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Case Number 37,2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN MILLER,	§	
	§	No. 37, 2021
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On November 21, 2016, a Superior Court grand jury indicted Kevin Miller on charges of first-degree murder, possession of a firearm during the commission of a felony ("PFDCF"), and possession of a firearm by a person prohibited ("PFBPP").[1] The Superior Court later severed the PFBPP charge from the others.[2] On April 23, 2018, a grand jury reindicted Miller, adding one count of witness tampering against him.[3]

On October 17, 2019, Miller's case proceeded to a jury trial on the primary charges and a simultaneous bench trial on the PFBPP charge.[4] After the close of the State's evidence, the Superior Court granted Miller's motion for judgment of acquittal on the count of witness tampering.[5] Then, the jury found Miller guilty of first-degree murder and PFDCF, and the court found him guilty of PFBPP.[6] The court ordered a pre-sentence investigation.[7]

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[1] A1, at Docket Item ("D.I.") 1, A31–32.

[2] *See* A2, at D.I. 7, A18, at D.I. 89.

[3] A7, at D.I. 30, A9, at D.I. 34, A93–95. The re-indictment also included a witness tampering charge against Miller's sister. *See* A93–95.

[4] A20, at D.I. 110, A27, at D.I. 2.

[5] A20, at D.I. 110.

[6] A20, at D.I. 110, A27, at D.I. 2.

[7] A20, at D.I. 110.

On November 5, 2019, Miller filed a motion for a new trial.[8] After receiving the trial transcripts, he filed an amended motion on February 26, 2020.[9] The Superior Court denied the motion.[10]

The State then filed a motion to declare and sentence Miller as an habitual offender.[11] On January 8, 2021, the Superior Court granted the State's motion and sentenced Miller: (i) for first-degree murder, to life in prison; (ii) for PFDCF, as an habitual offender, to 25 years in prison; and (iii) for PFBPP, to 25 years in prison, suspended after 10 years for 5 years of probation.[12]

Miller filed a timely notice of appeal. He filed an opening brief on June 28, 2021. This is the State's answering brief.

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[8] A20, at D.I. 112.

[9] A22, at D.I. 126.

[10] *State v. Miller*, 2020 WL 4355557 (Del. Super. Ct. July 30, 2020).

[11] A24, at D.I. 143.

[12] A24–25, at D.I. 142, 144, 145, A969–70.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. Miller expressed alibis in three different ways. After the State played recordings of the alibis—without objection—Miller argued that two were the same, expressed differently, and that the third—the "Smyrna alibi"—referenced a different murder investigation altogether. The prosecutors did not engage in misconduct by admitting evidence of the Smyrna alibi, stating their intention to cross-examine him about it if he testified, or by using the alibi evidence in their closing arguments. The calls did not delineate between the murders, and the chief investigating officer testified that he believed the Smyrna alibi also referenced the instant murder. Regardless, the use of the evidence did not clearly deprive Miller of any substantial rights or show manifest injustice. The substance and force of the State's case would not have materially changed without the evidence, and it hardly permeated the two-week trial that included substantial direct evidence of Miller's guilt. Furthermore, the prosecutors did not unconstitutionally infringe upon Miller's right to testify by proffering, in open court, the topics about which they intended to cross-examine Miller. The proffer armed Miller with more information to make his decision and gave him the opportunity to limit or exclude any lines of questioning if they were actually impermissible.

II. The Appellant's argument is denied. The Superior Court did not abuse its discretion by admitting the out-of-court statement of a witness who disappeared after being threatened at his job on the first day of trial. Miller made extensive efforts to derail his prosecution, coordinating with associates and employing explicit threats of violence against witnesses. The court did not exceed the bounds of reason by concluding that Miller acquiesced to this act of intimidation, too. In any event, given the substantial other evidence of Miller's guilt—his motive, his stated intentions, his opportunity, the eyewitness identifications of him as the shooter, his quasi-admission after the fact, and a consciousness of guilt as exhibited by his intimidation tactics—any error in admitting the out-of-court statement was harmless.

STATEMENT OF FACTS

By July 2012, Kevin "Chevy" Miller had begun an intimate relationship with Krystle Bivings.[13] Bivings and Jeremiah "Farmer" McDonald had a child together.[14] The intertwined relationships led to "bad blood" between Miller and McDonald.[15] Several people witnessed them engaged in verbal altercations.

Warner "Gene" Wheeler had seen Miller accost McDonald.[16] Wheeler grabbed McDonald to keep the situation from escalating into a fistfight.[17] Miller said to Wheeler, "You ain't got to hold him, no, I ain't g[e]t down [that]way."[18]

Michael Mude, who grew up with both Miller and McDonald, also saw them argue.[19] Afterward, Miller was "pretty pissed off" and said he was "getting sick and tired of seeing [McDonald] walking around there."[20] Mude later overhead Miller say on the phone that he did not want anybody "to put their hands on him" and that he would "handle it his self."[21] After the call, Miller explained that

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[13] A312–13.

[14] A312–13.

[15] A313, A484.

[16] A485.

[17] *See* A485.

[18] A485; *see also* Opening Br. 15.

[19] A416.

[20] A416.

[21] A416.

McDonald had "disrespected him the night before" and that he "was going to make an example out of him."[22] Miller asked Mude where he could find McDonald.[23]

Anthony Pruitt confirmed there was animosity between Miller and McDonald. Miller had said to Pruitt, "Tell him [McDonald] Halloween is coming early."[24]

Later, on July 17, 2012, Miller and Mude met at the Governor's Square shopping center.[25] While there, Miller received a text message, then placed a call and said: "He's out there right now, where at? . . . Just keep him right there. . . . Do whatever you got to do, talk to him, I'll be right there, five minutes."[26] Miller and Mude got in separate cars and left, both traveling in the direction of Brookmont Farms.[27] As Mude's car kept driving past, he saw Miller turn into Wellington Woods, a neighboring development.[28]

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[22] A416–17.

