EFiled: Jun 15 2018 02:45PM EDT
Filing ID 62145129
Case Number 559,2017

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| **HAKIEM ANDERSON,** | ) | |
| | ) | |
| Defendant-Below, | ) | |
| Appellant, | ) | No. 559, 2017 |
| | ) | |
| v. | ) | On Appeal from the |
| | ) | Superior Court of the |
| **STATE OF DELAWARE**, | ) | State of Delaware |
| | ) | |
| Plaintiff-Below, | ) | |
| Appellee. | ) | |

# STATE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

Martin B. O'Connor (No. 3528)
Deputy Attorney General
820 North French Street, 7th Floor
Wilmington, DE 19801
(302) 577-8500

Dated: June 15, 2018

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Statutes and Rules

## NATURE AND STAGE OF THE PROCEEDINGS

Hakiem Anderson ("Anderson") was arrested on September 23, 2015. (A1). On December 21, 2015, a New Castle County grand jury indicted Anderson for Murder First Degree, Possession of a Firearm During the Commission of a Felony ("PFDCF"), and Possession of a Deadly Weapon (firearm) by a Person Prohibited ("PDWBPP"). (A1). On July 6, 2017, the Superior Court held a jury trial, and on July 17, 2017, Anderson was found guilty of Murder First Degree and PFDCF. Subsequently, the Superior Court judge held a bench trial and found Anderson guilty of PDWBPP. (B-51). The Superior Court ordered a presentence investigation.

On December 8, 2017, the Superior Court sentenced Anderson to Level V imprisonment for the remainder of his natural life for Murder First Degree; to 3 years Level V for PFDCF; and 20 years Level V, suspended after 10 years, for PDWBPP. (A164). Anderson filed a timely notice of appeal, followed by an opening brief and appendix. This is the State's answering brief.

## SUMMARY OF THE ARGUMENTS

I. DENIED. The Superior Court did not abuse its discretion by granting the State's motion to play Arto Harrison's recorded statement pursuant to DRE 804(b)(6). Harrison was unavailable, and it was reasonable for the Superior Court to conclude Harrison's disappearance and failure to appear at trial was a result of Anderson's conduct.

II. DENIED. The Superior Court properly denied Anderson's request for a missing evidence instruction. The corrupted videotape did not result from the State's failure to collect or preserve evidence, and Anderson failed to demonstrate the recording had probative value or would have materially assisted his defense.

III. DENIED. The Superior Court reasonably denied Anderson's Motion for a Mistrial. Anderson's current claim of cumulative error was not presented to the trial court and is therefore waived. To the extent this Court considers the claim, Anderson cannot demonstrate error. Harrison's appearance at trial cured any perceived prejudice, and the admission of Anderson's prison calls was appropriate under DRE 404(b). Anderson cannot show any error, much less cumulative error.

## STATEMENT OF FACTS

At approximately 11:00 p.m. on August 15, 2015 Markevis Clark ("Clark") and Hakiem Anderson ("Anderson") were in the 800 block of Vandever Avenue in the City of Wilmington. (B-11-12). Clark and Anderson, who grew up together, got into an argument where Clark informed Anderson that Anderson was named in someone's court paperwork, thus labeling him a "snitch" in front of a crowd of people. (B-12). Anderson told Clark he "ain't the police" and "ain't no snitch," and he walked down Church Street. (B-12-13).

A short time later, Anderson returned to the area of 807 Vandever Avenue. (B-14). Anderson walked up to Clark and said "you thought this shit was a joke, huh?" (Court Ex. 1). Anderson then fired a handgun at Clark, shooting him in the head. (Court Ex. 1; B-14, 16-17; B-21-22). Three eyewitnesses saw Anderson shoot Clark. Keisha Waters was approximately 10 feet from Clark when Anderson shot him. (B-15). Theresa Brooks was "a couple feet" from Clark when she saw Anderson shoot Clark. (Court Ex. 1; B-16-17). Joseph Brown, Clark's brother, saw Anderson come across the street and shoot Clark.[1] (B-21-22). After he shot Clark, Anderson ran back up Church Street. (B-14).

[1] Joseph Brown was also present when Anderson called Arto Harrison on the phone and told him he accidentally killed Clark. (B-23-24).

At the time of the shooting, Wilmington Police officer Eric Gonzales was investigating a hit and run collision in the 600 block of Vandever Avenue when he heard gunfire east of his location. (B-4). Gonzales entered his police vehicle, activated his emergency equipment, and raced to the 800 block of Vandever Avenue. (B-4). As Gonzales parked his vehicle in the intersection of the 700 block of Vandever Avenue, he saw Clark laying face down on the north side of the sidewalk. (B-4). Clark was bleeding from the head, and appeared lifeless. (B-5). As other officers arrived, they tried to resuscitate Clark and secured the scene. (B-5). Although there were several people on the block, and approximately six or seven people in the immediate area of Clark's body, no one came forward that evening to tell the police what happened. (B-5).

