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Case Number 454,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON THOMPSON,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	No. 454, 2017
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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SECONDARY AUTHORITIES

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NATURE AND STAGE OF THE PROCEEDINGS

Aaron Thompson ("Thompson") was arrested on February 26, 2016 for the murders of Joe and Olga Connell. (A1 at DI 1)[1]. On February 29, 2016, Thompson, with two of his co-defendants, Christopher Rivers ("Rivers") and Dominique Benson ("Benson"), was charged by re-indictment with two counts of Murder First Degree, two counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), and Conspiracy First Degree.[2] (A1 at DI 1).

Rivers and Benson's joint trial was scheduled to begin on April 5, 2016, therefore, the State did not oppose the severance of Thompson's case from that of his co-defendants. (A34 at DI 68). At an April 1, 2016 office conference, the Superior Court set Thompson's trial date for June 6, 2017. (A2 at DI 6).

Rivers' and Benson's jury trial took place on April 11, 2016. (A18 at DI 89, 90). On April 29, 2016, the jury found Rivers guilty on all indicted

[1] All "DI" references are to the Superior Court Criminal Docket in State v. Aaron Thompson, I.D. No. 1602016732.

[2] Rivers and Benson had been arrested almost two years prior to Thompson. After Thompson's arrest in February 2016, the State re-indicted the case to include all three defendants. (A1 at DI 1; A34 at DI 68 & 69). Rivers was also charged with Criminal Solicitation First Degree.

charges.[3] The jury found Benson guilty of Conspiracy First Degree and were hung on the remaining counts. (A39 at DI 97). On June 13, 2016, the Superior Court advised counsel for Thompson and Benson of its intention to schedule Benson's retrial for June 6, 2017 so that he and Thompson could be tried together. (A3 at DI 11).

On August 2, 2016, Thompson filed a motion to sever his trial from Benson's (A5 at DI 17), which the Superior Court denied in October 2016. (A6 at DI 23). On May 9, 2017, Thompson renewed his motion to sever defendants. (A8 at DI 35, A9 at DI 42). At the May 23, 2017 office conference, the Superior Court granted the motion to sever, and the State elected to try Thompson first. (A9 at DI 45). At the May 30, 2017 pretrial conference, the Superior Court denied Thompson's motion for a trial continuance. (A62).

Thompson's jury trial began on June 6, 2017, and on June 28, 2017, the jury found Thompson guilty of all charges. (A317-18). On October 6, 2017, the Superior Court sentenced Thompson to two natural life terms plus 45 years at Level V. (A17-18).

Thompson has appealed his conviction and has filed an opening brief and appendix. This is the State's Answering Brief.

[3] *Rivers v. State*, 183 A.3d 1240, 1241 (Del. 2018).

SUMMARY OF THE ARGUMENT

I. Denied. The prosecutor did not commit prosecutorial misconduct in rebuttal closing arguments. The prosecutor asked the jury to draw inferences that were supported by the record regarding Bey's communication with Rollins' phone. The prosecutor agreed that Bey called Rollins' phone but argued Bey testified that he had spoken to Benson on the phone numerous times that day when Benson was with Rollins.

The prosecutor did not attempt to invoke the jury's sympathy by suggesting Bey would be harmed upon his release from prison. There were many inferences that could be drawn from the prosecutor's comment and the prosecutor did not intimate that someone would harm Bey. As a matter of caution the State requested a curative instruction and Thompson declined it.

II. Denied. The Superior Court did not abuse its discretion in admitting the cooperating co-defendant's September 5, 2014 taped statement to police in the State's redirect questioning of the co-defendant under Delaware Rule of Evidence 801(d)(1)(B) and 11 *Del. C.* § 3507. The court properly allowed the State to admit the statement in order to rehabilitate its witness against Thompson's claim of improper motive and recent fabrication. The Rule of Completeness contained in DRE 106 further supports the admission of the statement.

STATEMENT OF FACTS

Early on September 22, 2013, Officer Richards of the New Castle County Police Department ("NCCPD") responded to a call of a shooting with a female victim at 84 Paladin Drive, Paladin Club Condominiums. (A92). When Officer Richards arrived, she saw paramedics treating the victim, who was lying on the sidewalk with a gunshot wound to her cheek and blood under her head. (A92). Officer Richards recognized the victim as Olga Connell ("Olga"). Officer Richards had previously investigated a burglary at Olga and Joseph Connell's Paladin Club home on July 30, 2013.[4] (A92, 95). Olga's purse and iPhone were near her body, her keys were in the building's front door-lock, and the couple's mail was scattered near her. (A92, B6-8). Olga died at the hospital. (B-32).

The police found Joe Connell's ("Joe") dead body face down in the shrubs next to the entrance of their condominium. (A93). Joe's head was bleeding and he held his iPhone in his hand. (A93, B-9). The Connells had been out with friends at the Firestone Restaurant at the Wilmington Riverfront. (B-14). Christopher Rivers, Joe's business partner at C&S Automotive Repair, was supposed to meet the group at Firestone but he

[4] The Connells reported jewelry, laptops, clothing, shopping bags and a pillow case missing from their residence. (A94).

never did. (B-16).

Because it had been raining, the police preserved the scene by covering pieces of evidence with plastic. (B-18). The building's front door was shattered by bullets. (B19-20). The police found live rounds in the parking lot. (A93). In addition to other ballistic evidence scattered throughout the scene, the police recovered five 9mm casings near Joe's body, a projectile under his body, and eight .22 caliber casings closer to Olga's body. (B21-4, 25, 37-8).

The medical examiner found one projectile on the examining table near Joe's head and three others; one each in Joe's skull, knee and upper chest. (B33-6). The medical examiner also removed projectile fragments from Olga's brain. (B33-5). The medical examiner determined that both Joe and Olga's manner of death was homicide, caused by multiple gunshot wounds. (A116).

Delaware State Police Firearms Examiner Carl Rone examined 18 cartridge cases from the murder scene and determined that six of the 9mm cartridge cases were fired from the same firearm. (B57-8). Based upon insufficient markings, Rone was not able to conclusively determine whether the 12 remaining .22 cartridge cases were fired from the same weapon. (B61). Because they were too damaged, Rone could also not make any

determinations as to two 9mm copper-jacketed projectiles, nine .22 washed lead projectiles, or the projectile fragments. (B63-4).