[23] A417.

[24] A615.

[25] A417.

[26] A417.

[27] A417. Brookmont Farms has since been renamed "Sparrow Run." *See* A378.

[28] A417.

Meanwhile, McDonald was hanging out near the cul-de-sac on Heron Court in Brookmont Farms.[29] He was talking to two women, Marquita Brooks and Shantell Newman, near their cars.[30] Brooks and Newman had been coming and going from Brookmont Farms throughout the day.[31] When they finally returned that evening, after retrieving a cigar to smoke their marijuana, they were alone with McDonald.[32] As Brooks sat in a car to roll her marijuana cigar, Newman asked McDonald to help her find a bathroom.[33] McDonald took her to a house to use the bathroom, and then they returned together to the car where Brooks sat.[34]

Wheeler and James "Bocker" Watson were also hanging out near the cul-de-sac on Heron Court that evening.[35] At one point, Watson had a conversation with McDonald.[36] Wheeler saw McDonald talking to the two women.[37]

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[29] A327, A468–69.

[30] A297, A470–71.

[31] A296–97.

[32] A303.

[33] A297–98, A304.

[34] A298, A304.

[35] A327, A468–71.

[36] A327.

[37] A468–71.

Wheeler then saw Miller come out from around the corner of a house.[38] He watched Miller put on a mask and walk quickly in McDonald's direction.[39] After seeing Miller put on the mask, Wheeler decided not to call out to him by name because it would be "dumb" to get involved.[40]

Watson was standing at the end of a driveway when he saw Miller come out from around the side of a home.[41] Miller was already wearing a wolf mask by the time Watson noticed him.[42] When questioned by detectives, Watson at first indicated he did not know who was behind the mask.[43] He later told detectives he knew it was Miller because they grew up in Brookmont together and he recognized Miller by his height, frame, build, and gait.[44] As he passed, Miller pointed a gun at Watson, who responded, "Yo, stop playing."[45] Watson stopped himself from calling Miller by name because he did not want to reveal that he knew Miller's

[38] A471.

[39] *See* A472.

[40] A471–72.

[41] A328.

[42] A328.

[43] A329.

[44] A330–31.

[45] A328.

identity.[46] As Miller kept pointing the gun, Watson said to himself, "Oh, shit. He ain't playing."[47] Watson then ran to the other side of the house.[48]

Brooks and Newman saw someone wearing an animal mask approach McDonald from behind.[49] They saw him fire seven to eight shots at McDonald.[50] At one point, the gun jammed; the shooter fixed it and continued firing another five or so shots.[51] McDonald fell to the ground, and the shooter fled through the bushes between the houses.[52] Wheeler and Watson, who continued observing Miller after he passed them with the mask and gun, also witnessed Miller shoot McDonald and then flee through the cut between the houses.[53] Watson remembered seeing at least four or five shots.[54] Wheeler called 911.[55]

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[46] A330.

[47] A328.

[48] A328–29.

[49] A298, A305–06.

[50] A298.

[51] A298–99.

[52] A299.

[53] A328–29, A472, A474.

[54] A328–29.

[55] A472, A474.

Brooks, who was initially dazed, also called 911.[56] Newman ran over and attempted to perform CPR on McDonald.[57] The police arrived minutes later, and then the medics.[58] McDonald was pronounced dead at the scene.[59]

The police found nine .45-caliber shell casings, two live rounds, and one projectile at the scene.[60] A police dog tracked the shooter through the houses but lost the scent near the Wellington Woods development.[61]

The next morning, around 7:00 or 8:00 a.m., Miller returned to Brookmont Farms to visit Bivings at her home.[62] They discussed rumors that they were involved in the murder and "tr[ied] to piece together what happened the night prior."[63] Miller told Bivings that he was home at the time of the murder.[64]

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[56] A299.

[57] A266, A299, A307.

[58] A265–67.

[59] A267.

[60] A277–79.

[61] *See* A271–72.

[62] A315.

[63] A315–16.

[64] A316.

Miller also visited Mude's home that morning.[65] Miller asked Mude what he had heard about the shooting.[66] Mude asked Miller if he was worried, and he responded, "Nah. Mother fuckers that seen me do it know better than to say my name, and the people that know I did it ain't going to say shit."[67]

Days later, Mude saw Miller at McDonald's funeral.[68] Mude asked why he was there, and Miller said that he was "keeping up appearances" because "[y]ou never know who's looking and what they're not seeing."[69]

Two or three weeks after that, Mude ran into Miller at Wal-Mart. Miller questioned why he had not seen Mude around.[70] Mude felt compelled to deny that he was talking to anyone about McDonald's murder.[71] Miller said that Mude was "starting to worry [him]" and that he knew where Mude's mother lived.[72] Upon seeing Mude's "Rest in Peace Farmer" tattoo, Miller threatened that Mude could "end up just like [his] boy Farmer."[73]

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[65] A417.

[66] A417–18.

[67] A418.

[68] A418.

[69] A418.

[70] A418.

[71] A418.

[72] A418.

[73] A418.

ARGUMENT

I. THE STATE DID NOT COMMIT MISCONDUCT BY INTRODUCING EVIDENCE OF MILLER'S MULTIPLE ALIBIS, NOR DID ITS ADMISSION AND USE AT TRIAL CLEARLY DEPRIVE MILLER OF ANY SUBSTANTIAL RIGHTS.

