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Case Number 467,2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE WHITE,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 467, 2019
	)	
	)	
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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NATURE AND STAGE OF THE PROCEEDINGS

On October 16, 2017, a New Castle County grand jury indicted Dwayne White ("White") and several co-defendants with Criminal Racketeering and other charges associated with the activities of a drug dealing enterprise headed by White and co-defendant Eric Lloyd ("Lloyd"). A6; A21-43. Specifically, the indictment charged White with Criminal Racketeering, Conspiracy to Commit Criminal Racketeering, and several predicate acts including Attempted Murder First Degree, Drug Dealing, and Bribing a Witness. A21-43. On June 3, 2019, White and is co-defendants, Lloyd and Damon Anderson ("Anderson") proceeded to a jury trial in the Superior Court. A16. After a nine-day trial, the jury convicted White of Criminal Racketeering, Conspiracy to Commit Criminal Racketeering, two counts of Conspiracy First Degree, two counts of Drug Dealing (Tier 4), eight counts of Conspiracy Second Degree, Aggravated Possession of Heroin (Tier 5), Money Laundering, Criminal Solicitation First Degree, Aggravated Act of Intimidation, Bribing a Witness, Attempt to Evade or Defeat Tax, and Tampering with Physical Evidence. A17. The jury acquitted White of Attempted Murder First Degree and two counts of Conspiracy to Commit Drug Dealing.[1] A17. The State entered a *nolle prosequi* on the remaining charges. A17.

[1] The jury also found Lloyd guilty of several charges in the indictment related to the criminal enterprise. Lloyd's case is currently on appeal to this Court.

On October 18, 2019, the Superior Court sentenced White to an aggregate 57 years incarceration followed by descending levels of supervision. Exhibit 1 to Opening Brief. White filed a timely notice of appeal and an opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. Because White did not raise any of the claims in the instant appeal in the Superior Court, this Court is not obligated to consider his claims unless White can demonstrate that the interests of justice require review. In any event, the Superior Court did not plainly err when it did not *sua sponte* merge two counts of Conspiracy First Degree (Count Four and Count Twenty Three) because the charges were separate and distinct and did not violate the constitutional rule against double jeopardy.

II. Appellant's argument is denied. The Superior Court did not plainly err when it sentenced White for multiple counts of conspiracy. Each offense was separate and distinct and not subject to merger for sentencing purposes.

III. Appellant's argument is denied. The accomplice liability instruction was a correct statement of the law that did not mislead or confuse the jury.

IV. Appellant's argument is denied. White's argument that Count Sixteen was defective is a result of his misreading of that Count in the indictment.

V. Appellant's argument is denied. The Superior Court did not commit plain error by allowing Joseph Benson to testify. Benson's testimony was relevant and admissible, and it did unfairly prejudice White.

VI. Appellant's argument is denied. White's sentence was within statutory limits. The Superior Court provided several reasons for departing from

SENTAC guidelines and the court's sentence was not based on false factual predicates.

STATEMENT OF FACTS

Between 2015 and 2017 Eric Lloyd ("Lloyd") sat atop a criminal enterprise that sold drugs. When Lloyd went to federal prison in 2017, he transferred control of the enterprise to White. White ran the enterprise until his arrest, and during that time expanded the drug dealing business from mainly cocaine to include heroin. In 2015, members of the enterprise suspected that Markevis Stanford ("Stanford"), a former member of the enterprise, was cooperating with the police, sparking a feud between Stanford and certain members of the enterprise. (B713-14). The conflict involved shootings, assaults, robberies, and witness intimidation. Members of the enterprise, including White, placed a "bounty" on Stanford's life, which ultimately led to the June 2017 kidnapping and murder of Stanford's girlfriend in Maryland and the shooting of an innocent child in Wilmington.

The Criminal Enterprise

Several members of the drug dealing enterprise who had been indicted with White and resolved their cases by guilty pleas, testified at White's trial. Tyrone Roane ("Roane") pled guilty to multiple counts of conspiracy. (B726). Roane testified about some of his drug dealing activity for the enterprise. (B667-70). Roane explained that White would advance him a quantity of drugs at an agreed upon price. (B670). Roane would then sell the drugs, pay White the agreed upon price, and keep the remaining amount as profit from the sales. (B670). Other

members of the enterprise had the same arrangement with White, including co-defendant Damon Anderson. (B686). When shown ledgers recovered during the execution of search warrants of locations associated with White (State's Trial Exhibits 82-83), Roane testified that the entries listed the names of people in the enterprise who owed White money for drugs. (B679). In addition to personally receiving drugs from White, Roane testified that he observed the exchange of drugs between White and other members of the enterprise. (B679-86).

According to Roane, White initially sold heroin, but his business intensified in 2017, when he started dealing in powder cocaine. (B658). Roane described White as Lloyd's "protégé." (B727). In June 2017, Roane attended a "going away" party for Lloyd at a club on Union Street. (B688). White hosted the party as a farewell to Lloyd, who was about to serve a federal prison sentence for a violation of probation. (B689). Roane also testified about White storing, moving, and concealing drugs from the police. (B694-95; B707).

In 2015, members of the enterprise suspected Stanford of cooperating with police. (B713). According to Roane, two members of the enterprise made a sex video with the mother of Stanford's child. (B713). The video, coupled with members' suspicions that Stanford was cooperating with police, started a feud that led to Stanford robbing two of White's close associates. (B716). The robbery resulted in a "check" on Stanford's head, financed, in part, by White. (B717-17;

B860-61). The ongoing conflict also sparked a shootout between Stanford and members of the enterprise in the Riverside neighborhood of Wilmington. (B719-21).

