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Case Number 108,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARTH HEALD,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 108, 2020
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S CORRECTED OPENING BRIEF

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DATED: October 5, 2020

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NATURE AND STAGE OF THE PROCEEDINGS

On March 4, 2019, Darth Heald was indicted on Sexual Abuse of a Child by a Person in a Position of Trust, Authority, or Supervision 2nd Degree; Dangerous Crime Against a Child; Unlawful Sexual Contact 1st Degree; and Unlawful Imprisonment 2nd Degree.[1] He went to jury trial on September 10, 2019. The State sought to prove the charges against Heald through the complainant's testimony and out-of-court statement to the Child Advocacy Center. There was no physical evidence, none of the State's other witnesses validated the allegation and Heald testified, denying the allegation under oath.

Over objection, the State introduced inadmissible evidence through the complainant's parents to improperly vouch for her allegation.[2] Further, both the prosecutor and an investigator vouched for the complainant's CAC statement by improperly discussing the investigator's training and experience as well as the interview process. And, the prosecutor made multiple improper comments in her opening statement and closing arguments.

Heald was convicted of all counts and was sentenced to 2 years in prison followed by probation.[3] This is his Opening Brief in support of a timely-filed appeal.

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[1] A1, 8.
[2] Trial Court's Ruling on Hearsay and Bolstering Objection, Ex.A.
[3] March 6, 2020 Sentence Order, Ex.B.

SUMMARY OF THE ARGUMENT

1. The trial court abused its discretion and denied Heald his right to a fair trial when it allowed the State to introduce irrelevant and unfairly prejudicial hearsay and witness opinions through the testimony of the complainant's parents in order to bolster her credibility and to elicit sympathy for her.

2. The trial court committed plain error when it permitted the forensic investigator who took the complainant's statement to testify about her own training and experience in interview techniques and about the CAC interview process.

3. In this credibility case, the prosecutor's repeated comments which directly and indirectly vouched and elicited sympathy for the complainant were improper and jeopardized the fairness and integrity of Heald's trial.

4. The errors at trial cumulatively prejudiced Heald and deprived him of a fair trial.

STATEMENT OF FACTS

In September 2018, Brandon and Christina Heald lived in Newark, Delaware with their two children, (10-year-old Ashley and 8-year-old Brian).[4] Brandon's parents lived with them and his brother Darth and sister-in-law Angie stayed there part time. Darth and Angie spent the rest of their time in Pennsylvania where they worked. The Heald residence was a split-level house with three floors.[5] Darth and Angie's room and a bathroom were on the first floor. A kitchen, dining area, and a living room were on the second floor. Additional bedrooms and a bathroom were on the third floor.

In the early afternoon of Sunday, September 10, 2018, Ashley and Brian had two friends over, Carl and 9-year-old Ann. Most of the adults in the Heald family watched football while the kids played amongst themselves. Angie had left the house, however, to visit her mom in Pennsylvania.[6] Later that afternoon, Darth joined the kids in a game that was fairly popular in the Heald family. The game "Monster" was the Heald family's version of "tag" or "hide and seek." In their variation of the game, the designated "it" player chases the other players with the object of tickling them once they are caught.[7]

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[4] A31-32, 45-46, 51. Consistent with Del. Sup. Ct. R. 7 (d), Appellant has assigned pseudonyms to the complainant and all of the juvenile witnesses.
[5] A 14, 16, 26, 44, 51.
[6] A31-32, 45-46, 51.
[7] A28, 35, 39, 47.

There is no dispute that, on this particular Sunday, Darth was "it" and Ashley, Brian, Cole and Ann were the players being sought in order to be tickled. There is also no dispute that only a short time after the game began Ann abruptly left the house and went home. However, Ann later claimed that she left because Darth had touched her on her "private"[8] while she was alone with him in Ashley's room. Darth denied the allegation and the issue at trial was over the discrepancy between Ann's story of what happened and the testimony of Heald and the State's other witnesses.

At Heald's trial, the State relied heavily on Ann's CAC statement. Her story was that she and Brian were alone upstairs in Ashley's room with the door locked when Darth came up and somehow unlocked the door, came inside the room and tickled both her and Brandon. Then, because it was hot, Darth walked over to and opened a window. According to Ann, while he did that, Brian ran out of the room. She claimed that she too tried to run but Darth blocked the door before she could leave.[9]

Ann told the investigator that, after her unsuccessful attempt to leave, she laid on the bed, Darth came close to her and touched her. She claimed that he touched her on her stomach with the backside of his hand and slid it

[8] A18, 23.
[9] A40, 43. Ann' CAC Statement, Court Ex.#2 at 7:30.

down over her pants on her private and continued to slide her hand off. She also stated that she could smell alcohol on his breath.[10]

According to Ann, Darth then asked her to be his partner in the game. So, she followed him to the first-floor bathroom where the others were hiding. She said that because she felt "scared and uncomfortable" she told Darth that she had to go home to "do homework." She called her father and told him she was on her way home. She claimed that she then told Darth that she had to go home and then ran out the door. [11]

At trial, Darth testified under oath. He denied touching Ann's genitals. He denied touching Ann in a sexual manner. In fact, he denied the possibility of even inadvertently touching Ann in the way in which she described. Further, he told the jury that he was never alone in the room with just Ann and he was never alone in the room with just Brian and Ann. In fact, Brian testified that he and Ann were never in Ashley's room alone.[12]

Darth's testimony was more consistent with that of the State's other witnesses, which included Brian, Ashley and Christine, than was Ann's statement. He acknowledged that, over the course of the afternoon, he had four or five beers while he watched football and ate snacks with the other

