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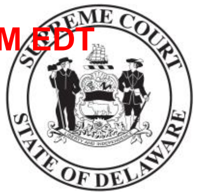

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIC C. LLOYD,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 460, 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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Dated: July 2, 2020

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NATURE AND STAGE OF THE PROCEEDINGS

On October 16, 2017, a New Castle County grand jury returned a sealed indictment against Eric Lloyd ("Lloyd") and 34 other defendants. The indictment charged Lloyd with Conspiracy to Commit Racketeering, Money Laundering, and Conspiracy in the Second Degree.[1] The Superior Court issued a Rule 9 warrant, and Lloyd was arrested on the warrant on November 8, 2017.[2] Over the course of the next year and a half, a series of superseding indictments unsealed the charges against Lloyd, adjusted and ultimately reduced the number of Lloyd's codefendants, and refined the charges against Lloyd based on the then-extant evidence.[3]

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[1] A2 at DI 2; B1-31.

[2] A2 at DI 4.

[3] On November 13, 2017, a New Castle County grand jury returned an unsealed indictment charging Lloyd with the same offenses included in his October 16, 2017 indictment. A2 at DI 5; B32-73. On June 4, 2018, a New Castle County grand jury returned a second superseding indictment against Lloyd and 40 co-defendants, which charged Lloyd with Criminal Racketeering, Conspiracy to Commit Racketeering, Drug Dealing Heroin, Aggravated Possession of Heroin, Drug Dealing Cocaine, Money Laundering, Conspiracy in the Second Degree, Criminal Mischief, Attempt to Evade or Defeat Tax, and Advancing Gambling in the First Degree. A6 at DI 28; B74-139. On July 16, 2018, a New Castle County grand jury returned a third superseding indictment against Lloyd and 39 co-defendants; the charges against Lloyd remained the same. A8 at DI 36; B140-205. On October 8, 2018, a New Castle County grand jury returned a fourth superseding indictment against Lloyd and nine co-defendants, which charged Lloyd with Criminal Racketeering, Conspiracy to Commit Criminal Racketeering, Drug Dealing Cocaine, Money Laundering, Conspiracy in the Second Degree, and Attempt to Evade or Defeat Tax. A8 at DI 39; B206-254. On April 29, 2019 a New Castle County grand jury returned a fifth superseding indictment against Lloyd and three co-defendants, which charged Lloyd with Criminal Racketeering, Conspiracy to

On June 4, 2019, Lloyd, Dwayne White ("White"), and Damon Anderson ("Anderson") proceeded to a jury trial in the Superior Court.[4] The State dismissed Lloyd's charges of Criminal Mischief and Advancing Gambling in the First Degree.[5] Following a nine-day trial, the jury informed the presiding judge on June 14, 2019 that it had reached a verdict.[6] Despite instructions to remain in the hallway outside the courtroom while the jury deliberated, Lloyd could not be found.[7] In his absence, the jury found Lloyd guilty of Racketeering, Conspiracy to Commit Racketeering, Conspiracy in the Second Degree, Money Laundering, and Attempting to Evade or Defeat Tax.[8] The jury found Lloyd not guilty of Drug Dealing.[9] After dismissing the jury, the Superior Court ordered a capias for Lloyd's arrest.[10]

On July 11, 2019, Lloyd was returned on the June 14, 2019 capias and committed to DOC.[11] On October 18, 2019, the Superior Court sentenced Lloyd to

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Commit Criminal Racketeering, Drug Dealing Cocaine, two counts of Conspiracy in the Second Degree, Money Laundering, Criminal Mischief; Attempt to Evade or Defeat Tax, and Advancing Gambling in the First Degree. A11 at DI 66; B255-277

[4] A14 at DI 81.

[5] A15 at DI 84.

[6] A15 at DI 84, A1463

[7] A1463-1464

[8] A15 at DI 84; A1464-1468.

[9] A1466.

[10] A15 at DI 86.

[11] A17 at DI 96.

an aggregate 30 years of incarceration to be served pursuant to 11 *Del. C.* § 4204(k) followed by a term of probation.[12]

Lloyd filed a timely appeal and an Opening Brief. This is the State's Answering Brief.

[12] A22 at DI 138; A1506-1507; A1523-1528.

SUMMARY OF THE ARGUMENT

I. Lloyd's Argument I is DENIED. The Superior Court did not abuse its discretion by denying Lloyd's motion to sever his case from Dwayne White. The State was required to prove the existence of an enterprise and Lloyd's association with the enterprise. Evidence of the conduct of associates of the enterprise – White, for example – served to establish the existence of the association in fact enterprise. Moreover, White's admission of membership in the enterprise did not present a mutually antagonistic defense. Rather, the jury was instructed to assess each defendant's culpability individually and was free to find Lloyd not to be a member of the enterprise despite White's admission.

II. Lloyd's Argument II is DENIED. The Superior Court did not abuse its discretion by denying Lloyd's motion for a mistrial. The father of a young shooting victim erroneously identified Lloyd as Boop, the person who attempted to bribe him. Three other witnesses identified White as Boop, and White himself admitted through a stipulation with the State that he was the person attempting to bribe the family of the young shooting victim. While Lloyd did not immediately bring the erroneous identification to the attention of the Superior Court, any prejudice was resolved through the clarifying testimony of subsequent witnesses and White's stipulation.

III. Lloyd's Argument III is DENIED. The Superior Court did not err by allowing the State to introduce limited evidence from and about Lloyd's prior attorney, Joseph Benson. Benson testified about his representation of several other members of the enterprise, communications he had with enterprise members, and the presence of his name on a document forming an LLC on Lloyd's behalf. Further, Benson explained that protected discovery had been unintentionally revealed to enterprise members. And, the State offered evidence of enterprise business occurring on Benson's property. This evidence was relevant to establish the business and associations of Lloyd's enterprise. Finally, Benson's employee's statement immediately following her observation of enterprise conduct on Benson's property was properly admitted as a present sense impression.

IV. Lloyd's Arguments IV and V are DENIED. The Superior Court did not err by allowing the State to introduce evidence of guns found in the possession of an enterprise member and rap videos revealing the connections and conduct of other enterprise members. Guns admitted at trial were found, with a large quantity of heroin, in the possession of an enterprise member. This evidence was relevant to establishing enterprise business. Similarly, rap videos offered by the State displayed a number of enterprise members together, discussing enterprise business, conducting

enterprise business (cooking cocaine), and singing about other enterprise members. This evidence, too, was relevant to establish the existence and business of Lloyd's enterprise.

V. Lloyd's Argument VI is DENIED. The Superior Court did not abuse its discretion in sentencing Lloyd. The Superior Court, citing Lloyd's conduct in the present case and his continued voluntary re-immersion into the drug world, exercised its discretion to impose a sentence within the statutory guidelines but not subject to early release. Lloyd's sentence presents no inference of gross disproportionality; thus, proportionality review is not warranted.

