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Case Number 564,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAIQUAN BORDLEY Defendant below, Appellant	)	
V.	)	No. 564, 2018
STATE OF DELAWARE, Plaintiff below, Appellee	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

APPELLANT'S OPENING BRIEF

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NATURE OF THE PROCEEDINGS

Daiquan Bordley ("Bordley") was arrested on April 29, 2016,[1] on charges stemming from a homicide that occurred on March 30, 2016, at Port Mahon in Kent County Delaware. A Grand Jury indicted Bordley on July 5, 2016, for Murder First Degree, Robbery First Degree, Possession of a Firearm During Commission of a Felony, and Conspiracy Second Degree.[2] On the same date, a co-defendant, Chelsea Braunskill, was charged in a separate indictment for the same charges.[3] The case was originally processed as a capital murder case.[4]

The case was heard in a bench trial that began on August 7, 2018, before the Honorable William L. Witham, Jr.[5] The trial lasted until August 10, 2018,[6] and the Court rendered its verdict on August 15, 2018, finding Bordley guilty of all charges.[7]

On October 24, 2019, Bordley was sentenced to life imprisonment plus six years.[8]

A Notice of Appeal was timely filed on November 7, 2018, by Trial Counsel and on November 20, 2018, a Motion to Withdraw as Counsel was granted and

[1] A001, Docket Entry 1.
[2] A020-A022.
[3] A023-A024.
[4] A022.
[5] A015, Docket Entry 75
[6] A015, Docket Entry 77
[7] A016, Docket Entry 78.
[8] Exhibit A.

Julianne E. Murray, Esq. entered her appearance to represent Bordley. This is Bordley's Opening Brief on direct appeal.

SUMMARY OF THE ARGUMENT

I. BORDLEY'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION WERE VIOLATED BY PROSECUTORIAL MISCONDUCT

Bordley alleges that the prosecution intimidated a witness into not testifying and that, as a result, he was denied the ability to fully present his case. Had the witness testified, Bordley believes it could have changed the outcome of his case.

II. BORDLEY'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION WERE VIOLATED BY THE ADMISSION OF TEXT MESSAGES INTO EVIDENCE THAT WERE NOT PROPERLY AUTHENTICATED

Bordley argues that text messages that were allegedly exchanged with a codefendant were improperly admitted because they were not properly authenticated. The text messages were a key piece of evidence in the case against him and had they not been admitted could have changed the outcome of the case.

SUMMARY OF THE ARGUMENT, CONTINUED

III. **BORDLEY'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION WERE VIOLATED BECAUSE THE NOTES WRITTEN BY CO-DEFENDANT HARMON WERE ADMITTED FOR A LIMITED PURPOSE AND DO NOT APPEAR TO HAVE BEEN CONSIDERED AS IMPEACHMENT OF HIS CREDIBILITY**

Bordley alleged that he received notes from co-defendant Harmon while they were incarcerated at the same institution and that, while the Court did permit them to be admitted, that the Court did not consider the significance of them as impeachment evidence.

STATEMENT OF THE FACTS

On March 30, 2016, Delaware State Police ("DSP") troopers responded to the Port Mahon fishing pier in reference to a deceased male. The deceased, later identified as Dontray Hendricks ("Hendricks"), was found dead with a gunshot wound to the torso.[9]

DSP prepared and swore to a search warrant for the cell tower and call detail records for Hendricks' cell phone. The records revealed that Hendricks had exchanged text messages with a phone number that was linked to someone named Chelsea Braunskill ("Braunskill).[10]

DSP interviewed Braunskill at Troop 3 where she advised that she had been at the fishing pier with Hendricks where they were confronted by three males. Braunskill advised that she ran off the pier and hid in tall grass where she heard a single gunshot and saw the three suspects leave the area.[11]

When confronted by DSP that her account of the incident was not believable, Braunskill refused to answer any additional questions without an attorney.[12]

DSP secured a search warrant for the contents of Braunskill's phone and an examination showed numerous text messages between Braunskill and an unknown

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[9] A017.
[10] A018.
[11] A018.
[12] A018.

person. The text messages appeared to set up the crime and showed their actions after the crime.[13]

The text messages appeared to be between Braunskill and a contact named "Keys" who was ultimately identified as the defendant, Daiquan "Keys" Bordley.[14]

A cooperating witness (later identified as Alexis Golden), advised that she was present at the Port Mahon fishing pier with Braunskill and Hendricks and that they were smoking marijuana. Golden advised that upon arrival at the pier Braunskill informed her that there was going to be a robbery of Hendricks. Golden stated that three black males, includings "Keys", came up behind them on the pier, that Hendricks and "Keys" struggled, and that "Keys" shot Hendricks.[15]

DSP prepared and swore out a warrant for the arrest of Braunskill. When Braunskill turned herself in, with her attorney present, she admitted her involvement in the crime and advised that her co-conspirator was Bordley and that the plan had been to rob Hendricks of cash and/or marijuana. Braunskill identified Bordley as the person who shot Hendricks.[16]

A bench trial was held from August 7 through August 10, 2018. Following is a summary of testimony of witnesses relevant to this appeal:

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[13] A018.
[14] A018.
[15] A018-A019.
[16] A019.