According to Roane, members of the enterprise, including White, were at times able to access and review discovery materials in in their co-defendants' criminal cases through an attorney who routinely represented members of the enterprise. (B707-09). Soon after Roane pled guilty, a copy of his plea agreement was posted on social media alongside a wedding photo of Roane and his wife. (B723-34; State's Trial Exhibit 212).

William Wisher ("Wisher") pled guilty to Conspiracy to Commit Racketeering, two counts of Drug Dealing, Conspiracy Second Degree and Possession of a Firearm by a Person Prohibited. (B997). Wisher grew up with Lloyd in Riverside. (B1001). According to Wisher, Lloyd was the leader of a criminal enterprise that sold powder cocaine and marijuana. (B1003). Wisher maintained a "consignment" arrangement with Lloyd whereby Lloyd would provide Wisher with powder cocaine for an agreed upon price, Wisher would then "cook" the cocaine to make crack cocaine and sell it. After Wisher paid Lloyd the agreed upon price, Wisher would keep any profit. (B1005-07). As part of the arrangement, Lloyd directly supplied Wisher with the drugs. (B1012).

Prior to Lloyd reporting to federal authorities to serve his violation of probation sentence, Wisher attended a party for Lloyd at a restaurant on Union Street so that Lloyd could "pass the torch" to White. (B1017-18). The day after the party, Wisher began the "consignment" arrangement with White. (B1021-23). White personally supplied Wisher with drugs. (B1025).

In 2017, DEA agents arrested Wisher. (B988). Wisher told the agents that they would find heroin that belonged to him stored at 1234 Dyer Avenue. (B989). Wisher said that White had supplied him with the heroin found by the DEA agents, as well as additional heroin that the agents had not found. (B991). After Wisher's arrest, White arranged for an attorney who previously represented members of the enterprise to represent Wisher at his preliminary hearing. (B1027-28).

Dontae Sykes ("Sykes"), who had federal charges related to the June 6, 2017 kidnapping and murder pending at the time of White's trial, was also a member of the enterprise. (B1088-89). After his 2016 release from prison, Sykes began selling cocaine for Lloyd. (B1090; 1093). According to Sykes, Lloyd was at the top of cocaine trade in Wilmington and White, backed by Lloyd, was at the top of the heroin trade. (B1091). When Lloyd went to federal prison in 2017, Sykes began dealing with White directly. (B1092).

At trial, Sykes testified that he knew how drug dealers, like White and Lloyd, concealed the proceeds and assets of the criminal enterprise by using gambling,

investment properties and LLCs. (B1097-98). According to Sykes, Lloyd and White would use proceeds from their drug trade to legally gamble in order to "wash" the money and create a "paper trail." (B1097). They also purchased investment properties with the illegal proceeds because "this drug thing don't last forever." (B1098). Sykes also explained the use of LLCs to hide physical assets and money. (B1098).

June 6, 2017 Shooting

On June 6, 2017, S. Banner ("Banner") was driving her car in Wilmington with her six-year-old son, her infant daughter, and her mother. (B207-08). While Banner's car was stopped at the 6th and Spruce Street intersection, she saw a man, later identified as Markevis Stanford, trying to cross the street. (B209). At that point, a white truck, later identified as being driven by Michael Pritchett, blocked her way. (B209). When the white truck blocked in Banner, Stanford tried to hide on the side of her car. (B209). Gunfire erupted from within Pritchett's truck, shattering Banner's car windows. (B210). When the gunfire stopped, Banner realized her son had been shot. (B210). Following the shooting, her son was in a coma for five days and spent three months in the hospital. (B211).

Stanford was the intended target of the gunfire coming from Pritchett's truck; the result of the "check," financed and increased in value by White. (B717-19). In the days following the shooting, White attempted to bribe Banner by offering her

money to say that "his cousin," later identified as Pritchett, was not involved in the shooting. (B212-23). At trial, White stipulated to the fact that he attempted to bribe Banner, thus conceding he was guilty of that charge. (B1133).

ARGUMENT

I. THE SUPERIOR COURT DID NOT COMMIT PLAIN ERROR BECAUSE IT WAS NOT REQUIRED TO *SUA SPONTE* MERGE THE TWO COUNTS OF CONSPIRACY TO COMMIT ATTEMPTED MURDER WITH RACKETEERING OR CONSPIRACY TO COMMIT RACKETEERING.

Questions Presented

Whether this Court should review claims that White failed to present to the trial court in the first instance, and if so, whether the Superior Court committed plain error when it did not *sua sponte* merge two counts of Conspiracy First Degree (Count 4 and Count 23) with Conspiracy to Commit Racketeering.

Standard and Scope of Review

"[This Court] generally decline[s] to review contentions not raised below and not fairly presented to the trial court for decision unless [the Court] find[s] that the trial court committed plain error requiring review in the interests of justice."[2] "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."[3]

The interests of justice exception embodied in Delaware Supreme Court Rule 8 is applied "parsimoniously, and only where a trial court's failure to confront an

[2] *Turner v. State,* 5 A.3d 612, 615 (Del. 2010). Del. Supr. Ct. R. 8.
[3] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

issue 'is basic, serious and fundamental" in character and clearly results in "manifest injustice.'"[4]

Merits of the Argument

Supreme Court Rule 8 Precludes Review of White's Claims on Appeal

White failed to raise all of the claims in this appeal in the Superior Court in the first instance. While White acknowledges this, he nonetheless bypasses any analysis under Rule 8 and simply states that this Court can review his claims for plain error. But, for this Court to consider White's previously unraised claims, the interests of justice must require their review.[5] The fact that White is raising a constitutional claim (Argument III) for the first time on appeal is of no moment. This Court has "previously refused to review constitutional arguments raised for the first time on appeal."[6]

This Court expressed its concern over presenting arguments for the first time on direct appeal, stating, "[w]e place great value on the assessment of issues by our trial courts, and it is not only unwise, but unfair and inefficient, to litigants and the development of the law itself, to allow parties to pop up new arguments on appeal

