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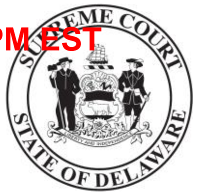

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JOHN A. TUCKER,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 390, 2017
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF
AND OPENING BRIEF ON CROSS-APPEAL

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Dated: January 16, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

A New Castle County grand jury returned an indictment on October 24, 2016, charging John Tucker ("Tucker") with Assault First Degree (11 *Del. C.* § 613), Possession of a Deadly Weapon During the Commission of a Felony (11 *Del. C.* § 1447) ("PDWDCF"), and Conspiracy Second Degree (11 *Del. C.* § 512). D.I. 4[1]; A-009-10.

Tucker proceeded to a jury trial in Superior Court on May 16, 2017. D.I. 31. During trial, the prosecution learned about, and disclosed to Tucker, a photo of Tucker's belt that a police officer had taken.[2] The court declined Tucker's motions to dismiss his charges and for a mistrial, but the court offered to give Tucker a curative instruction to disregard the officer's testimony about the photo.[3] Tucker, however, sought an instruction that there was no photo, which the court refused to give.[4] Tucker rejected the court's offer for him to draft a curative instruction.[5] As part of his case, Tucker also requested that an officer recite portions of Tucker's

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[1] "D.I.__" refers to item numbers on the Delaware Superior Court Criminal Docket in *State v. John Tucker*, I.D. #1609007140. A-001-08.

[2] A-063.

[3] A-067-068.

[4] *Id.*

[5] *Id.*

preliminary hearing testimony pursuant to D.R.E. 804(b)(3).[6] The State objected.[7] However, the court permitted the officer to read Tucker's non-inculpatory statements to the jury.[8]

On May 24, 2017, the jury found Tucker guilty of all charges. D.I. 31. The Superior Court ordered a pre-sentence investigation. *Id.* On September 15, 2017, the Superior Court sentenced Tucker to a total of twenty-seven years Level V incarceration, suspended after fifteen years for decreasing levels of supervision. D.I. 35.[9]

On September 25, 2017, Tucker filed a Notice of Appeal, and, on October 11, 2017, the State filed a Notice of Cross-Appeal. On December 13, 2017, Tucker filed his opening brief. This is the State's answering brief and opening brief on cross-appeal.

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[6] A-149.

[7] A-149-50.

[8] A-150.

[9] Op. Br. Ex. A.

SUMMARY OF THE ARGUMENT

I. Tucker's argument is denied. Tucker waived the argument that the Superior Court erred by not giving the jury a curative instruction. The court offered to give an instruction within certain parameters if Tucker provided draft language, but Tucker declined to do so as part of his defense strategy. Tucker now claims the court should have given the instruction that it offered to give but Tucker declined to accept. Tucker has failed to show plain error because the court did not provide an instruction.

II. The Superior Court abused its discretion in admitting Tucker's non-inculpatory statements as part of Tucker's statement against interest under D.R.E. 804(b)(3). Tucker's non-inculpatory statements lacked indicia of trustworthiness and are inadmissible. D.R.E. 106 did not make Tucker's non-inculpatory statements otherwise admissible.

STATEMENT OF FACTS

At around 11 p.m. on September 9, 2016, Belinda Moody ("Moody") was in the bedroom of her house at East 31st Street in Wilmington. A-016-17. Moody heard arguing in the alley behind her house. A-017. She could not see anything outside her bedroom window because it was dark. *Id.* Moody then looked out of her dining room window and saw two people standing over a person who was lying motionless facedown on the ground. *Id.* One of the two people was beating this person. *Id.* Moody called police and went outside. A-018. Moody noticed a grill that did not belong to her in her recycling bin. A-018.

Alana Jones ("Jones") testified that, around that same time, she was watching television in bed when someone pushed in her bedroom's air conditioner unit. A-073. Jones went outside and saw two people beating a man with fists and a metal stick. *Id.* Jones recognized Tucker as one of the two people. A-074.[10] The man was balled up on the ground and shielding his face. A-073. When Jones asked what was happening, the two assailants left, with Tucker returning to his house. A-074.

WPD Corporal Coleman ("Coleman") was dispatched to the area. A-023. As Coleman drove there in his marked patrol vehicle, he noticed two males exiting the alley with a female, who was pushing a stroller. A-024. They were walking away quickly. *Id.* Coleman believed that they were involved in the incident and intended

[10] Jones identified Tucker in court and from a police photo lineup. A-074, A-134.

to stop them but, before Coleman could do so, he received information that someone was injured in the alley. A-025. Coleman drove to the alley where he found a naked man lying face down on the ground; his clothes had been ripped off, and blood surrounded his head. A-025-026. The man did not respond to Coleman and struggled to breathe. A-026.