During the search of the Connell residence, the police found an insurance policy for Joe, with Rivers as the named beneficiary. (A107-08). On October 10, 2012, the Life Insurance Company of the Southwest issued Joe a $977,500 life insurance policy, with Rivers as the beneficiary. (A107-08). The policy was intended to secure a bank mortgage loan. The bank required Joe and Rivers to purchase identical life insurance policies naming each other as beneficiary. (A107-08). If one insured died, the insurance policy would pay off the mortgage loan prior to the named beneficiary receiving any remaining proceeds. (A108).

At around 6:00a.m. on September 22, 2013, NCCPD Detectives Leonard and Breslin went to Rivers' residence at 1228 Faun Road in North Wilmington, where he lived with his girlfriend, Lauren Gorman, ("Gorman"), and their son. (A102-03). When Rivers answered the door, the detectives asked if he was Joe's business partner and he responded, "What did he do now?" (A103). While on his front door step, Rivers told the police that Joe used steroids and sold them at the auto repair shop. (A103). At the police station later that day, Rivers also told the police Joe was involved with the Russian mob, and had been fighting with his sister over a

family ring. (A103-04). Rivers told the detectives that he had texted Joe about hanging out at the Riverfront the night before, but never met up with Joe. (A104).

The police also reviewed video surveillance from Rivers' house to determine his location around the time of the murders. (A104-05). The video showed Rivers arriving home on September 21, 2013. (A104). Rivers was home and awake throughout the night, texting many times on his cell phone and pacing downstairs. (A104-05). Rivers contacted both Joe and Bey using his cell phone during that time. (A261).

On September 22, 2013, the police executed various search warrants. (A105). At C&S Automotive, Rivers showed the police where Joe kept steroids in a drop ceiling. (A107). Police also collected the six-camera continuously activated home surveillance system at Rivers' home, (A105, 121, B30-1), and took Rivers' cell phone. (A105, 121). As a result of his phone being seized, Rivers began using Gorman's cell phone. (B-79).

Rivers had three outstanding civil judgments against him, all predating his partnership with Joe, totaling $158,000. (A109). Rivers also had large amounts of money flowing through his personal bank account to pay debts, which included a total of $324,000 his family had loaned him. (B85-9). Rivers was amassing debt through the business. During the

summer of 2013, C&S business checks were bouncing, and in September 2013, the mortgage was not paid. (B94-6).

The police obtained cellphone records for Rivers, Gorman, and the Connells. (A121-23, 128). Around the time of the murder, there was a series of deleted texts or calls on Rivers' phone to and from Joe's phone, and to and from a cell phone number associated with Joshua Bey ("Bey"). (A124-25). On October 4, 2013, Detective Leonard questioned Bey about the frequency of contacts and deleted texts with Rivers; Bey said Rivers was his mechanic and denied any other connection to him. (A126-27). Bey told the police that at the time of the murders, he was working at Kohls. (A127). Detective Leonard obtained more of Bey's cell phone records, which were in the name of his girlfriend, Alicia Prince, and verified Bey's alibi for the night of the murders. (A123-25, 127-28, B118-19).

Police also spoke with Harry Cook, ("Cook"), who had a significant financial investment in C&S. (A110). Cook was a friend of Rivers and "worked" at C&S to fulfill probation requirements. (A111, B39-40). Cook regularly sold Rivers Percocet pills, (B-41), and when Rivers ran into financial problems, Cook loaned him approximately $140,000. (B-44, 50). Because Rivers was unable to repay Cook, and was unhappy with Joe, he asked Cook to assume a percentage of the partnership in C&S. (B44-6).

One day, Rivers asked Cook what he thought about getting somebody to kill Joe, (B-49), and Cook replied that it was a bad idea. (B49-50). In 2013, Cook noticed Bey visiting Rivers at the shop, sometimes having work done on Bey's Cadillac. (B54-6).

William Monahan, a friend of Rivers, who routinely visited the shop, said Bey came to the shop regularly, beginning a few months before the Connell murders, and ending right before Rivers was arrested. (B76-78). Bey came to the shop late at night to have work done on his white Cadillac and to sell drugs. (B-77).

Joseph Mallon, ("Mallon"), also worked at the shop. (B66-7). Mallon and Rivers were friends who did illegal drugs together. (B-68). Mallon also knew Bey because he worked on Bey's Cadillac, and he knew Bey sold drugs to Rivers at the shop and in the city. (B68-9). In the summer of 2013, Mallon and Rivers went to the city to buy drugs from Bey, and Rivers told Mallon that Joe was ruining the business and Rivers "was going to have someone take care of him." (B-69). Rivers then pointed to Bey and told Mallon that "Josh knows people." (B69-70).

On the day of the murders, Mallon asked Rivers if he had killed Joe, and Rivers responded "absolutely not. I didn't talk to anybody. I didn't give anybody money." (B-70). Rivers told Mallon the repair shop would be

paid off because Joe was deceased. (B-72). Later, in Mallon's presence, Rivers told a friend of Mallon's that the people he had talked to about killing Joe "couldn't have done the murders". (B74-5).

On October 24, 2013, the police met with Bey again; Bey admitted to the police that he sold drugs to Rivers. The police seized Bey's phone and the next day, arrested Bey for providing a false statement to the police. (A148, A151-152). Bey's arrest also resulted in a violation of his probation ("VOP"). (A151).

The police continued to obtain more cellphone records for people associated with Bey – specifically Dominique Benson,[5] and Benson's friend Aaron Thompson. (A146). The police learned that on the day of Bey's arrest, October 25, Benson's girlfriend, Ashley Cooper, sold her cellphone that Benson had been using to communicate with Bey and Thompson. (A149, B98-9, 103-05).

The police extracted information from all of the cell phones and generated Cellebrite reports. (B82-4). Two cell phones were connected to Thompson, one was a Sprint phone in his name ("Thompson phone"), and one was a Metro PCS phone in the name "Kenny AAAA" ("Kenny phone").

[5] During the relevant timeframe, Benson regularly used Ashley Cooper's cell phone. (B101-02).