[10] Ann's CAC Statement, Court Ex.#2 at 29:00.
[11] *Id.* at 27:00.
[12] A38, 52-53.

adults.[13] When he joined the game, however, he chased all four of the kids upstairs to Ashley's room. Brian and Ashley testified that all four of the kids were in the room. They played around with the lock until Darth came in.[14]

Darth recalled that once he was in the room, he tickled Brian, then either Carl or Ashley then Ann. Ashley said that Darth tickled her, Brian, and Carl on their stomachs.[15] And, Brian said that Darth tickled all four of the kids. According to Darth, Ann was shy about the tickling aspect of the game until Brian told her "it's okay. It's fine. He's not going to hurt you."[16] Darth then asked her if she wanted to be tickled, and she said yes. He tickled her while the others were still in the room. Then, as Ashley and Darth both testified, "a second after" Darth started tickling her, Ann told him to stop and he did.[17]

Contrary to Ann's statement, Darth, Brian and Ashley all testified that Ann immediately left the room.[18] According to Ashley, Ann said she was going to the kitchen and "walked around the corner to go downstairs."[19] Darth and all of the other kids then left the room and headed downstairs.[20]

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[13] A53.
[14] A30-31, 34, 37, 39, 51.
[15] A30, 52-53.
[16] A54.
[17] A30-31, 52, 54.
[18] A37.
[19] A30.
[20] A52.

Darth and Ashley both testified that while Ann went to the second-level kitchen area by the dining room table the other three children went downstairs to the first level bathroom. According to Ashley, the game continued a little longer while Darth knocked on the bathroom door. However, Ann was no longer participating. Ashley could hear her footsteps in the kitchen. A short time later, Darth gave up, went to his room, talked to Angie on the phone and did not come out of his room the rest of the evening.[21]

Christina, who is Ashley and Brian's mother, testified that she saw Ann in the kitchen texting and pacing.[22] Ashley said that she assumed Ann's mom texted her and that "[m]aybe she had to go somewhere or just do something."[23] Brian said that a few minutes before Ann left, he saw her in the living room "walking back and forth" near the couch and that she said she "wasn't comfortable being there."[24] Christina told the jury that Ann often came over to play with her kids and had previously exhibited some issues with anxiety. That night, she watched Ann walk home then asked her children if they knew why Ann was upset. They said that she felt uncomfortable during the game.[25]

[21] A29-30, 33, 38, 52, 55. Brian said all of the kids hid in the bathroom.
[22] A48.
[23] A29.
[24] A37-38.
[25] A47-49.

I. THE TRIAL COURT ABUSED ITS DISCRETION AND DENIED HEALD HIS RIGHT TO A FAIR TRIAL WHEN IT ALLOWED THE STATE TO INTRODUCE IRRELEVANT AND UNFAIRLY PREJUDICIAL HEARSAY AND WITNESS OPINIONS THROUGH THE TESTIMONY OF THE COMPLAINANT'S PARENTS IN ORDER TO BOLSTER HER CREDIBILITY AND TO ELICIT SYMPATHY FOR HER.

Question Presented

Whether the trial court abused its discretion and denied Heald a fair trial when it allowed the State to introduce irrelevant and unfairly prejudicial hearsay and witness opinions through the testimony of Ann's parents in order to bolster her credibility and to elicit sympathy for her.[26]

Standard and Scope of Review

This Court reviews "a trial court's ruling admitting or excluding evidence for abuse of discretion" and "[a]lleged constitutional violations relating to a trial court's evidentiary rulings are reviewed *de novo*."[27]

Argument

As its first witnesses, the State called Ann's parents and introduced: an interpretive narrative of Ann's out-of-court statement to her father; insinuations that Ann made multiple consistent statements to her mother, grandmother, therapist and law enforcement; and multiple opinions on Ann's

[26] A12, 20-21.
[27] *Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015).

feelings and demeanor. Not only was the interpretive narrative inadmissible under any exception to the hearsay rule, none of the evidence served a proper purpose. Further, the evidence was unfairly prejudicial to Heald as it improperly bolstered Ann's claim and improperly elicited sympathy for her. Thus, Heald was denied his right to a fair trial.[28]

Defense Counsel's Pre-Trial Objection

Prior to trial, the parties explained that they had only one remaining issue to work out with respect to redactions to Ann's recorded CAC statement. Defense counsel was opposed to the introduction of a portion of the interview in which Ann explained to whom she had already reported her claim and what she had said. The prosecutor agreed to redact the portions that revealed what was actually reported to the other individuals but claimed, "[w]e need to be able to present that this victim did tell the interviewer when asked that she spoke to these particular people."[29] She said this was necessary to explain how the investigation unfolded. Defense counsel argued that the introduction of that evidence was improper "because the implication then is, well, it must be true because she told all these other people the same thing."[30]

[28] U.S.Const., Amend. V.
[29] A12.
[30] A12.

In the course of this discussion, the prosecutor also said that she planned to have Ann's father testify to what Ann said to him after she came home from the Heald household. The stated purpose for this evidence was to counter an anticipated credibility argument by the defense arising from the fact that Ann did not report the alleged "touch" to anyone in the Heald household. So, the State needed to show that Ann went home and immediately told someone she trusted.[31] The trial court reserved decision.