Paramedics transported the unconscious man, identified as Joshua Moore ("Moore"), to Christiana Hospital as a trauma code. A-026, A-096-97. Moore received a tracheostomy and had to rely upon a breathing machine. A-102. Moore suffered irreparable brain damage and multiple other injuries to his face, arms, thigh, and abdomen. A-098-101. Moore spent four months in the hospital and required additional time at a rehabilitation center to communicate and walk again. A-102-03.

Around 11 p.m., WPD Corporal Saunders ("Saunders") responded upon receiving Coleman's radio communication requesting a pedestrian stop of three people. A-030, A-034. Saunders located the people Coleman described near Jessup and Danby streets. A-030-31. Saunders commanded them to stop, but they refused to do so. A-031. One of these individuals was Tucker,[11] who was talking on his cell phone and carrying his belt. *Id.* Tucker also refused Saunders' command to put down his phone. *Id.* After twice requesting that Tucker put down his phone, Saunders grabbed the phone and disconnected Tucker's call. *Id.* When Saunders

[11] Saunders identified Tucker in court. A-031.

asked Tucker where he was coming from, his destination, and about his belt, Tucker said that he was walking towards a friend's house and that his belt was off because he had just left home. *Id.* Saunders noticed that Tucker's belt had fresh blood on it. *Id.* Saunders told Tucker that he was going to detain him. A-032, A-035. Tucker then dropped to the ground and told Saunders that he would not get into Saunders' police car and that Saunders would have to tase him. A-032. Saunders took Tucker into custody and noticed fresh cuts on Tucker's elbows. *Id.* Saunders collected Tucker's belt. A-056, A-063. Saunders drove Tucker back to the crime scene to conduct a show-up identification. A-035.

WPD Forensic Services Unit ("FSU") collected and processed evidence from the crime scene. A-041-42. FSU collected, among other items, a metal bar from the grill and the grill itself. A-045. FSU obtained Tucker's DNA from swabbing Tucker's mouth and from fingernail clippings. A-053-54. FSU also collected Tucker's clothing from the night of the incident. A-053.[12] FSU swabbed the grill's upper and lower edges for DNA and processed the grill for fingerprints, but was unable to get a fingerprint match. A-078, A-080, A-085. FSU also photographed Tucker's injuries, including abrasions on his hand and knee and a bruise on his arm. A-056-57.

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[12] WPD's Detective Randy Nowell collected Tucker's sneakers. A-062.

Sarah Lindauer ("Lindauer"), a senior DNA analyst with the Division of Forensic Science, analyzed Tucker's belt, his sneakers, and the grill for DNA. A-087. Her testing revealed that Moore's DNA was on Tucker's belt (probability of selecting another matching DNA profile: 1 in greater than 7 trillion). A-090. Moreover, one of the stains on the grill's lid showed a DNA mixture with Moore as the major contributor (probability of selecting another matching DNA profile: 1 in greater than 7 trillion). A-089. The grill's top edge had a mixture of two individuals' DNA, with Tucker and Moore as possible contributors (probability of selecting another matching DNA profile: 1 in 7). A-091.

Both Tucker and his brother, Shaquan Guilford ("Guilford"), testified for the defense. Guilford said that, on the date of the incident, he and Tucker drove and picked up Kanisha Poole ("Poole"), the mother of Tucker's child, from work. A-153. They dropped Tucker off at the alley afterward. *Id.* An unknown light-skinned tall man crossed the car as Tucker exited. *Id.* Tucker called Guilford on his cell phone a few minutes later and told Guilford to get out of the car because Poole had set him up. A-154. Poole smiled at Guilford when he confronted her about this accusation. *Id.*

Tucker testified that he and Moore (who previously dated Poole) argued months before the incident. A-143, A-158. Tucker said that he refused to give Poole child support money, despite her request, because she had a boyfriend. A-159. On

the night of the incident, Poole and Guilford dropped Tucker at the alley. A-157. Tucker stated that, as he entered the alley, he heard someone tell him that his "baby mom" had set him up and not to run. *Id.* Tucker then saw this person, who turned out to be Moore, charge towards him. *Id.* Tucker claimed that Moore reached into his pants and struck Tucker in the head. A-157-58. Moore tussled with Tucker in his apartment, where Tucker's friend, Mark Rollins ("Rollins"), was watching television. A-158. Moore and Tucker then fought outside the apartment. *Id.* Rollins intervened, whereupon Moore let Tucker go, but continued to fight with Rollins. *Id.* Tucker called Guilford on his phone and left the scene. *Id.*

I. THE SUPERIOR COURT DID NOT ERR IN NOT INSTRUCTING THE JURY TO DISREGARD THE POLICE OFFICER'S TESTIMONY ABOUT A PHOTO OF TUCKER'S BELT.