STATEMENT OF FACTS

Eric Lloyd ("Lloyd") sat atop a cocaine distribution enterprise.[13] When Lloyd went to federal prison in 2017, he transferred control of the enterprise to Dwayne White ("White").[14] White expanded the business of the enterprise to include heroin distribution.[15] As the enterprise grew, so did disputes with rivals and, in 2015, a feud developed between members of the enterprise and Markevis Stanford ("Stanford") who was believed to be a "snitch."[16] The feud escalated when Dion Oliver ("Oliver" or "Fine Wine") and Maurice Cooper ("Coop") "had a big screen video of [Stanford's] big mom,[17] which fueled a lot of anger with them . . . ."[18] This feud resulted in shootings, assaults, and robberies and the beef spilled over on to the entire enterprise.[19] The shootings drew more attention from police investigators and was bad for business.[20] In an effort to eliminate the criminal conduct shining a light

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[13] A1234.

[14] A1133; A1147; A1235-1236.

[15] A1234-1235.

[16] A844-845. Markevis Stanford is also known as "Young Money."

[17] This reference refers to the mother of Stanford's child.

[18] A845. "Big screening means basically when you got a group of individuals, that take a female, have sex with her and record it and spread it through social media, basically on a big screen." A844.

[19] A845-846; A847-848.

[20] A850.

on the drug distribution, Stanford "had to go."[21] The group, including White, placed a "bounty" or "check" on Stanford's life.[22] This bounty led to the June 2017 kidnapping and murder of Stanford's girlfriend in Maryland, and the shooting of an innocent bystander in the city of Wilmington.[23] The police investigation of the events surrounding this shooting revealed the scope and breadth of Lloyd's enterprise.

The Criminal Enterprise

Lloyd, known to his associates as "Butter,"[24] "Butterico,"[25] or "Bub,"[26] was the leader of the Wilmington drug dealing enterprise. Lloyd ran the show, "[t]he whole giddy up."[27] When Lloyd violated his probation and returned to prison, "[h]e passed the torch to [Dwayne] White."[28] But nobody was higher in the chain of command than Lloyd in the enterprise's cocaine and marijuana distribution.[29]

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[21] A848.

[22] A848-849.

[23] A1234; A1247; A853.

[24] A321.

[25] A457.

[26] A1335.

[27] A1133.

[28] A1133.

[29] A1134.

Lloyd enlisted his associates to distribute cocaine on a consignment basis. According to William Wisher, an admitted member of the racketeering enterprise,[30] Lloyd would provide him with a large quantity of powder cocaine with the understanding that Wisher would repay Lloyd an agreed upon price for the "wholesale" drugs.[31] Wisher would then "stretch" the powder cocaine by cooking it with baking soda to make crack cocaine.[32] By cooking the drugs, he was able to make more money.[33] After selling the crack cocaine, Wisher would repay Lloyd and retain the remaining profit.[34] Wisher received cocaine in "bricks," or one kilogram (2.2 pound) increments directly from Lloyd.[35] Wisher would pay Lloyd, and Lloyd would then provide him with more drugs.[36] Wisher and Lloyd would communicate by Facetime to defeat any law enforcement surveillance efforts.[37]

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[30] A1128. Wisher, an indicted co-defendant in this case, pled guilty to Conspiracy to Commit Racketeering, two counts of Drug Dealing, Conspiracy Second Degree, and Possession of a Firearm by a Person Prohibited and was sentenced to serve 21 years of incarceration followed by probation.

[31] A1136.

[32] A1137-38.

[33] A1138.

[34] A1138.

[35] A1140-1142.

[36] A1145.

[37] A1145.

Dontae Sykes, another member of Lloyd's enterprise, described a similar consignment arrangement with Lloyd and described one instance where Lloyd delivered a brick of cocaine to him by placing the drugs in his car while he was meeting with his lawyer in Wilmington.[38] Sykes explained that Lloyd was at the top of the cocaine trade in Wilmington, and White, backed by Lloyd, was at the top of the heroin trade.[39] When Lloyd returned to jail in 2017, he left the drug business to White and Sykes began dealing directly with White.[40]

While incarcerated, Lloyd maintained a foothold on the affairs of the enterprise. Through e-mail, Lloyd communicated with enterprise associates.[41] While many e-mails were innocuous, they evidenced Lloyd's ongoing relationship with enterprise associates. In other e-mails, Lloyd discussed the complexities of managing a large-scale operation, dealing with "these young boys and these mess ups," and why he no longer engaged in street-level dealing.[42] Lloyd communicated often to make sure his associates would not forget him.[43] Lloyd communicated his goal to acquire and rent out several houses so that his assets covered his expenses

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[38] A1239.

[39] A1234.

[40] A1235.

[41] A1354-1355.

[42] A1362-1363.

[43] A1362.

allowing him to become financially free.[44] And, despite his physical absence, Lloyd continued to issue commands. When Zaire Miller was arrested for harassment, Lloyd instructed an associate to go to Benson's office and have Alice send Lloyd paperwork so he could read it.[45]

The police investigation revealed the methods enterprise members used to conceal the origin of their illegal drug trade proceeds. Lloyd concealed drug proceeds through investment properties and gambling.[46] According to Sykes, Lloyd and White used drug trade proceeds to gamble and "wash" the money and create an otherwise legitimate "paper trail" for acquiring money.[47] While Lloyd was in federal prison, White placed bets on his behalf.[48] And, Lloyd instructed Sykes on how to purchase property through the Interfaith Housing first-time homeowner program.[49] Sykes explained that he used limited liability companies to conceal assets from the police.[50] Michelle Hoffman, a forensic accountant with the Federal Bureau of Investigation ("FBI")[51] described her review of properties purchased by NCTZA,

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[44] A1363.

[45] A1363.

[46] A1240.

[47] A1240.

[48] A508.

[49] A1241.

[50] A1241.

[51] A1367.

LLC and T&B DE Homes, and explained that Lloyd and White had management authority over these entities.[52]

The Criminal Enterprise Revealed

On June 6, 2017, Shaylynn Banner ("Banner") drove her car in Wilmington with her six-year-old son, her infant daughter, and her mother.[53] Banner stopped at a stop sign, let the traffic pass, then explained: "I was about to go until my mom said, stop, because some guy is right in front of us and next thing you know, I get blocked in and somebody started shooting out the window."[54] Banner saw a man, later identified to be Markevis Stanford, trying to cross the street in front of her.[55] At the same time, a white truck, driven by Michael Pritchett, blocked her way.[56] Stanford hid behind Banner's car.[57] Gunfire erupted from within Pritchett's truck, shattering Banner's car windows.[58] When the gunfire stopped, Banner saw that her son had

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[52] A1368-71.

[53] A339-40.

[54] A340.

[55] A340.

[56] A340.

[57] A340.