The Parents' Testimony

Ann's father, Ryan Smith testified that on September 9, 2018 at about 7:30 p.m. Ann came home extremely upset and scared. He claimed that he had "never seen her act like that before."[32] Smith stated that he thought something "really bad had happened."[33] When the prosecutor asked him if he questioned Ann, Smith responded,

> I said, what happened? Did somebody hurt you? And she kind of, you know, stumbled over her words. Like trying to calm her down –[34]

At this point, defense counsel objected on the grounds of hearsay and bolstering. He noted that the State's earlier asserted purpose for this evidence,

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[31] A13.
[32] A20-22.
[33] A20.
[34] A20.

to counter a defense claim that Ann left the Heald house without telling anybody, was baseless as he had not made any such argument. Instead, the State was "put[ting] forth evidence that [Ann] told this person and this person, and the implication to the jury is, well, she must be telling the truth because she told all these different people at around the time it happened."[35] The trial court overruled finding Smith's response fell under the "excited utterance" exception to the hearsay rule. Without explanation, the court also overruled the bolstering argument.[36]

Smith continued his narrative:

> I calmed her down, and she said someone had touched me, touched me inappropriately. And I kind of asked her where. And I guess she didn't really want to show me. So my in-laws they were getting ready to leave, so I ran out and grabbed them and brought [Ann] out. And my mother-in-law had talked to her.[37]

He also mentioned that Ann told him that it was "[t]he uncle, the friend's uncle" that had touched her.[38] Finally, Smith explained that he did not call the police because he wanted to talk it over with his fiancé and get more information from his daughter.

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[35] A20-21.
[36] A21.
[37] A21-22.
[38] A21-22.

Samantha Houghton, Ann's mother, spoke to Ann after Smith. She received a call at work from her mother about her daughter. She said that Ann was on the call but "didn't go into a lot of details" about her allegation. She opined that this was because "she was kind of embarrassed."[39] The prosecutor had Houghton describe and give her opinion about Ann's demeanor when she got home from work.

> You could tell that she had been very upset, that she was crying for a while. Her eyes were red and puffy. She wouldn't look me in the face when she was talking to me. She kept her head down. Just very nervous.
>
> It was kind of like unravelling a onion a little bit at a time. Little questions at a time.

Houghton also explained that she

> did not call the police because she didn't want to frighten her by having people come to our house. She was already pretty mortified, so I figured I wanted her to talk to her counselor and, you, speak in a free environment and go from there.[40]

Finally, Houghton told the jury that Ann saw her therapist a couple of days later and that, shortly thereafter, the therapist contacted law enforcement.

[39] A17-18.
[40] A18-19.

Testimony Regarding Ann's Prior Statements And Her Demeanor Served No Proper Purpose

To introduce a hearsay statement, a party is required to establish that it falls within one of the exceptions to the hearsay rules. If the party meets that burden, it must then establish that "the purpose of admitting the statement is relevant to an issue at trial" and that any probative value that evidence may have "is not substantially outweighed by the danger of unfair prejudice to the defendant."[41] Here, the State argued that Ann's hearsay statement to her father alleging that Heald touched her was admissible under the excited utterance exception to the hearsay rule for the purpose of countering some sort of attack on her credibility for failing to tell an adult at the Heald house about what happened. In addition to failing to meet its burden to establish that Ann's irrelevant hearsay statement was an excited utterance, the State brought in a volume of additional irrelevant and unfairly prejudicial evidence.

To be admissible as an excited utterance, a hearsay statement must "relat[e] to a startling event or condition, made while the declarant was under the stress of excitement that it caused.[42] "[W]hen faced with an objection to an excited utterance, a trial court should conduct a hearing outside the

[41] *Sanabria v. State*, 974 A.2d 107, 112 (Del. 2009). See *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999) (citing D.R.E. 401, 402 and 403).
[42] D.R.E. 803(2).

presence of the jury to consider the necessary evidence and make the findings of fact essential to determine whether the statement constitutes an admissible excited utterance."[43] The court did not follow that procedure in this case. Therefore, evidence relevant to whether Ann was under the stress of excitement of the startling event was erroneously before the jury. This evidence was irrelevant and improperly elicited sympathy from the jury. Had the court conducted voir dire, the jury would not have heard the irrelevant and sympathetic opinions that something "really bad had happened," or that Ann was "extremely upset and scared," "kind of embarrassed," "pretty mortified" and "very nervous." Further, the jury would not have been informed that Ann "was crying for a while. Her eyes were red and puffy."

Assuming the circumstances support finding Ann's hearsay statement was an "excited utterance," only her actual words would fall under that

[43] *Tucker v. State*, 884 So. 2d 168, 173 (Fla. Dist. Ct. App. 2004). *See, e.g.*, *Williams v. United States*, 859 A.2d 130, 139 (D.C. 2004) (voir dire outside presence of jury to make determination on whether the statement qualified as an excited utterance); *United States v. Taylor*, 978 F.2d 1260 (6th Cir. 1992) (conducting hearing outside presence of jury to determine whether the proffered hearsay was admissible under the excited utterance exception to the hearsay rule); *State v. Lopez*, 974 So.2d 340, 344 (Fla. 2008) (hearing outside presence of jury to determine if statement admissible as an excited utterance); *Wright v. State*, 249 S.W.3d 133, 139 (Ark. 2007) (heard each witness's testimony outside presence of jury before ruling statements were excited utterances).

exception to the hearsay rule, not Smith's narrative or perception of the statement. Here, it is unclear which portions of his testimony are Ann's actual statements and which are Smith's statements. For instance, Smith testified that his then 9-year-old daughter told him that "***someone*** had touched me, touched me ***inappropriately***." He then said that Ann told him that it was "[t]he uncle, the friend's uncle" that had touched her.[44] At best, therefore, the totality of the statement that should have been permitted to fit under the hearsay exception is that "the friend's uncle touched her [inappropriately]." Even so, the State would still have been required to establish the probative value of the statement before it could be deemed admissible.

