EFiled: Oct 01 2020 12:31PM EDT
Filing ID 65980695
Case Number 53,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN HAIRSTON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 53, 2020
	)	
	)	
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: October 1, 2020

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NATURE AND STAGE OF THE PROCEEDINGS

On June 13, 2018, Stephen Hairston ("Hairston") was arrested following a traffic stop, and a New Castle County grand jury subsequently indicted him for drug dealing (heroin), aggravated possession (heroin), possession of marijuana, misdemeanor resisting arrest, driving a vehicle while license is suspended or revoked, no proof of insurance, turning movements and required signals, and aftermarket window tint without certificate. D.I. 1, 5;[1] A8-11. Hairston subsequently served a discovery request on the State, dated July 2, 2018, in which he demanded, under 10 *Del. C.* §§ 4330-4332,[2] "all persons involved in the chain of custody of any evidence" to be present at trial. A14.

On January 15, 2019, the State requested a continuance of the date scheduled for Hairston's jury trial because the chief investigating officer, Wilmington Police Department ("WPD") Senior Corporal Lynch ("Lynch") was on medical leave. D.I.

[1] "D.I.__" refers to item numbers on the Delaware Superior Court Criminal Docket in *State v. Stephen Hairston*, I.D. No. 1806008732. A1-7.

[2] Title 10, section 4331(1)(a)-(c) of the Delaware Code provides that the chain of custody for drug evidence could be established by testimony from the seizing officer, the packaging officer (if this officer is not also the seizing officer), and "[t]he forensic toxicologist or forensic chemist or other person who actually touched the substance and not merely the outer sealed package." Title 10, section 4332(a)(1) of the Delaware Code states that "[i]n a criminal proceeding, the prosecution shall, upon written demand of a defendant filed in the proceedings at least 5 days prior to the trial, require the presence of the forensic toxicologist or forensic chemist, or any person in the chain of custody as a prosecution witness."

12. The Superior Court granted the State's request and rescheduled Hairston's trial for March 2019. D.I. 12, 13.

On February 25, 2019, the State requested a second continuance of Hairston's trial date because Lynch, who had been injured in the line of duty, needed to undergo surgery for his injury. D.I. 16. The Superior Court granted the request and rescheduled Hairston's trial for May 2019. D.I. 16, 17, 18.

On April 24, 2019, the State requested a third continuance because Lynch was not anticipated to return to work until September 2019, as his recovery was "taking longer than expected." D.I. 19. The State noted that Lynch was "the officer who physically seized and packaged the drugs," but "he had another officer partnered with him on the day in question who personally observed the seizing and packaging of the drugs." D.I. 19. The State advised that the defense opposed the request and was also unwilling to stipulate that testimony from Lynch's partner, Corporal Bartolo ("Bartolo"), could satisfy Delaware's chain of custody requirements for admitting the drug evidence. D.I. 19. The State also asked that a judge be specially assigned to the case if the continuance request was denied so the State could file a pre-trial motion *in limine* to allow the evidence to be admitted through Bartolo's testimony. D.I. 19. On May 3, 2019, the Superior Court granted the State's request and rescheduled Hairston's trial for September 17, 2019. D.I. 22.

Lynch, due to injury, remained unavailable for the September 2019 trial date. Rather than seek rescheduling again, on September 3, 2019, the State filed a motion *in limine* to admit the drug evidence through Bartolo's testimony, which it supplemented on September 16, 2019. D.I. 26, 29. In the motion, the State argued that Bartolo could establish the drug evidence's chain of custody. A17-18.

On September 17, 2019, immediately before Hairston's trial, the Superior Court held a hearing and granted the State's motion *in limine*. D.I. 32. On the same day, the State entered a *nolle prosequi* on the no proof of insurance charge. A1. On September 18, 2019, a jury found Hairston guilty of all remaining counts in the indictment, except drug dealing (Hairston was acquitted of this charge). D.I. 32. The Superior Court ordered a pre-sentence investigation. D.I. 32. On January 24, 2020, the Superior Court sentenced Hairston as follows: for aggravated possession, 10 years of Level V incarceration, suspended after two years for one year of probation; for resisting arrest, one year of Level V incarceration, suspended for one year of probation; and for possession of marijuana, driving a vehicle while license is suspended or revoked, turning movements and required signals, and aftermarket window tint without certificate, fines totaling $725. Ex. B to Op. Br.

On February 10, 2020, Hairston timely filed a Notice of Appeal. Hairston filed his opening brief on August 31, 2020. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Hairston's argument is denied. The Superior Court did not violate Delaware's chain of custody statutes by admitting the drug evidence through Bartolo's testimony. Title 10, sections 4331 and 4332 of the Delaware Code did not displace the standard for authentication under the common law or D.R.E. 901, and the State adequately established the evidence's chain of custody and authenticated it as the evidence seized from Hairston. And admission of the evidence did not violate the Confrontation Clause. The Confrontation Clause did not require the State to have presented live testimony from every individual in the chain of custody. Bartolo's testimony about the evidence was based on his personal observations, and he was available to be examined by Hairston.