[58] A341.

been shot.[59] Soon thereafter he was transported to a hospital where he remained for three months after awakening from a five-day coma.[60]

This investigation of the shooting of Banner's child revealed that White financed a bounty on Stanford to end his feud with members of the enterprise.[61] After the shooting, White attempted to bribe members of the Banner family to say that Pritchett was not involved in the shooting by offering them money.[62] At trial, White stipulated to the fact that he attempted to bribe Banner.[63] The shooting investigation soon expanded to include State and Federal law enforcement and ultimately resulted in uncovering an extensive, well financed, violent drug dealing enterprise managed by Lloyd and White.

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[59] A341.

[60] A342.

[61] A847-50.

[62] A243, 348, 355-56.

[63] A1276.

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING LLOYD'S MOTION TO SEVER HIS CASE FROM DWAYNE WHITE

Question Presented

Whether the Superior Court abused its discretion by declining to sever Lloyd's trial from that of his co-defendant, Dwayne White.

Standard and Scope of Review

"This Court reviews the trial court's decision on a motion to sever for abuse of discretion. A trial judge's denial of a motion to sever will not be set aside on appeal 'unless [the] defendant demonstrates a reasonable probability that the joint trial caused substantial injustice.'"[64]

Merits of Argument

Lloyd argues that because he was not charged with "the attempted murders of Markevis Stanford, the conspiracy to commit those murders, nor subsequent bribery attempts," he should not have been tried with White.[65] He contends that these charges were the result of a feud unrelated to the "drug dealing enterprise under which [Lloyd] was indicted."[66] Thus, he argues, he was prejudiced. His argument

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[64] *Otis Phillips v. State*, 154 A.3d 1130, 1138 (Del. 2017) (quoting *Winer v. State*, 950 A.2d 642, 648 (Del. 2008)).

[65] Op. Brf. at 12.

[66] Op. Brf. at 13.

is unavailing. The attempted murder of Markevis Stanford and the resulting "severe injury of an innocent child"[67] were directly related to the drug dealing enterprise. Whatever the origin of the feud with Stanford, it was bad for the drug dealing business. The Superior Court did not abuse its discretion by trying Lloyd and White together. The State was required to establish the existence of an enterprise, Lloyd's association with the enterprise, and Lloyd's participation in a pattern of racketeering activity. As the verdict makes clear, the jury appropriately cabined the evidence attributable to each defendant and was neither confused nor improperly influenced by the evidence associated solely with White.

Superior Court Criminal Rule 8(a) permits the joinder of two or more offenses in the same indictment if the offenses "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan."[68] Similarly, Superior Court Criminal Rule 8(b) permits joinder of defendants in the same indictment "if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses."[69] A trial court may

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[67] *Id.*

[68] Super. Ct. Crim. R. 8(a).

[69] Super. Ct. Crim. R. 8(b).

grant severance of charges or defendants if the defendant is prejudiced by the joinder.[70]

"Ordinarily, defendants indicted together should be tried together, but, if justice requires it, the trial judge should grant separate trials."[71] This Court has set forth four factors that a trial court should consider when determining whether to sever defendants: "(1) problems involving a codefendant's extra-judicial statements; (2) an absence of substantial independent competent evidence of the movant's guilt; (3) antagonistic defenses as between the codefendant and the movant; and (4) difficulty in segregating the State's evidence as between the codefendant and the movant."[72]

Lloyd argues that "the cases relied upon by the [Superior] Court are highly distinguishable from the case at hand."[73] He also asserts that "the law relied upon by the [Superior] Court" is inapposite and contends the Superior Court "failed to

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[70] Super. Ct. Crim. R. 14.

[71] *Otis Phillips,* 154 A.3d at 1137 (citing *Skinner v. State*, 575 A.2d 1108, 1119 (Del. 1990); Super. Ct. Crim. R. 8(b)); *Jeffrey Phillips v. State*, 154 A.3d 1146, 1156 (Del. 2017) (citing same). Because Otis Phillips and Jeffrey Phillips were tried together and this Court relied on the same body of law to address both defendants' claims of prejudicial joinder, the State has limited its citations to *Jeffrey Phillips v. State* unless otherwise required.

[72] *Jeffrey Phillips*, 154 A.3d at 1156 (citing *Flouditis v. State*, 726 A.3d 1196, 1210 (Del. 1999)).

[73] Op. Brf. at 14.

conduct a proper analysis under *H.J. Inc.* [*v. Northwestern Bell Tel. Co.*]."[74] He is wrong.

The State was required to prove Lloyd associated with an enterprise and that he engaged in a pattern of racketeering activity.[75] A racketeering "enterprise" is defined by Delaware law as "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."[76] Under Delaware's "RICO statute, the State need only prove that an association-in-fact enterprise has three characteristics: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient to permit these associations to pursue the enterprise's purpose."[77] Of course, "nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence."[78] Here, the State established Lloyd and White were associated with each other and a group

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[74] *Id.* at 14-15.

[75] 11 *Del. C.* § 1503(a).

[76] 11 *Del. C.* § 1502(3).

[77] *Lloyd v. State*, 152 A.3d 1266, 1273 (Del. 2016) (explaining how the United States Supreme Court's opinion in *Boyle v. United States*, 556 U.S. 938 (2009), "changed the RICO landscape by dispensing with the 'separate' or 'ascertainable' structure requirement")

[78] *Id.* at 1272, n.17 (quoting *Boyle*, 556 U.S. at 948)).

of persons committed to the business of illegal drug dealing and associated money laundering.

Delaware law states that a "pattern of racketeering activity"[79] "may be established by '2 or more incidents of conduct . . . [t]hat . . . constitute racketeering activity . . . .'"[80] This Court and the Superior Court recognize that "to show a pattern of racketeering, the State must prove that 'the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.'"[81] Delaware law is in accord with the requirements set forth by the United States Supreme Court in *H.J. Inc.*[82] While Lloyd correctly posits, "relatedness exists if the racketeering acts 'have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events[,]"[83] continuity, "may be established by showing that the

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[79] 11 *Del. C.* § 1502(5).

[80] *Kendall v. State,* 726 A.2d 1191, 1194 (Del. 1999) (quoting 11 *Del. C.* § 1502(5)).

[81] *Kendall*, 726 A.2d at 1194 (quoting *Stroik v. State*, 671 A.2d 1335, 1342 (1996) (citing *H.J. Inc. v. Northwestern Bell Tel. Co.,* 492 U.S. 229, 239 (1989)); *State v. Da Zhong Wang*, 2018 WL 2202274, *5 (Del. Super. Ct. May 11, 2018) (discussing proof of "pattern of racketeering activity" required under RICO statute by *H.J. Inc.*).

[82] *H.J. Inc.,* 492 U.S. at 239 ("[T]o prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.").

[83] Op. Brf. at 16 (citing *H.J. Inc.* 492 U.S. at 240 (quoting 18 U.S.C. § 3735(e))).

predicate acts or offenses are part of an ongoing entity's regular way of doing business."[84]

Count I of the trial indictment charged criminal racketeering, alleging the existence of an enterprise, Lloyd's association with the enterprise, and Lloyd's commission of multiple predicate acts in support of the ongoing operation of the enterprise.[85] The jury found, beyond a reasonable doubt, the existence of an enterprise[86] established through the commission of twenty separate criminal acts occurring between January 2015 and January 2019.[87] The jury then found Eric Lloyd guilty of Criminal Racketeering.