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[4] *Sabree Environmental & Construction, Inc. v. Summit Dredging*, LLC, 2016 WL 5930270, at *1 (Del. Oct. 12, 2016) (quoting *Cassidy v. Cassidy*, 689 A.2d 1182, 1184–85 (Del. 1997)).
[5] *Id.* Del. Supr. Ct. R. 8.
[6] *Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017) (citing *Cassidy*, 689 A.2d at 1184–85) (other citations omitted).

they did not fully present below."[7] The reason for this is clear:

> Opponents should have a fair chance to address arguments at the trial court. It is prudent for the development of the law that appellate courts have the benefits that come with a full record and input from learned trial judges. Thus, fair presentation facilitates the process by which the application of rights in an individual case affects others in other cases and society in general.[8]

Because White did not fairly present all of his claims to the Superior Court, he has deprived the State of an opportunity to litigate the claims and the Superior Court of an opportunity to address the issues. Instead of addressing the Rule 8 bar to his claims, White ignores it. White has not pled, nor can he demonstrate, that the trial court committed plain error requiring review of his claims in the interests of justice. Consequently, this Court should decline review of White's claims because he failed to present them to the Superior Court in the first instance.

Even if the interests of justice required review, which it does not, White cannot demonstrate plain error. None of White's claims have merit, nor do they amount to an issue, that if error were found, would "clearly deprive an accused of a substantial right or show manifest injustice."[9]

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[7] *DFC Global Corporation v. Muirfield Value Partners, L.P.*, 172 A.3d 346, 363 (Del. 2017).
[8] *Shawe*, 157 A.3d at 169.
[9] *Johnson v. State*, 878 A.2d 422, 429 (Del. 2005).

Merger of Offenses

White claims the Superior Court plainly erred when it failed to *sua sponte* merge two counts of Conspiracy First Degree with Racketeering or Conspiracy to Commit Racketeering for sentencing purposes. White contends he "could not be convicted of both sets of offenses because . . . all of the offenses included and duplicated 'conspiracy' elements which should merge . . . ."[10] White's argument is unavailing.

Conspiracy First Degree is a stand-alone offense that provides, in part:

> A person is guilty of conspiracy in the first degree when, intending to promote or facilitate the commission of a class A felony, the person:
>
> > (1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the felony or an attempt or solicitation to commit the felony; or
> >
> > (2) Agrees to aid another person or persons in the planning or commission of the felony or an attempt or solicitation to commit the felony, and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.[11]

Delaware's racketeering statute provides, in part:

> (a) It shall be unlawful for any person employed by, or associated with, any enterprise to conduct or participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity or collection of an unlawful debt.

* * *

[10] Op. Brf. At 19.
[11] 11 *Del. C.* § 513.

> (d) It is unlawful for any person to conspire or attempt to violate any of the provisions of subsection. (a), (b) or (c) of this section.[12]

The indictment charged White with Conspiracy First Degree in Count Four and Count Twenty Three. Count Four reads, in part:

> Dwayne White, on or about the 6th day of June 2017, … when intending to promote or facilitate the commission of the felony of Murder First Degree, [he agreed] with Ryan Bacon, Maurice Cooper, Dion Oliver, Michael Pritchett, Dontae Sykes, Teres Tinnin, and Rasheed White that one, the other or each of them would commit the offense, and one, the other of each of them did commit some overt act in pursuance of the conspiracy by engaging in conduct constituting Attempted Murder in the First Degree, or by committing some other overt act in pursuance of the conspiracy.[13]

Count Twenty Three reads, in part:

> Dwayne White, on or about the 27th day of August, 2017, … along with Ira Brown when intending that another person engage in conduct constituting a class A felony (Murder or Attempted Murder in the First Degree), did solicit, request, command, importune or otherwise attempt to cause another person, Ira Brown, to engage in conduct which would constitute the felony or an attempt to commit the felony, or which would establish the other's complicity in its commission or attempted commission.[14]

The indictment also charged White with Conspiracy to Commit Racketeering in Count Two, which reads, in part:

> Damon Anderson, Eric Lloyd, Dimichael Showell, and Dwayne White, between the 1st day of January, 2015, and the 1st day of January, 2019, . . ., when intending to promote or facilitate the affairs of [a criminal

[12] 11 *Del. C.* § 1503.
[13] A28.
[14] A37.

> enterprise], did agree with each other, or with any other person, . . . that at least one, or another, or all of them would engage in conduct constituting the felony of Criminal Racketeering . . . , and that at least one, or another, or all of them did commit an overt act in furtherance of the conspiracy, as set forth in paragraphs 1 through 21 of Count One of this Indictment.[15]

White argues the two counts of Conspiracy First Degree identified above "are included offenses of Racketeering and/or Conspiracy to Commit Racketeering"[16] under section 206 of Title 11. He is mistaken. Conspiracy First Degree is not an included offense of Conspiracy to Commit Racketeering because each requires proof of different elements.