(A271-72). The Kenny phone and the Thompson phone had at least 10 numbers in common and both phones had several of the same contacts who were Thompson's associates or family members. (A118-119, A251-52, B155-65).

Thompson's girlfriend, Selma Ross, ("Ross"), worked for a dental practice which was attached to a financial corporation, USA Financial Network. (A247-48). As part of her job, Ross staffed the after-hours patient emergency phone, ("USA phone"), but regularly used that phone, in contravention of policy, to contact Thompson and others. (A247-48).

From September 15, 2013 through September 29, 2013, Thompson's phone and Ross' USA phone were in frequent contact. (B173-74). On September 19 and 20 of 2013, the USA phone contacted Thompson's "Kenny phone". (B175-76). On the evening of September 21, around 10:00pm, there was a routed call between Thompson's Kenny phone and the USA phone used by Ross, followed by Thompson calling Ross on the USA phone. (B-177). Next, Ross used the USA phone to call Benson at 12:30pm on September 22. Benson returned the call at 12:53pm. (B-178). Ross and Benson called each other again around 5:00pm. (B-179). Notably, Thompson's Kenny phone called Ross' USA phone 13 minutes after the Connell murders. Phone records in the week after the murders showed Ross

using the USA phone to call Thompson on the Kenny phone and Thompson's phone, and Thompson returning Ross' calls. (B-180).

In 2013, Thompson worked as a driver for Leonard's Express, located at Pigeon Point Road in New Castle. (B166-71). Thompson worked the weekend of September 20 to 22, 2013. (B-168). At around 8:30pm that Friday night, Thompson picked up a delivery to transport to New York; he returned on Saturday, September 21, between 11:00am and noon. (B168-70).

On September 21, 2013, at 11:55am and 11:57am, Rivers called Bey. (A255-56). At around 4:15pm Benson and Bey were communicating. (A256-57). At 6:52pm, Bey called Benson and then Benson called Thompson. (A257-58). Later on the same evening, Connell sent Rivers a text message indicating that he was leaving Firestone "in about an hour". (A258). Rivers passed this information to Bey who texted it to Benson who sent it on to Thompson. (A258-59).

Special Agent William Shute from the FBI Cellular Analysis Survey Team, (A222), reviewed the Thompson and Kenny cell phone records. (A228-29). On September 21, 2013, between 6:06pm and 7:26pm, both of Thompson's phones were in the area of I-95 and Route 9. (A229). From 7:37pm to 7:46pm, Thompson's phone (communicating with Benson) was

moving in a northwesterly direction. (A230, B181-82). Between 8:00pm and 9:24pm the Kenny phone (communicating with Rollins and Benson) hit off a cell tower close to the murder scene. (A230, B182-83). Benson's phone at this time was near his home on Greenhill Avenue. (B183-85). The Thompson phone, in the area of Leonard's Express, made 4 calls to Benson between 11:27 and 11:30pm and then made no more calls on September 21. (A231, A243, B-188). At 11:45p.m., the Thompson Kenny phone called Benson from the area of the crime scene. (B-190).

From 7:41pm through 11:45pm, Benson's cell phone was not in the vicinity of the crime scene. At 11:45p.m. Benson called the Kenny phone and then there were no more calls from Benson until 2:16am. At that time, Benson's phone was near his home on the west side of Wilmington. On the night of the murders, the Kenny phone and Benson's phone were in contact 9 times between 6:00pm and 2:30a.m. (A234). During all of those calls, Thompson's Kenny phone was in the crime scene area. (A234). Benson's phone was not.

At 1:41a.m., approximately 13 minutes after the murders, Thompson's Kenny phone called Ross, while the phone was moving away from the crime scene. The phone hit off the tower that services Leonard's Trucking, 4-5 miles from the crime scene. (A232, B191-92). The next call from the

Thompson phone was at 8:30a.m. on September 22, 2013, and at that time the phone was in New York State. (A242).

After Bey's October 25, 2013 arrest, Rivers and Alicia Prince, Bey's girlfriend, contacted each other frequently.[6] (B-124, 126). Rivers told Prince that he was retaining an attorney for Bey. (B124-30). Prince called Bey in prison and told him that his "mechanic" was willing to help pay for a lawyer. (B128-29). At one point, Rivers informed Prince that the first attorney fell through and he would pay for another attorney. (B130-31). Rivers and Prince met at a Wawa where Rivers gave her around $800. (B-132).

Right after Bey was arrested on October 25, 2013, Benson came to Bey's home and asked for him. (B133-35). Prince told Benson that Bey was in jail. (B133-35). Benson and Thompson came to the New Castle County Courthouse for Bey's November 5, 2013 VOP hearing, which was rescheduled. (A151-52). On August 4, 2014, the day of Bey's trial for providing a false statement, Bey confessed to the police. (A180). Bey was arrested for the Connell murders and pled guilty to a VOP, and to Conspiracy First Degree for conspiring to commit the Connell murders. (A159, 181). The State agreed to recommend two years and six months at

[6] Prince had never spoken to Rivers before Bey's arrest. (B121-22).

Level V for the VOP, and not to prosecute him for providing a false statement, or for the July 2013 burglary of the Connell residence. (A160). Bey agreed to cooperate in the Connell murder case. (A160). Bey provided another statement on September 5, 2014. (A206). Bey's sentencing for the conspiracy charge was supposed to be deferred until resolution of the co-defendants' cases. (A160). Bey, however, was sentenced on September 6, 2016 to 5 years Level V incarceration followed by 6 months at Level II probation, with a plan for future review of sentence. (A183, B1-4).

Bey testified that he first met Rivers to have work done on Bey's car. (A161). At that time, Rivers was working at a different shop. (A161). Soon after they met, Bey starting selling Rivers pills and cocaine. (A161). Rivers usually paid for the drugs with money, but sometimes he would work on Bey's car in exchange for drugs. (A162). One time, Bey bought a white Chevy Impala from Rivers at C&S for his girlfriend, and Bey regularly brought the car in to C&S for service. (A162).

Bey continued to sell Rivers drugs after C&S moved to the new location where Rivers partnered with Joe. (A162). The shop appeared to be doing well. (A162). Bey always went to the shop after hours, when Joe was not there, to sell drugs to Rivers. (A162). Rivers would also buy drugs from Bey at other locations in the city. (A163). Rivers told Bey that he hated

Olga, and that Joe was lazy and "running the business into the ground," draining the business account with his lavish spending habits. (A163).