Question Presented

Whether the Superior Court erred in not giving the jury a curative instruction to disregard testimony after the defendant declined such instruction.

Standard and Scope of Review

This Court normally "review[s] a refusal to give a 'particular' instruction (that is, an instruction is given but not with the exact form, content or language requested) for abuse of discretion."[13] However, a defendant's failure to accept a curative instruction that would obviate any alleged prejudice constitutes a waiver of that issue on appeal unless the error is plain.[14] "To constitute plain error, the error must affect substantial rights, meaning that it must have affected the outcome of the trial."[15]

Merits of the Argument

Tucker complains that the Superior Court erred in not instructing the jury to disregard testimony from Detective Randy Nowell about a photo that he took of

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[13] *Wright v. State,* 953 A.2d 144, 148 (Del. 2008).

[14] *Stevens v. State,* 3 A.3d 1070, 1076 (Del. 2010) (citing *Wainwright v. State,* 504 A.2d 1096, 1100 (Del. 1986); *Morgan v. State,* 962 A.2d 248, 254 (Del. 2008); Del. Supr. Ct. R. 8; D.R.E. 103(d)).

[15] *Id.*

Tucker's belt.[16] Tucker contends that the State tainted the defense's credibility by introducing this inadmissible evidence, which the Superior Court should have cured with a jury instruction.[17] Tucker's arguments are unavailing.

During the defense's case at trial, Detective Nowell testified that he photographed Tucker's belt in October 2016 when deciding which evidence to send for DNA testing.[18] The prosecution learned at trial that the photo, located on Detective Nowell's cellular phone, had not been provided to Tucker.[19] Tucker moved for a mistrial and to dismiss his charges, claiming violations of *Brady v. Maryland* [20] and Delaware Superior Court Criminal Rule 16.[21] The Superior Court declined to declare a mistrial or dismiss the charges, determining that the photo's existence would not affect the outcome of Tucker's trial.[22] The Superior Court, however, found a discovery violation.[23] The State agreed to not enter the photo into

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[16] Op. Br. at 9.

[17] *Id.* at 7.

[18] A-063.

[19] *Id.*

[20] 373 U.S. 83 (1963).

[21] A-064-65.

[22] A-067-68.

[23] A-067.

evidence.[24] The Superior Court asked Tucker to draft a curative instruction.[25] Tucker asked the court to advise the jury that there was no photo.[26] The Superior Court refused to give that instruction, but offered to give an instruction advising the jury to disregard Detective Nowell's testimony about the photo if the defendant drafted an instruction along those lines.[27] Tucker declined to draft one, stating that he believed such a curative instruction would not be effective and that he wished to preserve the issue for appeal.[28] Consequently, the Superior Court did not provide a curative instruction.[29]

Because Tucker declined a curative instruction, Tucker has waived the issue that the Superior Court should have instructed the jury to disregard Detective Nowell's testimony about the photo. Tucker refused the instruction that he says now the court should have given. Tucker's claim therefore may only be reviewed for plain error.[30]

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[24] A-068.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *See Stevens,* 3 A.3d at 1075 (trial court's offer of a curative jury instruction after defense's objection where defense later withdrew objection and did not request curative instruction reviewed for plain error); *Morgan,* 962 A.2d at 254 (trial court

Tucker fails to show that the Superior Court committed any error, much less plain. To demonstrate plain error, Tucker must show that any error from admitting Detective Nowell's testimony about the photo without a curative jury instruction affected his trial's outcome.[31] Tucker grossly overemphasizes the importance of the detective's testimony. The photo of the belt was not published to the jury or described by the detective in detail.[32] The detective's brief testimony about photographing Tucker's belt was a miniscule part of the evidence presented and essentially amounted to nothing. The photo's subject—the belt—was admitted into evidence.[33] To the extent that the presence of blood on the belt was at issue, the jury was free to reach its own conclusions based upon examining the actual item. The Superior Court correctly found that the photo's existence would not affect the outcome of Tucker's trial.[34]

Notably, Tucker complains that the Superior Court improperly failed to give an instruction that Tucker originally tactically declined to accept. "Plain error

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sustaining evidentiary objection where defense counsel did not request curative jury instruction reviewed for plain error).

[31] *Id.*

[32] *See* A-063.

[33] A-055.