"Double Jeopardy prohibits successive prosecutions and cumulative punishments for greater-and-lesser-included-offenses that are based on the same conduct."[17] When analyzing a double jeopardy claim, this Court employs the *Blockburger*[18] test to determine "whether each provision [of the challenged statutes] requires proof of an additional fact which the other does not."[19] In *Blockburger,* the United States Supreme Court considered whether several offenses charged in a single prosecution were sufficiently different to permit the imposition of multiple

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[15] A27.
[16] Op. Brf. at 20.
[17] *Ingram v. State*, 2015 WL 631581, at *2 (Del. Feb. 11, 2015) (citing *Blake v. State*, 65 A.3d 557, 561 (Del. 2013); *Brown v. Ohio*, 432 U.S. 161, 169 (1977)).
[18] *Blockburger v. United States*, 284 U.S. 299 (1932).
[19] *See, e.g.*, *Hackett v. State*, 569 A.2d 79, 80 (Del. 1990) (quoting *Blockburger*, 284 U.S. at 304 (internal quotes omitted)).

sentences without violating the double jeopardy clause.[20] The Court explained:

> [t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.[21]

The prohibition against double jeopardy is codified in section 206 of Title 11, which reads, in relevant part:

> (a) When the same conduct of a defendant may establish the commission of more than 1 offense, the defendant may be prosecuted for each offense. The defendant's liability for more than 1 offense may be considered by the jury whenever the State's case against the defendant for each offense is established in accordance with § 301 of this title. The defendant may not, however, be convicted of more than 1 offense if:
>
> > (1) One offense is included in the other, as defined in subsection (b) of this section; or
> > (2) One offense consists only of an attempt to commit the other; or
> > (3) Inconsistent findings of fact are required to establish the commission of the offenses.
>
> (b) A defendant may be convicted of an offense included in an offense charged in the indictment or information. An offense is so included when:
>
> > (1) It is established by the proof of the same or less than all the facts required to establish the commission of the offense charged; or
> > (2) It consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or
> > (3) It involves the same result but differs from the offense charged only in the respect that a less serious injury or risk

[20] 284 U.S. at 299.
[21] 284 U.S. at 304.

> of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.[22]

Under Delaware law, "[a] lesser-included offense is one that does not require proof of elements beyond those required by the greater offense."[23]

In this case, Conspiracy First Degree, as charged in Count 4 and Count 23 of the indictment, is not a lesser-included offense of Racketeering or Conspiracy to Commit Racketeering. Conspiracy First Degree requires proof of the following:

- The defendant agrees with another person or persons that they or one or more of them
- will engage in conduct constituting a Class A felony;
- or an attempt or solicitation to commit a Class A felony;
  -OR-
- The defendant agrees to aid another person or persons
- in the planning or commission of a Class A felony or an attempt;
- or solicitation to commit a Class A felony,
- and the defendant or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.[24]

The plain language of section 513 is directed toward actions advancing an underlying Class A felony. Conspiracy to Commit Racketeering requires proof that:

- the defendant is employed or associated with an enterprise

- the defendant conspires to conduct or conspires to participate in the conduct of the affairs of the enterprise

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[22] 11 *Del. C.* § 206.
[23] *Ingram*, 2015 WL 631581, at *2 (citing *Blake*, 65 A.3d at 561; *Brown*, 432 U.S. at 169; 11 *Del. C.* § 206).
[24] 11 *Del. C.* § 513.

- through a pattern of racketeering activity[25]

Conspiracy to Commit Racketeering is limited to an agreement to engage in actions amounting to racketeering activity that advance the interests of the enterprise. Racketeering is a Class B felony. Conspiracy First Degree cannot be a lesser-included offense of Conspiracy to Commit Racketeering.

White contends, "the specific allegations in predicate acts 6 and 20 are substantially identical to the elements of the Conspiracy First Degree counts."[26] However, not only is Conspiracy First Degree limited to Class A felonies but, Count Four and Count Twenty Three required proof of an element not required by Conspiracy to Commit Racketeering, namely the object of the conspiracy. In order to prove Conspiracy to Commit Racketeering the State was not required to prove that White conspired to kill Markevis Stanford on two separate occasions. The acts alleged in Count Four and Count Twenty Three were among several predicate acts underlying the Racketeering charge. As such, the jury could have convicted White of Conspiracy to Commit Racketeering without convicting him of Conspiracy First Degree in Count Four and Count Twenty Three. To convict White of Racketeering or Conspiracy to Commit Racketeering the jury need only agree that White

[25] 11 *Del. C.* § 1503. *See Stroik v. State*, 671 A.2d 1335, 1342 (Del. 1996).
[26] Op. Brf. at 20.

committed two of the alleged predicate acts listed in the Racketeering charge.[27] The two statutes at issue here pass the *Blockburger* test because Conspiracy First Degree applies only to Class A felonies and that charge and Conspiracy to Commit Racketeering each require proof of an element not required by the other. White has therefore failed to show plain error when the court did not *sua sponte* merge the aforementioned conspiracy charges for sentencing purposes.

[27] *See* 11 *Del. C.* § 1502 (5) ("pattern of racketeering activity" means two or more incidents of conduct that constitute racketeering activity).

II. THE SUPERIOR COURT DID NOT PLAINLY ERR WHEN IT SENTENCED WHITE ON SEPARATE COUNTS OF CONSPIRACY.

Question Presented

Whether the Superior Court committed plain error when it did not *sua sponte* merge all counts alleging conspiracy with Conspiracy to Commit Racketeering for sentencing.

Standard and Scope of Review

Issues that were not fairly present to the trial court are reviewed for plain error when the interests of justice so require.[28]

Merits of the Argument

For the first time on appeal, White contends "[u]nder section 521 [of Title 11] [he] can only be guilty of conspiracy to commit racketeering since the multiple substantive crimes charged are the object of the same comprehensive, continuing agreement."[29] He is wrong.

Under subsection (a) of section 521 a defendant can be convicted of two separate conspiracies in connection with two separate criminal offenses, "where the evidence showed that the crimes were not the object of the same agreement."[30] Such was the case here. The indictment charged White with several counts of conspiracy:

[28] Del. Supr. Ct. Rule 8.
[29] Op. Brf. at 23.
[30] *Harris v. State*, 2001 WL 433459, at *1 (Del. Apr. 25, 2001).