One day Rivers called Bey to the shop and told him that he was tired of Joe running the business into the ground. (A164). Rivers said he had an insurance policy out on Joe and Olga and if they were both killed, Rivers would be able to pay off the shop. (A164). Bey told Rivers to give him $5,000[7] to start and they negotiated $30,000 for each murder, for a total of $60,000. (A164). Rivers told Bey he would use $25,000 his dad had given him for the shop to pay Bey; the rest Rivers would pay off in smaller amounts. (A165).

Bey talked to Benson about committing the murders. (A165). Benson said he would get his close friend Thompson to help him do it. (A168). One night in the summer of 2013, Bey drove Benson to the shop to meet Rivers, Rivers got in the car and confirmed that he would pay $60,000 for the Connell murders, $30,000 for each victim. (A166). Rivers told Bey where the Connells lived, their daily activities, and they discussed burglarizing their residence before the murders. (A167). In July 2013, Bey and a friend broke into the Connells' condominium and stole jewelry.

[7] Bey used most of this money to pay an attorney for legal representation for charges he had pending at the time. (A165, B138-41).

(A167-68).

Benson also talked to his "cousin" Willis Rollins ("Rollins"), about committing the murders, (A168-69), and Rollins agreed to kill Joe and Olga. (A169). One evening, Benson told Bey to show Rollins the Paladin Club. (A169-70). Bey met Rollins at McDonalds on 4th Street and before they left for the apartments, Thompson appeared and handed Rollins a black gun with a silencer. (A169-70, A196). Rollins followed Bey to the Paladin Club. (A170). Bey and Rollins parked in a different complex and walked to the Connell's building, then walked back to their cars and waited for Rivers to text them that the Connells were on their way home. (A170). Bey then left Rollins alone with the gun to wait for Joe and Olga. (A170). Rollins did not kill the Connells that night. (A170, A197).

Other attempts to kill Joe and Olga failed because Benson and Thompson did not have transportation. (A171). One time, Rivers lent them his truck for the murders, but Thompson did not want to use it because the truck had an OnStar connection. (A171, B-142).

On September 21, 2013, Benson called Bey. (A171). Bey, using Prince's phone, contacted Rivers, and Rivers texted Bey that the Connells were leaving for the Riverfront within a half hour. (A171-72). Bey texted Benson asking for confirmation, (A172), and Rivers informed Bey that Joe

and Olga were leaving at any moment. Bey relayed that information to Benson. (A172). On his way to work the night shift at Kohls, Bey stopped at Benson's house. (A172). Benson told Bey that Thompson had already attempted to murder Joe and Olga, but he arrived too late so he decided to wait until the Connells returned home later that night. (A172). Bey then stopped by the repair shop to tell Rivers, who showed Bey a screenshot of his text with Joe.[8] (A172). Bey went to work the night shift at Kohl's, (A164, A172, B112-17), and while there, Benson called to find out when the Connells were leaving for home (A173); Bey called Rivers, and Rivers texted Joe. Joe texted Rivers that they would be leaving the Riverfront in 30 minutes. (A173). Bey passed that message to Benson (A173), who passed the message on to Thompson.

After the murders, between 8:00 and 8:46a.m., Benson placed many calls to Thompson; the calls either went to voicemail or the phones were off. (A259-60). Between 8:00 and 9:00am, Benson called Bey to say it was "official" and to "go collect." (A174, A259-60). At 12:30pm, Ross, using the USA phone, called Benson, followed by Benson calling Bey and then Ross. (A260). Bey and Benson continued to contact each other during the

[8] The screenshot of this text was verified in Rivers' cell phone records. (B146-48).

day, and Bey and Rivers contacted each other with Rivers using Gorman's phone. (A261).

After the murders, Bey found it increasingly difficult to get in touch with Rivers to collect payment for the murders. (A175). At one point, Rivers told Bey that the police had taken $30,000 found in a search of his house. (A175). Rivers also told Bey he would sell his truck, his tools and get more work to pay him the money. (A175). Bey told Rivers that "people are not playing about their money." (A175). Rivers gave Bey $5,000, which Bey tried to give to Benson as payment. (A175-76). Benson called Thompson, who at first refused it, but then met Bey in the area of Reed Street, where Thompson lived with Ross. (A175-76, A211). Thompson was irate because he had read in the paper that Rivers was in debt, and believed Rivers was "playing" them. (A176). Thompson eventually took the $5,000 from Bey. (A177). Benson was also upset and did not want to wait for the rest of the money. (A177). Rivers gave Bey $2,500 on another occasion and Bey gave that money to Benson. (A177). Rivers then gave Bey $1,500 on another date, which Bey again paid to Benson. (A177).

ARGUMENT

I. STATEMENTS MADE BY THE PROSECUTOR IN REBUTTAL CLOSING ARGUMENT DID NOT AMOUNT TO MISCONDUCT THAT VIOLATED THOMPSON'S DUE PROCESS RIGHTS.

Question Presented

Whether the prosecutor's statements in rebuttal closing argument amounted to misconduct.

Standard and Scope of Review

If counsel fails to raise a timely objection to alleged prosecutorial misconduct at trial, this Court reviews only for plain error.[9] If a timely objection is raised to a prosecutor's conduct at trial, the conduct is reviewed for harmless error.[10] Under a plain error and harmless error analysis, this Court first reviews the record *de novo* to determine whether the prosecutor's actions were improper. If the Court determines that no misconduct occurred, the analysis ends. But if the Court determines the prosecutor engaged in misconduct, under the plain error analysis, the Court then applies the *Wainwright*[11] standard to determine whether the error complained of is so

[9] *See Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

[10] *See Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012) (citing *Baker*, 906 A.2d at 148).

[11] *Wainwright v. State*, 504 A.2d 1096 (Del. 1986).

clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the *trial* process. The doctrine of plain error is limited to material defects which: (1) are apparent on the face of the record; (2) are basic, serious, and fundamental in their character; and (3) clearly deprive an accused of a substantial right, or clearly show manifest injustice.[12]

Under the harmless error standard, if misconduct is found, the Court must then determine whether the misconduct prejudicially affected the defendant.[13] To make that determination, the Court applies the three factors identified in *Hughes v. State,*[14] which are: (1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error.[15] Where the misconduct "fails" the *Hughes* test and otherwise would not warrant reversal, the Court applies *Hunter*[16] to determine whether the "prosecutor's statements or misconduct are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process."[17]

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[12] *Id.* at 1100 (emphasis added and citations omitted).