Detective Daddio

On direct examination, Detective Daddio, a crime scene investigator,[17] testified that when he arrived at the scene that Hendricks was face down on the pier, with his arms and hands in a type of "V" formation, with currency in his right hand.[18] Also on the pier was a Wawa plastic drinking bottle. There was also a gold in color bullet.[19] Daddio testified to the photographs taken at the scene as well as physical evidence collected at the scene.[20]

Detective Daddio also testified to photographs of a Hyundai Sonata, that was located at Persimmon Tree Apartments. Daddio confirmed that the vehicle belonged to Hendricks.[21]

During the cross examination, Daddio was questioned about the presence of gunshot residue and the measurements of the pier.[22] He confirmed that there were valued prints on the label of Wawa bottle[23] and that the vehicle was not tested for gunshot residue because of the nature of the crime and the amount of time that had

[17] A026.
[18] A028.
[19] A028.
[20] A028-A047.
[21] A048-A049.
[22] A050-A055.
[23] A054-A059.

elapsed between when the crime was believed to occur and when the body was actually found.[24]

Later in the State's case in chief, Detective Daddio was recalled and testified about the contents of text messages between Hendricks and Braunskill as well as other investigative steps he took.[25] Trial Counsel questioned Daddio about the trip to Maryland with the prosecutors to meet with Alexis Golden and confirmed that Golden did indicate that she was not sure who the shooter was.[26] Finally, Daddio testified that it appeared to him that Bordley's phone had been wiped clean of text messages around the time of the crime,[27] and confirmed that neither Golden nor Gartner-Hunter had been charged in connection with the case.[28]

Zhyree Harmon

Zhyree Harmon ("Harmon") was a third co-defendant that was also charged in connection with this case. Harmon testified that he had known Bordley for years and that he purchased marijuana from Bordley.[29] He testified that he knew Braunskill through Bordley and that he was asked by Bordley to get a gun for him to give to Braunskill because he kept getting robbed.[30] Harmon testified that he,

[24] A060.
[25] A313-A322.
[26] A323-A325.
[27] A326.
[28] A327-A328.
[29] A074.
[30] A075-A076.

Bordley and Braunskill were all present when the gun was purchased and that Bordley personally handed him the money for the gun and that he handed the gun to Bordley.[31]

Harmon testified that the gun, a Cobra chrome .380,[32]was normally located in the glove compartment of Bordley's car. Harmon testified that on the day of the homicide that he, Bordley and Braunskill were all together and that on the night of the homicide that Bordley personally delivered some marijuana to him but indicated that they would have to meet up with Braunskill to get the remainder of the marijuana.[33]

Harmon testified that he, his brother-in-law Christopher Gartner-Hunter, and Bordley all went to Port Mahon to meet Braunskill in Bordley's car.[34]When they arrived at the pier, Harmon testified that Bordley got out of the car first and headed toward the pier.[35] Harmon testified that by the time he got to the pier that Hendricks and Bordley were wrestling and that he could see Braunskill, Alexis Golden, Hendricks and Bordley.[36] Harmon testified that Bordley fired the gun at

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[31] A077.
[32] A079.
[33] A079-A082.
[34] A083-A084.
[35] A085-A087.
[36] A088-A089.

Hendricks,[37]and that he, Golden and Braunskill all ran off the pier.[38] He also testified that Gartner-Hunter threw the keys to Hendricks' vehicle at Braunskill and Golden.[39]

Harmon testified that Bordley was on the telephone with Braunskill after they all departed Port Mahon and that they were coordinating where to meet.[40] Harmon testified that he threw away Hendricks' shoes and that Bordley asked him to sell the gun that was used in the crime.[41]Harmon testified that he ultimately did sell the gun and that he took a plea in the case.[42]