STATEMENT OF FACTS

Evidence presented at trial established that, on June 13, 2018, WPD Senior Corporal Lynch and his partner, Corporal Bartolo, were patrolling the area of West 2nd and Scott Streets in Wilmington in a fully marked patrol vehicle. A40-41. Around 6 p.m., while driving westbound on West 2nd Street, Bartolo observed a silver Chevrolet Equinox sport utility vehicle with tinted windows traveling in the same direction. A41, A45-46, A56. Bartolo conducted an inquiry on the Equinox's temporary license plate in the Delaware Criminal Justice Information System but did not find a waiver from the Delaware Division of Motor Vehicles ("DMV") for the vehicle's tinted windows. A46. Bartolo then saw the Equinox turn onto Scott Street without using a turn signal. A46. The officers activated their patrol vehicle's emergency lights and sirens and stopped the Equinox between the 200 and 300 blocks of Scott Street. A46, A71. The officers, who were wearing external ballistics vests marked with the word "Police" in white letters, exited their patrol vehicle. A48-49, A51, A55. As Bartolo walked from the rear of the Equinox to its front passenger door, which had its window down, Bartolo saw the Equinox's driver, later identified as Hairston, glance back at the officers. A48-49. Bartolo then observed Hairston reach across the Equinox's center console with his hand into the front passenger area and quickly retract it. A48-49. Lynch approached the Equinox's driver's side and talked to Hairston, who handed Lynch the Equinox's registration.

A51, A82. Bartolo contacted the Equinox's front seat passenger and, from the passenger door, detected an odor of marijuana and saw a disposable plastic cup missing its lid in the front passenger footwell near the vehicle's center console in the area where Hairston had reached. A49-50. Bartolo noticed a clear knotted plastic bag with an off-white powdery substance on top of the cup in plain view. A50, A62-63. Additional WPD officers, including Corporals MacNamara ("MacNamara") and Akil ("Akil"),[3] arrived at the scene. A53. Bartolo and Lynch removed Hairston and his passenger from the Equinox and had them stand at the rear of the vehicle so MacNamara and Akil could watch them while Lynch and Bartolo searched the vehicle. A53-54.

As Bartolo returned to the front of the Equinox, he heard MacNamara yell, "Police! Stop!" and saw Hairston flee southbound on Scott Street. A54. While MacNamara chased Hairston, Bartolo handcuffed Hairston's passenger, placed him into Bartolo's patrol vehicle, and drove to where Hairston had fled. A55-56. MacNamara, who was also wearing an external ballistics vest marked with the word "Police," pursued Hairston on Scott Street, and Hairston ran between two parked cars. A70, A72. Hairston then ran toward MacNamara, and, fearing that Hairston would physically engage him, MacNamara deployed his taser. B8. Hairston immediately complied with MacNamara's commands and was arrested and taken

[3] This officer's name is misspelled in the trial transcript.

back to the Equinox. A57; B8. Bartolo assisted in searching Hairston incident to his arrest. *See* A58. Police found, but did not seize, a total of $768 in cash in various denominations found in Hairston's immediate possession. A58, A66. Hairston was transported to Wilmington Hospital to remove the taser prongs. B8.

Bartolo also assisted Lynch in searching the Equinox. A59-60. Bartolo observed Lynch recover the clear knotted plastic bag with the powdery substance, along with a small bag of a green leafy plant-like substance from the Equinox's center console. A59-60. The powdery substance field tested positive for heroin, and the plant-like substance field tested positive for marijuana. A60. An affidavit and certified driving record from the DMV were admitted into evidence at trial over Hairston's objections, which established that Hairston's driver's license was suspended at the time of the traffic stop. A52-53; B6-7, B23.

At trial, Rachel Philibert ("Philibert"), a forensic analytical chemist with the Delaware Division of Forensic Science ("DFS"), testified that she tested the substances seized from the Equinox using a gas chromatograph mass spectrometer. A77; B16. At the conclusion of her testing, she produced a laboratory report, which was admitted into evidence over Hairston's objections. B21. Philibert concluded, to a reasonable degree of scientific probability, that the substance in the clear knotted plastic bag contained codeine, heroin, trans-3-Methylfentanyl, and cis trans-3-Methylfentanyl, and the substance weighed approximately 6.62 grams (plus or

minus 0.0006 grams). A80. Philibert also determined, to a reasonable degree of scientific probability, that the plant-like substance was marijuana and weighed 2.3363 grams (plus or minus 0.0006 grams). A81.

New Castle County Police Department Detective Landis ("Landis") testified as an expert witness in the State's case. B9. To a reasonable degree of certainty, Landis concluded that Hairston possessed the heroin intending to deliver it. B10. Landis reached this conclusion in part based on the heroin's packaging and quantity. B14. Landis opined that over six grams of heroin amounted to almost 1,000 doses of the drug and showed that a seller, not a drug user, possessed it. B11. Landis also concluded that the heroin's amount, around a quarter of an ounce, was commonly sold to distributors. B15. Landis stated that the substance's packaging was typical for a bulk purchase because a user would usually possess it in a small blue wax paper bag. B11. Landis also testified that the heroin's value was over $2,000 and that a user would normally not have access to this amount of money. B12. Landis also determined that Hairston's attempt to discard the heroin and his flight from police evidenced his intent to deliver the drug. B12, B14.

I. ADMISSION OF THE DRUG EVIDENCE DID NOT VIOLATE DELAWARE'S CHAIN OF CUSTODY STATUTES OR HAIRSTON'S RIGHTS UNDER THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE.

Question Presented

Whether the Superior Court abused its discretion in admitting the drug evidence at trial over Hairston's objections that (1) the State had failed to adequately establish the evidence's chain of custody; and (2) admission of the evidence violated the Confrontation Clause of the Sixth Amendment of the United States Constitution.