The police recovered two 9 millimeter spent shell casings near Clark's body. (State's Ex. 18, 19; B-6). Clark had been shot in the left frontal region of his head, resulting in a skull fracture, laceration of the brain and brain hemorrhage. (B-18). The medical examiner determined that the gunshot was fired from an indeterminate range, and recovered the bullet from Clark's brain. (B-19).

## ARGUMENT

### I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY GRANTING THE STATE'S MOTION TO ADMIT ARTO HARRISON'S STATEMENT PURSUANT TO DRE 804(b)(6).

### QUESTION PRESENTED

Whether the Superior Court abused its discretion in granting the State's Motion to Admit Arto Harrison's statement pursuant to Delaware Rule of Evidence ("DRE") 804(b)(6).

### STANDARD AND SCOPE OF REVIEW

This Court reviews a trial court's ruling under the forfeiture by wrongdoing hearsay exception for an abuse of discretion.[2]

### MERIT OF THE ARGUMENT

Anderson argues that the Superior Court erred in admitting Harrison's statement under DRE 804(b)(6) because the state failed to satisfy the test for admissibility under the forfeiture by wrongdoing exception to the hearsay rule.[3] He is wrong.

---

[2] *Phillips v. State*, 154 A.3d 1130, 1144 (Del. 2017) (citing *Charbonneau v. State*, 904 A.2d 295, 318 (Del. 2006).

[3] Corr. Op. Br. at 13-14.

Arto Harrison ("Harrison") was the biological father of Clark, and stepfather to Anderson.[4] On August 18, 2015, Harrison and Shyra Dennis ("Dennis") went to the Wilmington Police Department ("WPD").[5] (B-32). Harrison told WPD Detective Peter Leccia he spoke to Anderson by phone on the Sunday morning after the homicide. (Court Ex. 4). Anderson first told Harrison he did not know what happened to Clark, and he denied being in the area at the time of the shooting. (Court Ex. 4). A short time later, Anderson called Harrison back, crying and "balling his eyes out." (Court Ex. 4). Anderson told Harrison "Pop, I'm sorry, I didn't mean to do it." (Court Ex. 4). Anderson told Harrison he would come to the house to talk to them, but Anderson never appeared. (Court Ex. 4). Anderson told Harrison he wanted to turn himself in to the police. (Court Ex. 4).

Because Anderson's statement to Harrison was obviously incriminating, the State intended to call Harrison as a witness at trial. On June 16, 2017, the State served Harrison with a subpoena to appear for an interview at the Attorney General's office. (B-49, 50). Harrison did not appear for that interview. (B-49). The police immediately started looking for Harrison, calling his residence, and sending officers to his home and other locations where he was known to hang out, to secure his

[4] (B-32).

[5] For approximately 15 years, Dennis had been Harrison's paramour. (B-32). Dennis is Anderson's aunt and had raised him since he was a child. (B-32).

appearance for trial.[6] (B-49). The Wilmington Police looked for Harrison on the north side, around 22nd Street and 23rd Street, Riverside and Southbridge. (B-43). The State obtained a material witness warrant for Anderson. (B-42). The United States Marshall's Task Force also assisted in trying to locate Harrison, tracking phone numbers to which Harrison was possibly associated. (B-42). Law enforcement monitored Harrison's Electronic Benefit Transfer ("EBT") card – which Harrison used to obtain supplies under the federal food stamp program. (B-42). Harrison had last used the EBT card on June 17, 2017, the day after the police served him with a subpoena to appear for trial preparation. (B-42). The police also contacted Meadowwood Hospital and the Rockford Center; Harrison was at neither location. (B-42).

While law enforcement continued to look for Harrison, on Tuesday, July 11, 2017, the State received copies of Anderson's recent prison telephone calls. (B-49). The next day, July 12, 2017, Detective Leccia listened to the prison calls, which revealed a scheme by Anderson, his sister Kourtney, and his aunt Tara, to keep Harrison and Dennis from appearing at trial. (State's Exs. 48-51). Anderson repeatedly told his sister and aunt that Aunt Shy's (Shyra Dennis) people "lied on him;" the "starter," Harrison, was already "gone;" and if neither of them appeared at

[6] The police "checked many areas where [Harrison] has family and friends to see where he might be staying." (B-43).

trial, the State could not use their prior statements against him.[7] (State's Ex. 50). When Kourtney asked Anderson what he wants her to do with Aunt Shy, Anderson told her that Aunt Tara "got to do it." (State's Ex. 50). Anderson was clear that Harrison and Dennis could not testify against him – they had to go "bye." (State's Ex. 50).