[34] A-067-068. Moreover, Tucker ignores the substantial other evidence convicting him. Aside from DNA, eyewitness testimony put Tucker at the scene, and Tucker's own testimony placed himself at the scene fighting with Moore. A-074, A-157-58.

assumes oversight, not a tactical decision by defense counsel."[35] Rejecting the Superior Court's offer was part of Tucker's defense strategy.[36] The Superior Court was not required to question Tucker's strategy.[37]

Tucker's reliance on *Gomez v. State*[38] and *Ashley v. State*[39] is misplaced. In *Gomez*, the appellant was convicted of two counts of first-degree rape where the appellant's niece was the victim.[40] On appeal, Gomez argued that the trial judge committed reversible error in denying his motion for a mistrial after a State's witness testified about Gomez's prior conviction for a similar offense against his other niece.[41] This Court found that a jury instruction would not have cured the prejudice from the accusation that Gomez committed a similar sexual offense.[42] The facts of *Gomez* are completely inapposite here.

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[35] *Keyser v. State,* 893 A.2d 956, 961 (Del. 2008) (defendant could not establish plain error in trial court not giving jury instruction where the lack of an instruction may have been defense counsel's tactical decision); *Stevens,* 3.A.3d at 1076 (defense counsel's intentional decision to decline trial court's offer of curative instruction not oversight).

[36] A-068.

[37] *Morgan,* 962 A.2d at 255 ("Since defense counsel did not request any curative jury instruction after making an evidentiary objection, the trial judge was not required to second guess that defense strategy.").

[38] 25 A.3d 786 (Del. 2011).

[39] 85 A.3d 81 (Del. 2014).

[40] *Gomez,* 25 A.3d at 787.

[41] *Id.* at 793.

[42] *Id.* at 794-95.

Ashley also does not assist Tucker. In *Ashley,* this Court, assuming *arguendo* that testimony by a State's witness that she thought Ashley had pled guilty because he had already confessed was improperly admitted, found that any error in not giving a curative jury instruction was harmless.[43] This Court noted that Ashley had confessed to committing the crime, and the victim had also testified about Ashley's actions.[44] This case, upholding the court's lack of providing a curative instruction, does not support Tucker. Tucker has waived the issue by declining a curative instruction in the first instance and, in any case, has failed to demonstrate plain error.

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[43] *Ashley,* 85 A.3d at 87.

[44] *Id.*

II. THE SUPERIOR COURT ERRED IN NOT LIMITING TUCKER'S STATEMENTS TO COMPLY WITH D.R.E. 804(b)(3).

Question Presented

Whether the Superior Court erred in admitting the non-inculpatory portion of Tucker's preliminary hearing testimony under D.R.E. 804(b)(3). The State preserved this question for review by objecting to its admission at trial.[45]

Standard and Scope of Review

This Court reviews the trial court's evidentiary rulings for abuse of discretion.[46] This Court will disturb a discretionary ruling if "based upon unreasonable or capricious grounds."[47]

Merits of the Argument

As part of his case, Tucker requested to call Detective Nowell to read to the jury certain parts of Tucker's preliminary hearing testimony as statements against interest under D.R.E. 804(b)(3).[48] The State objected, arguing that part of the intended testimony did not fall under the hearsay exception.[49] The State only agreed

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[45] A-149-50.

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

[47] *Zimmerman v. State,* 628 A.2d 62, 65 (Del. 1993).

[48] A-149. The State had not requested any portions of this testimony be admitted in its case in chief.

[49] A-149-50.

that Tucker's statement admitting to beating Moore was admissible.[50] Over the State's objection, the Superior Court admitted Tucker's other non-inculpatory statements.[51]

Detective Nowell then read the following to the jury:

> I understand what he's saying, but I'm saying this. Like I'm the victim too. I got out of the car. When I got out of the car, I was walking to my house. Where I live at is no camera be—where I live at is no camera behind there. So, that's what I'm saying.
>
> I whooped the boy's ass because he ran down on me. That's what I'm trying to tell you. I was walking. He ran down on me. I thought he had a gun.[52]

The Superior Court abused its discretion by admitting into evidence Tucker's preliminary hearing testimony beyond Tucker confessing to beating Moore.

D.R.E. 804(b)(3)—statement against interest—sets forth the following:

> A statement which was, at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the

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[50] A-150.