Lloyd fails to support his argument that "'predicate acts' of attempted murder, conspiracy to commit murder, criminal solicitation of murder, and aggravated intimidation were . . . separate and isolated events . . . unrelated to the drug dealing activities of the enterprise."[88] As the United States Supreme Court explained in *Boyle*:

> [A]n association-in-fact enterprise is simply a continuing unit that functions with a common purpose. Such a group need not have a

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[84] *H.J. Inc.*, 422 U.S. at 243.

[85] B255-277.

[86] A1464.

[87] A1464-1465. The jury did not find sufficient evidence supporting White's involvement in the final alleged predicate act – attempted murder in the first degree. A1465.

[88] Op. Brf. at 17.

> hierarchical structure or a "chain of command;" decisions may be made on an ad hoc basis and by any number or methods – by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; *different members may perform different roles at different times*. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.[89]

Members of the enterprise sought to maintain the efficient operation of the enterprise. Stanford's continued attacks on enterprise members interrupted business and brought the unwanted attention of police investigators prompting some in the enterprise to, in their view, resolve the problem. The State appropriately offered evidence to establish the scope and operations of Lloyd's enterprise. The Superior Court did not err by denying Lloyd's request to sever.

Lloyd's contention that antagonistic defenses existed, because "[w]hile Dwayne White was conceding to the jury that the drug dealing enterprise existed, Defendant Lloyd was denying such existence,"[90] is similarly unavailing. "[T]he presence of hostility between a defendant and his codefendant or 'mere

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[89] *Lloyd*, 152 A.3d at 1272 (quoting *Boyle,* 556 U.S. at 948) (emphasis added).

[90] Op. Brf. at 20.

inconsistencies in defenses or trial strategies' do not require a severance."[91] White and Lloyd offered different positions with respect to the existence and composition of an association-in-fact enterprise. Their differing positions did not create a situation where "the jury had [to] reasonably accept the core of the defense offered by either defendant only if it reject[ed] the core of the defense offered by his codefendant."[92] Even with White's concession, the jury could very easily have concluded that White was part of an enterprise that did not involve Lloyd.

Lloyd concludes his severance argument claiming he incurred substantial prejudice from the "emotionally charged references to the shooting of Jashown Banner,"[93] and Joshua Potts' erroneous identification of Lloyd as the person who tried to bribe the Banner family.[94] But, Lloyd fails to acknowledge that the trial court instructed the jury with respect to assessing the evidence against each defendant:

> The defendants are each charged with separate offenses that are set forth in the indictment. These are each 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

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[91] *Jeffrey Phillips*, 154 A.3d at 1157 (quoting *Outten v. State*, 650 A.2d 1291, 1298 (Del. 1994)).

[92] *Jeffrey Phillips*, 154 A.3d at 1157 (quoting *Bradley v. State*, 559 A.2d 1234, 1241 (Del. 1989)).

[93] Op. Br. at 20.

[94] *Id.* at 22.

> 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.[95]

"Juries are presumed to follow the court's instruction,"[96] and there is no basis to conclude the jury did not do so here. In fact, the jury verdict, in finding Lloyd guilty of all charges save for one count of drug dealing, reflects thoughtful parsing of evidence with respect to each defendant and each alleged crime. Finally, Lloyd minimizes the stipulation between the State and White, which was read to the jury, in which White assumes full responsibility for attempting to bribe the Banner family:

> The State of Delaware and defendant Dwayne White hereby stipulate to the following: One, one of Dwayne White's nicknames is Boop. Two, that Dwayne White approached Joshua Potts, Shalynn Banner, and Deborah Banner with an offer of money in exchange for their exoneration of Michael Pritchett in the shooting of Jashown Banner.[97]

The Superior Court further instructed the jury that, "[w]hen the attorneys on both sides stipulate or agree as to the existence of a fact . . . you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved."[98]

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[95] A1457.

[96] *Jeffrey Phillips*, 154 A.3d at 1157.

[97] A1276.

[98] A1458.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING LLOYD'S MOTION FOR A MISTRIAL BASED ON AN ERRONEOUS EYEWITNESS IDENTIFICATION

Question Presented

Whether the Superior Court abused its discretion by denying Lloyd's motion for a mistrial the day after a witness made an erroneous eyewitness identification.

Standard and Scope of Review

"Whether a mistrial should be declared lies within the trial judge's discretion."[99] "Failure to raise a contemporaneous objection to allegedly prejudicial testimony constitutes a waiver of that issue on appeal, unless the error is plain."[100]

Merits of Argument

Lloyd argues that he suffered "egregious prejudice, which was not cured"[101] as a result of an erroneous in-court identification of him "by the father of a six-year-old shooting victim as the person who attempted to bribe the [victim's] family."[102] He is wrong. Lloyd failed to contemporaneously address the allegedly prejudicial testimony with the court. Rather, he waited until the following day, after three witnesses testified, to seek a mistrial. Nonetheless, any potential prejudice to Lloyd

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[99] *Revel v. State*, 956 A.2d 23, 27 (Del. 2008) (citations omitted).

[100] *Czech v. State,* 945 A.2d 1088 (Del. 2008) (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

[101] Op. Brf. at 30.

[102] *Id.* at 26.

was cured when Lloyd's co-defendant, Dwayne White, stipulated with the State that he, White, sought to dissuade witnesses from identifying Pritchett as Stanford's shooter.

Joshua Potts, JB's father, testified that an individual named "Boop" approached him shortly after his son's shooting and "told [Potts] that his man was the one being charged with the shooting of [Potts'] son and . . . tried to tell [Potts] that his man wasn't involved in it."[103] Potts identified the person in blue jeans to be Boop, and when asked, "can you tell which one is Boop?" Pott's responded, "I believe right there."[104] Potts then testified that Boop told him "he was hoping that we would take a bag of $20,000 and go and say that his man, whoever his man is, wasn't involved in the shooting."[105] Potts had never met Boop prior to this interaction.[106]

Neither Lloyd nor White or Anderson cross-examined Potts or lodged an objection as to his testimony. And, in examining the State's next witness, Wilmington Police Department Detective Devon Jones, Lloyd clarified that "Dwayne White also goes by the nickname Boop,"[107] and that White, identified by

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[103] A243.

[104] A243.

[105] A244.

[106] A245.