On July 13, 2017, the State moved for the admission of Harrison's statement pursuant to DRE 804(b)(6). (B-26). The State informed the court that Harrison was unavailable, he had not appeared at trial throughout the proceedings, and Anderson's prison calls demonstrated "the defendant has engaged in or acquiesced to wrongdoing intended to make Mr. Harrison unavailable." (B-26). Anderson objected, claiming the phone calls did not show Harrison's absence was "not here due to the efforts of the defendant." (B-26). Anderson claimed his investigator also made attempts to locate Harrison, and defense counsel "wanted Mr. Harrison here just as much as the State did."[8] (B-27). Although Anderson conceded Harrison was

---

[7] Anderson told his sister "both of them, bye; if nobody comes, then [the State] can't use nothing." (State's Ex. 50).

[8] Anderson's counsel represented the following:

> [Harrison's] statement is somewhat – is damaging. We believe if he was here, he would have recanted. That's why we were looking for him. But his – I – he wont have the chance to recant, he's not here. He has recanted to others and that's – I can't use that unless he's here. So it's justs as damaging to me as it is to the State not to have Arto Harrison here. So there's no reason why the defense did not want him here, your honor.

unavailable, he denied the evidence supported a conclusion that his actions caused Harrison's unavailability. (B-27).

After considering argument from the State and Anderson, the Superior Court granted the State's motion to admit Harrison's video recorded statement pursuant to DRE 804(b)(6) as a Court exhibit. The Superior Court concluded:

> I do find that there is a reasonable inference that Mr. Harrison is – well there's no question he's unavailable. That's undisputed. I do find that there's a reasonable inference that his unavailability was procured through the efforts of the defendant, therefore I find that pursuant to Rule 804(b)(6), the statement of Mr. Harrison, which is offered against the defendant, is admissible. (B-31).

On July 13, 2017, Harrison's video recorded statement was played to the jury. (7/13/17 at 42-43). The Superior Court instructed the jury as follows:

> Before we hear that statement, ladies and gentlemen, I have already made a determination that Mr. Harrison is a witness that is legally unavailable. That is why his statement is being played without him being present in the courtroom. (Court Ex. 4; B-32).

DRE 804(b)(6) is an exception to the hearsay rule that applies when the declarant is unavailable as a witness. The specific rule provides:

> (b) The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . .

---

> Now, some of the statements, yeah, I did tell Mr. Anderson that, yeah, if nobody showed up, they don't have a case. I don't think that's a stretch.

(B-27).

> *Forfeiture by wrongdoing.* A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

DRE 804(b)(6).

Forfeiture by wrongdoing is a common law doctrine that allows for the "introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement of the defendant.'"[9] This hearsay exception is "aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them – in other words, it is grounded in the ability of the courts to protect the integrity of their proceedings."[10] Merely eliminating a witness is insufficient to invoke the forfeiture by wrongdoing doctrine – "an admitting court must determine whether the defendant procured the absence of a witness as a means of silencing their testimony."[11] "While the defendant's intent to eliminate the witness' testimony must be established, the State 'need not [ ] show that the defendant's sole motivation was to procure the declarant's absence; rather, it need only show that the defense was motivated *in part* by a desire to silence the witness.'"[12]

---

[9] *Phillips v. State*, 154 A.3d at 1142 (quoting *Giles v. California*, 554 U.S. 353, 359 (2008)).

[10] *Id.* (quoting *Giles*, 544 U.S. at 374).

[11] *Id.* (citing *Giles*, 544 U.S. at 377).

[12] *Id.* (citing *Giles*, 544 U.S. at 377); *United States v. Dhinsa*, 243 F.3d 635, 653 (2nd Cir. 2001). Anderson seems to suggest this Court adopted the federal court's three part test to determine the admissibility of hearsay statements pursuant to the forfeiture by wrongdoing exception. Corr. Op. Br. at 13. This Court did not

The Superior Court appropriately determined that there existed a reasonable inference that Harrison's unavailability was procured through Anderson's efforts. (B-31). At trial, the State admitted four of Anderson's prison calls, dated June 28, 29, 30, and July 2, 2017. (State's Ex. 48-51). On the June 28 call, Anderson sounded panicked that, at a pretrial hearing, the State represented it was prepared for trial and its witnesses were available. (State's Ex. 48). Anderson's sister Kourtney and Aunt Tara assured him they were "working" on it. (State's Ex. 48). Anderson told them his attorney said he was in jail because of Shyra Dennis' "peoples," including Harrison. (State's Ex. 48).

On June 29, 2017, Anderson's aunt told Anderson that the "starter," (a.k.a. Harrison), was "gone," making veiled references to Florida. (State Ex. 49). She then told Anderson "He up there, you heard what I said?" Anderson replied "that's a good thing, right?" and her response was "uh, yeah." (State Ex. 49).