Even the phrase "the friend's uncle touched me [inappropriately]" was inadmissible as it did not serve a proper purpose in this case. It is true that "[b]ackground information" may sometimes "be necessary to give the jury a complete picture at trial and to ensure the jury is not confused in a way that would be unfavorable to the prosecution."[45] However, Ann's statement was not necessary to establish how the investigation unfolded. All the State needed to introduce was that Ann left the Heald's house and immediately told her parents that something happened and that this triggered the investigation.

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[44] A21-22.
[45] *Sanabria*, 974 A.2d at 112.

Instead, the State improperly introduced a prior consistent statement directly through Smith and indirectly through Houghton. And, it is improper to permit a witness to testify that another witness has made a prior consistent statement, absent an express or implied charge against the declarant of recent fabrication or improper influence or motive.[46] The record reveals that defense counsel's strategy in no way involved any such charge against Ann.[47] In fact, the prosecutor did argue to the jury in her closing precisely that which defense counsel predicted, that because Ann told the same story to multiple adults- an inference could be drawn that she was telling the truth.[48]

The Prejudice Of Ann's Parent's Testimony Substantially Outweighed Its Probative Value

Assuming, *arguendo*, this Court concludes that the State properly presented Ann's hearsay statement and related evidence as necessary background information, it must conclude that it was unfairly prejudicial to Heald. The value added was minimal. On the other hand, the State dumped in a significant amount of evidence that did nothing more than bolster and elicit sympathy for Ann. Thus, Heald's convictions must be reversed.

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[46] D.R.E. 801 (d) (1) (B). *See Tome v. United States*, 513 U.S. 150, 156-157 (1995); *Stevenson v. State*, 149 A.3d 505, 511 (Del. 2016).
[47] See *Baker v. State*, 213 A.3d 1187, 1191 (Del. 2019).
[48] A56-57.

II. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT PERMITTED THE FORENSIC INVESTIGATOR WHO TOOK THE COMPLAINANT'S STATEMENT TO TESTIFY ABOUT HER OWN TRAINING AND EXPERIENCE IN INTERVIEW TECHNIQUES AND ABOUT THE CAC INTERVIEW PROCESS.

Question Presented

Whether the forensic investigator who takes the statement of a complainant bolsters that statement, amounting to plain error, when she testifies about her own training and experience in interview techniques and about the interview process.[49]

Standard and Scope of Review

This Court reviews an issue not raised below for plain error.[50]

Argument

In a "she said/he said" case, the State erroneously presented the CAC forensic investigator to improperly vouch for the credibility of the statement she obtained from Ann. Rather than simply authenticate the recorded statement for purposes of 11 Del.C. §3507, the investigator touted her experience and training in interviewing children. She also explained the purpose and process of obtaining statements from children in sex abuse cases. The introduction of this irrelevant testimony created a substantial risk that the

[49] *See* Del. Sup. Ct. R. 8.
[50] *See Id.*; *Wainwright v. State*, 504 A.2d 1096 (Del. 1986).

jury believed that the investigator's skills and methods induced a truthful statement. Since the improper vouching in our case went to the central issue at trial – the complainant's credibility – Heald's convictions must be reversed.

Ann testified on the second day of trial. She provided minimal facts surrounding the actual allegation. She did say that, on the afternoon in question, she and her friends were playing a game with Darth. When the prosecutor specifically asked if she was touched during the game, Ann referred only to being tickled on her stomach. She also said that Heald tickled Brian.[51] The State then attempted to play Ann's CAC statement. However, defense counsel objected due to the State's failure to lay a proper foundation under 11 Del.C. §3507. So, the prosecutor returned and again asked Ann if she was touched when she was playing with Darth. This time, Ann responded that Darth had touched her private.[52] That was the full extent of her in-court allegation against Darth.

Improper Bolstering

The State then called Amy Kendall, the forensic investigator who interviewed Ann, for the purpose of introducing Ann's CAC statement.[53] Kendall testified about her current job and her reason for interviewing Ann.

[51] A39.
[52] A41.
[53] A41-43.

She told the jury that she received specialized training at Corner House in Minnesota on how to conduct forensic interviews.[54] She explained that, "[t]he interviews are in a child friendly environment. All of the questions are open ended and non-leading, and that enables the child to provide information from their perspective."[55] She told the jury that if a child has a difficult time opening up about things that might be embarrassing or difficult to talk about, there are techniques she uses to make it easier for them. "I tend to build rapport with the child, just help talk about something that might make them more comfortable in the room. Sometimes if a child doesn't want to say something out loud, I give them the opportunity to write it down or draw a picture about it."[56] She also uses anatomical drawings to assist the child. And, she claimed that she has conducted over 750 interviews. [57]

In *Richardson v. State*,[58] this Court noted that the investigator's sole purpose at trial is to authenticate the CAC statement for its introduction. It then condemned the testimony of the forensic investigator in that case who

[54] A42.
[55] A42. Detective Mackie watched Brian's CAC statement and he presented testimony similar to Kendall's that bolstered the interview process. He told the jury that he scheduled the children for interviews with the CAC so that "there's no leading questions, nothing like that, so the kid can feel comfortable and open to talk about what occurred." A25, 27.
[56] A42.
[57] A42.
[58] 43 A.3d 906 (Del. 2012).

explained the CAC interview process as well as her own training and experience to the jury. The testimony "served no purpose other than to validate the interview process, and its ability to draw out the truth from child victims."[59] The investigator "was not an expert witness and it is doubtful that the jury required an expert to explain the way children are interviewed. Even if she had been admitted as an expert, [the investigator] should not have been allowed to offer an opinion as to the truthfulness of the children's statements."[60]