During cross examination, Harmon was asked if he ever used anyone else's cell phone and Harmon said he did not. [43] Harmon indicated that he had been charged with murder in connection with the case and that he pled guilty to Possession of a Firearm by Person Prohibited and Conspiracy Second.[44] Harmon testified that the gun was for protection for both Bordley and Braunskill and that it belonged to both of them, not just Braunskill.[45] Trial counsel attempted to confront Harmon with a video of his original statement to Detective Daddio under § 3507. The State argued that the foundation hadn't been properly laid. Ultimately the Court allowed the tape

[37] A090.
[38] A091.
[39] A091.
[40] A092-A093.
[41] A094-A095.
[42] A096-A097.
[43] A099.
[44] A099.
[45] A100.

to be entered as an Exhibit and the video was played for the Court.[46]Trial Counsel argued that the video showed Harmon's propensity to give different stories and different versions that were self-serving as well as untruthful.[47]

Harmon also testified that Braunskill had been setting up robberies and that he believed that one of the reasons was because she had been robbed herself.[48] Harmon was confronted with his statement to an ATF agent that was acting undercover wherein he indicated that Hendricks was chosen by Braunskill not Bordley,[49]and that Braunskill bought the gun.[50] He admitted that he lied about who was on the pier because he was protecting his brother-in-law, Gartner-Hunter.[51] He also admitted to lying about other details in his statement to police.[52]

Finally, Harmon was confronted with letters that the defense alleged were written by him to Bordley while they were both incarcerated. Harmon denied authoring the letters.[53]

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[46] A102-A110.
[47] A111. Trial counsel also confronted Harmon with a a transcript of the video wherein he asked an abundance of questions about statements that were untruthful (A201-A219.)
[48] A113-A114.
[49] A122-A123.
[50] A115.
[51] A123-A24.
[52] A125-A134.
[53] A135-A137.

Alexis Golden

Alexis Golden testified that she "briefly" knew Bordley from classes and that Bordley and Braunskill were friends.[54] She testified that she was invited by Braunskill to go to Port Mahon with her and Hendricks to smoke marijuana.[55]She testified that all three of them were smoking and that they were about three-fourths of the way down the pier when she heard footsteps approaching.[56] Golden indicated that it was dark and that she heard Hendricks and someone "tussle", saw the muzzle flash, and that she ran off the pier.[57]Golden testified that three individuals came onto the pier and that the person in the front of the group was who shot Hendricks.[58]Golden testified that she heard Braunskill on the phone with someone as they were leaving Port Mahon and that she and Braunskill met up with Bordley, Harmon and Gartner-Hunter at Persimmon Tree Apartments, where they left Hendricks' vehicle.[59]

Golden testified that in her preliminary statement to police that she identified Bordley as the shooter.[60] During cross examination Golden admitted that she was

[54] A139.
[55] A140-A141.
[56] A143-A144.
[57] A144.
[58] A145-A146.
[59] A147-A148.
[60] A150-A151.

transported to testify by police and that she had given subsequent statements to the defense private investigator wherein she said that she couldn't identify the shooter, only that he was taller and bigger than the other three.[61]

Golden testified that Harmon was the person that disposed of Hendricks' shoes,[62]that Braunskill was a drug dealer,[63]that she had seen a video of Braunskill shooting the gun used in the crime,[64]that Braunskill was on the telephone with someone in the car as they were leaving,[65]and that at the time she was testifying that she could not recall the face of the shooter but that she was adopting her preliminary statement wherein she identified Bordley.[66]

Trial Counsel inquired as to whether she had spoken with the prosecutors prior to testifying and when Golden indicated that one of the prosecutors suggested to her that her first statement made to police would be more accurate because it was closer in time to the event Trial Counsel moved for a recess to discuss potential prosecutorial misconduct.[67]

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[61] A152-A154.
[62] A159-A160.
[63] A165.
[64] A166.
[65] A167.
[66] A168.
[67] A168-A170.

After a discussion as to what happened,[68] the examination continued and Trial Counsel worked through Golden's statements to the defense investigator to show the differences between the statements.[69]

Chelsea Braunskill

Braunskill testified that she and Bordley were friends,[70]that she sold marijuana for him,[71]that they texted "all the time" if they weren't together,[72] and she should was familiar with his style of texting.[73]She testified that she and Bordley came up with the plan to rob Hendricks together,[74]that they were texting throughout the day of March 30,[75]that she knew Hendricks liked to smoke at Port Mahon because of his Snapchat videos,[76]that she brought Alexis Golden along for moral support,[77]and that she was texting with Bordley on the way to Port Mahon.[78]

[68] A170-A176.
[69] A178-A187.
[70] A222-A223.
[71] A223.
[72] A223.
[73] A223.
[74] A225.
[75] A225-A227.
[76] A228.
[77] A229.
[78] A230.