[13] *See Baker*, 906 A.2d at 148.

[14] 437 A.2d 559 (Del. 1981).

[15] *Baker,* 906 A.2d at 149 (citing *Hughes,* 437 A.2d at 571).

[16] *Hunter v. State*, 815 A.2d 730 (Del. 2002).

[17] *Justice v. State,* 947 A.2d 1097, 1101 (Del. 2008).

Merits

Thompson argues that the prosecutor: 1) "tainted the summation by asking the jury to draw inferences that were not supported by the record" (Op. Brf. at 20); and 2) improperly asked the jury to speculate about the cooperating co-defendant's future (Op. Brf. at 23). Thompson is mistaken.

A. *The prosecutor did not argue unsupported inferences from the record.*

Thompson argues that the prosecutor improperly suggested that Bey spoke to Benson on September 26, 2013, when he actually talked to Rollins. Because Thompson did not object to the prosecutor's argument in rebuttal closing argument, this Court's review, if at all, is only for plain error.[18]

In rebuttal, the State argued:

> The defense makes much of the fact that Willis Rollins's phone communicates with Joshua Bey.
>
> Yes it does.
>
> But what Joshua Bey says is the person he is talking to is Dominique Benson.
>
> He doesn't say what phone number he is talking to Dominique Benson on.
>
> And, in fact, if we look at the records and we hear the testimony, review the testimony of Ashley Cooper, how many Bensons use her phone? And she goes to work every day.

[18] Supr. Ct. R. 8. *See Baker*, 906 A.2d at 150. Thompson objected that the prosecutor was making comments beyond the scope of rebuttal by discussing things that happened on September 26, 2013. (A304). That objection was overruled. (A304).

> And when she is gone, who is home with the kids? Who is at that Greenhill Avenue address with the kids?
>
> Dominque Benson.
>
> And what phone does he have available to him. His house phone.
>
> Who does Joshua Bey say is with Dominique Benson when he takes the $5,000 and goes to meet him over by Greenhill Avenue behind the house at a park. Willis Rollins is with him.
>
> And is Bey calling Willis's phone.
>
> No.
>
> Willis, over and over, and over, and over again is calling Bey's phone non-stop, incessantly, over and over. Does that sound familiar?
>
> Sound like something that somebody has done in the past?
>
> And, finally – and you heard testimony that these are all voicemail.
>
> Voicemail, voicemail, voicemail, voicemail.
>
> And then the last one at 2:28. Bey calls the Willis phone back after one, two, three four, five, six, seven, eight, messages.
>
> And then what call is right after that.
>
> It comes from the house phone; from Dom's house phone.
>
> After Dom, using the Willis phone, the State would suggest, the State would argue to you, it's a call from Dom's house to Aaron Thompson.
>
> And who does Bey call back. He calls the Benson house phone. And then the house phone calls Thompson. And Thompson calls Benson. And Benson calls Bey. (A304-05).

In closing argument, a prosecutor "is allowed and expected to explain all the legitimate inferences of the [defendant's] guilt that flow from the evidence."[19] Here, the prosecutor did nothing more than comment on Bey's testimony as it related to the evidence provided to the jury. Bey testified that after Rivers gave him $5,000, he called Benson and then met Benson and

[19] *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980).

Rollins at the park near Benson's house to give Benson the money. (A175-76). As testimony had previously shown, Benson and his girlfriend, who worked at the courthouse, shared a cell phone. (B99-102). His girlfriend generally used the cell phone during the day at work and Benson would use it after she came home. (B99-110). During the day, Benson did not have access to the cell phone so he used the house's landline (B108-11), or other cell phones. The prosecutor argued reasonable inferences from the record, and Thompson's claim fails.

B. *The prosecutor did not improperly ask the jury to speculate about the co-defendant's future.*

Thompson argues that the prosecutor unfairly appealed to the emotions of the jury by invoking sympathy for Joshua Bey, the cooperating co-defendant. He is incorrect.

In closing statements, Thompson argued:

> So there is only one winner here. And I think you would all agree that the only winner in this entire scenario is Joshua Bey, because as you heard, in two or three years – two or three years, imagine that he is going to discard that orange jumpsuit that he wore, and he is going to walk out that door (indicating), laughing all the way to his freedom. (A296).

In rebuttal, the State argued:

> He is a flipped co-defendant. He is a snitch. He is a rat. All of those things. He will serve eight-and-a-half years in prison, and then he will get out. And what will happen to him then? (A306).

At this point, Thompson objected and said he would address the issue later. (A306). The Superior Court allowed the State to finish its point; unsurprisingly, the State moved on to another topic. (A306).

Thompson complains that the court did not ask the parties come to sidebar. (Op. Brf. at 24). That was likely because Thompson did not ask for a sidebar, but instead said "I will address that later." (A306). After the jury was excused, Thompson moved for a mistrial, arguing that the prosecution created an inference that Bey would be harmed when he got out of jail. (A307-08). The State argued against a mistrial, stating that there were several inferences that could be drawn from Bey's cooperation with the State. Bey being in future danger was not the sole or clear inference as suggested by Thompson. (A308). To the extent the court found it to be an issue, the State requested a curative instruction and that the statement be struck from the record. (A308). The Superior Court denied the mistrial and asked Thompson whether he wanted a curative instruction, which he declined. (A309).

Here, the court appropriately denied Thompson's request for mistrial.[20] The State's comment was neutral at best; the comment did not

[20] In *Pena v. State*, this Court developed a four-part analysis to determine whether a trial judge was required to declare a mistrial: (1) the nature and frequency of the comments; (2) the likelihood of resulting prejudice; (3) the

suggest Bey would be harmed by Thompson. The State was entitled in rebuttal to respond to Thompson's remarks focusing upon Bey's credibility, and that he would be "laughing all the way to his freedom."[21] (A296).