Plain Error

Kendall's testimony, like the investigator's testimony in *Richardson*, also went beyond authentication and served no purpose other than to validate the process. Thus, as in *Richardson*, there was plain error. "When testimony that constitutes such impermissible vouching is admitted into evidence, this

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[59] *Richardson*, 43 A.3d at 911. *Wright v. State*, 504 S.E.2d 261, 263 (Ga.App. 1998) (holding trial court did not err when it prevented defendant from presenting testimony of a psychologist concerning proper interviewing techniques of children). See *Commonwealth v. Allen*, 665 N.E.2d 105 (Mass.App.Ct. 1996) (holding trial court did not err when it precluded an expert witness to comment on questions used in videotaped interview of child victim in sex abuse case because jury could make its own assessments based on the evidence presented); *State v. Biezer*, 947 S.W.2d 540 (Mo.Ct.App.E.D. 1997) (holding trial court did not abuse its discretion when it refused to admit expert testimony about techniques used to interview children because there is a "risk of commenting on the victim's credibility and that it injects a collateral issue into the case and may confuse and muddle the mission of the jury.").

[60] *Richardson*, 43 A.3d at 909.

Court will find plain and reversible error."[61] Kendall's credentials as an experienced forensic interviewer who is well trained in the methods of interviewing children "may have imparted credibility to [Ann's] testimony-owing not to [her] believability but to the credentials of the [investigator]-witness vouching for [them]."[62] Essentially, Kendall told the jury that it could believe the statements she obtained because she is trained to obtain trustworthy statements.

This was a credibility case involving no physical evidence. None of the State's other witnesses validated Ann's allegations. Heald denied the allegations under oath. The jury had the opportunity to observe the testimony

[61] *Luttrell v. State*, 97 A.3d 70, 78 (Del. 2014). *See e.g., Holtzman*, 1998 WL666722*5 (Del. July 27, 1998) ("It is plain and reversible error for a State's witness to directly or indirectly express a personal opinion about a witness' veracity."); *Stevens v. State*, 3 A.3d 1070 (Del. 2010) (reemphasizing the inadmissibility of the opinion of a police officer as to witness credibility); *Miles v. State*, 2009 WL 4114385*2 (Del. Nov. 23, 2009) (finding error to allow officer's statements about credibility to be presented to the jury); *Waterman v. State*, 956 A.2d 1261, 1264 (Del. 2008) ("experts may not usurp the jury's function by opining on a witness's credibility"); *Hassan-El v. State*, 911 A.2d 385 (Del. 2006) (finding error where 3507 statement was replete with officer's opinion as to the witness' truthfulness); *Miller v. State*, 893 A.2d 937 (Del. 2006) (holding that portions of 3507 statement containing police officer suggestions that defendant committed the crime should have been redacted). *Capano v. State*, 781 A.2d 556, 595-596 (Del. 2001). *See Graves v. State*, 648 A.2d 424 (Del. 1994) (reversing, in part, because lawyer for two prosecution witnesses testified as to his impressive credentials and that he urged the witness to cooperate with investigators and tell the truth).

[62] *Capano*, 781 A.2d at 596.

of all of the State's witnesses. In fact, over defense objection, during deliberations, the jury was permitted to view Ann's and Brian's CAC statements a second time.[63] The jury was in a position to sufficiently "assess the truth of the testimony[.]"[64] This assessment was thwarted, however, through the improper introduction of Kendall's vouching testimony. Therefore, it was plain and reversible error for Kendall to directly or indirectly express her opinion about the veracity of Ann's statement.

[63] A58-59.

[64] *Floray v. State*, 720 A.2d 1132, 1135 (Del. 1998) ("… the common experience of the jury provides a sufficient basis to assess the credibility of the child-witness and the testimony of an expert witness is not necessary to assist the jury.")

III. IN THIS CREDIBILITY CASE, THE PROSECUTOR'S REPEATED COMMENTS WHICH DIRECTLY AND INDIRECTLY VOUCHED AND ELICITED SYMPATHY FOR THE COMPLAINANT WERE IMPROPER AND JEOPARDIZED THE FAIRNESS AND INTEGRITY OF HEALD'S TRIAL.

Question Presented

Whether the prosecutor's repeated comments which directly and indirectly vouched and elicited sympathy for the complainant were improper and jeopardized the fairness and integrity such that it requires reversal.[65]

Standard and Scope of Review

When the issue of whether the prosecutor has made improper comments is not raised below, it is reviewed for plain error. Even when there is no plain error, this Court may still reverse if the errors are repetitive.[66]

Argument

Throughout the prosecutor's opening statement and closing arguments in this credibility case, she made comments that directly or indirectly vouched for Ann's credibility, in general, and improperly bolstered the credibility of her CAC statement in particular. The State relied heavily on Ann's CAC statement to prove its case. There was no physical evidence to support her

[65] *See* Del. Sup. Ct. R. 8.
[66] *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

allegation against Heald. None of the State's other witnesses at the scene validated her claim. Heald testified under oath and denied her allegation. In fact, his testimony, as opposed to Ann's statement, was more consistent with the testimony of the State's other witnesses. And, Ann's in-court testimony on the sequence of events was minimal at best. Thus, the prosecutor's repeated improper comments amounted to a material defect that denied Heald a fair trial which requires that his convictions now be reversed.