On June 30, 2017, Anderson and his sister discussed Dennis. (State Ex. 50). The following conversation ensued:

> Kourtney: Did she sign something?
> Anderson: If I could tell you you'd punch her in her goddamn face. You know the same situation her people's in, put her in that same

---

explicitly adopt the three-part test, but cited with approval *Giles v. California,* 554 U.S. 353 (2008), in addressing a defendant's intent and the State's burden of proof. Even applying the federal test, the Superior Court did not abuse its discretion in admitting Harrison's statement as a Court Exhibit.

category. *You do what you do. Both of them, bye. Both of them, bye.* Both, no. No way possible, ok?
Kourtney: they in the same category?
Anderson: Her shit worse.
Kourtney: She protecting the nigger?
Anderson: Man, fuck that. Threw me under the two railroad – two different trains on both sides.

It is clear from this call that Anderson was aware of the importance of the appearance of these State's witnesses at trial. The call continued:

Anderson: I have a right to confront my accuser. If somebody say something about me, but if nobody comes then they can't use nothing. You understand what I'm saying?
Kourtney: Yeah.
Anderson: Its like everybody has their right to confront their accuser but if the accuser don't come then -- nothing. You hear me? I have a right, Kourtney. If someone says I did something they gotta come to court. If they don't come they can't use nothing. That fucking lady raised me. I can't believe the whole fucking thing. They made a whole fucking story up, man. . . . .
Anderson: Kourtney, when this phone hang up, do what you do, man.
Kourtney: When I run outside I'm running over there first.

(State Ex. 50).

Finally, on July 2, 2017, four days before trial began, Anderson and his sister discussed a "game" he called "bye bye birdie." Kourtney told Anderson that Harrison was gone, playing "bye bye birdie," and Anderson told Kourtney that Dennis should not appear at trial. (Ex. 51).

Anderson: You remember growing up we played that basketball game . . . its called bye bye birdie?
Kourtney: Yup.
Anderson: I want to play that game, Kourtney.
Kourtney: Do you?

Anderson: I want to play that game. I want to play that shit. Do you hear me?
Kourtney: Y'all don't play that game in there?
Anderson: Nah, its not the same. Is that the game your peoples is going to play?
Kourtney: Yeah, yup.
Anderson: Seriously, both of them?
Kourtney: I only know about one. I only think one player said they would be able to play.
Anderson: And that's the immediate one?
Kourtney: Yeah, yup.
Anderson: Is that the homeboy who always win?
Kourtney: Yeah.
Anderson: I could never beat his shot.
Anderson: Is your Aunt Shy doing good? Is she going to the hospital? So, where's she going to go at? Get her motherfucking foot fixed? She got to go some motherfucking where.
Kourtney: I hear you, bitch. . . . . .
Anderson: I ain't fucking around because right now, my lawyer came to see me and said everything is looking good.
Kourtney: Ok.

(State Ex. 51).

Anderson's calls reveal his involvement in wrongdoing that was intended to and did procure the unavailability of Harrison as a witness. Thus, the Superior Court did not abuse its discretion in concluding Anderson demonstrated an intent to ensure Harrison's unavailability for trial, and that he intended to silence the witness. Given the State's efforts to locate Harrison, it was also reasonable for the Superior Court to conclude, based on the recordings, that Anderson's actions caused Harrison's unavailability so that he would not testify. The Superior Court did not abuse its discretion in admitting Harrison's statement pursuant to DRE 804(b)(6).

In any case, Anderson cannot show prejudice. The State played Harrison's statement for the jury on July 13, 2017. (B-32-33). Later that day, Dennis contacted Wilmington Police Detective Danielle Farrell, expressing concern for Harrison's well-being after learning his video recorded statement was played to the jury. (B-39). Later, Dennis again contacted Detective Farrell, informing her that Harrison was coming home and intended to turn himself in. (B-39). On the morning of July 14, 2017, Detective Farrell picked up Harrison from his residence and brought him to the courthouse. (B-39). Anderson immediately requested a mistrial, arguing that had Harrison appeared, he would deny being threatened by Anderson's family, and then, the recorded prison statements would not have been admissible, and the statements of witness tampering would not have been before the jury.

The Superior Court denied Anderson's motion for a mistrial:

> At the time I made the ruling that Mr. Harrison's statement was admissible, the facts available to the Court and the reasonable inferences to be drawn from those facts were as they were at that time. I made the ruling based upon what was before me at that time. I see no reason to alter that ruling. It – for all the reasons I stated – and I'm not going to reiterate all of those reasons, but the conclusion is that I found there was evidence that the defendant had procured the unavailability of the witness and, therefore, the statement was admissible under 804(b)(6). I see no reason to alter that ruling.

(B-40).

Anderson conceded that, had Harrison been available as a State's witness and taken the stand, and then provided testimony contrary to his prior recorded

statement, the State would have been able to impeach him with his prior recorded statement, playing the same recorded statement the Court admitted and the State played pursuant to DRE 804(b)(6). (B-40).