[107] A282.

a photograph, "was the individual who the family members of the six year old boy told [Jones] had contacted them in an attempt to have them alter their potential testimony."[108] Shaylyn Banner, the boy's mother, testified that Boop offered her money to "[s]ay that wasn't his cousin that was involved in the shooting."[109] Deborah Banner testified Boop offered her $20,000 in "bribe money to testify that the boy that was driving the truck wasn't him."[110]

After Potts, Jones, and the Banners concluded their testimony, Lloyd informed the trial court that "[t]here was a misidentification by Joshua Potts of [Lloyd] as the individual who approached [Potts]. That's completely just a misidentification and all the evidence points in that direction"[111] Lloyd agreed that a stipulation would cure the issue.[112] But, the following day, Lloyd nevertheless moved for a mistrial.[113] In making this application, Lloyd acknowledged:

> Everyone is aware and there is no disagreement here that [Lloyd did not bribe Potts]. [Lloyd] had absolutely no role in that. It was not possible for [Lloyd] to have a role in that because he was in federal prison at that

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[108] A281.

[109] A348.

[110] A355-356.

[111] A358.

[112] A359.

[113] A388.

> time. And the individual who did engage in that behavior is alleged to be Mr. Dwayne White, not Eric Lloyd.[114]

The Superior Court denied Lloyd's motion, concluding that "a mistrial is too draconian a remedy for the problem that occurred. I.E., the misidentification of [Lloyd] by an, obviously, distraught witness who is the father of the child who was shot."[115] The Superior Court found the subsequent testimony of Detective Jones "sufficiently cured the problem" and that, while not necessary, a stipulation would further mitigate the situation.[116]

The State and White stipulated that White sought to bribe members of the Banner family:

> The State of Delaware and defendant Dwayne White hereby stipulate to the following: One, one of Dwayne White's nicknames is Boop. Two, that Dwayne White approached Joshua Potts, Shalynn Banner,

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[114] A389. In fact, the jury learned that Lloyd was in federal custody for the summer of 2017.

[115] A403.

[116] *Id.*

> and Deborah Banner with an offer of money in exchange for their exoneration of Michael Pritchett in the shooting of Jashown Banner.[117]

The Superior Court instructed the jury that "[w]hen the attorneys on both sides stipulate or agree as to the existence of a fact . . . you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved."[118]

Here, Lloyd argues that "[i]n considering the *Pena* factors, the court erred in denying the motion for a mistrial."[119] His claim is unavailing. "In *Pena v. State*, this Court established a four-factor assessment to determine whether a mistrial should be granted in response to an alleged prejudicial remark by a witness: (1) the nature and frequency of the offending comment; (2) the likelihood of resulting prejudice; (3) the closeness of the case; and (4) the adequacy of the judge's actions to mitigate any potential prejudice."[120] "[A] mistrial should only be granted as a last resort when there are no other alternatives – i.e., where there is 'manifest necessity'

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[117] A1276.

[118] A1458.

[119] Op. Brf. at 26.

[120] *Jeffrey Phillips,* 154 A.3d at 1154 (citing *Pena v. State*, 856 A.2d 548, 550 (Del. 2004)).

or the 'ends of public justice would otherwise be defeated.'"[121] And, of course, "[j]uries are presumed to follow the trial judge's instructions."[122]

An application of the *Pena* factors supports the propriety of the trial judge's exercise of discretion in denying Lloyd's motion for a mistrial. Potts, when describing White's effort to influence testimony, misidentified Lloyd. But, he consistently reported that it was Boop who contacted him. And, Detective Jones established that Boop was Dwayne White and confirmed that the Banner family identified a photograph of White as the person who attempted to bribe them. Lloyd has not shown resulting prejudice and this was not a close case. Nonetheless, the State and White further stipulated that it was White who offered money to exonerate Pritchett and the Superior Court instructed the jury that it must accept that stipulation as fact. The trial judge was in the best position to assess the impact of Potts misidentification and the subsequent testimony, stipulation, and jury instruction effectively ameliorated any potential prejudice.[123]

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[121] *Id.* (quoting *Revel v. State*, 956 A.2d at 27).

[122] *Id.* (quoting *Pena,* 856 A.2d at 551).

[123] *Id.* at 1154-55.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING LLOYD'S MOTION TO LIMIT OR EXCLUDE THE TESTIMONY OF AND ABOUT HIS PRIOR ATTORNEY

Question Presented

Whether the Superior Court abused its discretion by denying Lloyd's motion to limit or exclude testimony of and about Joseph Benson, Esq. and members of his law office.

Standard and Scope of Review

"This Court reviews the Superior Court's decision to admit or exclude evidence for abuse of discretion."[124] "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice to produce injustice."[125]

Merits of Argument

Lloyd argues that the "testimony from and regarding attorney Joseph Benson was misleading to the jury, and infringed upon the defendant's sixth amendment right to counsel."[126] He contends the State "created a situation where an impermissible inference of guilt was created by defendant's choice to obtain

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[124] *Roy v. State*, 2018 WL 6004462, *2 (Del. Nov. 14, 2018) (citing *Urquhart v. State*, 133 A.3d 981, 981 (Del. 2016)).

[125] *Id.* (citing *Culp v. State,* 766 A.2d 486, 489 (Del. 2001)).

[126] Op. Brf. at 31.

counsel."[127] He continues by asserting that the Superior Court erred by admitting the present sense impression of Benson's secretary, Alice.[128] Lloyd is incorrect. By assessing and limiting the scope of permissible testimony from and about Benson prior to trial, the Superior Court engaged in a proper exercise of its discretion as evidentiary gatekeeper.[129]

At trial, Benson testified that he maintained a law practice in the city of Wilmington where he employed one other attorney and an office manager.[130] Contrary to Lloyd's argument, Benson did not "indicate[] to the jury that he represented Eric Lloyd;"[131] rather, when asked if he knew Lloyd, Benson responded, "I don't know how to answer that because . . . if I represent Mr. Lloyd, its attorney client."[132] The Superior Court immediately interrupted Benson's testimony to insure his response would not present privileged communication or leave the jury with the impression that any defendant required Benson's services based upon a prior arrest.[133] The Superior Court then recessed to allow the State to inform Benson of

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[127] *Id.* at 33.
[128] *Id.* at 34.
[129] B278-391.
[130] A731.
[131] Op. Brf. at 33.
[132] A734.
[133] A734-737.

the permissible parameters of his testimony.[134] After the recess, and before Benson's testimony resumed, the State advised the court of its planned examination of Benson and that "we conferred again with defense counsel and there was no further objection."[135] Hearing no objection, the Superior Court resumed trial.[136] Benson testified that he knew Lloyd and White.[137]

Benson then explained his office had represented Dontae Sykes,[138] and that he had represented Tyrone Roane,[139] William Wisher,[140] Michael Pritchett[141] – members of the enterprise – and had also represented Markevis Stanford.[142] He explained that he received protected documents pertaining to Zaire Miller which were "automatically sent . . . to Mr. Miller" in violation of the protective order.[143] Benson explained that his staff, if asked, might make copies of documents for clients, but clarified that it is not their practice to reveal protected discovery.[144] And, he

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[134] A737.

[135] A738.

[136] A739.

[137] A739.

[138] A740.

[139] A741.

[140] A741.

[141] A742.

[142] A742.

[143] A744.