Standard and Scope of Review

This Court reviews a trial court's evidentiary rulings for abuse of discretion.[4] Alleged constitutional violations relating to a trial court's evidentiary rulings are reviewed *de novo*.[5]

Merits

Hairston claims that the Superior Court erred in admitting the drug evidence at trial after he demanded, under 10 *Del. C.* §§ 4330-4332, "all persons involved in the chain of custody of [any] drug evidence to be presented in court[.]" Op. Br. at 9. Hairston argues that § 4332 "is clear on its face that once the defendant complies with the demand requirement, the prosecution must comply with its corresponding

[4] *Fuller v. State*, 860 A.2d 324, 329 (Del. 2004).

[5] *Smith v. State*, 913 A.2d 1197, 1234 (Del. 2006).

production requirement." *Id.* at 11. Hairston contends that these chain of custody statutes supplant the common law standard for authentication or D.R.E. 901. *See id.* at 12. Moreover, Hairston argues that his right under the United States Constitution's Sixth Amendment to confront witnesses against him was violated. *Id.* at 16. Hairston is incorrect.

In his July 2, 2018 discovery request, Hairston demanded "for all persons involved in the chain of custody of any evidence to be present in court and Medical Examiners' personnel who prepared the Medical Examiner's report be subpoenaed for trial." A14. The request also stated that "[i]n any case in which the State will be using [DFS], there will be no stipulations or agreements with regard to any trial issue, including but not limited to testing and chain of custody, unless expressly agreed to in writing." A14. Subsequently, the Superior Court continued the date scheduled for Hairston's jury trial three times at the State's behest because the chief investigating officer, Lynch, had suffered an injury and was on medical leave. D.I. 12, 16, 17, 22.

On September 3, 2019, two weeks before Hairston's trial, the State filed a motion *in limine* to admit the drug evidence through testimony from Lynch's partner, Bartolo, because Lynch was still on medical leave. D.I. 26, 29; A15-21; B1. In the motion, the State acknowledged that Lynch "was the officer who physically seized and packaged the heroin and marijuana" under § 4331 but contended that Bartolo

"personally observed the chain of custody process" and that his testimony "would suffice as to eliminate any possibility of misidentification of the evidence seized." A18.

The Superior Court held a hearing on the motion *in limine* on the day of Hairston's trial. Bartolo testified at the hearing that Lynch was "out on medical leave on today's date" and said that his absence was "[d]ue to [an] on-duty accident." B5. Bartolo recited the circumstances leading to Hairston's traffic stop, and he said that he saw a clear knotted plastic bag with a powdery substance in plain view in the Equinox's front passenger footwell. B3-4. Bartolo confirmed that the powdery substance in the exhibit marked as State's TL-1 (the suspected heroin) for identification was "the powdery substance that I observed in the cup that was seized by Corporal Lynch" and that the exhibit marked as State's TL-2 (the suspected marijuana) was "the green leafy substance that we located in the center console, which was seized by Corporal Lynch." B4. Bartolo also confirmed that he "[saw] Corporal Lynch seize the bag containing that brown powdery substance" and "the green leafy substance that field tested positive for marijuana." B4. Bartolo informed the court that "Corporal Lynch and I transported the drugs back to the police station, where they were packaged by Corporal Lynch in my presence and submitted to Evidence, supervised by Sergeant Gifford, also in my presence." B5. Bartolo further confirmed that he "personally observe[d]" Lynch package and submit the suspected

heroin and marijuana into the "evidence collection location." B5.

The Superior Court granted the State's motion and concluded that "the seizing and packaging officer is not available," but "[h]is unavailability was not procured by the State." A27. The Court found that Bartolo was "a direct eyewitness to the seizing and packaging, and he was a participant in the search resulting in the seizing and packaging." A27. The Court determined that "[t]here has not been any proffer by the defense that the confrontation issues involved in the seizure and packing could not be responded to by Corporal Bartolo, who was the direct eyewitness and participant in the same way as Corporal Lynch." A28. The Court concluded that "the purpose of Section 4331 was to eliminate the need for repetitive and unnecessary witnesses for purposes of chain of custody" and that "[t]here is no indication in the statute that the Legislature intended that the statute deviate from the common law requirements that the standard is a reasonable probability that the evidence offer[ed is] what the proponent says that it is." A30. The Court also ruled that

> particularly when the packaging and seizing officer is unavailable, and that unavailability was not procured by the State, and the proffered witness is a direct eyewitness and participant in the search, and directly observed the seizure and packaging, … there is, for admissibility purposes, a reasonable probability that the evidence offered is what the proponent says it is, and that the evidence has not been misidentified, and no tampering, or adulteration, occurred for purposes of the seizing officer and packaging officer portion of the testimony.

A31.

At trial, Bartrolo testified consistently with his testimony at the hearing on the motion *in limine*. Bartolo said that he "observed the recovery [of the brown powder substance and green leafy substance] from the vehicle, transporting it to Central, the field testing of the substances, packing, and submitting all substances into evidence." A60. According to Bartolo, State's TL-1, which was marked as State's Exhibit C, "appear[ed] to be the same powdery substance we recovered from the vehicle" and confirmed that its contents were "in the same, or substantially the same, condition as it was when [he] observed it on the cup inside the Chevy Equinox that Mr. Hairston was driving." A61-63. Bartolo stated that the State's TL-2, which was marked as State's Exhibit D, was "located inside the center console of the vehicle" and was "in the same, or substantially the same, condition as [he] observed it also in the vehicle that Mr. Hairston was driving." A61, A63-64.[6]