Count 4 – Conspiracy First Degree – conspiracy to commit Attempted Murder (Count 3) on June 6, 2017.
Count 6 – Conspiracy Second Degree – conspiracy to commit Drug Dealing (Count 5) between August 8, 2017 and September 7, 2017.
Count 7 – Conspiracy Second Degree – conspiracy to commit Drug Dealing (Count 5) between January 1, 2017 and September 7, 2017.
Count 8 – Conspiracy Second Degree – conspiracy to commit Drug Dealing (Count 5) between January 1, 2015 and September 7, 2017.
Count 9 –Conspiracy Second Degree – conspiracy to commit Drug Dealing (Count 5) between January 1, 2015 and September 7, 2017.
Count 11 – Conspiracy Second Degree – conspiracy to commit Aggravated Possession of Heroin (Count 10) on September 5, 2017.
Count 12 – Conspiracy Second Degree – conspiracy to commit Aggravated Possession of Heroin (Count 10) on August 23, 2017.
Count 13 – Conspiracy Second Degree – conspiracy to commit Aggravated Possession of Heroin (Count 10) between January 2, 201 and October 11, 2017.
Count 14 – Conspiracy Second Degree – conspiracy to commit Aggravated Possession of Heroin (Count 10) on September 5, 2017.
Count 15 – Conspiracy Second Degree – conspiracy to commit Aggravated Possession of Heroin (Count 10) on August 28, 2017.
Count 17 – Conspiracy Second Degree – conspiracy to commit Drug Dealing (Count 16) between January 1, 2015 and October 8, 2018.
Count 19 – Conspiracy Second Degree – conspiracy to commit Money Laundering (Count 18) between August 8, 2017 and September 7, 2017.
Count 20 – Conspiracy Second Degree – conspiracy to commit Money Laundering (Count 18) between January 1, 2015 and October 8, 2018.
Count 21 – Conspiracy Second Degree – conspiracy to commit Money Laundering (Count 18) between January 1, 2015 and October 15, 2017.
Count 23– Conspiracy First Degree – conspiracy to commit Murder or Attempted Murder First Degree on August 27, 2017.[31]

Each indicted conspiracy count alleged an agreement between White and another individual or individuals to commit a specific crime on or between particular dates.

[31] A28-37.

The indictment also charged White with Conspiracy to Commit Racketeering, alleging that White, Damon Anderson, Eric Lloyd and Dimichael Showell, between January 1, 2015 and January 1, 2019, agreed with several others to engage in Criminal Racketeering.[32]

With no legal support, White summarily argues "it is improper 'piling on' to convict [him] of separate conspiracy offenses which are subsumed under the continuing conspiracy envisioned by the conspiracy to commit racketeering charge."[33] However, this was not a case of "piling on." Each count of Conspiracy First Degree and Conspiracy Second Degree contemplated an agreement to commit a single substantive offense. In contrast, Conspiracy to Commit Racketeering contemplates an agreement to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity. The Racketeering statute itself creates substantive criminal offenses, making it unlawful to participate in the affairs of an enterprise through a pattern of racketeering activity and to conspire to violate the provisions of the statute. Thus, White could properly be charged, convicted, and sentenced in separate counts with violations of section 512, section 513, and section 1503. Each statute, as charged in the indictment, represents a separate and distinct offense and does not require the merger of offenses for sentencing. The Superior

[32] A26-27.
[33] Op. Brf. at 23.

Court properly sentenced White on separate counts of Conspiracy First Degree, Conspiracy Second Degree, and Conspiracy to Commit Racketeering.

III. THE ACCOMPLICE LIABILITY INSTRUCTION PROVIDED TO THE JURY WAS A CORRECT STATEMENT OF THE LAW.

Question Presented

Whether the accomplice liability instruction provided to the jury was a correct and reasonably informative statement of the law.

Standard and Scope of Review

When a defendant fails to raise an objection to jury instructions at trial, this Court reviews for plain error.[34]

Merits of the Argument

White argues for the first time that the Superior Court committed plain error when it failed to *sua sponte* provide the jury with a supplemental accomplice liability instruction that would have limited its application to "certain specified offenses."[35] He claims that the Superior Court's placement of the accomplice liability instruction toward the end of the jury instructions and the court's failure to specifically instruct the jury that accomplice liability did not apply to the conspiracy charges "likely led the jury to believe that it applied to every offense."[36] White's contentions are meritless.

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[34] *Swan v. State*, 820 A.2d 342, 357 (Del. 2003) (citing *McDade v. State*, 693 A.2d 1062, 1064 (Del. 1997).
[35] Op. Brf. at 26.
[36] Op. Brf. at 26.

"Implicit in every jury instruction is the fundamental principle that the instruction applies to the specific facts in that particular case and contains an accurate statement of the law."[37] Moreover, a "charge to the jury will not serve as grounds for reversible error if it is 'reasonably informative and not misleading judged by common practices and standards of verbal communication.'"[38]

The accomplice liability statute reads, in part:

> A person is guilty of an offense committed by another person when:
> (1) Acting with the state of mind that is sufficient for commission of the offense, the person causes an innocent or irresponsible person to engage in conduct constituting the offense; or
> (2) Intending to promote or facilitate the commission of the offense the person:
> a. Solicits, requests, commands, importunes or otherwise attempts to cause the other person to commit it; or
> b. Aids, counsels or agrees or attempts to aid the other person in planning or committing it[39]

At the close of evidence, the trial judge provided the jury the accomplice liability instruction which, in part, read:

> In order to find a defendant or the defendants guilty of a crime committed by another person, you must find that the . . . State has proved the following three elements beyond a reasonable doubt:
> First, another person committed the crime; and
> Two, a defendant or the defendants intended to promote or facilitate the commission of the crime; and

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[37] *Bullock v. State*, 775 A.2d 1043, 1053 (Del. 2001).
[38] *Probst v. State*, 547 A.2d 114, 120 (Del. 1988) (quoting *Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947)).
[39] 11 *Del. C.* § 271.