[144] A747.

testified about a recorded telephone call in which he updated White about the status of Pritchett's case. Benson claimed he was unwittingly listed as the registered agent for one of Lloyd's LLCs. Finally, Benson "recall[ed] asking Markevis Stanford if he was cooperating with the police," because his "office refuses to represent anyone that cooperates."[145]

Lloyd argues the evidence offered at trial implies "that hiring Attorney Benson is evidence of membership in the enterprise" compromising his Sixth Amendment rights. To the contrary, the State assiduously adhered to the Constitutional protections afforded Lloyd by limiting Benson's testimony to facts outside his representation of Lloyd. Benson's testimony was relevant here, because "any evidence that tends to show common interests, economic relationships, or a hierarchical structure involving the defendants will be relevant to" establish the existence of an association in fact enterprise.[146]

In a racketeering case, the fact that several associates of the enterprise employ the services of the same attorney is relevant and may be offered to prove the existence of the enterprise.[147] Here, several members of the enterprise retained

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[145] A755.

[146] *United States v. Castellano,* 610 F. Supp. 1151, 1153-54 (S.D.N.Y 1985) (discussing *United States v. Turkette*, 452 U.S. 576, 583 (1981)).

[147] *See Castellano*, 610 F. Supp. at 1160 (discussing *United States v. Barnes,* 604 F.2d 121, 147 (2d Cir. 1979)) ("*Barnes* implicitly stands for the proposition that,

Benson to represent them in criminal cases. Benson communicated with members of the enterprise, passed information on to members of the enterprise, acquiesced in his firm's involvement in creating a money laundering vehicle for the enterprise, and enterprise business involving drugs and cash was conducted on Benson's property. Benson's testimony clearly aided in establishing Lloyd's association in fact with the enterprise and was both relevant and admissible in proving Lloyd's racketeering conduct.

In addition to having personal involvement with members of the enterprise, on at least one occasion, enterprise business was conducted on Benson's property. Dontae Sykes testified that Lloyd delivered a quantity of cocaine to him while he met with an attorney in Benson's office.[148] Sykes explained, "I was going [to Benson's office] to see the lawyer . . . about my case in Dover, and I was like in the mix of meeting [Lloyd], too, so it was like he got to go there anyway. . . . [H]e told me to park around back, leave the door open. So I parked around back and I left the door open while I was inside."[149] "When [he] came out [of the meeting] the secretary lady, . . . Alice, she must have observed [Lloyd] pull up and get out and go into my

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when 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.").

[148] A1239.

[149] A1239.

truck and then get back out."[150] "[S]he said, Don't do that again, like, tell him, I'm going to talk to Eric, but don't do that again."[151] When Sykes returned to his car after his meeting, bricks of cocaine were underneath the front seat.[152] Lloyd argues that Alice's comment was inadmissible hearsay. He is wrong.

The Superior Court ruled that Alice's statement was admissible under the present sense impression exception to the hearsay rule.[153] "A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it" is "not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness."[154] This Court has held that a hearsay statement qualifies as a present sense impression where:

> [T]he declarant must have personally perceived the event described; the declaration must be an explanation or description of the event, rather than a narration; and the declaration and the event described must be contemporaneous. The statements, however, need not be precisely contemporaneous with the triggering event but must be in response to it and occur within a short time after the stimulus.[155]

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[150] A1239.

[151] A1240.

[152] A1240. Sykes explained that a brick of cocaine is a kilogram, or 2.2 pounds. *Id.*

[153] A1240.

[154] D.R.E. 803(1).

[155] *Warren v. State*, 774 A.2d 246, 251–52 (Del. 2001) (quoting *Abner v. State*, 2000 WL 9990973 (Del. June 29, 2000)).

"The exception for present sense impressions is based on the theory that spontaneous statements describing an event are trustworthy because the declarant has no time to fabricate the statements and because there is less concern that the statements reflect a defect in the declarant's memory."[156] And, "courts generally find statements admissible as present sense impressions if the statements were made within about ten or twenty minutes of the event."[157] "[A] challenge to the credibility of the witness who heard the statements goes to the weight to be accorded to that evidence by the jury, not to its admissibility."[158]

Alice, the declarant here, told Sykes to not do "that" again. Sykes explained, through his testimony, Alice was referring to the transfer of drugs in Benson's parking lot. To the extent Alice's statement asserts a fact, the Superior Court did not abuse its discretion in concluding the statement was admissible under the present sense impression exception to the hearsay rule. Within moments of observing Lloyd place something in Sykes' car, Alice presented her impression to Sykes. The jury was afforded the opportunity to assess Sykes credibility and accord appropriate weight to his testimony. The Superior Court did not err by admitting this statement.

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[156] *Id.* (internal citations omitted)

[157] *Id.* (internal citations omitted)

[158] *Taylor v. State*, 76 A.3d 791, 800 (Del. 2013) (quoting *Green v. St. Francis Hosp. Inc.,* 791 A.3d 731, 736 (Del. 2002)).

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING EVIDENCE OF GUNS AND RAP VIDEOS ESTABLISHING LLOYD'S CRIMINAL RACKETEERING ENTERPRISE.[159]

Question Presented

Whether the Superior Court abused its discretion by admitting evidence of guns and rap videos that establish Lloyd's association in fact with a criminal racketeering enterprise.

Standard and Scope of Review

"This Court reviews the Superior Court's decision to admit or exclude evidence for abuse of discretion."[160]

Merits of Argument

Lloyd argues the Superior Court abused its discretion by admitting "evidence of co-defendant Maurice Cooper's guns"[161] and "rap videos created by another alleged member of the enterprise"[162] as evidence in his trial. He posits that the evidence of Cooper's firearms was not relevant, and contends that because five of

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[159] Appellant's claims IV and V contend the Superior Court erred by admitting evidence establishing the existence of Lloyd's association in fact enterprise. The State answers both claims here.

[160] *Roy v. State*, 2018 WL 6004462, *2 (Del. Nov. 14, 2018) (citing *Urquhart v. State*, 133 A.3d 981, 981 (Del. 2016)).

[161] Op. Brf. at 36.

[162] *Id.* at 39.

the admitted videos related to predicate offenses of the enterprise for which he was not charged, they should not have been admitted against him at trial.[163] And, he contends a video, in which an "unindicted co-conspirator appears to be making crack cocaine" and "shouts out the name 'Butterico,'" contains inadmissible hearsay.[164] Lloyd's arguments are unavailing. The State properly offered evidence of guns found in the possession of a member of the enterprise and videos, displaying the association and conduct of members of the enterprise, as evidence supporting the existence and dealings of the enterprise. The Superior Court did not abuse its discretion by admitting the evidence as relevant to making the existence of Lloyd's association in fact enterprise more probable.

Relevant evidence – "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"[165] – is admissible unless otherwise provided by statute or rule.[166] Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[167]

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[163] Id.

[164] Id.

[165] D.R.E. 401.

[166] D.R.E. 402.

[167] D.R.E. 403.