DFS's forensic analytical chemist, Philibert, testified that law enforcement agencies normally make appointments with DFS's forensic evidence specialists to deliver evidence to log into DFS's system. B17. Philibert said that DFS's laboratory manager assigns cases to different chemists for testing based on "who has time to do it." B17. Philibert stated that she normally requests the evidence from the forensic evidence specialist after a case is assigned to her, and the evidence is typically placed

[6] State's Exhibits C and D were later admitted into evidence as State's Exhibits 1 and 2, respectively. B20.

in a specific one of her work lockers. B17. Philibert testified that she usually transfers the evidence to a second work locker after she tests it and then to a third work locker once the case has been peer reviewed. B17. Thereafter, DFS's forensic evidence specialist normally returns the evidence to the law enforcement agency. B17. Philibert confirmed that these procedures were followed in Hairston's case and that she had personally obtained the drugs from her lockers. B17-18. Philibert examined the drug evidence at trial and did not see any signs of tampering, nor did she observe such signs when the evidence "came to [her] hands and DFS." B18.

A. The State Adequately Established the Drug Evidence's Chain of Custody.

Hairston contends that the State failed to properly authenticate the drug evidence because it did not comply with § 4331. Op. Br. at 11-16. Hairston complains that the State did not present testimony from Lynch, who had seized and packaged the drugs, despite Hairston's timely demand under § 4332(a)(1) for each person in the chain of custody to appear at trial. *Id.* at 11. According to Hairston, the common law standard for authentication or D.R.E. 901 does not apply because "ours is a case governed by a statute that creates, in plain language, a duty on the part of the State to present at trial certain witnesses defined by statute as being in the chain of custody of evidence even if, under common law, a break in the wider chain of custody of that evidence would generally not be fatal to admissibility." *See id.* at 12. Hairston's claims are meritless.

1. Sections 4331-4332 Did Not Displace the Common Law Standard for Authentication or D.R.E. 901.

The Superior Court reasonably concluded that the General Assembly enacted § 4331 to eliminate the need for repetitive witnesses and that the statute did not supplant the common law standard for authentication. *See* A30. At common law, in order to be admissible, the State had to make a sufficient showing that physical evidence was what it was claimed to be.[7] The State was "oblige[d] to account for its careful custody of evidence from the moment the State [wa]s in receipt of the evidence until trial" or had to establish the evidence's chain of custody.[8] To meet its burden, the State needed to "only prove that there [wa]s a reasonable probability that no tampering ha[d] occurred."[9] "It [wa]s not necessary for the State to prove beyond all possibility of doubt the identity of the evidence or the impossibility of tampering."[10] Deficiencies in the chain of custody did not necessarily render evidence inadmissible.[11] Instead, "the integrity of the chain of possession was a matter of weight, rather than admissibility, and was properly a matter for the jury."[12]

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[7] *Wheeler v. State*, 187 A.3d 641, 646 (Md. 2018).

[8] *Tatman v. State*, 314 A.2d 417, 418 (Del. 1973) (finding heroin properly authenticated).

[9] *Id.* (citing *Clough v. State*, 295 A.2d 729 (Del. 1972) (finding LSD properly authenticated)).

[10] *Clough*, 295 A.2d at 730.

[11] *Id.*; *Tatman*, 314 A.2d at 418.

[12] *Tatman*, 314 A.2d at 418; *accord Clough*, 295 A.2d at 730-31.

D.R.E. 901 embodies common law principles for authenticating evidence and is based on the federal rule in effect in December 2000, which, in turn, draws on common law precepts for authentication.[13] Under D.R.E. 901(a), the party offering an item for evidence at trial is required to present "evidence sufficient to support a finding that the item is what the proponent claims it is."[14] Caselaw interpreting D.R.E. 901 has held that the State may authenticate an item that it claims was involved with a crime in two ways. "It may have witnesses visually identify the item as that which was actually involved with the crime, or it may establish a 'chain of custody,' which indirectly establishes the identity and integrity of the evidence by tracing its continuous whereabouts."[15] This Court has also explained that, "[i]n *Whitfield* [*v. State*], we held that the relevant factors in a chain of custody analysis included 'the nature of the article, the circumstances surrounding its preservation in custody, and the likelihood of intermeddlers having tampered with it' ... The State was required to eliminate possibilities of misidentification and adulteration, not

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[13] *See* Comment to D.R.E. 901 (noting that, with limited exception, "D.R.E. 901 tracks F.R.E. 901 in effect on December 31, 2000"); Advisory Committee Notes to F.R.E. 901 (noting that, for purposes of the examples in F.R.E. 901(b), "[t]he treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision [F.R.E. 901] (a)").

[14] D.R.E. 901(a).

[15] *Tricoche v. State*, 525 A.2d 151, 152 (Del. 1987).

absolutely, but as a matter of reasonable probability."[16] This Court has never required "the State to produce evidence as to every link in the chain of custody."[17] "Rather, the State must simply demonstrate an orderly process from which the trier of fact can conclude that it is improbable that the original item had been tampered with or exchanged."[18] By way of illustration, D.R.E. 901 provides that "[t]estimony of a [w]itness with [k]nowledge" that "an item is what it is claimed to be" is sufficient.[19] The "appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances" provides sufficient authentication.[20]

In interpreting a statute, "[w]here there is a dispute over the meaning or effect of a statute, a court seeks to ascertain the legislative intent."[21] In determining whether a statute displaces the common law, this Court considers the following: (1) whether the "explicit language in the [statute] supersede[s] or limit[s] the common law;" (2) whether "the statutory scheme evidence[s] a legislative intent to occupy

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[16] *Id.* at 153 (quoting *Whitfield v. State*, 524 A.2d 13, 16 (Del. 1987)).