On July 14, 2017, Anderson called Harrison as a defense witness. (B-44). Harrison denied being threatened by anyone to "not come forward in this case." He also denied being threatened or compensated by anyone to change his original statement. (B-46, 47). Harrison explained he had been in a rehab facility "the last few months," and told the jury at the time of his statement to the police in 2015, his drug addiction was "off the chain." (B-45). Harrison could not recall telling the police that Anderson killed Clark, and denied that Anderson ever told him he killed Clark. (B-45). Harrison said if he did tell the police Anderson killed Clark, it was a lie. (B-46). Harrison conceded he may have told the police Anderson told him he killed Clark, and it was an accident, but the source of that information was not Anderson, but "hearsay," -- word on the street. (B-46). Harrison further denied that Joseph Brown was present during any phone conversation he had with Anderson about Clark's murder, which contradicted Brown's trial testimony. (B-46).

Anderson's trial counsel had told the court that he wanted to call Harrison as a trial witness, because he believed Harrison would recant his prior recorded statement. (B-27). He did. Anderson also conceded Harrison's prior statement would have been admissible if he testified as Anderson expected. The record

establishes that Anderson cannot show prejudice from the admission of Harrison's statement pursuant to DRE 804(b)(6). If Harrison had been available, his prior statement would have been admissible pursuant to 11 *Del. C.* § 3507, and Anderson had a full and fair opportunity to extract a recantation from Harrison and present that evidence to the jury. Anderson has failed to show that the Superior Court abused its discretion in admitting Harrison's statement pursuant to DRE 804(b)(6).

## II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING ANDERSON'S REQUEST FOR A MISSING EVIDENCE INSTRUCTION.

### QUESTION PRESENTED

Whether the Superior Court erred in denying Anderson's request for a missing evidence instruction.

### STANDARD AND SCOPE OF REVIEW

This Court reviews a trial court's denial of a request of a missing evidence instruction *de novo*.[13]

### MERIT OF THE ARGUMENT

Anderson argues that he was entitled to a missing evidence instruction because a video in the State's possession was corrupted and no longer available. Anderson asserts the State failed to "preserve and turn over potentially exculpatory evidence".[14] Anderson claims that two witnesses reported the shooter ran in two different directions, and the recording *could* have "shed doubt on the credibility of the witnesses," as Anderson *could* have discredited them.[15] Anderson argues "the testimony of what was on the video was supported by independent evidence and

[13] *Pardo v. State*, 160 A.3d 1136, 1153 (Del. 2017).

[14] Corr. Op. Br. at 16.

[15] Corr. Op. Br. at 16-17.

further a jury may have determined the black silhouette was the shooter thus showing inconsistency in the eyewitness testimony."[16]

At trial, Anderson's argument was somewhat different. He argued that the missing evidence instruction was warranted because even though Detective Leccia could not make out the person outside the liquor store, "that does not mean the trier of fact could not have made something out." (B-35). Here, Anderson argues that the video would have possibly shown an inconsistency in eyewitness testimony, impacting witness credibility. To the extent Anderson raises a different claim, it is waived.[17] In any event, both claims are speculative.

On August 16, 2015, Detective Leccia responded to Vandever Avenue to locate potential witnesses and surveillance video that could assist the investigation. (B-7). At the opposite end of the street, a block away from the homicide scene at 807 Vandever Avenue, Leccia found two businesses operating surveillance cameras – Richardson's Market and a liquor store. (B-7). No camera from either business pointed towards 807 Vandever Avenue. (B-8). The video recording recovered from Richardson's Market had no evidentiary value, and displayed images from inside the store, showing that the store was closed at the time of the homicide. (B-9).

[16] Corr. Op. Br. at 18 (emphasis added).

[17] Supr. Ct. R. 8.

The liquor store was also closed at the time of the homicide. (B-9). The surveillance footage from the store depicted "a black silhouette . . . a body, but it was all blacked out." (B-9). Leccia described the liquor store surveillance equipment and its operation:

> The business turns its lights off right around there, so there's – its back off the street a little bit from where its at, so you – where the cameras are at, its very dark before you get out into the street, so everything is a dark silhouette. So you couldn't tell the color of the pants or if they were male or female. You could only tell there was a human being going down the street.

(B-9).

Leccia did not believe that the silhouette captured on the recording had anything to do with the homicide. (B-9).