"The determination of relevancy and unfair prejudice are 'matters within the sound discretion of the trial court, and will not be reversed in the absence of clear abuse of discretion."[168]

A. The Superior Court did not err by admitting evidence of firearms found in Maurice Cooper's possession as evidence supporting the existence of Lloyd's criminal racketeering enterprise.

White objected to the admission of firearms found in Maurice Cooper's possession.[169] Lloyd joined White's objection earlier in the trial[170] and the Superior Court's ruling reflects its understanding that Lloyd continued to object to their admission. Lloyd contends that the firearm evidence was not relevant in his trial and that "[t]he evidence was highly inflammatory and prejudicial."[171] He is mistaken. The Superior Court did not abuse its discretion by admitting evidence of firearms found in Cooper's possession to assist in establishing the business and operations of Lloyd's enterprise.

The State explained that the illegal possession of firearms by a member of the enterprise was alleged in Lloyd's criminal racketeering charge, and that it "goes to the existence of the enterprise, which . . . is the first step in proving the racketeering

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[168] *Banks v. State*, 93 A.3d 643, 646-47 (Del. 2014) (quoting *Gallaway v. State*, 65 A.3d 564, 569 (Del. 2013)).

[169] A1222.

[170] A411.

[171] Op. Brf. at 37.

or conspiracy to commit racketeering."[172] The Superior Court agreed, finding the objection "more goes to weight than admissibility."[173] The court continued, finding the evidence was relevant to assist in proving the existence and operations of the enterprise. The Superior Court correctly recognized that, to establish Lloyd's culpability for racketeering, the State must offer evidence establishing an association in fact enterprise.[174] And, to be sure, evidence that members possessed or routinely carried firearms may be offered to prove the existence of the enterprise.[175]

The State introduced evidence that firearms were found at Cooper's 18th Street apartment and at a storage garage on Downing Drive.[176] Investigators also found about 14,000 bags of heroin in the Downing Drive garage.[177] Thus, contrary to Lloyd's argument on appeal, the firearms introduced at trial were directly linked to the enterprise's drug dealing operation. The Superior Court did not abuse its

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[172] A1222.

[173] A1223

[174] *See Lloyd*, 152 A.3d at 1273.

[175] *See e.g. United States v. Jones,* 873 F.3d 482, 488-489 (5th Cir. 2017) (discussing evidence of enterprise members' possession and use of firearms for the group's benefit); *United States v. Applins*, 637 F.3d 59, 68 (2d Cir. 2011) (discussing government's introduction of evidence showing enterprise members routinely carried firearms in order to protect their territory).

[176] A1224.

[177] A1225.

discretion by allowing the State to introduce the firearm evidence to establish the existence and continuity of Lloyd's association in fact enterprise.

B. The Superior Court did not err by admitting evidence of rap videos evidencing the association of members of Lloyd's criminal racketeering enterprise.

The State provided Lloyd 94 videos in discovery and sought to introduce only five at trial.[178] The State explained that the videos illustrate predicate acts and associations of members of the enterprise and that the videos assist in establishing the existence of the criminal enterprise.[179] The Superior Court addressed Lloyd's objection to the admissibility of the videos *in limine*.[180] After hearing argument, the court overruled the objection, finding the issue one of:

> weight rather than ultimate admissibility. Counsel is free in closing argument or in cross-examination to stress the fact that their clients or other names were not mentioned in the videos. I think we're dealing with the racketeering case, whether it's a requirement of the state to prove predicate offenses and I think this goes to illustrate that.[181]

During trial, the State introduced rap music videos to establish many of the associations supporting the criminal enterprise. The video "All That"[182] displayed Ryan Bacon ("Buck 50"), Lawrence Flowers, Thomas Jackson, Dwayne White,

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[178] A420-421.

[179] A421-422.

[180] A416-423

[181] A422-423.

[182] Trial Ex. 46; A450-452.

Michael Pritchett, Damon Anderson, and Dion Oliver. And, this video corroborated Jamar Callahan's description of his trip to stay on the grounds of a mansion in Miami,[183] and extolled the financial benefits of the drug dealing enterprise. "Coke in My System"[184] showed Kevin White, Ryan Bacon, Michael Pritchett, Teres Tinnin, Jerome Pritchett, and Dion Oliver, and it contained a reference to Lloyd as "Butterico."[185] This video, too, evidenced the drug dealing business of the enterprise and stressed the violence required to effectively maintain the operation. "Let it Fly"[186] included lyrics suggesting "free my brother Tuckermaxx," a reference to then-incarcerated Michael Pritchett, and discussed snitching and gun possession. Finally, "Did it for My Dogs" demonstrated connections between Ryan Bacon, Dion Oliver, and Terres Tinnin.

This Court addressed the admissibility of rap music videos in *Taylor v. State*.[187] To prove the defendant's association with a criminal street gang in *Taylor*, the State offered as evidence rap songs "generally discuss[ing] drug dealing and violent acts, while also containing statements that specifically reference animosity between the TrapStars and Pope's Group and the crimes and violence at issue in the

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[183] A366.

[184] Trial Exs. 47 and 48; A454.

[185] A454-457.

[186] Trial Ex. 221; A1280.

[187] 76 A.3d 791, 802 (Del. 2013).

instant case."[188] Ultimately, this Court concluded that "the song helped establish the fact that the TrapStars are a criminal street gang."[189] And, because the trial court admitted the song under the co-conspirator exception to the hearsay rule and "analyzed the rap video under the six-part *Getz* test . . . '[t]he trial court did not abuse its discretion."[190] In reaching this conclusion, the Court recognized that the trial court was in the best position to assess the probative value of the evidence and whether that probative value is substantially outweighed by the danger of unfair prejudice.[191]

Lloyd continues to ignore that, as part of its racketeering case, the State was required to establish the existence of an enterprise.[192] The videos admitted at trial offered clear linkages between members of the enterprise and evidenced one of the

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[188] *Id.*

[189] *Id.* Rap videos have generally been deemed admissible to support racketeering and gang participation charges. *See e.g. United States v. Mills,* 367 F. Supp. 3d 664, 671 (E.D. Mich. 2019) (rap lyrics and videos relevant to establish existence of enterprise); *State v. Davenport*, 2017 WL 4700652, *39-40 (La. Ct. App. 4th Cir. Oct. 18, 2017) (videos relevant in proving existence of an enterprise by highlighting association); *United States v. Graham*, 293 F. Supp. 3d 732, 739-40 (E.D. Mich. 2017) (admitting rap tracks which "portray the purpose of the enterprise"); *United States v. Pierce,* 785 F.3d 832, 841 (2d Cir. 2015) (rejecting First Amendment artistic expression argument and finding rap videos admissible to show associations).

[190] *Taylor*, 76 A.3d at 802. (citing *Getz v. State*, 538 A.3d 726 (Del. 1988).