C. *Thompson has failed to show that prosecutorial misconduct occurred.*

In both of his claims, Thompson has failed to substantiate that prosecutorial misconduct occurred. Because his claims fail, this Court need not consider the *Hughes* factors.

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closeness of the case; and (4) the sufficiency of the trial judge's efforts to mitigate any prejudice. *Pena v. State*, 856 A.2d 548, 550–51 (Del. 2004).

[21] *See Grayson v. State*, 524 A.2d 1 (Del. 1987) ("[T]he State was entitled in its rebuttal to respond to defendant's answering remarks focusing upon defendant's credibility and the inconsistencies in testimony of the complaining witnesses.).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE COOPERATING CO-DEFENDANT'S STATEMENT TO BE ADMITTED IN THE STATE'S RE-DIRECT QUESTIONING OF BEY.

Question Presented

Whether the Superior Court erred by admitting the cooperating co-defendant's statement.

Standard and Scope of Review

This Court reviews a trial judge's evidentiary rulings for an abuse of discretion.[22]

Merits

Thompson argues that the trial court erred by allowing Bey's statement, provided to the police on September 5, 2014, to be played for the jury. He is mistaken.

On June 19, 2017, the Superior Court held oral argument on Thompson's motion to exclude the State's presentment to the jury of Bey's prior recorded statements with the police. (A161). Thompson acknowledged that in cross-examination, he had questioned Bey regarding inconsistencies contained within those two statements. (A161). Thompson

[22] *Smith v. State*, 913 A.2d 1197, 1228 (Del. 2006) (citing *Dollard v. State*, 838 A.2d 264, 266 (Del. 2003); *Chapman v. State*, 821 A.2d 867, 869 (Del. 2003)).

argued that allowing the State to play the entirety of the statements in their redirect of Bey would allow them to show the consistencies, something which Thompson opposed. (A161-62). Thompson argued because there was no recent fabrication, rather there had always been fabrication, the statements were not admissible under Delaware Rule of Evidence ("DRE") 801(d)(1)(B). (A162). In addition, Thompson argued, the statements were not admissible under 11 *Del. C.* § 3507 because the State was seeking to admit the statements for the purpose of bolstering the witness. (A162).

The Superior Court asked Thompson if, based upon his impeachment of Bey on portions of his statements, whether the "rule of completeness," codified in DRE 106, allowed the State to rehabilitate Bey by introducing the entirety of his statements. (A162). Thompson argued no. (A162-64). Thompson asserted it was not fair to allow them to put the entirety of the statements in on redirect examination. (A164).

While Thompson did not argue recent fabrication under DRE 801, but rather, argued total fabrication from the beginning, his cross-examination of Bey implied recent fabrication. (A164). In cross-examination, Thompson asked Bey "when in your previous statement have you talked about laptops," "when did you meet the prosecutors," and "did you meet the prosecutors to go over this?" (A164-65).

The State argued that under *Adams v. State*,[23] and *Stevenson v. State*,[24] Bey's statements were admissible to rebut Thompson's cross-examination of Bey. Specifically, the State argued in *Stevenson*, once defense counsel, on Bey's cross-examination, began to suggest that his trial testimony was fabricated, it became appropriate for the State to admit the videotaped statements to rebut that suggestion.[25] (A165-66). The State pointed out that here, Thompson sought to impeach Bey on a number of passages from his statements, using snippets out of order and "pluck[ing] out, you know, out of context, requir[ing] the witness to read the portion only that he has selected and highlighted." (A165-66). The State argued that the entirety of Bey's statements were admissible under the "rule of completeness," as set forth in DRE 106, to provide the proper context. (A167). The State further stated that while 11 *Del. C.* § 3507 did not prohibit the admission of the statements, the State was seeking their admission under DRE 801(d)(1)(B). (A167).

The Superior Court, relying on 11 *Del. C.* § 3507, declared that Bey's prior statements to police were admissible. (A167). The court, however,

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[23] 124 A.3d 38 (Del. 2015).

[24] 149 A.3d 505 (Del. 2016).

[25] *See Stevenson*, 149 A.3d at 514-15.

decided to recess for the evening and make its formal ruling the following day. (A167).

On the morning of June 20, 2017, the State provided the sequence of Bey's prior statements to the police. On October 4, 2013, Bey gave his first statement to Detective Leonard and then gave a second unrecorded statement to him on October 23, 2013. (A206). The police arrested Bey for providing a false statement to police on October 25, 2013. (A206). Bey provided a recorded statement to police regarding the Connell murders on August 14, 2014. (A206). The police arrested Bey for the Connell murders on September 3, 2014. (A206). Bey provided a second recorded statement to the police regarding the Connell murders, on September 5, 2014. (A206). Thompson's cross-examination of Bey impeaching him on his prior statements involved Bey's first statement in which he lied to the police about his relationship with Rivers and his two recorded proffers. (A206). The State proposed to play only the September 5, 2014, statement for the jury, declining to play the August 14, 2014, statement as it was of poor audio quality. (A207).

The Superior Court, noting that Bey's cross-examination predominantly consisted of impeachment of his direct testimony that was based upon his prior statements to the police, and the clear goal of the cross-

examination was to portray Bey as a pathological liar who would say anything to help himself out of legal trouble, thereafter reviewed DRE 801(d)(1)(B) and made the following observations:

> The State wants to rehabilitate the testimony with evidence that other portions of the prior statements were consistent with the testimony, the defense argues that the State can't do so because the prior consistent statements do not rebut an express or implied charge of recent fabrication or improper influence or motive.
>
> The defense finds primary support in the United States Supreme Court opinion of *Tome versus United States*. This was a case involving child sex abuse victims giving pre-trial statements that her father sexually abused her.
>
> The statements were given while visiting her mother, who did not have custody of child, and the defense was that the statements were concocted by the child motivated by a desire to live with her mother.
>
> In a 5:4 decision the Supreme Court ruled that the statements did not rebut a claim of improper motive because they did not predate the allegedly improper motive.
>
> There are a couple salient points with respect to the *Tome* decision. First, the complaining witness in *Tome* on the facts of that case barely testified at all. Most of the accusatory testimony came in the form of her out-of-court statements.
>
> Second, the United States Supreme Court was interpreting the federal rules of evidence, not the United States Constitution, and while its opinion is valuable and cannot be ignored, neither does it control the interpretation of State Rules of Evidence as evidenced by the many, many state court opinions that have distinguished or declined to follow *Tome*.
>
> For example, in *State versus Brown*, the New Mexico Supreme Court distinguished the ruling in *Tome* saying, and I

quote, "At common law, prior consistent statements were admissible for rehabilitation on several theories:

> One. To place a supposed inconsistent statement in context to refute the alleged inconsistency.
>
> Two. To support the denial of making an inconsistent statement.
>
> Three. To refute the suggestion that the witness' memory is flawed due to the passage of time;
>
> and Four. To refute an allegation of re[c]ent fabrication, improper influence or motive." (A207).