Detective Leccia copied the liquor store surveillance onto a flash drive. (B-10). When Detective Leccia tried to review the file at a later date, his computer indicated the file was "corrupt" and could not be viewed. (B-10). Before trial and during evidence review with defense counsel, the State and defense counsel attempted to view the recording with Detective Leccia. (B-2). At that time, the recording would not play. (B-2). The prosecutor and defense counsel then went to a "high tech individual," to try and assist with getting the recording to play. (B-2). Counsel were informed that an effort to recover the recording could be made, but if it failed, the recording would be erased. (B-2). Defense counsel agreed that an attempt should be made to recover the recording, because it could not be viewed in

its current form, and if it were lost, he would be in no worse position than he was prior to the attempt being made. (B-2). The attempt to recover the recording failed, and the recording was erased. (B-2).

At trial, Anderson argued that the fact that Detective Leccia was the only person to see the surveillance video, and he only saw a dark silhouette of a person on the tape, "[did] not mean the trier of fact could not have made something out." (B-35). The State replied that the recording was provided to the defense, "such as it existed." (B-35). But, at that point, it was discovered that the recording was corrupted. (B-35). Given the dark silhouette Detective Leccia observed on the recording, and the absence of evidentiary value, the State argued it did not have a duty to preserve the recording. (B-35). The State also argued it did not fail to preserve the evidence, and did not breach a duty to do so. (B-35). The State claimed it acted neither in bad faith or negligently, and there was no reason to believe the recording would have had evidentiary value. (B-36). The surveillance cameras at the liquor store did not point in the direction of the homicide, and there was no reason to conclude whomever Brooks saw running after the shooting would have been recorded on the surveillance camera. (B-36). Finally, Detective Leccia described what he observed on the surveillance recording, so the absence of the recording was not material. (B-36).

The Superior Court denied Anderson's request for a missing evidence instruction, concluding the State did not breach its duty to preserve the evidence:

> The undisputed testimony, which I find to be credible, is that the thumb drive was corrupted through, it appears, certainly not any intentional conduct of the police, but also there's no evidence to demonstrate what the negligence would have been. In fact, efforts were made, including efforts in the presence of defense counsel to try to reconstitute this thumb drive and no one has presented any evidence through expert or lay testimony which would give a reasonable bases for indicating the State affirmatively did something to corrupt the tape, or through negligence, permitted the tape to be corrupted. So, under these circumstances, I find that there was no breach of the duty to preserve the evidence. (B-36-37).

The Superior Court also considered two additional issues: whether the State acted with bad faith, and the nature of the evidence at issue. The court concluded the State did not act with bad faith. (B-37). Looking at the totality of the circumstances, the Superior Court concluded the "State appropriately took all actions necessary to preserve the tape," (B-37), noting that the video recording "was not a videotape of the shooting." (B-37). Viewing the evidence in the light most favorable to the defendant, "the videotape was of a figure at the end of the block at or about the time of the shooting and there was testimony that the shooter went toward that area of the block and got into a car." (B-37). The court noted the figure was "sufficiently indistinct so [Detective Leccia] was not even able to discern whether it was a male or a female, let alone be able to identify who was on that tape." (B-37). The tape did not contain *Brady* material, and even if the evidence were in

existence and had been turned over to Anderson, "there's no reason to believe that the evidence contained on that tape was material or would have been exculpatory or inculpatory in any way." (B-37). The Superior Court appropriately determined the tape "had virtually no probative value." (B-37).

A missing evidence instruction requires a jury to infer that, had the evidence at issue been preserved, it would have been exculpatory to the defendant.[18] This Court employs a two-step test to determine whether the State's failure to preserve evidence entitles a defendant to a missing evidence instruction.[19] First, the Court considers whether the State breached its duty to preserve potentially exculpatory evidence, considering: (1) whether the requested material, if in the possession of the State at the time of the request, would have been subject to disclosure under Superior Court Criminal Rule 16 or under *Brady v. Maryland*;[20] if so, (2) whether the State had a duty to preserve the material; and (3) if there was a duty to preserve, whether the State breached that duty and what consequences should flow from the breach.[21]

---

[18] *Worley v. State*, 2013 WL 6536750 at * 1 (Del. Dec. 9, 2013) (citing *Lunnon v. State*, 710 A.2d 197, 199 (Del. 1998)).

[19] *Worley*, 2013 WL 6536750 at * 1 (citing *Deberry v. State*, 457 A.32d 744, 750 (Del. 1983), *Hammond v. State*, 569 A.2d 81, 86 (Del. 1989), *Lolly v. State*, 611 A.2d 956, 959-60 (Del. 1992)).

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

[21] *Worley*, 2013 WL 6546750 at * 1 (citing *McCrey v. State*, 2008 WL 187947 at * 2 (Del. Jan. 3, 2008)).