Question Presented

Whether it constituted plain error for the State to introduce alibi evidence that Miller later contested, to proffer that it would ask Miller about his alibis on cross-examination if he testified, and to argue the inferences from the alibi evidence in closing arguments.

Standard and Scope of Review

This Court reviews claims of prosecutorial misconduct for plain error when defense counsel failed to raise a timely and pertinent objection below.[74] This Court first reviews the record *de novo* to determine whether any misconduct actually occurred.[75] If it did, this Court then considers whether the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process" (the "*Wainwright* standard").[76] The review is limited to material, basic, serious, and fundamental defects apparent on the face of the record that

[74] *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

[75] *Id.*

[76] *Id.* (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

"clearly deprive an accused of a substantial right" or "clearly show manifest injustice."[77] If reversal is not warranted under *Wainwright*, this Court then considers, under *Hunter v. State*,[78] whether reversal is nonetheless required because the misconduct entails repetitive errors that cast doubt on the integrity of the judicial process.[79]

Merits of Argument

On recorded prison calls, Miller claimed several times that he was elsewhere at the time of a murder.[80] He expressed those alibis in three different fashions. On one call, he stated that he was at home—which was in the Frenchtown Woods community outside Newark, Delaware.[81] On another, he said that he was at a liquor store in Smyrna, Delaware.[82] On a third, that he was all the way down by Elkton, Maryland.[83] The State played the prison calls at trial, without objection from the Defense, believing that each of these purported alibis referenced

[77] *Id.*

[78] 815 A.2d 730 (Del. 2002).

[79] *Baker*, 906 A.2d at 150 (citing *Hunter*).

[80] A348–52.

[81] *See* A350–51.

[82] A350.

[83] A351.

McDonald's murder.[84] Afterward, Miller's trial counsel represented that the Smyrna alibi actually referenced a different murder, and he sought to introduce evidence of the other investigation to explain the contradictions in Miller's alibis.[85] The parties disputed these underlying facts.[86] It was an issue discussed in closing arguments, and it might have become an issue on cross-examination if Miller had chosen to testify.[87]

Miller contends on appeal that the prosecutors committed misconduct in two related ways. First, he claims that the prosecutors deprived him of a fair trial by introducing the Smyrna alibi into evidence and relying on it during closing arguments.[88] Miller alleges that the prosecutors knew or should have known that the Smyrna alibi referenced a different murder but nevertheless presented it as an alibi for McDonald's murder.[89] As a result, the prosecutors wrongly portrayed Miller as insincere and unnecessarily injected the specter of a second murder into his trial, unfairly prejudicing him before the jury.[90] Second, Miller claims that the

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[84] *See* A354.

[85] *See* A352–53.

[86] *See* A353.

[87] A632, A808–09, A824.

[88] Opening Br. 38.

[89] Opening Br. 33–34.

[90] Opening Br. 38.

prosecutors violated his right to make a free and voluntary choice whether to testify because, after wrongfully introducing a second, unrelated murder into the trial, the prosecutors "threatened" to question him about it in detail on cross-examination.[91]

The prosecutors' actions did not give rise to plain error. In fact, the prosecutors did not commit misconduct at all. The prosecutors introduced the Smyrna alibi under the belief that it did, or could have, referenced McDonald's murder and without objection from the Defense. They then argued appropriate inferences from the evidence in the record. The fact that Miller offered competing evidence to explain the alibi affected the weight of the alibi evidence, but it did not render the State's reliance on it misconduct. The prosecutors also did not commit misconduct by previewing, in open court in the presence of the trial judge and defense counsel, the subjects about which they hoped to cross-examine Miller if he elected to testify. It was a non-coercive environment, and if any of the State's questions risked going too far, they could have been properly limited by the trial judge upon an application from Miller. But even if the prosecutors' actions constituted misconduct, they did not clearly deprive Miller of any substantial

[91] Opening Br. 4–5, 38–39.

rights, and they were not repetitive errors that cast doubt upon the integrity of the judicial process.

A. The Smyrna-Alibi Evidence and the Right to Due Process

(1) *No misconduct occurred.*

Miller claims that the prosecutors violated his right to a fair trial by using the Smyrna-alibi evidence.[92] Before applying the *Wainwright* standard, this Court must first determine whether any misconduct actually occurred.[93] A prosecutor may not misrepresent the evidence admitted at trial, and he may not use false evidence to obtain a conviction.[94] But prosecutors are otherwise permitted to craft arguments based on the trial evidence and the reasonable inferences that flow therefrom.[95] An innocent or unknowing mistake does not rise to the level of prosecutorial misconduct.[96] Certain parts of the evidence may involve

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[92] Opening Br. 38.

[93] *Baker*, 906 A.2d at 150.

[94] *Mitchell v. State*, 2014 WL 1202953, at *6 (Del. Apr. 8, 2014).

[95] *Id.*

[96] *See id.* ("[W]e conclude that the prosecutor's initial narration was an innocent mistake that does not rise to the level of prosecutorial misconduct."); *McCloskey v. State*, 2009 WL 188857, at *2 (Del. Jan. 27, 2009) ("There is no evidence . . . that the State knowingly suborned perjury.").

contradictions or contain uncertainties, but those qualities can implicate the weight of the evidence without signifying prosecutorial misconduct.[97]

Here, the prosecutors did not commit misconduct by introducing the Smyrna alibi into evidence and arguing its significance in closing arguments. The evidence was already admitted and published to the jury before defense counsel represented that the Smyrna alibi referred to a different murder.[98] Even though Miller later introduced testimony that supported his interpretation of the Smyrna alibi,[99] it was not definitively established and remained a fair issue for closing arguments.