> Three, a defendant or the defendants requested, commanded aided, counseled, or agreed or attempted to aid another person in planning or committing the crime.[40]

The trial judge also instructed the jury as follows:

> The defendants are each charged with separate offenses that are set forth in the indictment. These are separate and distinct offenses, and you must independently evaluate each offense. The fact that you reach a conclusion with respect to one offense, or with regard to one defendant, does not mean that the same conclusion will apply to any other charged offense, or to any other charged defendant. Each charge before you is separate and distinct, and you must evaluate evidence as to one offense independently from evidence of each other offense and render a verdict as to each individually.[41]

"As a general rule, a defendant is not entitled to a particular instruction, but he does have the unqualified right to a correct statement of the substance of the law."[42] "In reviewing the sufficiency of a jury instruction, this Court will read the instructions as a whole to determine if the trial court accurately instructed the jury on the law. Some inaccuracies and inaptness of language are to be expected in any jury charge."[43] Here, the instructions, when read as a whole, accurately stated the applicable law.

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[40] A147.
[41] A146.
[42] *Bullock*, 775 A.2d at 1047 (quoting *Flamer v. State*, 490 A.2d 104, 127 (Del. 1983) (internal quotation marks omitted)).
[43] *Robertson v. State*, 2012 WL 628001, at *3 (Del. Feb. 27, 2012) (citations omitted).

The accomplice liability statute instruction was particularly applicable in White's case, which involved the actions of several codefendants and other members of the criminal enterprise.[44] White does not claim the trial judge erred in giving the instruction. Rather, he simply contends the placement of the instruction toward the end of the court's charge to the jury and the lack of guidance from the court limiting its applicability amounted to plain error. White is wrong. "An instruction which tracks the statutory language is adequate to inform the jury."[45]

White contends "[c]onspiracy is different than accomplice liability." Rejecting the same argument White makes here, this Court noted the distinction between accomplice liability and conspiracy in *Turner v. State.*[46] In *Turner,* the Court considered whether the Superior Court abused its discretion when it provided the jury with an accomplice liability instruction in light of the fact that Turner had been charged with conspiracy.[47] The *Turner* Court determined:

> Accomplice liability only requires a finding that Turner aided the others in the commission of an offense, whereas conspiracy requires a finding that Turner agreed to commit the drug crimes.[48]

Here, the court properly instructed the jury on accomplice liability and conspiracy.

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[44] Op. Brf. at 28.
[45] *Robertson v. State,* 596 A.2d 1345, 1354 (Del. 1991) (citations omitted).
[46] *Turner v. State*, 25 A.3d 774 (Del. 2011).
[47] *Turner,* 25 A.3d at776.
[48] *Id.*

The Superior Court's accomplice liability instruction substantially tracked the language of the accomplice liability statute. The trial judge was not required to place it at a particular point in the charge to the jury, nor was the court required to limit the application of the instruction to certain charges. White cannot demonstrate plain error because the Superior Court's instruction was a correct statement of the law that was reasonably informative and did not mislead the jury.

IV. THE INDICTMENT WAS NOT DEFECTIVE.

Question Presented

Whether the indictment contained defects that would render White's conviction for Conspiracy Second Degree invalid.

Standard and Scope of Review

When a defendant fails to raise a claim that the indictment was defective in the Superior Court, this Court reviews only for plain error.[49]

Merits of the Argument

Here, for the first time, White claims he should not have been convicted of "Count Sixteen Conspiracy Second Degree" because that count "did not state a criminal offense."[50] He is mistaken. It appears that White has misread Count Sixteen of the indictment.

White claims that Count Sixteen fails to state a criminal offense and only refers to a conspiracy when it alleges the underlying Drug Dealing charge to which it purports to apply. White appears to confuse Count Sixteen and Count Seventeen, which appear on the on the same page of the indictment.

Count Sixteen of the indictment charged White with Drug Dealing and reads as follows:

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[49] *Mott v. State*, 9 A.3d 464, 466 (Del. 2010) (citations omitted).
[50] Op. Brf. at 31.

> DRUG DEALING COCAINE, in violation of Title 16, Section 4752(1) of the Delaware Code.
>
> DAMON ANDERSON, ERIC LLOYD and DWAYNE WHITE, on or between the 1st day of January, 2015 and the 8th day of October, 2018, in the County of New Castle, State of Delaware, did knowingly deliver or possess with intent to deliver 20 grams or more of cocaine or any mixture containing cocaine, a controlled substance as described in 16 Del. Code Section 4716(b)(4), or did knowingly manufacture or possess with intent to manufacture or deliver 20 grams or more of cocaine or a mixture containing cocaine.[51]

Count Seventeen charged White with Conspiracy Second Degree and reads as follows:

> CONSPIRACY SECOND DEGREE in violation of Title 11, Section 512 of the Delaware Code.
>
> DWAYNE WHITE and ERIC LLOYD, on or between the 1st day of January 2015, and the 8th day of October, 2018, in the County of New Castle, State of Delaware, when intending to promote or facilitate the commission of Drug Dealing as set forth in Count Sixteen, which is incorporated herein by reference, did agree with Clarence Charles, G. Jermaine Dollard, Harold Ellington, Jamar Farnum, Tyron Friend, a/k/a Talib Al-Atharee, Darryl Kelley, Tyrone Roane, Charmaine Sanders, Dontae Sykes, or William Wisher, to commit said crime and one or more of them did commit an overt act in pursuance of said conspiracy by engaging in conduct constituting said felony, or by committing some other overt act in pursuance of the conspiracy.[52]

As is evident from the indictment, White was charged with Drug Dealing (Cocaine) in Count Sixteen. That count of the indictment clearly charged White with a crime. Count Seventeen also charged White with a crime, alleging a conspiracy to commit

[51] A34.
[52] A34-35.