Braunskill testified that it was not that dark out and that she saw Bordley shoot Hendricks.[79]She testified that she and Golden ran off the pier[80] and that she and Bordley spoke on the phone where he directed her to drive Hendricks' car away from the scene.[81] She admitted that she drove Hendricks' car to Persimmon Tree Apartments.[82] She testified that Bordley kept the gun in his car[83] and that she pled guilty to Murder Second Degree and Conspiracy Second Degree and was sentenced to twenty years in prison.[84] She admitted to lying to police in her first statement,[85] and being as "honest as she could be" in her second statement.[86]Finally she testified that the last time she saw the murder weapon was a few days before the robbery[87]and she testified to text messages that she alleged were between her and Bordley.[88]

During cross examination, Braunskill was challenged about her first statement to police and asked whether she told the truth or lied in several instances.[89]

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[79] A232.
[80] A222.
[81] A235-A236.
[82] A236.
[83] A238.
[84] A240.
[85] A241.
[86] A307.
[87] A243.
[88] A246-A252.
[89] A262-A287.

Daiquan Bordley

Bordley testified that he and Harmon were friends and that Harmon bought marijuana from him,[90]that he would occasionally give him a portion of marijuana to sell, and that he would loan him money.[91]

Bordley testified that Harmon frequently discussed robberies with Braunskill and that Braunskill had money problems.[92]He testified that Braunskill sold marijuana for him and that Braunskill told him that she wanted a gun because she was scared of people taking advantage of her.[93]Bordley testified that Braunskill got the gun from Harmon and that he had nothing to do with the purchase and that he believed she got the gun more for intimidation than protection.[94]

As for March 30, Bordley testified that Harmon asked him to drive to make a sale and that he, Harmon and Gartner-Hunter went to Port Mahon together.[95] Bordley testified that Harmon used his (Bordley's) phone on the way[96] and that when they got to Port Mahon, that Harmon and Gartner-Hunter got out of the vehicle,[97]

[90] A340-A341.
[91] A341-A342.
[92] A343-A344.
[93] A345-A349.
[94] A349-A350.
[95] A353-A356.
[96] A355.
[97] A357.

were gone for two to three minutes,[98] and that the next thing he knew Braunskill, Golden, Harmon and Gartner-Hunter were running toward the vehicle and Harmon was panicking.[99]Bordley testified that Harmon was on the phone and giving him turn by turn directions to Persimmon Tree Apartments.[100]

Bordley testified that Harmon mentioned that he "knows the law and watches First 48" and that he told told everybody to keep quiet, remain calm and to not admit to robbery because robbery would be necessary to connect to felony murder.[101]

Bordley testified that he was passed notes four notes from Harmon while they were both incarcerated.[102]

On cross examination, Bordley was confronted with the fact that Golden placed three people on the pier, not just two as Bordley was suggesting.[103]He was also confronted about the fact that messages around the date of the crime until the day that Braunskill was arrested were deleted from his phone.[104]

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[98] A358.
[99] A357-A358.
[100] A358.
[101] A359-A360.
[102] A365-A370.
[103] A383.
[104] A384-A390.

At the end of the defense's case in chief the defense verbally submitted a Motion for Judgment of Acquittal as to Counts 2, 3 and 4 of the indictment.[105] The Court denied the Motion.[106]

On August 15, 2018, the Court rendered its verdict or guilty as to all counts.[107]

[105] A391.
[106] A395-A397.
[107] A398-A405.

ARGUMENT

I. BORDLEY'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION WERE VIOLATED BY PROSECUTORIAL MISCONDUCT

1. Question presented: Whether Bordley's due process rights were violated by misconduct of the prosecutors. This issue was preserved at A172 and A334.

2. Scope of Review:

This Court reviews claims of prosecutorial misconduct *de novo* to determine whether the conduct was improper or prejudicial.[108] Claims of a constitutional violation are reviewed *de novo*.[109]

3. Merits of Argument

When Christopher Gartner-Hunter was getting ready to take the stand in the defense case in chief, the following exchange occurred:

> DAG: Your Honor, before we begin testimony with this witness, I believe it would be appropriate for the Court to do a colloquy with him. He is still a suspect in this case, and he has not been arrested at this time.
>
> The Court: There's an issue I need to discuss with this witness. Mr. Garner-Hunter, when did you appear in the courtroom?

[108] *Hunter v. State*, 815 A.2d 730 (Del. 2002).
[109] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del 2010).

The Witness: I've never appeared in the courtroom.

The Court: You appeared in this courtroom today, correct?

