



IN THE SUPREME COURT OF THE STATE OF DELAWARE

**THEOPALIS K. GREGORY**

**Defendant Below,  
Appellant,**

**v.**

**STATE OF DELAWARE**

**Plaintiff Below,  
Appellees.**

**No. 85, 2022**

**APPEAL FROM THE OPINION  
DATED JANUARY 12, 2022 OF  
THE NEW CASTLE COUNTY  
SUPERIOR COURT IN ID NO.  
1909016095**

**APPELLANT'S REPLY BRIEF**

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Dated: October 4, 2022

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## **NATURE OF THE PROCEEDINGS**

Appellant incorporates the Nature of the Proceedings stated within Appellant's Opening Brief.

## SUMMARY OF THE ARGUMENT

1. Appellant's appeal is properly preserved under Delaware Supreme Court Rule 8, and should be reviewed under a de novo standard. Appellant presented the issue before the Superior Court through a Motion for Judgment of Acquittal, who ruled upon the merits of that argument in its final decision. Appellant's appeal relies on the same theory as that motion; and therefore, Appellant's appeal is entitled to de novo review.

2. Appellant's request for reversal should still be granted under a plain error standard, as the Superior Court's failure to apply the correct interpretation of "official functions" is an error that is clear on its face and one that substantially prejudiced Appellant's trial. The Superior Court was required to apply a common law definition of "official functions" under 1 Del. C. § 303, and its failure to apply the correct definition changed the jury's ability to make the correct verdict. This interpretation clearly prejudiced the verdict, as none of the State's evidence in favor of Appellant's conviction was done with the actual or apparent authority of the City Council President. This was not harmless error; and accordingly, Appellant is entitled to reversal as a matter of law.

3. Appellant's request for reversal is a request to clarify the term "official functions" in the context of 11 Del. C. § 1211. "Official function" carries too much weight for this Court to allow a definition with no legal meaning. The statute calls

for a common law definition. The State argues that there should be no definition. The State's position would permit elected public servants to be guilty for any action done in or around the official's service.

## **STATEMENT OF FACTS**

Appellant incorporates the Statement of Facts stated within Appellant's Opening Brief.



## **ARGUMENT**

Appellant's conviction under 11 Del. C. 1211 must be reversed because the Superior Court committed reversible error under any standard of review by failing to properly interpret the term "official functions", and the Superior Court's incorrect interpretation of "official functions" had a substantial, prejudicial impact on the verdict. The State's answering brief fails to contradict Appellant's right to a reversal on both procedural and substantive grounds. First, Appellant properly preserved this appeal under Delaware Supreme Court 8, as the Superior Court reviewed this same argument in Appellant's Motion for Judgment Acquittal. Second, even if this Court applies a plain error standard of review, Appellant still meets the standard for reversal because the Superior Court's definition of "official functions" was clear error which substantially prejudiced Defendant's trial. For these reasons, Appellant requests the Superior Court's conviction be reversed and Appellant's conviction be vacated.

### **A. Appellant's Appeal is Compliant with Del. Sup. Ct. R. 8.**

Appellant's appeal was properly preserved in the Superior Court under the requirements of Delaware Supreme Court Rule 8. Delaware Supreme Court Rule 8 states "[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented". Del. Sup. Ct. R. 8; *see*,

*Monroe v. State*, 652 A.2d 560, 563 (Del. 1995)(“Rule; however, only requires that a question be fairly presented to the trial court”). The court’s review is also limited to arguments which were advanced in the court below. *Walls v. State*, 1987 Del. LEXIS 1101, at \*2-3 (Del. 1987). Once preserved, the Court reviews the denial of a motion for acquittal under a de novo standard, and the standard of review is “whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of the crime”. *Priest v. State*, 879 A.2d 575, 577 (Del. 2005); *Brown v. State*, 967 A.2d 1250, 1252 (Del. 2009).

Appellant argument regarding the interpretation of “official functions” in 11 Del. C. § 1211(3) was properly presented before the Superior Court through Appellant’s Motion for Judgment of Acquittal; and is therefore properly preserved under Del. Sup. R. 8. The record clearly reflects that the Superior Court had the opportunity to rule upon the merits of Appellant’s Motion for Judgment of Acquittal. (A351-59). That motion relied on the same theories as Appellant’s Opening Brief, which is (1) that the court’s interpretation of “official functions” was incorrect and (2) that the judgment should be reversed for sufficiency of the evidence. (A338-43). Accordingly, Appellant’s arguments are entitled to de novo review.