Baker v. State instructs that, on a claim of prosecutorial misconduct, this Court must first conduct "a *de novo* review of the record to determine whether misconduct actually occurred."[67] If misconduct did occur, then, where there was no objection or intervention by the court below, this Court will reverse where the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[68] If the Court does not find plain error, the matter is not ended, however. "Under the *Hunter* test, [this Court] *can* reverse, but need not do so, notwithstanding that the prosecutorial misconduct would not warrant reversal"[69] if it determines the

[67] *Baker*, 906 A.2d at 148, 150.
[68] *Id.* at 150 (quoting *Wainwright*, 504 A.2d at 1100).
[69] *Id.* at 149 (citing *Hunter v. State*, 815 A.2d 730 (Del. 2002)).

prosecutor's comments "are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.[70]

A. Improper Comments Are A Form Of Prosecutorial Misconduct.

A prosecutor engages in misconduct when she vouches for the credibility of a State witness as "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." [71] "Prosecutors may not comment on the truth of testimony or credibility of witnesses. This general rule includes a specific prohibition against vouching for the credibility of the State's witnesses such as stating or implying personal knowledge of the truth of their testimony 'beyond that logically inferred from the evidence presented at trial.'" [72] Further, "[t]he scales of justice must never be tipped by the prosecutor's personal beliefs or

[70] *Id*.
[71] *United States v. Young*, 470 U.S. 1, 18–19 (1985). See *Trump v. State*, 753 A.2d 963, 967 (Del. 2000); *Saunders v. State*, 602 A.2d 623 (Del. 1984)).
[72] *Caldwell v. State*, 770 A.2d 522, 529–30 (Del. 2001).

by the weight of the prosecutor's office."[73] That is because "the prosecutor represents all people including the defendant[.]"[74]

In denouncing prosecutorial vouching, this Court has cited to the ABA standards, which provide:

> The line between permissible and impermissible argument is a thin one. Neither advocate may express his personal opinion as to the justice of the cause or the veracity of witnesses. Credibility is solely for the triers, but an advocate may point to the fact that circumstances or independent witnesses give support to one witness or cast doubt on another. The prohibition goes to the advocate's personally endorsing or vouching for or giving his opinion; the cause should turn on the evidence, not on the standing of the advocate, and the witnesses must stand on their own.[75]

1. The Prosecutor's Improper Argument During Her Opening Statement Was Designed To Bolster The Credibility Of Ann's CAC Statement.

During her opening statement, the prosecutor told the jury that Ann was a "nervous Nellie" and "had some anxiety issues."[76] She then explained the State expected Ann was going to be nervous at trial. This was followed by a

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[73] *Brokenbrough v. State*, 522 A.2d 851, 859 (Del. 1987). *See Clayton v. State*, 765 A.2d 940, 942 (Del. 2001) ("As a general rule, prosecutors may not express their personal opinions or beliefs about the credibility of witnesses or about the truth of testimony.").
[74] *Hunter*, 815 A.2d at 735 (*quoting Sexton v. State*, 397 A.2d 540, 544 (Del. 1979)).
[75] *Brokenbrough*, 522 A.2d at 858 (*quoting* Commentary ABA Standards relating to the Prosecution Function and Defense Function, page 128).
[76] A15.

lengthy description of CAC interview training and techniques and the actual interview process:

> [There] are experienced interviewers who will interview children in a soft setting. So in other words, it's not a child being brought into a police headquarters to be interviewed. The other benefit you will hear testimony about is that in addition to it being a setting outside of a police environment, the child is only interviewed once. So multiple people in the system such as doctors, attorneys like myself, prosecutors, police officers, Division of Family Services, all of those people can witness this interview taking place live, but we're not in the room with the child. And the child is only interviewed one time as opposed to be interviewed on multiple occasions. The other thing is these interviewers are skillfully trained to not ask leading questions or suggestive questions. They're very open-ended and it's to not cause any more trauma to a child who may have suffered trauma or may have witnessed trauma.[77]

As explained in Argument II, the State committed plain error when it presented the testimony of the forensic investigator that "created a substantial risk that the jury would conclude that [the investigator's techniques] induced [the complainant] to tell the truth[.]"[78] Here, the damage in *Richardson*[79] was compounded because, in addition to the witness, the prosecutor also imparted credibility to Ann's CAC statement. The prosecutor's comment about the interview process was made even more egregious by that fact that it formed the basis of a preemptive, if indirect, argument urging the jury to place more

[77] A15.
[78] *Capano*, 781 A.2d at 595.
[79] *Richardson*, 43 A.3d 906.

weight on the CAC statement - "[s]o the good thing in this case is as nervous as Ann may be, there is that recorded statement."[80] Thus, the prosecutor's improper argument in her opening statement was prosecutorial misconduct.

2. The Prosecutor Made Several Improper Comments During Her Closing Arguments.

Not only did improper bolstering take place during the State's opening statement and throughout the trial, it continued throughout the State's closing and rebuttal arguments.

a. Vouching For Ann's And Her Parent's Action Through Improper Expression Of Opinion.

The prosecutor told the jury that Ann did the "right thing" by telling her parents that Heald touched her. The prosecutor also told the jury that the parents did the right thing in how they handled Ann's claim:

> ***[Ann] did everything right.*** She got the touch. She knew it wasn't right. She got out of there. And she told her parents, and she told her therapist. And to judge her parents, everybody responds to trauma differently, and ***her parents did the right thing.*** They reached the therapist because their priority was not law enforcement, was not reporting a crime, not the defendant. In that moment their priority was their daughter, and they took care of their daughter.
>
> And ***the system actually worked***. It got reported through the therapist. And when it got reported, ***the system worked***, the interview at the Child Advocacy Center.[81]

[80] A15.
[81] A57.