The Witness: Yeah. I came in, and I was told by the investigator that I wasn't supposed to be in here. So he told me to step out.

The Court: So did you step in the courtroom?

The Witness: Yes.

The Court: Before you were called as a witness?

The Witness: Yes. I didn't know I wasn't allowed in the courtroom.

The Court: Very well. All right. And then you request a colloquy?

DAG: That's correct, Your Honor. The Court has heard testimony regarding Mr. Gartner-Hunter and his involvement. He has not been charged yet. It doesn't mean he will not be charged. I don't know if he's had any opportunity to meet with a defense attorney regarding whether or not he should testify.

Trial Counsel: Your Honor, if I could comment on that, Your Honor.

The Court: You may comment.

Trial Counsel: I think with a murder charge everyone is a suspect. I believe Ms. Golden was a suspect at one point in time. I think the detective told us that. I would hate to see the State try to threaten this particular witness to silence him so he can't give information in Mr. Bordley's case. He had an attorney that represented him on several different charges that are out there pending. When we spoke with him, we are going to try to limit his testimony to just the ride back from the pier that evening in a very select topic. So we are not going to go outside that topic, and I believe

that when he speaks to that topic it will not be incriminating on his part. But, you know, he's over the age of 18. He was involved in this. We are talking, Your Honor, also two-and-a-half years that the State comes forward now and says "Well, he is still a suspect. We still might arrest him.," just to quiet him on the stand. I think we have a lot of – there was a similar incident of intimidation, possible intimidation of another witness by the State. You know, Your Honor, we want the truth here. We want it to come out. It's going to be limited testimony.

DAG: Your Honor, this isn't a threat by the State. And frankly, this is a baseless allegation. This is the Department of Justice saying that this particular witness might want to retain –

The Court: Let me ask you this, Ms. Taylor, why didn't you ask for a colloquy with Alex – the witness Alex Golden if she was a – she had possible involvement.

DAG: The State had already made a determination that she was not a suspect. That determination had already been made. The State has made several attempts through Detective Grassi to interview Mr. Gartner-Hunter, and he hasn't made any statements to the State. So his level of involvement has yet to be determined.

The Court: All right. All right. Given that, then there is a possibility that Mr. – this witness could be charged with a crime.

DAG: There is that possibility. That's all the State is trying to raise.

The Court: All right. I can see the issue. Sir – I will conduct a colloquy with him. It's apparent it will be necessary to do so. Sir, are you represented by counsel?

The Witness: No, Sir.

The Court: Have you consulted with counsel concerning any matters which you may be called to testify today?

The Witness: At one point in time I did.

The Court: All right. Is that counsel still representing you at the present time?

The Witness: No.

The Court: All right. Do you understand, I hope what's just been said in court, that – I am not sure – I'm the finder of fact and law here in this case, but I don't know what your involvement would be. But if there is a risk you are involved and there is a possibility that based on your testimony that you could be charged. Do you understand that?

The Witness: I do.

The Court: And do you wish to consult with counsel now in that regard?

The Witness: Considering the fact, yes.

The Court: All right. Previous counsel that you had is that counsel still available?

The Witness: Like I say, I would have to call and see. He was working for the State and now he works for his own private firm.

The Court: All right. All right….[ ]… I will allow him to consult with counsel today. He may be recalled by the defense on Monday. That gives him an opportunity to consult with counsel.[110]

[110] A331-A337.

Mr. Gartner-Hunter stepped down and never testified.

There are several issues with the above exchange. First is the timing of the DAG's statement. While on the surface it appears that the DAG is simply being conscientious, Bordley submits that the DAG's comment as the witness was approaching was completely intentional and was meant to intimidate the witness into not testifying.

The second issue is that the entire exchange happened in front of the witness. While this was a bench trial and therefore there was no jury, a sidebar would have appropriate and, in fact, happened several times throughout the trial. The fact that the exchange about Mr. Gartner-Hunter did not happen at sidebar is particularly interesting considering that when Trial Counsel raised an issue earlier in the trial about possible witness intimidation related to Alexis Golden, the Court made a point of telling Trial Counsel to NOT say anything in front of the witness in the following exchange:

Trial Counsel:	Did she suggest to you that your first statement to the police would be more accurate because it was closer to the time of the event than the statement that you made to a private investigator further down the road?
Witness:	Yes.
Trial Counsel:	She suggested that?
Witness:	Yes

Trial Counsel: Your Honor, I don't know if we should take a recess to discuss whether or not there has been some witness tampering or not with this particular –

The Court: Mr. Beauregard, not here.

Trial Counsel: I know, Your Honor. That's why—

The Court: Not in front of a witness, not in front of a witness.