On the third day of trial, the State recalled its chief investigating officer, Detective Brian Shahan.[100] During his testimony, the State played several recordings of Miller's prison calls.[101] In an October 26, 2017 call, Miller tells Wheeler that he was home—which was in Newark, Delaware—and received calls

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[97] *See, e.g.*, *McCloskey*, 2009 WL 188857, at *2 ("Scott's testimony at the two trials was not entirely consistent, and McCloskey explored the inconsistencies in an effort to undermine Scott's credibility. But there is nothing in this record to suggest that the State acted improperly in calling Scott as a witness or in eliciting any of his testimony."); *see also Swan v. State*, 248 A.3d 839, 878 (Del. 2021) (explaining, in the context of a claim under *Napue v. Illinois*, 360 U.S. 264 (1959), that "[m]ere contradictions . . . may not require reversal because those contradictions may not constitute knowing use of false or perjured testimony").

[98] A352–53.

[99] A685–89.

[100] A345.

[101] A348–52.

from his wife and his child's mother.[102] In a January 11, 2018 call with Wheeler, Miller tells him that "Gate" called him while has was at a liquor store in Smyrna, Delaware, with his wife.[103] In a January 27, 2018 call, Miller told Wheeler that he was down near Elkton, Maryland.[104] The Defense did not object to the admission of any of these phone calls.[105]

Instead, on cross-examination, defense counsel attempted to elicit testimony about another murder investigation:

> Q. Okay. Are you familiar with the murder of somebody with the name of Two Hundred?
>
> A. Yes.
>
> Q. And was Mr. Miller, did you know, questioned about that murder?[106]

The prosecutor interrupted and asked for a sidebar.[107] The State had been trying to avoid mentioning the other DEA and murder investigations into Miller.[108] Defense counsel explained, however, that he was trying to establish the existence of a

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[102] A350–51.

[103] A350.

[104] A351.

[105] A348–52.

[106] A352.

[107] A352.

[108] A353.

second investigation to explain why one of Miller's alibis was different: "The reason I'm doing that, your Honor, is . . . . they're trying to say he's giving two different stories. However, when he's talking about being in Smyrna, he's talking about the Two Hundred murder . . . , not the murder of [McDonald]."[109]

The State and its witness denied knowing that the Smyrna alibi referenced a different murder, or that the evidence necessitated that conclusion. As the prosecutor explained at sidebar: "[T]he calls do not at all reference or delineate between various murders, he just says what we played, and that's what we have."[110] When defense counsel claimed the calls referenced "two different situations," the prosecutor responded: "But we don't know that."[111] After the sidebar, defense counsel asked Detective Shahan if the separate Smyrna alibi was referencing the same murder as the at-home alibi, and the Detective responded: "I

[109] A352.

[110] A353. Miller similarly observes that "the calls are rambling and jump around from topic to topic." Opening Br. 34.

[111] A353. Miller contends that the prosecutor, with this statement, was being disingenuous with the court and claiming not to know that Miller was a suspect in a second murder. Opening Br. 34. The context of the statement reveals otherwise: the prosecutor did not know if defense counsel's allegation at sidebar, that the Smyrna alibi referenced a different murder, was true. *See* A353. The prosecutor's "[b]ut we don't know that" statement was in direct response to that specific allegation. A353.

believe it to be."[112] When pressed, he admitted that he could not say for sure.[113] Later, the parties discussed how Miller could cleanly introduce evidence to support his contention that the Smyrna alibi might have concerned a different investigation, and the State reaffirmed its beliefs about the evidence:

> [Defense Counsel]: I think I already asked [Detective Shahan], actually when he was up there before if he knew for a fact [Miller] was talking about [the McDonald murder] and [Detective Shahan] said[, "]I thought that's what it was,["] okay.
>
> [Prosecutor]: Yes, which is true.[114]

The prosecutor mentioned the alibis only once during his closing argument. The argument spanned 31 pages of the trial transcript, and the mentions were limited to a single paragraph, tucked in the middle of the argument on the 20th page: "And then we heard on the prison calls these inconsistent alibis. . . . Which is it? Is he in Elkton, Smyrna, and at home, or is he in the circle killing [McDonald] like [Wheeler] and [Watson] said he was[?]"[115]

Miller argues that, despite their representations to the Superior Court, the prosecutors and chief investigating officer knew or should have known that the

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[112] A354.

[113] A354.

[114] A644.

[115] A808–09.

Smyrna alibi concerned a different murder investigation.[116] According to Miller, the call makes clear that he was living in Smyrna at the time, not Newark.[117] The Smyrna alibi also referenced getting a call from someone named "Gate," not from his wife and child's mother, as the at-home alibi did.[118] Moreover, Miller told the Smyrna and Elkton alibis to the same person, just weeks apart.[119] Miller also argues that the at-home and Elkton alibis were in fact the same alibi, expressed differently—meaning he had only one, consistent alibi for the McDonald murder.[120]

The prosecutors were not obligated to accept Miller's proffered explanation of his various statements. It was reasonable to believe that three different expressions of his whereabouts were three distinct stories. The Smyrna alibi was clearly separate, and as for the at-home and Elkton alibis, it is questionable whether a person would refer to his home by reference to a city in a different state. In fact, the trial judge likewise understood the alibis to reference three different places.[121] It was also reasonable for the prosecutors to believe that the calls could

[116] Opening Br. 34.

[117] Opening Br. 34.

[118] Opening Br. 34.

[119] Opening Br. 34.

[120] Opening Br. 20–21, 38.

[121] A353 ("THE COURT: So it's three different places, okay.").

have all concerned the McDonald murder when their own chief investigating officer held that belief and the calls did not explicitly state otherwise.[122] Moreover, the prosecutors would not have viewed the alibi evidence in a vacuum: it existed against the backdrop of multiple witnesses who directly identified Miller as being at or near the scene at the time of the shooting. There was ample room for the possibility that Miller was fabricating alibis and could have been sloppy in doing so. Miller's argument raises proper questions about the weight of the alibi evidence, but it does not establish that any prosecutorial misconduct occurred.