[17] *Demby v. State*, 695 A.2d 1127, 1131 (Del. 1997).

[18] *Id.*

[19] D.R.E. 901(b)(1).

[20] D.R.E. 901(b)(4).

[21] *Acierno v. Worthy Bros. Pipeline Corp.*, 656 A.2d 1085, 1088 (Del. 1995) (determining whether provisions of Delaware's version of the Uniform Commercial Code displaced certain common law doctrines).

the field;" and (3) whether "the statutory scheme actually conflict[s] with the common law."[22]

Under the first factor, § 4331 provides:

> In the context of controlled dangerous substances:
>
> (1) "Chain of custody" means:
>
> a. The seizing officer;
> b. The packaging officer, if the packaging officer is not also the seizing officer; and
> c. The forensic toxicologist or forensic chemist or other person who actually touched the substance and not merely the outer sealed package in which the substance was placed by the law-enforcement agency before or during the analysis of the substance.
>
> (2) "Chain of custody" does not include a person who handled the substance in any form after analysis of the substance.
>
> (3)a. For the purpose of establishing, in a criminal or civil proceeding, the chain of physical custody or control of evidence consisting of or containing a substance tested or analyzed to determine whether it is a controlled substance defined under Chapter 47 of Title 16, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.
>
> b. The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received.

[22] *A.W. Financial Services, S.A. v. Empire Resources, Inc.*, 981 A.2d 1114, 1123 (Del. 2009).

> c. The statement may be placed on the same document as the report provided for in § 4330 of this title.
>
> d. Nothing in this section precludes the right of any party to introduce any evidence supporting or contradicting the evidence contained in or the presumption raised by the statement.

Relatedly, § 4332 states:

> (a) In general.—
>
> > (1) In a criminal proceeding, the prosecution shall, upon written demand of a defendant filed in the proceedings at least 5 days prior to the trial, require the presence of the forensic toxicologist or forensic chemist, or any person in the chain of custody as a prosecution witness.
> >
> > (2) The provisions of §§ 4330 and 4331 of this title concerning prima facie evidence do not apply to the testimony of that witness.
> >
> > (3) The provisions of §§ 4330 and 4331 of this title are applicable in a criminal proceeding only when a copy of the report or statement to be introduced is mailed, delivered or made available to counsel for the defendant or to the defendant personally when the defendant is not represented by counsel, at least 10 days prior to the introduction of the report or statement at trial.
>
> (b) Witness for defense.—Nothing contained in this subchapter shall prevent the defendant from summoning a witness mentioned in this subchapter as a witness for the defense.

"For there to be an explicit superseder, the statute must clearly manifest a legislative intent to repeal the common law."[23] Here, neither §4331 nor § 4332 evidence a clear intent by the General Assembly to displace the common law

[23] *Id.*

standard for authentication. Notably absent are such words as "supersede," "repeal," "revoke," or "preempt."[24] In fact, these provisions do not refer to the common law at all.[25] Therefore, Hairston has not demonstrated that these statutes expressly displace the common law.

Under the second factor, "a statute that undertakes to revise and cover the subject matter may impliedly supersede the common law."[26] This Court disfavors repeal by implication, which can only occur "where there is fair repugnance between the common law and the statute, and both cannot be carried into effect."[27]

Hairston has not shown such repugnance. The General Assembly enacted §§ 4330-4332 in 1994, and the legislation's synopsis provides, in pertinent part:

> Under this legislation, it would not be necessary for the chemist and all of the police officers handling seized drugs to appear as witnesses in a trial to establish the proper chain of custody unless the defense makes a proper demand for such appearances. Instead, the legislation creates evidentiary presumptions for the admissibility of reports and statements that, in modern society, are inherently reliable.[28]

The synopsis does not evidence any intent by the General Assembly to displace the

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[24] *See id.*

[25] *See id.*

[26] *Id.* at 1122 (internal quotation and citation omitted).

[27] *Andreason v. Royal Pest Control*, 72 A.3d 115, 124 (Del. 2013) (quoting *id.* at 1122) (internal quotations omitted).

[28] Synopsis to House Substitute No. 1 for H.B. No. 305, 137th Gen. Assembly (1994). B24.

common law standard for authentication or show that the statutes were to become the sole means for authenticating controlled substances.[29] As this Court has concluded, §§ 4331-4332 "liberalized the State's obligation to establish the chain of custody in drug cases" and "lessen[ed] the State's burden to authenticate evidence prior to admission."[30] Section 4331 "acts only to eliminate the logistical and financial burden that the State would face if it were required to produce at trial every person who handled the evidence, irrespective of how tangential the contact might have been."[31]

Moreover, this Court's precedent demonstrates that §§ 4331-4332 and the common law standard for authentication can both be carried into effect. In *Demby*, the defendant argued that the State had not established the drug evidence's chain of custody when, among other issues, a courier who had transported the drugs did not testify at trial.[32] Demby claimed that § 4331 violated his due process rights because

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[29] *See Andreason*, 72 A.3d at 124 (finding no repeal by implication of the common law where the "statutory enactment made no reference to this purpose"); *Kallop v. McAllister*, 678 A.2d 526, 530 (Del. 1996) ("In interpreting a statute, we give considerable deference to an official commentary written by the statute's drafters and available to the General Assembly before the statutory enactment.") (citing *Snell v. Engineered Systems & Designs, Inc.*, 669 A.2d 13, 17 (Del. 1995) (relying on synopsis)).