Drug Dealing and referring to Count Sixteen as the substantive offense. White's argument is predicated on his misreading of the indictment and in any event is meritless. The indictment was not defective. White's claim fails.

V. THE SUPERIOR COURT DID NOT COMMIT PLAIN ERROR BY PERMITTING A DEFENSE ATTORNEY WHO HAD REPRESTENTED SEVERAL MEMBERS OF WHITE'S ENTERPRISE TO TESTIFY.

Question Presented

Whether the Superior Court plainly erred by permitting a defense attorney who represented several members of the enterprise to testify about non-privileged matters.

Standard and Scope of Review

When a defendant fails to object to trial testimony, this Court reviews only for plain error.[53]

Merits of the Argument

For the first time on appeal, White claims the Superior Court committed plain error when it permitted a criminal defense attorney, Joseph Benson, to testify in the State's case-in-chief. He contends Benson's testimony "was not relevant to any issue other than to suggest that Benson was the attorney for members of the enterprise, and to reinforce the existence of a criminal enterprise based upon his representation of a number of its members."[54] White's argument is unavailing.

[53] *Jackson v. State*, 2000 WL 1508601, at *1 (Del. Sep. 13, 2000).
[54] Op. Brf. at 35.

At trial, Benson testified that he represented several members of the enterprise in criminal cases. Several witnesses testified that members of the enterprise would hire Benson to represent fellow members charged with crimes. Benson claimed he was unwittingly listed as the registered agent for an LLC used by Lloyd to launder money. He provided a member of the enterprise, Zaire Miller, with discovery material that was under a protective order. Benson also testified that he knew Dwayne White and Eric Lloyd. White argues that while Benson's testimony may have been relevant under Delaware Rule's of Evidence ("D.R.E.") 401 and 402, it was unfairly prejudicial under D.R.E. 403 and should not have been admitted into evidence.

Under D.R.E. 402, relevant evidence is admissible.[55] D.R.E. 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[56] This Court has stated that "[t]he definition of relevance encompasses materiality and probative value."[57] Evidence is material if it is offered to prove a fact that is "of consequence" to the action.[58]

[55] D.R.E. 402.
[56] D.R.E. 401.
[57] *Lilly v. State,* 649 A.2d 1055, 1060 (Del. 1994) (citations omitted).
[58] *Id.*

Evidence has probative value if it affects the probability that the fact is as the party offering the evidence asserts it to be.[59]

In a racketeering case, the State is required to prove the existence of the enterprise charged in the indictment. In other words, the existence of the enterprise is a material fact. To prove its existence, the prosecution must show that the enterprise was comprised of "any individual, sole proprietorship, partnership, corporation, trust or other legal entity; and any union, association or group of persons associated in fact, although not a legal entity."[60] The enterprise in White's case was an association in fact. Thus, Benson's testimony was relevant because "any evidence that tends to show common interests, economic relationships, or a hierarchical structure involving the defendants [and other members of the enterprise] [is] relevant to this element of the [State's]case."[61]

White contends the fact that Benson represented several associates of the enterprise "created unfair prejudice by making it more likely that the jury would find the existence of a criminal enterprise . . ."[62] He is wrong. The evidence regarding Benson's representation was not unfairly prejudicial.

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[59] *Id.*
[60] 11 *Del. C.* § 1502.
[61] *United States v. Castellano*, 610 F.Supp. 1151, 1153–54 (S.D.N.Y. 1985).
[62] Op. Brf. at 35.

"In cases involving a claim that evidence was improperly introduced, 'the fundamental test ... is whether the evidence at issue was improper and unfairly prejudicial.'"[63] "Virtually all evidence is prejudicial - if the truth be told, that is almost always why the proponent seeks to introduce it - but it is only *unfair* prejudice against which the law protects."[64] Unfair prejudice is defined as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."[65]

In a racketeering case, the fact that several associates of the enterprise employ the services of the same attorney is relevant and can be offered to demonstrate the existence of the enterprise.[66] "[W]hen other suspicious circumstances are present, the decision of a number of persons to retain the same lawyer may be probative of an association among them."[67] Here, several members of the enterprise hired Benson to represent them in criminal cases. At times, members of the enterprise were directed to hire Benson's firm to represent them in criminal matters. Members of the enterprise would raise money to pay Benson to represent one of their

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[63] *State v. Sullins*, 2007 WL 2083657, at *5 (Del. Super. July 18, 2007) (quoting *State v. Savage*, 2002 WL 187510, at *3 (Del. Super. Jan. 25, 2002)).
[64] *Id.* at n. 26 (quoting *United States v. Pitrone,* 115 F.3d 1, 8 (1st Cir. 1997) (internal quotes omitted)).
[65] *Paikin v. Vigilant Insurance Company*, 2013 WL 5488454, at *3 n.7 (Del. Super. Oct. 1, 2013) (citing *Advisory Committee's Note*, Fed. R. Evid. 403).
[66] *See Castellano*, 610 F.Supp. at 1160; *United States v. Barnes*, 604 F.2d 121, 147 (2d Cir. 1979).
[67] *Castellano*, 610 F.Supp. at 1160 (citing *Barnes* at 604 F.2d at 147).

associates. Benson's testimony about his representation of several members of the enterprise assisted in establishing an element of the racketeering charge by demonstrating one of the ways in which the members of the enterprise were associated in fact.

Under White's reading of D.R.E. 403, any evidence that tends to demonstrate a defendant's guilt or establish an element of an offense is unfairly prejudicial. But there was no unfair prejudice here. Benson's testimony was admissible and relevant, and it did not present a danger that the jury would make its decision on an improper basis.

