instruction [could have] remed[ied] the prejudice suffered.'"[118]

In *Ashley v. State,* the Court considered whether a spectator's outburst made in the presence of the jury during the guilt phase required a mistrial.[119] Robert Ashley was on trial for Murder in the First Degree for the stabbing death of the victim.[120] The defense was self-defense alleging that the victim was the aggressor.[121] After the defense's closing argument, a spectator shouted, "Don't think he's not guilty, he stabbed me in the back 14 times. Don't think he's not guilty. He's nothing but a coward. Stabbed me in the back."[122] Defense counsel moved for a mistrial, but the trial court denied the motion and gave a curative instruction instead.[123]

The Court in *Ashley* held that the trial court could not cure the outburst with a curative instruction because the outburst was so prejudicial, and a mistrial was

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[118] *Id*. at 794-95 (citing *State v. Ashley*, 1999 WL 463708, *4-8 (Del. Super. Mar. 19, 1999)).

[119] *Ashley v. State*, 798 A.2d 1019, 1020 (Del. 2002).

[120] *Id*.

[121] *Id*.

[122] *Id*.

[123] *Id*. at 1021-22.

required.[124] The Court reasoned that the outburst was of a prior bad act that was directly on point with the type of crime for which the defendant was on trial.[125] Further, the Court held the outburst "was likely to give rise to the impermissible inference that [the defendant] was acting in conformity with the previous behavior . . ."[126] The trial court had excluded evidence from the trial of a prior stabbing where the defendant was the aggressor.[127] Further, the Court reasoned that the outburst far exceeded the threshold where a curative instruction would be a viable remedy.[128] Thus, a mistrial was required.[129]

In Mr. Buckham's case, the reference to his nickname "Gunner Montana" by the chief investigating officer was extremely prejudicial in a trial where the charges included firearms offenses as well as an Attempted Murder relating to a shooting. Like the agreement between the parties in *Gomez* to exclude the prior commission of a similar crime by the defendant and the agreement between the parties in *Ashley* to exclude the prior convictions for assault by the defendant; here, the parties had agreed and the trial court was aware that Mr. Buckham's nickname of "Gunner Montana" was extremely prejudicial and was to be kept out of the trial by

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[124] *Id*. at 1022.

[125] *Id*.

[126] *Id*. at 1023.

[127] *Id*. at 1022.

[128] *Id*.

[129] *Id.* at 1023.

all witnesses. Mr. Buckham's nickname "Gunner" was redacted from over seventy social media chats that were going to be admitted by the state, so only the end of his nickname "Montana" was legible. However, when the chief investigating officer testified referring to Mr. Buckham as "Gunner Montana," the jury could infer that the nickname "Gunner" was used over seventy times by the State. A curative instruction was not given nor was a mistrial granted. The trial court erred by not granting a mistrial when the nickname of "Gunner" was inferred over seventy times in the evidence, the nickname was testified to by the lead officer, the nickname was closely related to the charges at trial, and there was no curative instruction given. The reference was particularly egregious where the parties had agreed that the nickname would not be mentioned in front of the jury. Therefore, Mr. Buckham suffered substantial prejudice by having his nickname said in front of the jury, and the Court should reverse his convictions.

CONCLUSION

Based on the facts and legal authorities set forth above, Appellant David Buckham respectfully requests that this Honorable Court reverse his convictions and remand for a new trial.

Respectfully Submitted,

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