(2) *Even assuming that the prosecutors' actions constituted misconduct, McDonald was not deprived of a fair trial.*

Even if the prosecutors committed misconduct by introducing and arguing the Smyrna-alibi evidence, they did not clearly deprive Miller of a substantial right. The knowing use of false evidence violates a defendant's right to due process.[123] In such cases, a conviction "'must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'"[124] Miller claims that introduction of the Smyrna-alibi evidence unfairly

[122] A353–54.

[123] *Jenkins v. State*, 305 A.2d 610, 616 (Del. 1973) (citing *Napue*, 360 U.S. 264); *see also Carvalho v. State*, 1996 WL 343817, at *1 (Del. June 12, 1996).

[124] *Romeo v. State*, 2011 WL 1877845, at *1 (Del. May 13, 2011) (quoting *United States v. Agurs*, 427 U.S. 97, 106 (1976)).

prejudiced him by wrongly portraying him as a liar and, because it led to mentions of a second murder investigation, as having a propensity for violence.[125] But the State had other means to attack Miller's credibility, and the nondescript mentions of a second investigation hardly "permeated" a trial with multiple direct accounts of Miller's involvement. There was no reasonable likelihood that the Smyrna-alibi evidence affected the judgment of the jury.

For one, the State had ample other evidence to cast doubt on the credibility of Miller's alibis. The State had substantial direct evidence contradicting them. The State called multiple witnesses who placed Miller at or near the scene of the murder at or near the time of the murder. Moreover, as stated above, the at-home and Elkton alibis could reasonably be interpreted as separate and distinct alibis. Even then, the force of the State's alibi argument was placing Miller's stories, not against each other, but against the direct evidence discounting them: "Is he in Elkton, Smyrna, and at home, or is he in the circle killing [McDonald] *like Gene* [*Wheeler*] *and Bocker* [*Watson*] *said he was*[?]"[126] Thus, even without the Smyrna alibi, the State could have made the same argument about conflicting alibis that it made in its closing. The strength and substance of the State's case would not have been materially different without it.

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[125] Opening Br. 38.

[126] A808–09 (emphasis added).

In addition, references to the other murder investigation were nondescript and relatively brief in the context of the two-week trial. And those mentions were driven by defense counsel. After the Smyrna alibi was played, defense counsel asked Detective Shahan if Miller was questioned about the other murder.[127] The parties went to sidebar before he could answer, and then defense counsel abandoned the question.[128] Later, Miller called his son's mother, Dashanna Jones, to testify that he never told her that he was in Smyrna when McDonald was murdered.[129] At sidebar, the parties agreed that her testimony should be clarified—that Miller did in fact tell her he was in Smyrna at the time of some event, but a different event.[130] Defense counsel proffered that she would not remember what the other event was.[131] Relying on that proffer, the prosecutor asked Jones what the Smyrna alibi referenced, and Jones answered: "Um, it was about another guy who was murdered."[132] Thus, although the reference came out through the State's cross-examination, as Miller points out in his opening brief,[133] the prosecutor only

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[127] A352.

[128] A352–54.

[129] A684–85.

[130] A686–87.

[131] A687.

[132] A689.

[133] Opening Br. 35 ("By asking that question, the State again placed before the jury Mr. Miller's status as a suspect in a second murder.").

asked the eliciting question because defense counsel had proffered that Jones would say she did not remember.[134] The court asked for a sidebar, where defense counsel stated that he "[d]idn't expect her to say that."[135] Defense counsel nonetheless objected to striking the testimony, apparently finding the mere mention of another murder investigation to be less prejudicial than eliminating the Defense's explanation of the alibi.[136] The testimony stayed in the record, but the examination stopped there.[137]

The references to the second murder investigation were short and nondescript. They did not describe the murder or belabor any facts about the investigation. They also did not characterize Miller as a suspect in the murder. The so-called specter of a second murder did not permeate the trial. It focused largely on Miller's motive, the identification of him as the shooter, and his subsequent efforts to derail his prosecution. In light of the substantial other evidence of Miller's guilt, it is unlikely that the Smyrna-alibi explanations affected the judgment of the jury. Its introduction was not plain error.

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[134] A689 ("[Prosecutor]: Well, . . . Your Honor, I asked the question because [defense counsel] made a representation that [she was going to say she didn't remember].").

[135] A689.

[136] A689–92.

[137] A691–92.

B. The Cross-Examination Preview and the Right to Testify

(1) *No misconduct occurred.*

Miller makes the related argument that the prosecutors used the Smyrna alibi to open the door for cross-examination about unrelated crimes, including the other murder.[138] As he describes it, the prosecutors "threatened" to ask him about topics "of dubious admissibility" if he testified.[139] According to Miller, the prosecutors "improperly leveraged the prison calls to discourage [him] from testifying."[140]

When it came time to discuss whether Miller would testify, the prosecutors previewed the topics they desired to cover on cross-examination, including the Smyrna alibi and the other murder.[141] It was not misconduct to do so. To the contrary, it provided Miller with more information with which to make his decision, and it armed him with the ability to seek advanced rulings on the scope and permissibility of the State's questioning.

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[138] Opening Br. 38–39.

[139] Opening Br. 4, 36.

[140] Opening Br. 39.

[141] A631–34.