Trial Counsel: Right, I understand. That's why I suggest that a break could be taken at this time.

The Court: All right, we'll take a break. You may step down. Thank you. All right. We'll take a 15-minute recess and allow the parties to confer first.[111]

So, as it related to Alexis Golden the Court was careful not to have an exchange in front of the witness, with Mr. Gartner-Hunter the same standard was not applied. Bordley submits that having the entire argument as to whether or not he was still a suspect in front of the witness was for the purpose of intimidating him.

The third issue is that for the State to suggest that they were still considering charging Mr. Gartner-Hunter, two-and-a-half years after the fact seems far-fetched. Trial counsel had already represented to the Court that the testimony was going to be limited and the State knew that Mr. Gartner-Hunter had not made any statements to the police so to suggest that he was going to now say something that would incriminate himself, and that such statement could lead to charges is a stretch. Furthermore, Bordley argues that it was evident that the State did not want Mr.

[111] A170-A171.

Gartner-Hunter to testify as evidenced by their initial objection that he had violated the sequestration order.[112]Bordley argues that when their initial objection did not work that they moved to the "possibility that he could be charged" argument and, apparently, that argument worked.

Bordley argues that the prosecutor's timing and the fact that the entire conversation occurred in front of the witness amounts to misconduct. In *Hughes v. State,* this Court adopted a three-part test to evaluate prosecutorial misconduct: "the closeness" of the case, the centrality of the issue affected by the (alleged) error, and the steps taken to mitigate the effects of the error."[113]

Here, Mr. Gartner-Hunter was being called in the defense's case in chief. Bordley argues that in a case where there is conflicting testimony and self-interested testimony, every bit of testimony that supports the defense's theory of the case is important.

As for the *Hughes* test, Bordley submits that as for the "closeness" of the case, two of the three witnesses that identified him as the shooter had their own interests to protect and that the third witness (Alexis Golden) made conflicting statements to

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[112] *See* A330-A331. The State objected that the witness was in the courtroom when Detective Grassi testified. Trial Counsel said he was unaware because he was presenting evidence.

[113] *Price v. State,* 858 A.2d 930, 939 (Del. 2004), citing to *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981) (quoting *Dyson v. United States,* 418 A.2d 127, 132 (D.C. 1980)).

the police and the defense private investigator. Furthermore, the issue affected by the misconduct has to do with the identity of the shooter and there were no steps taken to mitigate the effects of the error.

Also of significance is that when Trial Counsel raised the issue of witness intimidation related to Mr. Gartner-Hunter, it was the second such allegation within the trial. While Bordley concedes that the Court did conduct an inquiry when the allegation was raised directed to Alexis Golden and found no basis,[114] when the objection happens a second time, Bordley argues that the care required by the State and the Court is magnified and that the Court should have been consistent in how it handled the inquiry.

[114] A170-A176.

II. BORDLEY'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION WERE VIOLATED BY THE ADMISSION OF TEXT MESSAGES INTO EVIDENCE THAT WERE NOT PROPERLY AUTHENTICATED

1. Question presented: Whether Bordley's due process rights were violated by the admission of text messages into evidence without the proper authentication. This issue was not preserved.

2. Scope of Review:

When an issue is not preserved at trial, it is subject to a plain error standard of review.[115] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[116]

Claims of a constitutional violation are reviewed *de novo*.[117]

3. Argument on the Merits

During the direct examination of Braunskill, the State sought to introduce text messages and Trial Counsel made the following comment: "Your Honor, we have no opposition to a list of text messages between Ms. Chelsea Braunskill and *someone*

[115] *See* Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.")
[116] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[117] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del 2010).

else."[118] For reasons that are unclear, the State then introduced text messages that were allegedly between Braunskill and Bordley. It appears now that there was a misunderstanding. It appears that Trial Counsel thought the text messages were with someone else but because he did not raise an objection to the Court, undersigned counsel cannot argue that the issue was fairly preserved and it is therefore reviewed under plain error.[119]

In *State v. Zachary*¸[120] in response to a Motion in *Limine* to exclude text messages because the State could not adequately authenticate them, the Superior Court held that certain text messages could not be admitted because the State could not satisfy the requirements of D.R.E. 901.[121] The holding was that the State, as the proponent of the text message evidence, had the burden to explain the purpose for which the text messages were being offered and to provide sufficient direct or circumstantial evidence corroborating their authorship in order to satisfy the requirements of Del. R. Evid. 901.[122]

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[118] A244.