[51] *Id.* The court did determine, however, that Tucker's statement cursing the judge was inadmissible as irrelevant. *Id.*

[52] A-151.

trustworthiness of the statement.[53]

Any statement offered under D.R.E. 804(b)(3) must truly be self-inculpatory.[54] "The policy behind the declaration-against-interest exception is that self-inculpatory statements are inherently reliable and trustworthy."[55] "There is no clear policy basis, however, for attributing equal guarantees of trustworthiness to declarations appurtenant to the self-incriminatory ones, particularly those that are self-serving."[56] The rule is "'founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend not to make self-inculpatory statements unless they believe them to be true.'"[57] The same is not true, however, for non-inculpatory statements, because "'[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature.'"[58] A defense strategy that

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[53] D.R.E. 804(b)(3).

[54] *Smith v. State,* 647 A.2d 1083, 1086 (Del. 1994); *Barrow v. State,* 749 A.2d 1230, 1244 (Del. 2000).

[55] *Smith,* 647 A.2d at 1087 (citing *Williamson v. United States,* 512 U.S. 594, 599-600 (1994)).

[56] *Id.*

[57] *Id.* (quoting *Williamson,* 512 U.S. at 599).

[58] *Id.* (quoting *Williamson,* 512 U.S. at 599-600).

"place[s] the defendant's remarks before the jury without subjecting them to scrutiny of cross-examination . . . is precisely what is forbidden by the hearsay rule."[59]

Here, Tucker's statement that he beat Moore was the only truly self-inculpatory portion from Tucker's preliminary hearing testimony admitted at trial. Tucker's other statements—where he claims to also be a victim, that Moore "ran down" on him, and his belief that Moore carried a gun—were self-serving statements that bolstered his implausible justification defense. Other comments within that testimony were irrelevant under D.R.E. 804(b)(3). Tucker's non-inculpatory statements lacked corroboration or indicia of trustworthiness.[60] The Superior Court should have excluded Tucker's non-inculpatory statements.

D.R.E. 106 does not render Tucker's non-inculpatory statements admissible. This rule provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be

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[59] *United States v. Scrima,* 819 F.2d 996, 1001 (11th Cir. 1987); *see also United States v. Ortega,* 203 F.3d 675, 682 (9th Cir. 2000) (declining to allow defendant to place his exculpatory statements before jury without cross-examination); *United States v. Larsen,* 175 F. App'x 236, 241-42 (10th Cir. 2006) (upholding defendant's inability to elicit his exculpatory statements from detective on cross-examination without subjecting himself to cross-examination).

[60] For instance, police did not locate a gun at the scene, and Rollins did not testify at trial.

considered contemporaneously with it."[61] F.R.E. 106 "does not, however, render admissible the evidence which is otherwise inadmissible under the hearsay rules" and does not "require the admission of self-serving exculpatory statements made by a party which are being sought for admission by that same party."[62]

Thus, D.R.E. 106 does not help Tucker.[63] An adverse party did not offer Tucker's non-inculpatory statements because Tucker, not the State, requested that Detective Nowell read these statements to the jury. Moreover, D.R.E. 106 did not transform Tucker's inadmissible evidence into admissible evidence. *Smith* required the Superior Court to dissect Tucker's preliminary hearing testimony and exclude his non-inculpatory statements. By failing to exclude Tucker's non-inculpatory statements, the Superior Court abused its discretion.

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[61] D.R.E. 106. Delaware's rule tracks the federal one. *See* Comment to D.R.E. 106.

[62] *United States v. Lentz,* 524 F.3d 501, 526 (4th Cir. 2008) (internal quotation and citations omitted); *see also United States v. Guevara,* 277 F.3d 111, 127 (2d. Cir. 2001) (upholding exclusion of statements argued, among other things, as exculpatory because F.R.E. 106 did not transform inadmissible evidence into admissible evidence and defendant had not otherwise demonstrated the admissibility of the statements), *overruled on other grounds recognized by, United States v. Doe,* 297 F.3d 76 (2d. Cir. 2002); *Ortega,* 203 F.3d at 682 (exclusion of exculpatory statements made with inculpatory statements proper notwithstanding F.R.E. 106).

[63] While the Superior Court did not cite the rule it relied upon to admit Tucker's non-inculpatory preliminary hearing testimony, the State presumes that the Superior Court admitted this evidence for purposes of completeness under this rule.

CONCLUSION

The State respectfully requests that this Court affirm the judgment below for the foregoing reasons, but find that the Superior Court abused its discretion by admitting the non-inculpatory portions of Tucker's preliminary hearing testimony under D.R.E. 804(b)(3).

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Dated: January 16, 2018

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Defendant-Below,	)	
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STATE OF DELAWARE,	)	
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Plaintiff-Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 3,806 words, which were counted by Microsoft Word 2016.

Dated: January 16, 2018

/s/Brian L. Arban