Those consequences are determined in accordance with a three-part test, that considers: (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at trial to sustain the conviction.[22] A missing evidence instruction "is not required in cases where: (1) the defendant cannot show negligence or bad faith on the part of the police, and (2) the missing evidence 'does not substantially prejudice the defendant's case.'"[23] In evaluating a challenge to the trial judge's decision to deny instructing the jury about evidence that is missing because it was lost or not properly preserved, this Court examines the claim in the context of the entire record.[24]

The Superior Court appropriately determined the State did not breach its duty to preserve the surveillance video. Detective Leccia collected the video on a flash drive, and he maintained the flash drive as evidence. There was no evidence the flash drive was improperly maintained, and the police did not act intentionally or negligently to cause the flash drive to corrupt. Once discovered, efforts were made, in the presence of and with the consent of defense counsel, to recover the

---

[22] *Worley*, 2013 WL 6576750 at * 2 (citing *McCrey*, 2008 WL 187947 at * 2).

[23] *Powell v. State*, 49 A.3d 1090, 1102 (Del. 2012) (quoting *McCrey*, 2008 WL 187947 at * 2 (citations omitted)).

[24] *Cook v. State*, 728 A.2d 1173, 1176-77 (Del. 1999) (citing *Harris v. State*, 695 A.2d 34, 38 (Del. 1997); *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989) (quoting *United States v. Agurs*, 427 U.S. 97, 112 (1976))).

surveillance video on the flash drive, understanding that doing so could cause the permanent loss of the video. Unfortunately, those efforts failed and the recording was erased.

Most important, this recording was not a videotape of the shooting, but a surveillance video from a block away. At best, it showed a dark silhouette of a person in the area of the liquor store. This evidence had no probative value, but only showed someone near the liquor store around the time of the homicide. Three eye witnesses, Waters, Brooks and Brown, testified they saw Anderson shoot Clark. The Superior Court did not err in denying Anderson's missing evidence instruction.

## III. THE SUPERIOR COURT APPROPRIATELY DENIED ANDERSON'S MOTION FOR A MISTRIAL.

### QUESTION PRESENTED

Whether the Superior Court abused its discretion in denying Anderson's request for a mistrial.

### STANDARD AND SCOPE OF REVIEW

This Court reviews a trial court's denial of a request for a mistrial for an abuse of discretion.[25] Claims of error not raised below are waived in the absence of plain error.[26]

### MERIT OF THE ARGUMENT

Anderson claims the cumulative effect of errors at trial warranted a mistrial. Anderson argues, based on the totality of the circumstances, the Superior Court erred in admitting Anderson's prison calls.[27] Anderson also claims the Superior Court erred in admitting Harrison's statement pursuant to DRE 804(b)(6), as argued in Claim I.[28] In the Superior Court, Anderson requested a mistrial based on Harrison's appearance in court after his statement had previously been admitted based, in part,

---

[25] *Taylor v. State*, 827 A.2d 24, 27 (Del. 2003) (citing *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002)).

[26] *McDonald v. State*, 816 A.2d 750, 754 (Del. 2003) (citing *Lynch v. State*, 588 A.2d 1138, 1140 (Del. 1991)); Supr. Ct. R. 8.

[27] Corr. Op. Br. at 20.

[28] Corr. Op. Br. at 20.

on his unavailability. He now asserts the request for a mistrial "cannot be directed to one specific act."[29] Anderson argues because "the prejudicial effect of the court's earlier rulings could not be corrected or overcome in any way other than the granting of a mistrial," the cumulative effect of these two rulings "led to events so prejudicial that the defendant did not receive a fair trial."[30] Because Anderson did not raise a claim of cumulative error in the trial court, the claim is waived unless Anderson can show plain error.[31] Anderson cannot. His claim is meritless.

A trial judge should only grant a mistrial when there is "manifest necessity" or "the ends of public justice would otherwise be defeated."[32] The remedy of mistrial is required when "there are no meaningful and practical alternatives to that remedy."[33] In a claim of "cumulative error," such error must derive from "multiple errors that cause actual prejudice."[34]

---

[29] Corr. Op. Br. at 20.

[30] Corr. Op. Br. at 20.

[31] *McDonald*, 816 A.2d at 754; Supr. Ct. R. 8.

[32] *Smith v. State*, 963 A.2d 719, 722 (Del. 2008) (citing *Brown v. State*, 897 A.2d 748, 752 (Del. 2006) quoting *Steckel v. State*, 711 A.2d 5, 11 (Del. 1988), *Fanning v. Superior Court*, 320 A.2d 343, 345 (Del. 1974)).

[33] *Smith*, 963 A.2d at 722, (quoting *Dawson v. State*, 637 A.2d 57, 62 (Del. 1994) (quoting *Bailey v. State*, 521 A.2d 1069, 1077 (Del. 1987))).

[34] *Michaels v. State*, 970 A.2d 223, 231-32 (Del. 2009) (citing *Fahy v. Horn*, 516 F.3d 169, 205 (3d. Cir. 2008)).