(2) ***Even assuming that the prosecutors' actions constituted misconduct, they did not infringe upon McDonald's right to testify.***

The waiver of a constitutional right, such as the right to testify on one's own behalf, must be intelligent and voluntary.[142] Miller claims that the prosecution placed him between a rock and hard place: testify, and risk being questioned about the topics enumerated in the State's cross-examination proffer, including the other murder, or let the allegedly false narrative around the Smyrna alibi stand unrebutted.[143] But the State's preview was not coercive and did not render Miller's waiver involuntary.

Notably, the prosecutors did not preview their intended cross-examination in a threatening or coercive manner. The prosecutor first made the proffer to the trial judge, outside of Miller's presence.[144] After hearing the prosecutor's remarks, the trial judge asked him to repeat the proffer during the colloquy so that Miller could have a full understanding of the questions he might face on cross-examination.[145] The prosecutor did, with the blessing and under the supervision of the court, and with defense counsel present.[146]

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[142] *State v. Reyes*, 155 A.3d 331, 342 (Del. 2017).

[143] Opening Br. 38–39.

[144] A631–34.

[145] A637.

[146] A637, A639–41.

Miller cites no support for the proposition that such open-court proffers can unconstitutionally infringe upon a defendant's right to testify. In fact, the federal habeas court in *Martinez v. Perez*[147] held that a similar proffer was not coercive. When defense counsel called his client to testify, the prosecutor asked for a moment to confer off the record.[148] The prosecutor informed defense counsel that it had found an altered driver's license in subpoenaed records and intended to cross-examine the defendant about it, as well as other forged checks—potentially exposing the defendant to more culpability if he testified.[149] The defendant elected not to take the stand.[150] Even though this proffer was private rather than in open court, and even though it involved the "threat" of additional criminal liability rather than merely the introduction of incriminating evidence in that trial, the court still described the prosecutor's preview of her cross-examination as "merciful."[151] The court noted: "Far from coercive or threatening, the prosecutor was ensuring that the defense had a better understanding of the ramifications of [the defendant's] decision to testify in order to ensure his waiver of the right against self-

[147] 2015 WL 11071471, at *6–7 (C.D. Cal. Dec. 3, 2015).

[148] *Id.* at *5.

[149] *Id.*

[150] *Id.*

[151] *Id.* at *7.

incrimination was knowing and voluntary."[152] Moreover, because the so-called threat was communicated through counsel, it reduced the potential for intimidation.[153] Finally, the court noted that the defendant raised no objection at the time of the proffer and his decision not to testify.[154]

As in *Martinez*, the prosecutors here provided the defendant with more information with which he could make his decision to testify or not. The information was relayed in a non-coercive environment, in the presence of the trial judge and defense counsel. Miller then had an opportunity to consider the information and confer with defense counsel about his decision to testify.[155]

Miller nonetheless argues that more is not always better and suggests the proffered information was overbearing. He complains that several of the proffered topics were "of dubious admissibility."[156] He further states: "[T]he State made clear that it would not simply permit [him] to testify that his references to Smyrna were in relation to another case. . . . [and] would bring out the fact that [he] was the prime suspect as the murderer of 200 . . . ."[157]

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[152] *Id.* at *6.

[153] *Id.* at *7.

[154] *Id.*

[155] A641–42.

[156] Opening Br. 36–37.

[157] Opening Br. 39.

Miller portrays the prosecutor as having more power over the admissibility of evidence than he actually did. The trial judge remained the gatekeeper of the evidence and ultimate arbiter on admissibility. If any of the topics the prosecutor previewed were inadmissible, Miller could have moved to exclude them before he decided whether to testify. If certain aspects of the topics were unfairly prejudicial, he could have moved to limit the scope of the questioning. In other words, if any of the purportedly out-of-bounds topics would have affected his decision to testify, he could have sought rulings on those issues before making his decision. The prosecutor's proffer actually armed him with that ability and gave him the opportunity to do so. The fact that Miller did not make any such motions demonstrates that those issues did not have a significant impact, if any, on his decision whether to testify. Miller was not clearly deprived of any substantial right.

C. Reversal Is Not Warranted Under *Hunter*.

Miller finally urges this Court to reverse under *Hunter* because "[t]he errors permeated the trial."[158] He argues that multiple errors and arguments within his trial, from the introduction of the Smyrna-alibi evidence through the State's

[158] Opening Br. 39.

closing arguments, "more than satisfy the *Hunter* rubric of repetitive errors."[159] The argument misunderstands the import of *Hunter*.

Hunter does not apply to allegations of repetitive errors within a single trial.[160] In *Hunter*, this Court "identified a persistent pattern of misconduct because the prosecutor's improper comments covered several of the specific categories of comment that have been prohibited *in past decisions*."[161] The rule in *Hunter* targets the repetition of the same errors over multiple trials because it "reflects a disregard of [this Court's] prior admonitions and thus impugns the integrity of the judicial process."[162]

Miller's argument under *Hunter* is limited to allegations contained within his own trial. He does not cite any prior admonishment of the same misconduct he charges to the State. "Because [Miller] has not described this type of pattern or repetition, his argument under *Hunter* fails."[163]

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[159] Opening Br. 40.

[160] *Saavedra v. State*, 225 A.3d 364, 382–83 (Del. 2020).

[161] *Id.* (cleaned up) (emphasis in original).

[162] *Id.*

[163] *Id.*

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING AN UNAVAILABLE WITNESS'S OUT-OF-COURT STATEMENT UNDER D.R.E. 804(b)(6), OR THE ADMISSION WAS HARMLESS.

Question Presented

Whether the Superior Court abused its discretion by admitting the out-of-court statements of a witness who could not be found because he went into hiding after five people showed up at his job and threatened him once his identity was revealed in court.