[191] *Id.*

[192] Op. Brf. at 39.

primary functions of the enterprise – drug dealing. Lloyd argues the Superior Court "failed to engage in the six-part *Getz* test to insure that the videos were not being admitted for an improper purpose."[193] This Court's comment that the trial court, in *Taylor*, conducted the *Getz* analysis "in addition" to determine the rap videos established the existence of a gang and contained statements admissible under the co-conspirator exception to the hearsay rule, does not mandate that analysis in all cases.[194]

Here, the videos were admissible irrespective of a 404(b) analysis. They were neither 404(a) character evidence nor evidence of a Rule 404(b) "other crime, wrong or act." Instead, they were direct evidence of the crime charged – Criminal Racketeering between January 1, 2015 and January 1, 2019. To prove Criminal Racketeering, the State had to prove that Lloyd was: (1) associated with an "enterprise," and (2) "participate[d] in the conduct of the affairs of the enterprise through a pattern of racketeering activity or collection of an unlawful debt."[195] Thus, the State was required to prove the existence of an enterprise – "any association or

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[193] *Id.* at 39.

[194] *Taylor*, 76 A.3d at 802.

[195] 11 *Del. C.* § 1503(a).

group of persons associated in fact."[196] Because the videos established the existence and dealings of the enterprise Lloyd sat atop, they were relevant and admissible.

C. Any Error Was Harmless

Should this Court find that the Superior Court abused its discretion by admitting the firearm and rap video evidence, the error was harmless. Trial court decisions to admit evidence are subject to the harmless error analysis, and "[t]he well established rule is that where the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction, error in admitting the evidence is harmless."[197] The evidence of Lloyd's association in fact enterprise and its sweeping drug dealing business was overwhelming. In fact, the jury found the existence of all but one of the predicate acts beyond a reasonable doubt. Thus, the admission of firearm and rap video evidence, if erroneous, was harmless.

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[196] 11 *Del. C.* § 1502(3).

[197] *Downs v. State*, 2019 WL 1040407, *4 (Del. Mar. 4, 2019) (quoting *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991)).

V. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN SENTENCING LLOYD

Question Presented

Whether the Superior Court abused its discretion by directing Lloyd's sentences to run consecutively and to be served in their entirety under 11 *Del. C.* § 4204(k).

Standard and Scope of Review

This Court's "review of a sentence is extremely limited and its inquiry is generally limited to determining whether the sentence falls within the statutory limits prescribed by the legislature."[198] "[T]his Court will not find error of law or abuse of discretion unless it is clear from the record below that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability."[199]

Merits of the Argument

Lloyd contends his aggregate sentence of 30 years of incarceration to be served without the benefit of any form of early release under 11 *Del. C.* § 4204(k) is disproportionate to the crimes he committed.[200] He is wrong. At trial, the judge

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[198] *Ramsey v. State*, 2019 WL 1319761, at *2 (Del. Mar. 22, 2019) (citing *Mayes v. State*, 604 A.2d 839, 842-43 (Del. 1992)).

[199] *Id.*

[200] Op. Br. at 41-42.

learned Lloyd led a violent, dangerous drug dealing enterprise. The judge was provided substantial information to craft an appropriate sentence for Lloyd. The sentence imposed was reasonable, based on proven facts, and well within the judge's discretion.

The Superior Court found Lloyd deserving of a lengthy sentence:

> I did preside over the trial, so I'm familiar with the facts in the case, and to use [Lloyd's counsel's] words, there are a lot of blurring of facts and responsibility and involvement, but the bottom line is that the State prove[d] there is beyond a reasonable doubt one large sprawling – I'll call it dangerous racketeering enterprise. And I say "dangerous" because so many drugs were involved, and when we speak of victims, who knows who could ever guess how many victims there were of either becoming addicted, of aggravating their addiction, of persons who were addicted to committing crimes. It's just a great big tangled kind of web, these drug operations . . . we're talking not just about crime, but about the business of crime.
>
> *****
>
> You made the choice after serving a 14-year Federal sentence for re-engaging in the drug racketeering business. And as [the prosecutor] pointed out, it preceded your going back into prison for a relatively short Violation of Probation stay.
>
> *****
>
> What is most – as to the debate, if that's the right word, as to whether you were a kingpin or not, there probably can be more than one kingpin, maybe there was, Dwayne White and you with alternating roles over the time, but I think you were highly, highly involved if not a kingpin in this.
>
> *****

> What's most concerning to [the court], and I think concerning to the State, is after you served a lengthy prison sentence – for a drug charge, you came back, and you made the voluntary decision to reimmerse yourself in the drug world.
>
> *****
>
> Here, a 14-year sentence didn't get that message to you, and if one of the functions of a sentence is to keep the streets of Delaware and elsewhere safe, it's to put behind bars and into jail people who might be likely to reoffend when they get out.
>
> *****
>
> [O]ne of the purposes, not the only, of a sentencing is to send a message to the community so that persons in the community may learn that – and find out that this kind of activity is going to lead to a very significant jail sentence.

Lloyd appears to argue his sentence warrants proportionality review under the Eighth Amendment to the United States Constitution.[201] Proportionality review is reserved for the rare case where a comparison of the crime committed to the sentence imposed "leads to an inference of gross disproportionality."[202] Only when this inference exists must a sentencing court compare a defendant's "sentence with other similar cases to determine whether the trial court acted out of step with sentencing norms."[203] Lloyd's sentence offers no inference of gross disproportionality.

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[201] Op. Br. at 41.

[202] *Crosby v. State*, 824 A.2d 894, 907 (Del. 2003) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991)).

[203] *Id.*

Lloyd oversaw a far-reaching drug dealing enterprise. He had served a lengthy sentence for a prior drug related conviction and chose to return to this dangerous business upon his release. Unlike the defendant in *Crosby* who this Court concluded received an excessive sentence for forgery because he was "too much trouble for the criminal justice system,"[204] Lloyd warranted an extended sentence based on his proven danger to society.[205]

Where, as here, the threshold comparison of the defendant's crime to the sentence imposed fails to yield an inference of gross disproportionality, a comparison of sentences for similar crimes is unwarranted.[206] The Superior Court did not abuse its discretion when it sentenced Lloyd to serve the entirety of a sentence within the statutory range.[207]

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[204] *Id.* at 908.

[205] *See Reed v. State,* 2015 WL 667525, at *2 (Del. Feb. 12, 2015) (Delaware Supreme Court clarified in *State v. Evans*, 872 A.2d 539, 558 (Del. 2005) "that the *Crosby* holding applied to non-violent habitual offenders under Section 4214(a)"). Crosby received a sentence of 45 years as an habitual offender, rather than the normal maximum penalty of 2 years, for committing a class G felony – Forgery in the Second Degree. *Crosby*, 824 A.2d at 907.

[206] *Lacombe v. State*, 2017 WL 2180545, at *3-4 (Del. May 17, 2017).

[207] *See Mayes*, 604 A.2d at 842-43.

CONCLUSION

For the foregoing reasons, the State respectfully submits that this Court should affirm the judgment below.

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Dated: July 2, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ERIC C. LLOYD,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 460, 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 Microsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9,687 words, which were counted by Microsoft Word.

Dated: July 2, 2020

/s/ *Sean P. Lugg*