[30] *Demby*, 695 A.2d at 1129.

[31] *Id.* at 1132.

[32] *See id.* at 1131-32.

it eliminated links in the chain of custody and relieved the State of its burden to prove every element of his crimes beyond a reasonable doubt and its duty to authenticate evidence under D.R.E. 901.[33] The Court upheld the constitutionality of § 4331 and found that its presumption that evidence has not been tainted did not lessen the State's burden of proof under D.R.E. 901.[34] The Court noted that § 4331 "does not limit a defendant's right to raise issues concerning possible contamination or limit his right to call witnesses to demonstrate the possibility of tampering during transportation for exclusionary purposes."[35] Therefore, the statute was "consistent with the due process guarantees of both the United States Constitution and Delaware Constitution."[36] The Court then evaluated the admissibility of the drug evidence under D.R.E 901 in view of Demby's claims that officers in the chain of custody had provided inconsistent testimony about events after purchasing the drugs from Demby and that the police department had mishandled the evidence months after its seizure.[37] The Court found that "there was sufficient consistency to permit the trial judge, in his discretion, to conclude that the evidence was not tampered with or confused with other drugs prior to its being deposited in the evidence chute" and that

[33] *Id.* at 1131.

[34] *Id.* at 1132.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 1133.

"the evidence was either in the custody of the Medical Examiner or in a secured evidence locker from the time of its seizure until Demby's trial."[38]

In *McNally v. State*, the defense subpoenaed all forensic chemists involved with gunshot residue testing under § 4332 to appear at trial, but the State failed to produce, without leave of court, a lab employee who had placed the vials with the residue into a machine and had turned it on.[39] The trial judge admitted the evidence over the defense's objection that the State had not established a proper chain of custody.[40] On appeal, the Court reviewed "whether there is a reasonable probability that the evidence offered [wa]s what its proponent claim[ed] it to be."[41] Although concluding that the State must "strictly comply [with subpoenas] or seek relief from compliance from the Court in the future," the Court determined that the trial judge did not abuse his discretion in admitting the evidence because "[t]he evidence does not suggest that [the lab employee] misidentified or adulterated the samples when she put them into the machine."[42] Therefore, the Court could not "conclude that [the employee's] described limited involvement in the chain of custody suggests a

[38] *Id.* at 1134.

[39] *McNally v. State*, 980 A.2d 364, 370-72 (Del. 2009).

[40] *Id.* at 371.

[41] *Id.*

[42] *Id.* at 372.

reasonable probability of adulteration or tampering."[43]

Under the third factor, the statutory scheme of §§ 4331-4332 does not actually conflict with the common law standard for authentication or D.R.E. 901. Instead, the statutes, taken together, provide a procedural shortcut for admitting otherwise unchallenged evidence, and clarifies a mechanism for establishing the chain of custody of fungible evidence. Contrary to Hairston's argument, and as recognized by this Court in *McNally*, evidence may be authenticated through other means. While Hairston's demand for all witnesses obviated the State's ability to establish chain of custody through a signed report, this demand did not eliminate the State's ability to otherwise establish the chain of custody of the drug evidence seized and packaged in the presence of the testifying witness.

Maryland caselaw interpreting its chain of custody statutes is instructive. Section 10-1002 of the Maryland Code, Courts and Judicial Proceedings, is almost identical to § 4331, including the list of parties in the chain of custody,[44] and its §

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[43] *Id.*

[44] Section 10-1002 provides:

(a) In this part:

(1) "Chain of custody" means:

> (i) The seizing officer;
> (ii) The packaging officer, if the packaging officer is not also the seizing officer; and

10-1003 mirrors § 4332.[45] In *Wheeler*, the Maryland Court of Appeals determined

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> (iii) The chemist or other person who actually touched the substance and not merely the outer sealed package in which the substance was placed by the law enforcement agency before or during the analysis of the substance; and
>
> (2) "Chain of custody" does not include a person who handled the substance in any form after analysis of the substance.
>
> **Statements signed by persons in chain of custody**
>
> (b)(1) For the purpose of establishing, in a criminal or civil proceeding, the chain of physical custody or control of evidence consisting of or containing a substance tested or analyzed to determine whether it is a controlled dangerous substance under Title 5 of the Criminal Law Article, a statement signed by each successive person in the chain of custody that the person delivered it to the other person indicated on or about the date stated is prima facie evidence that the person had custody and made the delivery as stated, without the necessity of a personal appearance in court by the person signing the statement.
>
> (2) The statement shall contain a sufficient description of the material or its container so as to distinguish it as the particular item in question and shall state that the material was delivered in essentially the same condition as received.
>
> (3) The statement may be placed on the same document as the report provided for in § 10-1001 of this part.
>
> (4) Nothing in this section precludes the right of any party to introduce any evidence supporting or contradicting the evidence contained in or the presumption raised by the statement.

[45] Section 10-1003 states:

> **Chemists, analysts, or persons in chain of custody**
>
> (a)(1) In a criminal proceeding, the prosecution shall, upon written demand of a defendant filed in the proceedings at least 5 days prior to a trial in the proceeding, require the presence of the chemist, analyst, or any person in the chain of custody as a prosecution witness.

that the trial court did not abuse its discretion in admitting drug evidence from an undercover purchase when the State failed to call the packaging officer as a witness, despite the defense's timely demand for the presence of all persons in the chain of custody.[46] At trial, the State only called the seizing officer and the chemist as witnesses to establish the evidence's chain of custody, and the trial court admitted the evidence over the defense's objections.[47] In affirming the trial court, the Court of Appeals determined that "[t]he enactment of Cts. & Jud. Proc § 10-1003 did not impose a new burden on the State when establishing chain of custody because the creation of the statutes did not repeal the common law standard."[48] Therefore, "when [Wheeler] made his demand pursuant to Cts. & Jud. Proc. § 10-1003, the State was

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(2) The provisions of §§ 10-1001 and 10-1002 of this part concerning prima facie evidence do not apply to the testimony of that witness.