The Superior Court further noted that DRE 801(d) deals only with the fourth theory – to refute an allegation of recent fabrication, improper influence or motive. (A207). In the court's view, Thompson sought to show, through cross-examination of Bey, that Bey's motives were improper, that he was trying to get a deal to save himself or "curry favor" to minimize his own legal difficulties. (A207-08). The court, therefore, viewed Bey's prior consistent statements to fit squarely within DRE 801(d)(1)(B). (A208).

The Superior Court found support in this Court's opinion in *Adams*, which stated, "[a] charge of 'recent fabrication can be accomplished by several means of impeachment, including opposing counsel's questions and the introduction of prior consistent statements.'"[26] (A208). The court rejected Thompson's argument that only those specific statements that were

[26] *Adams*, 124 A.3d at 45 (citing Frank W. Bullock, Jr. & Steven Gardner, *Prior Consistent Statements and the Premotive Rule*, 24 FLA. ST. U. L. Rev. 509, 514 (1997)).

consistent with Bey's in-court testimony that was impeached with his prior inconsistent statements were admissible, stating:

> This is just a variation on having one's cake and eating it, too. The defense argument invites the Court to permit an inaccurate and unfair picture of Bey's prior statements before the jury.
>
> If his statement is accurate in 70% of its aspects and inaccurate in 30%, the defense is certainly entitled to its day with Bey's inaccuracies, but to say that must be the end of it cannot be. Only if the jury hears the rest of the prior statement can it evaluate Bey's credibility.
>
> Bey was impeached on two separate statements to the police. The defense said much of these statements are consistent with each other and with his in-court testimony, but having impeached him on those portions of each statement the defense felt he was inconsistent on, it cannot now be heard to complain that the consistent portions are boringly repetitive and bolstering. (A208).

The Superior Court, thus, after conducting a thorough analysis and reviewing relevant case law, appropriately found Bey's prior statements admissible under DRE 801(d)(1)(B) in their entirety. (A208).[27]

The Superior Court next correctly determined whether Bey's prior statements were admissible under 11 *Del. C.* § 3507. The court ruled:

> Section 3507 governs the use of prior statements by a witness who is quote, "present and available for cross-

[27] DRE 801 was amended on November 28, 2017, effective January 1, 2018. Although Thompson argues Bey's statement does not qualify as a prior consistent statement under DRE 801(d)(1)(B), as amended, the amendment is not applicable to this case.

examination." Such statements may be, quote, "used as affirmative evidence with substantive independent testimonial value" end quote, and regardless of whether the in-court testimony is, quote, "consistent with the prior statements or not." End quote.

In the Court's view, Delaware's response to the 2014 amendment to FRE 801 is found in 3507. Indeed, it is certainly true that 3507 affords a criminal defendant more procedural protections than 801, because a prior consistent statement under 801 could be admitted well after the witness has left the stand, leaving the defendant without recourse to cross examine the statement maker, while a statement maker whose statement is admitted under 3507 must be in the courtroom and available for cross-examination.

[]

I think its only fair to consider here that most of the time the State is going to introduce the 3507 during its case in chief with its witness on the stand and on direct examination.

This is a historical fact, not legal argument. The legal requirement is that the witness be present and available for cross examination when the state put in the record.

There is nothing in the rule or the cases that says that 3507 statements cannot be introduced on redirect instead of direct or that the defense cannot recross once the statement is introduced. Indeed, the State places reliance on *Stevenson versus State,* a Delaware Supreme Court case decided last year that is worth considering.

[]

It does not appear that either side argued the procedural point in *Stevenson,* as the Supreme Court certainly did not disapprove, and indeed one can certainly argue that the prosecution in *Stevenson* followed the prudent path, waiting to see where the cross examination went before offering the prior consistent statement under 3507, and, actually, because the

> Supreme Court found that the defense had intimated a recent fabrication of the testimony, it ruled the statements admissible under 801(d)(1)(B). It therefore found it unnecessary to address the admissibility of the statement under 3507, but at least under this Court's view, had it done so, it would have found them equally admissible under that provision. (A208-09).

And, while the court acknowledged Thompson's claim of bolstering, the court stated that any time a prior consistent statement is introduced it has that effect, but "it can't be criticized on that basis alone."[28] (A210). The court had been concerned that the State planned to play both the August 14 and September 5, 2014 statements, but appreciated the State's decision to refrain from doing that and choosing to only play the September 5th to avoid any potential problems. (A210).

DRE 801(d)(1)(B) provides that a statement is not hearsay if "[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is … consistent with his testimony and is offered to rebut an express or implied charge against him of

[28] *See Stevenson*, 149 A.3d at 515 ("Stevenson's characterization of the videotaped statements as mere repetitive statements disregards the fact that "be definition, a prior consistent statement inherently repeats [some] evidence that has already been heard at trial."); *see also Adams*, 124 A.3d at 46 (The rules of evidence distinguish between introducing the same evidence simply to bolster a witness's testimony (DRE 103), as opposed to the specific use of cumulative testimony to rebut a charge that the witness has a particular motive to lie on the stand (DRE 801(d)(1)(B)) (internal citations omitted)).

recent fabrication or improper influence or motive."[29] In analyzing whether Rule 801(d)(1)(B) applies, "[a trial] judge must make an objective determination based on its examination of the entire trial record to determine whether the impeaching counsel's trial tactics could reasonably be taken by a jury as implying recent fabrication or improper influence or motive."[30] Here, the Superior Court properly concluded that Bey's prior statements to the police were equally admissible under DRE 801(d)(1)(B) and 11 *Del. C.* § 3507. (A209).