Standard and Scope of Review

This Court reviews the admission of evidence under the forfeiture-by-wrongdoing doctrine for an abuse of discretion.[164] The trial court abuses its discretion when it exceeds the bounds of reason under the circumstances or when it ignores recognized rules of law or practice in a way that produces injustice.[165]

Merits of Argument

The State had subpoenaed Pruitt to testify at Miller's trial, but Pruitt failed to appear.[166] Miller had told Pruitt to relay a message to McDonald: that "Halloween

[164] *Phillips v. State*, 154 A.3d 1130, 1143 (Del. 2017).

[165] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

[166] A434–54.

is coming early."[167] Later, Miller approached McDonald from behind, wearing a wolf mask, and shot him dead.[168]

Pruitt attempted to avoid appearing in court, citing fear for his family's safety.[169] On the first day of trial, five people showed up at his job and threatened him.[170] Pruitt then quit his job and disappeared.[171] A motion to admit Pruitt's prior statements through the forfeiture-by-wrongdoing doctrine followed, which the Superior Court granted.[172]

Miller claims that the Superior Court abused its discretion by admitting Pruitt's out-of-court statements.[173] He argues there was no connection drawn between him and the wrongdoing that caused Pruitt's absence.[174] He faults the Superior Court for aggregating other evidence of his witness intimidation, "which had nothing to do with Pruitt."[175] Miller contends that, because the hearsay

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[167] A615.

[168] A328–29, A471–72, A474.

[169] A433.

[170] A434.

[171] A434

[172] A436–54.

[173] Opening Br. 41–46.

[174] Opening Br. 44.

[175] Opening Br. 43.

exception was not established, the admission violated his constitutional right to confront Pruitt.[176]

The Superior Court did not abuse its discretion. There was sufficient circumstantial evidence that Miller was involved in the witness intimidation that procured Pruitt's absence. Regardless, any error in admitting the statement was harmless because of the substantial other evidence of Miller's guilt.

A. The Superior Court did not abuse its discretion

Criminal defendants have the constitutional right to be confronted with the witnesses against them.[177] Relatedly, the rules of evidence preclude the admission of hearsay unless a recognized exception applies.[178] D.R.E. 804(b)(6) codifies the common law doctrine of forfeiture by wrongdoing.[179] The doctrine recognized that a defendant who procures the absence of a witness to silence his testimony extinguishes his confrontation claims on equitable grounds.[180] It seeks to

[176] Opening Br. 45–46.

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

[178] *See* D.R.E. 801–07.

[179] *Phillips*, 154 A.3d at 1142.

[180] *Id.* at 1143.

"remov[e] the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them" and to protect integrity of proceedings.[181]

Specifically, D.R.E. 804(b)(6) defines the following hearsay exception: "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Courts employ a three-part test to determine the admissibility of a statement under this rule: (i) that the defendant engaged or acquiesced in wrongdoing; (ii) that the wrongdoing was intended to procure the declarant's unavailability; and (iii) that the wrongdoing did procure the unavailability.[182]

The trial court did not abuse its discretion by finding that these elements were satisfied. As Miller concedes, "Certainly there was evidence that Pruitt was intimidated into staying away at trial."[183]

Pruitt had been a cooperative witness until the trial date neared.[184] Within weeks of the trial, Pruitt changed his story, saying that he could not remember his statement to the police and did not wish to testify.[185] Pruitt attended his regularly scheduled probation appointment on the first day of trial and received his trial

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[181] *Id.*

[182] *Id.*

[183] Opening Br. 43.

[184] *See* A433.

[185] A433.

subpoena, but he told his probation officer that did not want to come to court because he feared for his family's safety.[186]

During opening statements, the State identified Pruitt as a witness and previewed his expected testimony.[187] According to a text message from Pruitt, later that day, five people showed up at his job, said they saw his picture, and threatened him.[188] He immediately quit and had someone else collect his paycheck.[189] Investigators could not locate Pruitt after a protracted and diligent search.[190] The wrongdoing—the unexpected appearance at Pruitt's place of employment and the threat—was intended to, and did, procure Pruitt's absence from trial.

Miller only contests whether the trial court properly attributed that wrongdoing to him.[191] He argues there was no direct evidence tying him to the acts of intimidation.[192] But the State was not required to prove Miller's

[186] A433.

[187] A263.

[188] A434–35.

[189] A434–35.

[190] A434.

[191] Opening Br. 43.

[192] Opening Br. 43.

involvement through direct evidence.[193] D.R.E. 804(b)(6) requires only that the defendant acquiesced to the wrongdoing, and that fact can be proven by circumstantial evidence.[194] In this case, there was considerable evidence that Miller led coordinated efforts to intimidate witnesses and derail his prosecution and that those efforts extended to Pruitt.

Miller was confident that witnesses would be too afraid to speak out, stating: "Mother fuckers that seen me do it know better than to say my name . . . ."[195] His acts of intimidation began shortly after the shooting. Two or three weeks later, he ran into Mude at Wal-Mart.[196] Miller started to worry that he might talk, so he threatened him, saying that he knew where Mude's mother lived and that Mude could "end up just like [his] boy Farmer."[197]

Miller appeared to coordinate alibis with the women in his life. The morning after the shooting, he met with Bivings "to piece together what happened the night prior."[198] His wife, Rose Miller, adamantly testified that she called Miller at his home telephone number—his landline—around the time of the McDonald's

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[193] *See United States v. Stewart*, 485 F.3d 666, 670 (2d Cir. 2007).

[194] *See id.*

[195] A418.

[196] A418.

[197] A418.