[119] *See Moss v. State,* 166 A.3d 937, *2 (Del. 2017) where this Court held that the authentication and hearsay objections implicated problems involving the identity of each message's author, each objection invokes a distinct legal analysis. The question of authenticating individual messages appears not to have been fairly presented to the trial judge, who attempted to address blanket hearsay challenges to thousands of text messages during trial.

[120] *State v. Zachary*¸2013 LEXIS 295 (Del. Super July 16, 2013)

[121] *Id.*

[122] *Id.*

D.R.E. 901(b)(4) provides that a finding of authenticity may be based entirely on circumstantial evidence, including the document's "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with the circumstances.[123]

"A person cannot be identified as the author of a text message based solely on evidence that the message was sent from a cellular phone bearing the telephone number assigned to that person because 'cellular telephones are not always exclusively used by the person to whom the phone number is assigned.'"[124]

At issue in this case is text messages that were allegedly exchanged between Braunskill and Bordley. As previously stated, despite the fact that Braunskill pled guilty and was sentenced to twenty years, she still had a reason to implicate Bordley. She had been charged with Murder First and pled guilty to Murder Second. Bordley argues that the fact that she identified the messages as between her and Bordley is not enough circumstantial evidence to authenticate the messages, particularly when there was testimony that Harmon used Bordley's phone.[125]

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[123] *See* D.R.E. 901(b)(4)*; see also Swanson v. Davis*, 69 A.3d 372, (Del. Super. June 20, 2013)

[124] *State v. Zachary*¸2013 LEXIS 295 (Del. Super July 16, 2013), citing *Commonwealth v. Koch,* 39 A.3d 996, 1005 (Pa. Super Ct. 2011).

[125] A353-A354.

Bordley argues that the messages were improperly admitted and should not have been considered.

III. BORDLEY'S DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 7 OF THE DELAWARE CONSTITUTION WERE VIOLATED BECAUSE THE NOTES WRITTEN BY CO-DEFENDANT HARMON WERE ADMITTED FOR A LIMITED PURPOSE AND DO NOT APPEAR TO HAVE BEEN CONSIDERED AS IMPEACHMENT OF HIS CREDIBILITY

1. Question presented: Whether Bordley's due process rights were violated because the Court allowed notes from a codefendant into evidence for a limited purpose and then did not consider them for that purpose. This issue was not preserved.

2. Scope of Review:

When an issue is not preserved at trial, it is subject to a plain error standard of review.[126] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[127]

Claims of a constitutional violation are reviewed *de novo*.[128]

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[126] *See* Supr. Ct. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.")
[127] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[128] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del 2010).

3. Argument on the Merits

As previously stated, when codefendant Harmon was questioned under cross examination by Trial Counsel, he was presented with notes that he was purported to have written and he denied writing the notes.[129]

When Bordley testified, he was presented with the notes and testified that they were written by Harmon and were given to him while they were both incarcerated. Trial Counsel marked the letters for identification so that he could question Bordley about them and after the questioning he attempted to move them into evidence. Following is the exchange that occurred:

> Trial Counsel: All right, Your Honor. I ask that these notes be admitted into evidence.
>
> DAG: Your Honor, these notes contain hearsay. They are not for the purpose of conspiracy. This is after the alleged act has already occurred. So these are hearsay notes.
>
> Trial Counsel Your Honor, these are notes that would indicate, once Your Honor can look at them, that Zhyree Harmon had a plan to have Mr. Bordley get blamed for the murder because he didn't have a prior record and he knew the law and he was setting up how to orchestrate how to avoid him going to jail for the murder and Chelsea Braunskill going to jail for the murder. So he had a whole plan. He knew the law. It's self-explanatory. He denied that he ever wrote those notes. We have testimony now that he did write the notes. It was communicated to him about that he did write the notes. So it can come in as an exception at

[129] A135-A137.

the very least to impeach his statement, at the very least, without the content of the note coming in.

DAG: Your Honor, that is an improper understanding of these notes. The notes don't actually say this is a plan. The notes do not say I'm going to blame – or you don't have a record so I'm going to blame you. They don't say that. That is Mr. Beauregard's interpretation of these notes. They are hearsay. They are not in furtherance of the conspiracy.

Trial Counsel: I disagree with counsel, opposing counsel, Your Honor, that they are very relevant to what took place, and it actually shows the blame of Mr. Harmon and Miss Braunskill as the proponents of the murder.

DAG: It's not a relevancy objection, Your Honor. It's hearsay.

The Court: Let me see the notes.

Trial Counsel: If I could approach, Your Honor?

The Court: You may.

Trial Counsel: Your Honor, I have them in order of when he received them. The first being the first that he received.