Thompson claims, as he did in the Superior Court, that Bey's motive to falsify arose before he gave his September 15, 2014 statement and therefore, under *Tome v. United States*,[31] the recorded statement should not have been admitted. As the Superior Court found, *Tome* is not applicable. *Tome* interprets the FRE, not DRE 801(d)(1)(B), and is distinguishable because the actual use of evidence in that case was substantive, rather than rehabilitative.[32] *Tome's* "pre-motive rule" and the other decisions cited by

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[29] DRE 801(d)(1)(B).

[30] *United States v. Frazier*, 469 F.3d 85, 89 (3d Cir. 2006).

[31] 513 U.S. 150 (1995).

[32] *See State v. Brown*, 969 P.2d 313, 326 (N.M. 1998) ("[W]e believe that prior consistent statements continue to be admissible on these theories *for purposes of rehabilitation*, consistent with the common law, and subject to principles of relevancy and undue prejudice pursuant to Rules 401, 402, and

Thompson are also inconsistent with this Court's decisions in *Adams*. (Op. Brf. at 33).

The Superior Court in analogizing Thompson's case to *Adams*, noted that a charge of recent fabrication can be accomplished by a defendant's cross-examination, which is what occurred in Thompson's case. In other words, post-motive consistent statements are admissible for the purpose of evaluative the credibility of a declarant who testifies at trial.[33]

In *Adams*, the police stopped a car in which Adams was a passenger.[34] A search of the car revealed guns under the driver's seat, the passenger's seat and the rear passenger's seat; all three occupants were arrested.[35] Adams told an officer that his brother, Cale, called him the night before and

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403. Further, this interpretation is consistent with the traditional understanding of hearsay; the rehabilitative use of the statements does not purport to offer the words for the truth of the matter asserted but, instead, to refute a specific attack against the witness's credibility." (citing Bullock, *supra* at 539)); *United States v. Ellis*, 121 F.3d 908, 919-21 (4th Cir. 1997) (stating that Rule 801(d) and the United States Supreme Court Opinion in *Tome* do not control the introduction of prior consistent statements for the sole purpose of rehabilitating a witness).

[33] *See Cook v. State*, 7 P.3d 53, 58 (Wyo. 2000) ("The decision in *Tome* was not based on a constitutional issue and is, therefore, not binding upon this court, which is the final authority on this state's court rules."); *Anderson v. Gidley*, 2016 WL 4205923 (E.D. Mich. Aug. 10, 2016) ("*Tome* simply does not purport to create a constitutional limitation on the introduction of prior consistent statements.").

[34] *Adams*, 124 A.3d at 40.

[35] *Id.*

said he had been robbed at gunpoint.[36] Adams decided to help Cale find the person that robbed him and Adams knew the guns were in the car.[37] Before Adams' trial, Cale pled guilty to a number of charges in the case and had been sentenced, served jail, and was out on work release.[38] The State called him as a witness at Adams' trial and played Cale's post-arrest taped interview with police, where Cale admitted all three guns were his, he gave each of his co-defendants a gun, and they went looking for the person who robbed him; Cale did not know what Adams did with the gun he gave him.[39] At trial, Cale testified differently, saying that he had been target shooting the night before the robbery and had left the guns under the seat; no one else knew the guns were in the car.[40] Through Cale's redirect, the State pointed out that Cale's trial testimony was a recent fabrication, and suggested, after showing Cale's taped statement to police, that Cale was telling a different story because Cale had pled and was sentenced and no longer concerned about himself.[41] In response, Adams, on re-cross, sought to introduce an affidavit, executed by Cale a week after his arrest, that stated "the weapons

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 40-41.

[40] *Id.* at 41.

[41] *Id.*

found in my trunk [] belong to me" and that his co-defendants did not know about them.[42] The State objected and the Superior Court, finding it of marginal value, refused to admit it.[43]

On appeal, Adams argued that the Superior Court abused its discretion by excluding the affidavit because it was offered, not to cumulate evidence, but to rebut the State's implied charge of recent fabrication against Cale under DRE 801(d)(1)(B). This Court agreed, holding that because Cale testified at trial and was available for cross-examination, the affidavit was not hearsay, the affidavit was consistent with his trial testimony and tended to rebut the State's charge that Cale recently fabricated his trial testimony to help his brother now that Cale was out of jeopardy.[44] It was thus admissible for purposes other than simply bolstering prior testimony.

The same is true here. For example, Bey testified on direct examination about his negotiations with Rivers regarding a price for the Connell murders. (A164-65). Thompson extensively cross-examined Bey, pointing out inconsistencies between Bey's trial testimony and his prior statements regarding these negotiations, Bey's later attempts to hire

[42] *Id.*

[43] *Id*.

[44] *Id.* at 46.

someone do the murders for less money so that Bey would make a profit, and Rivers' offer to make monthly payments to Bey for life if Bey killed the Connells. (A190-93).

As another example, in Bey's cross-examination, Thompson referred to Bey's statement on September 5, 2014, which discussed Bey bringing Rivers' truck to Benson and Thompson for transportation to Paladin Club to murder the Connells. (A194). Thompson highlighted the discrepancy between Bey's testimony and his statement on September 5 stating:

> Thompson: And nowhere do you say either Mr. Thompson or Mr. Benson were present there, do you?
>
> Bey: Not, at the time, no.
>
> Thompson: So although you're sure of that now, you weren't so sure of it back on September 5th, were you?
>
> Bey: No.
>
> Thompson: Because you gave a completely different version, didn't you – well, not completely, but in terms of whether Mr. Thompson and Mr. Benson were there?
>
> Bey: Yes. (A194).

The Superior Court properly found Bey's prior consistent statement fits squarely within DRE 801(d)(1)(B) to rebut Thompson's attack that Bey's motives were improper and his testimony was recently fabricated. In addition, the Superior Court properly determined that Bey's statement was

admissible under 11 *Del. C.* § 3507 and the rule of completeness embodied in DRE 106 called for its admission.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Date: July 27, 2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AARON THOMPSON,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	No. 454, 2017
	)	
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 8,985 words, which were counted by Microsoft Word 2016.

Dated: July 27, 2018 /s/ Maria T. Knoll