It was proper for the prosecutor to address the evidence in the record as to the sequence of events provided by Ann and the reasons provided by the parents for the choices they made in reporting Ann's allegation as defense counsel had cross-examined the State's witnesses on that issue. It was also proper to argue reasonable inferences from that evidence. However, it was not proper for the prosecutor to express her opinion regarding those choices.

The prosecutor's expression of opinion in this area "constituted improper commentary on the justness of the cause in general"[82] and it "convey[ed] the impression that evidence not presented to the jury, but known to the prosecutor," required a conclusion that the choices the witnesses made were "right" and that as a result of those choices, "the system worked"[83] and the right person was brought to trial.[84] Accordingly, this destroyed Heald's presumption of innocence.[85]

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[82] *Brummett v. State*, 10 N.E.3d 78, 87 (Ind. Ct. App. 2015) (finding prosecutor's remark during closing that witness "just had to do the right thing," was impermissible).

[83] *Young*, 470 U.S. at 18–19.

[84] *Brummett*, 10 N.E.3d at 87.

[85] The prosecutor's comment that "system worked" essentially "emasculated the constitutionally guaranteed presumption of innocence." *Kirkley v. State*, 41 A.3d 372, 378 (Del. 2012) (finding prosecutor engaged in misconduct when he stated that the charges were brought because the defendant committed the crime). *See Hardy v. State*, 962 A.2d 244, 247 (Del. 2008) (holding prosecutor's comment that the State did not take "falsely reported cases to trial dramatically jeopardized the fairness and the integrity of the trial, because that statement eviscerated the presumption of [the defendant's]

b. The Prosecutor Improperly Urged The Jury To Believe Ann Because She Told A Consistent Story Multiple Times.

Prior to trial, the prosecutor represented that the purpose of introducing evidence of the number of people to whom Ann had relayed her claim was to explain how the investigation unfolded and to counter an anticipated credibility argument by the defense arising from the fact that Ann did not say anything before leaving the Heald household.[86] Yet, during her closing, the prosecutor argued:

> On the one hand, you have Ann, who is a nine-year-old young girl. She experienced something very traumatic to her. She ran home and she told an adult. ***She told a number of adults, trusted adults, who could help her.*** And what more could a parent ask for in that situation?[87]
>
> Do you find [the person who made the allegation] believable? What do their bias and interest seem by coming into this courtroom, ***by telling what happened to them multiple times and saying the same thing?*** You start with that person. Do you believe [the complainant]?[88]

The prosecutor improperly urged the jury to believe Ann because she told her story "multiple times" to "a number of adults" and said, "the same thing." First, the record does not reveal what Ann told the various adults.

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innocence by inferring guilt from the mere fact the State chose to prosecute him") .

[86] A12.

[87] A56.

[88] A57.

Thus, there was no basis for a reasonable person to infer that Ann actually did say "the same thing" "multiple times."

Second, it is improper to use the fact that a witness made a prior consistent statement as a basis to bolster a witnesses testimony, absent an express or implied charge against the declarant of recent fabrication or improper influence or motive.[89] The record reveals that defense counsel's strategy at trial in no way involved any such charge against Ann.[90] Thus, the prosecutor's argument was improper as it urged the jury to believe Ann simply because she gave prior consistent statements.

c. The Prosecutor Improperly Expressed Her Own Subjective Observation To Elicit Sympathy From The Jury For Ann.

It is "improper for the prosecution to appeal to sympathy in its closing argument."[91] Not only is that what the prosecutor did in our case, she did it in the form of her own subjective opinion:

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[89] D.R.E. 801 (d) (1) (B). *See Tome*, 513 U.S. at 156-157; *Stevenson*, 149 A.3d at 511.

[90] See *Baker*, 213 A.3d at 1191.

[91] *Briscoe v. State*, 905 A.2d 746 (Del. 2006). *See Jones v. State*, 152 A.3d 140 (Del. 2016) ("It is elementary that it is improper for an attorney to ask the jury to sympathize with either a victim or the defendant."); *United States v. Christy*, 916 F.3d 814, 834 (10th Cir. 2019) (finding remark that witness was "probably the most sincere witness the prosecutor had ever seen" to be improper vouching).

> It looked like this was probably one of the more painful things this ten-year-old had ever had to have done in her life up to this point.[92]

Rather than focusing on the evidence in the record that might affect the credibility of the complainant, the prosecutor once again impermissibly expressed her opinion. This time it was "to invoke the sympathy or anger of the jury by focusing on … the indignities associated with trial, without connecting it to the relevant issues presented to the jury."[93]

d. The Prosecutor Improperly Based An Argument On Facts Not Supported By The Record And Sought To Inflame The Passions Of The Jury Through Her Characterization Of The Charges.

The prosecutor extended a proper bias argument beyond that which could be reasonably inferred from the record. In doing so, she also inflamed the passions of the jury against Heald through an improper characterization of his charges.

> "Let's face it. When it comes to family members, ***no one wants to think or believe that a family member could ever do something as heinous as what we are alleging here***. It's something that ***family may choose to never believe it ever happened, unless they saw it with their own eyes***."[94]

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[92] A56.

[93] *Chambers v. State*, 924 So. 2d 975, 978 (Fla. Dist. Ct. App. 2006) (finding prosecutor's expressed indignation at the need for the victim to testify the morning after her graduation and the need for her to face questioning by defense counsel as to her credibility was improper). *See Richardson*, 43 A.3d at 911 (finding it improper to ask the young girl in a credibility case to testify that she is embarrassed because it "naturally engenders sympathy").

[94] A56.