The Court: What is the purpose of offering these notes?

Trial Counsel: Your Honor, it shows that Mr. Harmon was complicit in the charges themselves and that he tried to get Mr. Bordley to go along with a plan that he had to blame Mr. Bordley versus Chelsea Braunskill and himself and that he knew the law, and I believe there are some phrases in there that he mentioned to exonerate Mr. Bordley that there is more to this case then you know. I know for a fact that you don't know. More to this case that I didn't rap with you. I know what I did, and I'm going to fix like I said.

The Court: So you aren't offering these notes for the truth?

Trial Counsel: No, Your Honor.

The Court: You are offering the notes to show motivation?

Trial Counsel: Sure, Your Honor.

The Court: All right. I recognize the notes are unsigned and are denied that they are the notes of Mr. Harmon. There is not been any identification by a handwriting expert that these are his notes, and we do know that Mr. Bordley said they are his notes but that could be viewed as self-serving in his own interest. You can admit them under the basis that they offer some evidence, and I will weigh the relevancy of it. I will weigh the weight of these notes of what they may show. I will admit them on this basis.

Trial Counsel: Thank you, Your Honor. I would like to have them admitted.

The Court: Objection overruled. They will be admitted.

In *Edwards v. State,*[130] this Court reviewed a denial by the trial court of a statement that was overheard by a third person. The State argued that the statement could not come in because it was hearsay and the defense argued that the statement was being offered to impeach the credibility of a witness that had testified for the State.[131] The trial judge stated:

[130] *Edwards v. State,* 925 A.2d 1281 (Del. 2007).

[131] The witness was Michael Mude and while incarcerated, Edwards and two other prisoners, Michael Mude and Rachine Garnettt, were cellmates. As a State witness at trial, Mude testified that in the presence of Garnett, Edwards admitted that he shot the victim because the victim was stealing his drug customers. Edwards then called

> "This is, in my opinion, inadmissible hearsay, and I appreciate that [the State and Defense Counsel] were able to provide me with cases. I am not convinced that [Garnett's statement denying that Edwards admitted murdering Johnson] are being admitted for the truth of the matter involved as it is being admitted specifically and precisely to refute the testimony of Mr. Mude. So under the circumstances I will not permit you to ask questions of this witness that will elicit inadmissible hearsay concerning the defendant's statements."[132]

Edwards argued that the trial judge abused her discretion when she prevented him from impeaching Mude's statement and that the trial judge erred by limiting Garnett's testimony about Edward's out of court statement because he planned to use the statement solely to impeach Mude's credibility under D.R.E. 607 and he did not attempt to introduce Garnett's testimony for substantive purposes.[133] This Court agreed and determined that the trial judge's ruling denied Edwards the chance to introduce evidence contradicting Mude's testimony and that prevented Edwards from arguing to the jury that another person present at the time of the alleged incriminating statements heard nothing of the kind related by Mude and that Mude's version was at best inaccurate and at worse, a lie.[134]

Garnett, who was also present during the conversation, to testify about his recollection of the conversation. The trial judge limited Garnett's testimony and did not permit him to testify that he did not hear Edwards admit to killing the victim or that in the same conversation to which Mude referred, Edwards actually denied killing the victim.

[132] *Edwards v. State*, 925 A.2d 1281, 1284 (Del 2007)

[133] *Id.* at 1285.

[134] *Id.* at 1287.

While it might be readily apparent why this case is being discussed, Bordley argues that *Edwards* is significant because it gives guidance on the importance of evidence for the purpose of impeachment rather than just being hearsay.

Here, the Court did not deny admission of the notes like in *Edwards.* Although the Court indicated that it would weigh the relevancy and what they may show, the Court never again mentioned the notes or appeared to consider their contents. In the verdict, there is *no* mention of potential credibility issues with Harmon or the possibility that the notes were significant.[135]

Bordley argues that the notes were extremely significant because Harmon disclaimed authorship and was shown to have lied throughout his testimony. If the notes had been properly considered as impeachment evidence, one of the people identifying Bordley as the shooter would have been discredited.

[135] In the interest of full candor, the Court did state "..I accredit the testimony which, in my judgment, was most worthy of credit and disregarded any portion of the testimony which, in my judgment was unworthy of credit."A400.

CONCLUSION

The right to a fair trial is among our most prized rights.[136]Bordley begs this Court to consider that he was denied a fair trial because of prosecutorial misconduct and evidence rulings that severely impacted his case.

[136] *See Estes v. Texas*, 381 U.S. 532, 540 (1965)(describing the right to a fair trial as "the most fundamental of all freedoms.")