(3) The provisions of §§ 10-1001 and 10-1002 of this part are applicable in a criminal proceeding only when a copy of the report or statement to be introduced is mailed, delivered, or made available to counsel for the defendant or to the defendant personally when the defendant is not represented by counsel, at least 10 days prior to the introduction of the report or statement at trial.

Summons of witness by defense

(b) Nothing contained in this part shall prevent the defendant from summoning a witness mentioned in this part as a witness for the defense.

[46] *Wheeler*, 187 A.3d at 643-45.

[47] *Id.* at 644.

[48] *Id.* at 648.

precluded from availing itself of the statutory shortcut and the burden then reverted to the common law standard."[49] The State had to "establish chain of custody in a manner that comported with authentication and admissibility requirements."[50] The Court found that the evidence was properly authenticated under Maryland Rule 5-901 and noted that both the chemist who had tested the drugs and the officer who had originally seized them had testified.[51] Moreover, although the seizing officer was not present when the packaging officer had labeled the items, the seizing officer confirmed that "the drugs shown in court appeared to be the same drugs he purchased," and he also identified one of the bags as unique in its packaging and the same as he had purchased.[52] Hairston has not shown an actual conflict between the common law and §§ 4331-4332. And, unlike the testifying officer in *Wheeler*, Bartolo personally observed Lynch's seizing and packaging of Hairston's drugs.

Moreover, Hairston's reliance on *State v. Croce*[53] is misplaced. This Superior Court decision construed 21 *Del. C.* § 4177(h), the chain of custody statute for blood evidence in driving under the influence cases, and is not controlling.[54] *Croce*

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[49] *Id.*

[50] *Id.*

[51] *Id.* at 650. Similar to D.R.E. 901, Maryland Rule 5-901 was derived from the federal rule. *See* Note to Md. R. 5-901.

[52] *Id.* at 649.

[53] 1997 WL 524070, at *1 (Del. Super. Ct. May 14, 1997).

[54] *Id.* at *1 (citing 21 *Del. C.* § 4177(h)(4)).

concluded that the statute's language was unambiguous and did not appear to determine that a statute's disputed effect on the common law may constitute an ambiguity.[55] The Superior Court's decision in *Croce* also preceded this Court's opinion, *A.W. Financial Services*, and thus was not afforded this Court's interpretive guidance in assessing the statutes' interaction with established common law. Hairston's reasoning would require the General Assembly to affirmatively state its intent to preserve the common law in legislation or otherwise risk displacing established precedent. Of course, this is not the case. Hairston's position is inconsistent with this Court's instruction that the General Assembly's intent to repeal the common law must be plainly expressed and this Court's disfavor of repeal by implication.[56] Therefore, it is manifest that the statutory authentication process provided by §§ 4331-4332 does not displace Delaware's common law standard for authentication or D.R.E. 901.

[55] *Id.* at *3-4.

[56] *See A.W. Financial Services*, 981 A.2d at 1123; *Andreason*, 72 A.3d at 124.

2. The State Properly Authenticated the Drug Evidence Under the Common Law and D.R.E. 901.

The Superior Court did not err by concluding that the State established the drugs' chain of custody and properly authenticated them at trial. This Court has explained that the "decision of whether to admit evidence, in particular circumstances, is within the trial judge's discretion."[57]

Here, Bartolo testified that he observed Hairston's drugs within the Equinox and watched Lynch search the car and then seize, field test, package, and submit the drugs into evidence at the police station. *See* A59-60. Bartolo confirmed that the drugs were the same ones recovered from the Equinox and that the evidence was in the same or substantially same condition as when Bartolo saw it inside the vehicle. *See* A61-64. The State also presented testimony from DFS's forensic analytical chemist, Philibert, who recited DFS's procedures for submitting and handling drug evidence. *See* B17. Philibert confirmed that these procedures were followed, she personally obtained the evidence from her work lockers, and the drug evidence did not show signs of tampering. *See* B17-18. The State sufficiently established the identities of those who had handled the drug evidence, and the record does not suggest that any tampering occurred. Any gaps in the chain of custody went to the

[57] *Tricoche*, 525 A.2d at 152.

weight, not the admissibility, of the evidence.[58] Hairston remained free to have explored any gaps through cross-examination or to have highlighted them to the jury. The State demonstrated a reasonable probability that the evidence was what the proponent claimed it to be.[59] Therefore, the Superior Court properly admitted the drug evidence at trial.

B. Admission of the Drug Evidence Did Not Violate the Confrontation Clause.

Hairston also claims that admitting the drug evidence at trial violated the Sixth Amendment's Confrontation Clause. Op. Br. at 16-18. Hairston argues that "he properly asserted his right to confront Lynch, a witness defined by the State as two crucial links, (seizing officer and packaging officer) in the chain of custody." *Id.* at 17. Hairston alleges that the "'primary purpose' of Lynch's statements, with respect to the chain of custody, was to establish or prove the movement and location of the substances seized from the [Equinox] and brought to court for Hairston's trial" and that "the statements were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 17-18 (internal quotations and citation omitted). Hairston contends that "[i]t was Lynch's method and reliability of collection and packaging that was subject to cross-examination" and that "Bartolo had no first-hand knowledge regarding

[58] *See Demby*, 695 A.2d at 1134.