> I'm not saying they are being intentionally deceptive, ***but they are under influence***, I guess is a better word. They love their uncle. They have clearly seen their uncle since all of this. They live in the family. They're all together. They're together today. They were here every day together. They went on vacation. It's been discussed. And no one, like I said, ***no one wants to believe a family member could do something like this***."[95]

"Closing arguments are an opportunity for counsel to argue reasonable inferences drawn from the evidence. While the prosecutor is entitled to focus the jury's attention on admitted evidence, a [comment] that achieves no end but to inflame the passions of the jury is improper."[96] Here, the prosecutor's characterization of the alleged "touch" as "heinous" was just such a comment. And, her argument that "no one want to believe a family member could do something like this" goes well beyond a reasonable inference from the record.

The plain meaning of the term "heinous" is "hatefully or shockingly evil"[97] and it is not an element of any of the offenses charged against Heald. It was not relevant at trial. Rather, "heinousness" is generally a consideration at sentencing "to describe a particularly offensive crime."[98] In fact, it can be

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[95] A57.

[96] *Spence v. State*, 129 A.3d 212, 223–24 (Del. 2015)(finding prosecutor's power point used during closing argument improper where it displayed the victim's bloody body with the words "Terror," "Fear," and "MURDER" in red lettering as it served no purpose other than to attempt to inflame the jury).

[97] https://www.merriam-webster.com/dictionary/heinous (last visited 9/27/2020).

[98] *Cartwright v. Maynard*, 822 F.2d 1477, 1485 (10th Cir. 1987), *aff'd*, 486 U.S. 356 (1988).

an aggravating circumstance for purposes of imposing the death penalty. In other words, not even all murders are considered heinous, let alone a brief touch on a private part over clothes. This time the prosecutor provided her own inflammatory assessment of the crime not supported by the record.

The second impropriety with this set of comments is that the prosecutor's arguments that "no one wants to believe a family member could do something like this" and that certain State witnesses were under Heald's "influence" went beyond an acceptable bias argument supported by the record. While it was permissible for the prosecutor to argue that family members may have had an interest in testifying favorably for Heald, to make a categorical argument that "no one wants to believe a family member could do something like this"[99] was a step too far.

Even more problematic, there was nothing in the record to support an inference that Ashley and Brian were under Heald's "influence." Not only could the prosecutor not relate these particular arguments to specific evidence, it allowed the jury to speculate that she had personal knowledge beyond that logically inferred from the evidence presented at trial. Thus, the statements constituted impermissible comments.

[99] *Caldwell v. State*, 770 A.2d at 529 - 30.

B. The Prosecutor's Repetitive Errors Require Reversal.

The numerous improper comments made by the prosecutor in her opening statement and closing arguments were "so clearly prejudicial" to Heald's substantial rights that they "jeopardized the fairness and integrity of the trial process."[100] Both the State and the jury relied heavily on Ann's CAC statement. Since the State's improper comments in our case went to the central issue at trial –credibility – they constitute plain and reversible error.[101]

Assuming, *arguendo*, this Court does not find plain error, it should still reverse under *Hunter* because this is not "a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential."[102] The improper comments began during the State's opening statement and continued through the State's rebuttal. They were part of a theme to bolster Ann's story which differed from the testimony of all the other witnesses at the scene, including Heald. Reversal is required because these errors "cast doubt on the integrity of the *judicial* process."[103]

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[100] *Wainwright,* 504 A.2d at 1100.
[101] *Richardson*, 43 A.3d at 910.
[102] *Berger v. United States*, 295 U.S. 78, 89 (1935).
[103] *Baker*, 906 A.2d at 150 (*citing Hunter*, 815 A.2d 730).

IV. THE ERRORS AT TRIAL CUMULATIVELY PREJUDICED HEALD AND DEPRIVED HIM OF A FAIR TRIAL.

Question Presented

Whether the prior errors cumulatively deprived Heald of a fair trial.[104]

Standard and Scope of Review

"[W]here there are several errors in a trial, a reviewing court must also weigh the cumulative impact to determine whether there was plain error from an overall perspective."[105]

Argument

Credibility was central in this case. The primary source of evidence for the State was Ann's CAC statement. Heald testified, denying Ann's allegations under oath. His testimony was consistent with that of Ashley and Brian. The strategy the prosecutor sought to employ was to improperly bolster the credibility of and elicit sympathy for Ann.

In her opening statement, the prosecutor sought to condition the jury to believe Ann's CAC statement was truthful by improperly focusing on the investigator's skills and the interview process. Then, before Ann even testified, the State presented the testimony of both of her parents who provided

[104] Del. Sup. Ct. Rule 8.
[105] *Michael v. State,* 529 A.2d 752 (Del. 1987); W*right v. State*, 405 A.2d 685 (Del. 1979).

a summary of her prior consistent statement to her father. The jury was permitted to hear her parents talk about how scared, embarrassed and mortified their daughter was the night she came home from the Heald's house. The State dumped in more evidence of vouching for the CAC statement through the testimony of the forensic investigator.

Then, during closing, the prosecutor uttered several improper comments. She told the jury that it looked like coming into court to testify was "probably one of the more painful things this ten-year-old had ever had to have done in her life up to this point."[106] She said that the State's other witnesses were under Heald's influence and probably would never want to believe that he did this "heinous" thing. But, on "multiple times, Ann told the "same thing" to "a number of adults." She and her parents did "the right thing" and - the "system worked."

The errors so permeated the trial from start to finish that they were actually a feature of the trial. Thus, assuming this Court finds error in each of the previous arguments but does not find that each error, standing alone, warrants reversal, it must conclude that their cumulative impact requires reversal.

[106] A56.

CONCLUSION

For the reasons and upon the authorities cited herein, Heald's convictions must be reversed.

Respectfully submitted,

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