VI. THE SUPERIOR COURT DID NOT COMMIT PLAIN ERROR WHEN IT SENTENCED WHITE.

Question Presented

Whether the Superior Court plainly erred when it sentenced White.

Standard and Scope of Review

When a defendant fails to raise a claim regarding sentencing in the Superior Court, this Court reviews only for plain error.[68]

Merits of the Argument

For the first time here, White claims the Superior Court relied on false factual predicates when the court sentenced him. White also contends the sentencing judge violated Supreme Court Administrative Directive 76 when he "failed to adequately specify the reasons of imposing sentences so far in excess of SENTAC guidelines . . . [and] application of Section 4204(k)."[69] White's claim lacks merit.

Prior to imposing sentence, the Superior Court addressed White as follows:

> I've given this case considerable thought, obviously, presided over a number of pretrial motions. I presided over trial. I've conferred with all of the Presentence investigators personally for all three of the defendants, trying to come up with the appropriate sentence in this case.
>
> I have to start off with the fact that you were convicted of very serious crimes, 21, I believe there were, and you'll be sentenced on each of them. The most serious of which, to my mind is the racketeering case, because the State said, and as the statute says, racketeering addresses the business of crime and prohibits the existence of a criminal

[68] *Fisher v. State*, 2003 WL 1443050, at *2 (Del. Mar. 19, 2003).
[69] Op. Brf. at 40.

enterprise. We heard much of that in the trial, and I think by the very nature of the racketeering charge, a lot has come into evidence to explain how communications are made, what's done with profits of crime, et cetera.

And it's true, and I'm taking into account, that as [your attorney] said, in effect, you didn't contest the drug charges, or most of them. It was the attempted murder charge for which you were acquitted, and I take that into account as well.

But I can't overlook the fact that you were instrumental in leading a very, very serious criminal enterprise, where we can only guess at the number of victims of the poison that was spread, the cocaine, the heroin, the – cheapening and worsening of the quality of life in Wilmington and in Delaware because of this large scale, sophisticated, criminal enterprise.

It's true that you have, quote, just one prior felony, and I'm taking that into account, but I saw so much at trial of the - as the State said in its Sentencing Memorandum – how you operate, how you interact with other people, the huge amount of drugs that were involved in transactions, including, among other people, the William Wisher occasion, the vast amounts of money spent at the Delaware casinos, the bribery charge. And that goes directly to the importance and sanctity of the criminal justice process, the bribing of a witness.

Evasion of tax is serious also, as [the prosecutor] noted, because this was more than just a drug deal or several drug deals, where there was profit to a drug dealer. It was an enterprise, and we carefully defined "enterprise" to the jury.

I do think a sentence over the presumptive guidelines is warranted in this case. And I think, on balance, that the State has not completely, but accurately, set forth the aggravating factors, which includes prior violent felony criminal conduct, the 2012 Possession with Intent. And the fact that you didn't learn from that offense and kept on going by becoming, especially when Eric Lloyd was in prison, the mover and shaker of this racketeering criminal enterprise.

> I do think that now there's some evidence of remorse. The State has said not, but – and I do take into account, as I said, as I think I should, the fact that you didn't contest the drug charges in the indictment, only the attempted murder case.
>
> The Conspiracy First Degree charges are very serious, because that was conspiracy to commit murder, and you were found guilty of those.
>
> The bottom line is I think a very significant and severe sentence is required. I don't think that a 70- year sentence is appropriate, as I've tried to strike the balance in this, but I do think that a 50-year sentence is appropriate, and I'm going to impose that.[70]

This Court's Administrative Directive 76 implemented the sentencing guidelines that had been developed by SENTASC and:

> requires that reasons be given for deviations from SENTAC's sentencing guidelines because this Court *does* have appellate jurisdiction to review criminal sentences on the basis of alleged: unconstitutionality; factual predicates which are either false, impermissible, or lack minimum indicia of reliability; judicial vindictiveness, bias, or sentencing with a "closed mind;" and any other illegality. Except for these constitutional and legal constraints, it is well-established that appellate review of criminal sentences is limited in Delaware to a determination that the sentence is within the statutory limits. Delaware, unlike the federal and several state jurisdictions has not provided for appellate review of criminal punishments that deviate from sentencing guidelines.
>
> Thus, the trial court must explain its reasons for doing so, *but it is authorized to exceed the SENTAC guidelines without making any factual findings beyond those reflected in the jury's verdict*.[71]

[70] A251-54.

[71] *Benge v. State*, 2004 WL 2743431, at *1–2 (Del. Nov. 12, 2004) (emphasis added).

The judge stated his reasons for departing from the SENTAC guidelines when he sentenced White. The judge also stated his reasons for imposing a sentence pursuant to section 4204(k).[72] Simply stated, White's claim that the Superior Court violated Administrative Directive 76 is belied by the record.

White also claims "there was an insufficient factual predicate to find aggravating circumstances as alleged by the State."[73] White dedicates his argument to contesting the aggravating factors identified by the State in its Sentencing Memorandum. But the State did not sentence White, the Superior Court did. The sentencing judge articulated the aggravating factors and its reasons for departing from the non-binding SENTAC guidelines when it pronounced White's sentence.[74] The record does not support White's claim that the Superior Court relied on false factual predicates in formulating its sentence.

[72] A252-53; A255-56.
[73] Op. Brf. at 41.
[74] A253.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

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Dated: April 30, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE WHITE,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 467, 2019
	)	
	)	
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 MS Word.

2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 8,302 words, which were counted by MS Word.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Deputy Attorney General
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DATE: April 30, 2020

CERTIFICATE OF SERVICE

The undersigned certifies that on April 30, 2020, he caused the attached *State's Opening Brief* to be delivered electronically via Lexis/Nexis File and Serve to the following person:

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