[59] *McNally*, 980 A.2d at 371; D.R.E. 901(a).

Lynch's possession of the drug evidence during the time Bartolo was off assisting MacNamara." *Id.* at 18. Hairston's arguments are unavailing.

The Sixth Amendment provides a defendant with the constitutional right to confront witnesses against him at trial.[60] In *Crawford v Washington*,[61] the United States Supreme Court held that a defendant's confrontation rights are violated when the prosecution introduces evidence of a prior-out-of-court testimonial statement of a witness unless the witness is unavailable and the defendant had a previous opportunity to cross-examine the witness about the statement.[62] The Supreme Court also defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[63] Subsequently, the United States Supreme Court clarified the meaning of "testimony" in *Davis v. Washington.*[64] The Supreme Court held that "a statement is testimonial if: (1) the circumstances objectively indicate there is no ongoing emergency, and (2) the statement is made in response to an interrogation which has the primary purpose of establishing or proving events relevant to later criminal prosecution."[65] This Court has interpreted

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[60] U.S. Const. amend VI.

[61] 541 U.S. 36 (2004).

[62] *Crawford*, 541 U.S. at 38, 50-51.

[63] *Id.* at 51 (internal citations omitted).

[64] 547 U.S. 813 (2006).

[65] *Milligan v. State*, 116 A.3d 1232, 1237 n.17 (Del. 2015) (citing *Davis*, 547 U.S. at 822).

United States Supreme Court precedent as providing the following "indicator for when a statement is testimonial: the purpose of the statement i[s] proving an essential element of the crime."[66]

However, "[t]he Confrontation Clause only guarantees a defendant the opportunity for effective cross-examination of the declarant, not effective cross-examination in whatever way and in whatever manner a defendant may wish."[67] "[W]hen a witness takes the stand at trial, and is subject to cross-examination, the traditional protections afforded under the Confrontation Clause are satisfied."[68] Admission of testimony based on a witness's personal observations does not violate or implicate the Confrontation Clause.[69] Nor does such testimony even amount to hearsay.[70] This Court has also concluded that the plain language of United States

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[66] *Chavis v. State*, 227 A.3d 1079, 1091 (Del. 2020) (citing *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011)).

[67] *Johnson v. State*, 878 A.2d 422, 428 (Del. 2005).

[68] *Id.* at 428-29.

[69] *See United States v. Buelna-Valenzuela*, 176 F. App'x 891, 893 (9th Cir. 2006) (agent's testimony that he did not see anyone enter or leave a house under surveillance did not implicate Confrontation Clause because he testified about his own observations); *United States v. Occhiuto*, 784 F.3d 862, 866 (1st Cir. 2015) (Confrontation Clause not violated despite alleged uncertainties in officer's testimony about whether the drugs he observed during his surveillance were those in evidence as the testimony consisted of the officer's own observations).

[70] *See* D.R.E. 801(c) (hearsay is a statement that "the declarant does not make while testifying at the current trial or hearing" and that "a party offers in evidence to prove the truth of the matter asserted in the statement."); *Thomas v. State*, 2015 WL

Supreme Court precedent "provides that not every individual who may have relevant testimony for the purpose of establishing chain of custody must appear in person as part of the prosecution's case."[71] Therefore, "[t]he Sixth Amendment Confrontation Clause does not require each and every individual who possessed the evidence to provide live testimony in order to establish chain of custody."[72]

Here, Bartolo's testimony satisfied Hairston's rights under the Confrontation Clause. The Confrontation Clause did not require the State to have presented live testimony from every individual who had possessed the drug evidence. Bartolo did not recite Lynch's testimonial statements about the location and movement of the evidence. Rather, Bartolo testified about his personal observations regarding the drugs, including seeing them inside the Equinox and witnessing their seizure, packaging, field testing, and submission into evidence at the police station. *See* A59-60. Hairston had the opportunity to cross-examine Bartolo about his observations.

2169288, at *2 (Del. May 8, 2015) (detective's "testimony limited to his personal experience and first-hand observations" of defendant "was not hearsay") (citing *Jenkins v. State*, 8 A.3d 1147, 1153 (Del. 2010) (witness's testimony "based on firsthand observations of which he had personal knowledge … was not hearsay")); *United States v. Kolodesh*, 787 F.3d 224, 234 (3d Cir. 2015) ("Testimony that coveys a witness's personal knowledge about a matter is not hearsay."); *Buelna-Valenzuela*, 176 F. App'x at 893 (agent's testimony about his own observations did not implicate any hearsay rule).

[71] *Milligan*, 116 A.3d at 1239 (citing *Melendez-Diaz*, 557 U.S. at 311 n.1) (rejecting the claim that every individual who had possessed Milligan's blood sample was required to testify at trial).

[72] *Id.* at 1240.

Accordingly, the Superior Court did not abuse its discretion in admitting the drug evidence in Hairston's case.

CONCLUSION

The State respectfully requests that this Court affirm the judgment below for the foregoing reasons.

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Dated: October 1, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STEPHEN HAIRSTON,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 53, 2020
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 7,929 words, which were counted by Microsoft Word 2016.

Dated: October 1, 2020 /s/ *Brian L. Arban*