On July 13, 2017, the State sought to admit Anderson's prison calls pursuant to DRE 404(b). (B-28). The State argued the prison calls were evidence of Anderson's identity as Clark's killer and consciousness of guilt. (B-28). Applying the *Getz*[35] factors, the State argued: (1) the material issue or fact in dispute was the identity of the shooter; (2) the prison calls evidenced Anderson's identity and consciousness of guilt; (3) Anderson's phone calls were clear and conclusive evidence of his wrongdoing; (4) the evidence was not too remote in time; and the probative value of Anderson's attempted witness tampering evidenced consciousness of guilt and identity -- outweighing any prejudice to Anderson. (B-28).

Anderson's counsel conceded it was Anderson's voice on the prison recordings, but claimed the entire State's argument was "speculation." (B-29). He argued that Waters did not testify she was tampered with, and the tapes do not "mean anything was done or anything was taken seriously and there's absolutely no evidence that any of these witnesses were approached, offered money or threatened by anyone not to appear in the courtroom." (B-29). And, with the exception of Harrison, all other witnesses appeared for trial, so the State failed to establish its "intended purpose." (B-29).

[35] *Getz v State*, 538 A.2d 726 (Del. 1988).

The Superior Court applied *Getz* and concluded the prison calls were admissible. (B-31). The court agreed that the issue in the case was identification, and whether the witnesses were intimidated was material. (B-30). The State sought admission of the evidence for a proper purpose – identification. (B-30). The Superior Court concluded the prison call evidence was plain, clear and convincing -- "it is a reasonable inference and the conversations can reasonably be construed as demonstrating the defendant intended that these witnesses not testify against him." (B-30). Anderson's acts were not remote in time – they took place very shortly before jury selection. (B-30). Finally, the probative value of the phone calls was "very great" – the case turned "on the credibility of these witnesses and the quality of their testimony and also their motivations for providing the testimony."[36] (B-30).

Prior to playing the prison calls, the Superior Court instructed the jury on the limited purposes for which this uncharged misconduct evidence was to be considered:

> You are about to hear evidence of certain acts allegedly committed by the defendant; acts other than the alleged crimes for which the defendant is now on trial.

[36] The Superior Court concluded:

> …I find, on balancing, that the probative value is not substantially outweighed by the danger of prejudice. I also find that when you listen to the phone calls in context, which I have, the probative value is not outweighed by confusion of the issues or the potential misleading the jury. (B-31).

> You may not consider these other acts for the purposes of concluding that the defendant has a certain character trait or was acting in conformity with that character or character trait with respect to the crimes charged in this case.
>
> You may not use the evidence to conclude the defendant is a bad person or has a tendency to commit criminal acts and, is, therefore, probably guilty of the charged crimes.
>
> You may use the evidence relating to the other acts allegedly committed by the defendant only to determine issues relevant to the charged crimes.
>
> In this case, the State contends that the evidence of other acts relates to the defendant's identity and consciousness of guilt. You may consider such evidence for this purpose only.
>
> As with any other evidence presented at trial, you, the jurors, are the sole finders of the fact. You must determine what, if any, weight the evidence should be given. However, your use of the evidence must follow the rules I have just explained to you. (B-34).

As a general matter, acts, conduct and declarations of a defendant which occur after the commission of an alleged offense "which are relevant and tend to show a consciousness of guilt or a desire or disposition to conceal the crime are admissible in evidence."[37] A rational juror could reasonably conclude the prison recordings identify Anderson as the shooter and evidence his consciousness of guilt, regardless of whether he was successful in suppressing the attendance of witnesses at trial. The Superior Court did not abuse its discretion in admitting the prison calls for these limited purposes.

Anderson has failed to show prejudice by the admission of Harrison's statement or the prison calls, and cannot demonstrate error, much less cumulative

[37] *Goldsmith v. State*, 405 A.2d 109, 114 (Del. 1979).

error. Anderson's prison calls were admissible regardless of whether Harrison appeared at trial. Anderson has failed to demonstrate "manifest necessity" or that the "ends of public justice would otherwise be defeated." As such, Anderson has failed to show that the Superior Court erred by denying his motion for mistrial. In addition, Anderson has not demonstrated cumulative errors derived from "multiple errors that cause actual prejudice."[38]

[38] *Michaels*, 970 A.2d at 231-32 (emphasis added).

## CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

**/s/ Martin B. O'Connor**
Martin B. O'Connor, ID # 3528
Deputy Attorney General
Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

Date: June 15, 2018

**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

| | | |
|---|---|---|
| **HAKIEM ANDERSON,** | ) | |
| | ) | |
| Defendant-Below, | ) | |
| Appellant, | ) | No. 559, 2017 |
| | ) | |
| v. | ) | On Appeal from the |
| | ) | Superior Court of the |
| **STATE OF DELAWARE**, | ) | State of Delaware |
| | ) | |
| 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 6,742 words, which were counted by Microsoft Word 2016.

Dated: June 15, 2018 /s/ Martin B. O'Connor