[198] A315–16.

murder.[199] But earlier, in a recorded prison call, Rose stated that she called Miller on his cell phone.[200]

While in custody, Miller conducted a prolific campaign to manufacture exculpatory affidavits. The police executed a search warrant for Miller's cell and recovered affidavits drafted under the names of Charles Coleman, Thomas Christy, Dashanna Jones, Adrien Tyler, and James Watson.[201] At trial, Watson was shown one of those affidavits, which bore his signature.[202] The affidavit stated that Watson had no reason to believe that Miller shot McDonald.[203] Watson acknowledged his signature but denied writing it and stated it was not his handwriting.[204] He further denied authoring a second, typewritten affidavit that bore his name but was unsigned.[205] Coleman likewise denied writing one of the recovered affidavits bearing his name.[206]

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[199] A476–77.

[200] A788–89; *see also* A809.

[201] A356–57.

[202] A335.

[203] A335.

[204] A335, A339.

[205] A337.

[206] A382.

Miller enlisted his sister, Shelly Brown, to contact witnesses on his behalf, delivering letters, paperwork, and messages.[207] In at least some instances, she would deliver paperwork with a verbal message to destroy it when finished.[208] Miller also attempted to conceal his activities by using other inmates' PINs to place his phone calls.[209]

Miller had convinced Wheeler to change his incriminating statement.[210] Miller wanted Wheeler to say that a mask the police recovered, which did not have his DNA on it, was the shooter's mask.[211] Wheeler agreed and gave the fabricated statement to Miller's lawyer.[212] Wheeler later recanted the fabricated story because it "seemed like [he] was getting too deep[ly] involved" in the coverup and risked perjuring himself.[213] Miller also requested that Wheeler write an affidavit claiming he identified Miller as the shooter because they were fighting over a woman and money, which was not true.[214]

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[207] A371, A373.

[208] A373.

[209] A347–52.

[210] *See* 498–99.

[211] A499.

[212] A499.

[213] A512, A527.

[214] A524–25.

Wheeler did not appear for trial, and he was later arrested on a material witness warrant.[215] He testified that he skipped court because he feared for his and his family's safety.[216] Miller, through his associates, had been relaying threatening messages to Wheeler and his children.[217] One message read: "Karma don't have to hit you, it can get your kids."[218]

Spectators—an unusually large number of them—also attempted to influence the proceedings from the gallery and outside the courthouse.[219] Several were identified as denizens of Brookmont or associates of Miller.[220] A juror from Brookmont was excused because she felt uncomfortable after people stared her down in the parking lot.[221] The spectators approached Watson's daughter to ask if he would be testifying, and then Watson refused to testify if anyone from Brookmont was in the courtroom.[222] Four spectators appeared just in time for Wheeler's testimony, even though the trial had restarted much earlier in the day.[223]

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[215] *See* A432.

[216] A464.

[217] A596.

[218] A596.

[219] *See Miller*, 2020 WL 4355557, at *4.

[220] *E.g.*, A515.

[221] A294–96.

[222] A320.

[223] A516.

They seemed to be making faces at Wheeler while he testified.[224] The court ordered them to leave the courtroom, and one mouthed a possible threat to the prosecutor on his way out.[225]

In sum, Miller engaged in a long campaign to derail his prosecution, and he coordinated his efforts with his family, friends, and associates. He made explicit threats of violence against witnesses and their family members to discourage them from talking or testifying. The spectators were present for opening statements, where the State identified Pruitt as a witness, and then five people found him at his job and threatened him. The Superior Court did not exceed the bounds of reason by concluding the intimidation of Pruitt was an extension of the other efforts coordinated by Miller, the only person who stood to gain from Pruitt's absence.

B. Any error in admitting Pruitt's statements was harmless.

Even if the Superior Court abused its discretion by admitting Pruitt's out-of-court statements under D.R.E. 804(b)(6), the error was harmless. An error in admitting evidence is harmless "where the evidence admitted at trial, other than the improperly admitted evidence, is sufficient to sustain the defendant's

[224] *See* A516.

[225] A520–21.

conviction."[226] If the evidentiary error "is of a constitutional magnitude, the convictions may be sustained if the error is harmless beyond a reasonable doubt."[227] These standards apply the erroneous admission of hearsay evidence that violated a defendant's right to confrontation.[228]

Exclusive of Pruitt's out-of-court statements, the State offered substantial evidence of Miller's guilt, sufficient to sustain his convictions beyond a reasonable doubt. The State established Miller's motive to murder McDonald through multiple witnesses: "bad blood" over a shared paramour.[229] Miller stated an apparent intent to harm McDonald ahead of the murder, saying that he would "make an example out of" McDonald for disrespecting him.[230] A witness (Mude) saw him drive into a neighboring community around the time of the murder.[231] Another witness (Wheeler) saw Miller's unmasked face as he entered Heron Court, then watched him put on a mask, walk up to McDonald, and shoot him multiple times.[232] A third witness (Watson) did not see Miller's face but recognized him by

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[226] *Miller v. State*, 1993 WL 445476, at *3 (Del. Nov. 1, 1993).

[227] *Nelson v. State*, 628 A.2d 69, 77 (Del. 1993) (internal quotation marks omitted).

[228] *Wheeler v. State*, 36 A.3d 310, 320–21 (Del. 2012); *Dixon v. State*, 996 A.2d 1271, 1279 (Del. 2010).

[229] *E.g.*, A313, A484.

[230] A416–17.

[231] A417.

[232] A471–72.

his height, frame, build, and gait as he approached and shot McDonald.[233] The next morning, Miller confessed to Mude by saying that the people "that seen [him] do it" knew better than to identify him to the police.[234] Miller then engaged in the extensive campaign to intimidate witnesses and cause them to change their stories, evidencing a consciousness of guilt. This evidence, separate and apart from Pruitt's statement, was sufficient for a jury to convict Miller beyond a reasonable doubt.

[233] A328–31.

[234] A418.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: August 2, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN MILLER,	§	
	§	No. 37, 2021
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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