The State argues that Appellant presents a new theory, but Appellant’s brief merely provides a further argument on the points addressed in Appellant’s Motion

for Judgment of Acquittal. *See, Kerbs v. California Eastern Airways, Inc.*, 1952 Del. LEXIS 87 (Del. 1952)(holding that while an appellate court may not hear an entirely new theory of a case, “when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interests of a speedy end to litigation that the argument should not be considered”). Appellant’s definition of “official functions” in its Opening Brief only asserts further grounds for the conclusions stated in the Motion for Judgment of Acquittal; and therefore, Appellant’s arguments are preserved. Under a plain reading of Rule 8, this issue was properly preserved and Appellant’s appeal should be heard under a de novo standard of review.

The State makes multiple arguments that Appellant’s Motion for Judgment for Acquittal was ineffective; however, those arguments do not contradict a straightforward application of Delaware Supreme Court Rule 8. Under Delaware Superior Court Criminal Rules of Procedure, a motion for judgment of acquittal must be presented either before a case is submitted to a jury or within seven days of the jury’s discharge. Del. Super. Ct. R. Crim. P. 29. Appellant’s Motion was timely filed and appropriately reviewed by the Superior Court. (A351-59). The State argues that Appellant’s Motion for Judgment of Acquittal did not comply with the rules of procedure; however, the State made that same argument before the Superior Court and it did not factor into the Superior Court’s decision. (A344-50). Otherwise,

nothing in the State's Answering Brief negates that the Superior Court considered the merits of Appellant's argument regarding the interpretation of "official functions", and that alone preserves Appellant's appeal.

**B. Appellant Is Entitled to Reversal Under a Plain Error Standard of Review.**

Even if this Court finds that Appellant did not preserve this issue on appeal, Appellant is still entitled to reversal under a plain error standard of review. The Supreme Court reviews issues not presented to the trial court under a plain error standard of review, where reversal is granted if "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process". *Hammond v. State*, 1992 Del. LEXIS 137, at \*3 (Del. 1992). In reviewing jury instructions under a plain error standard, "the jury instructions must be viewed as a whole" and should reverse "if such deficiency undermined the ability of the jury to "intelligently perform its duty in returning a verdict". *Probst v. State*, 547 A.2d 114, 119 (Del. 1988). The moving party must show that the correct instructions would have affected the outcome of the trial, and the provided instructions "clearly deprive[d] an accused of a substantial right or which clearly show[ed] manifest injustice". *Hutt v. State*, 2012 Del. LEXIS 429, at \*3 (Del. Aug. 15, 2012).

The definition of “official functions” presented to the jury is reversible under a plain error standard of review because it violated 1 Del. C. § 303. Under 1 Del. C. § 303;

Words and phrases shall be read with their context and shall be construed according to common and approved usage of the English language. Technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

Under this standard, the Superior Court was required to interpret 11 Del. C. 1121 consistent with the common law meaning of the term “official functions”, which requires that the actions be done with the public officials actual or apparent authority. *People v. Rossi*, 415 N.Y.S.2d 21, 22 (N.Y. App. Div. 1979); *State v. Schenkolewski*, 693 A.2d 1173, 1187 (N.J. Super 1997). The State argues that the Superior Court did not have a definition of “official functions” available at the time of the trial, but that does not excuse an incorrect jury instruction nonetheless. Appellant has also presented a common law interpretation of “official functions” which is different than the interpretation used by the Superior Court. This is the type of error that is “basic, serious, and fundamental”, and accordingly, the Superior Court’s judgment must be reversed. *Hutt*, 2012 Del. LEXIS 429, at \*3.

The State makes two critical mistakes when addressing this argument in their Answering Brief. First, the State characterizes Appellant’s argument as one where the Court should adopt persuasive law outside of Delaware’s jurisdiction; however, that is not Appellant’s position. Appellant argues that 1 Del. C. § 303 **required** the Superior Court to adopt a common law definition, and the only common law definition of “official functions” is the interpretation advanced by Appellant. The State does not offer that there is another common law definition of “official functions”, nor does the State prove that “official functions” lacks a common law definition. Instead, the State advocates for a definition from the Merriam-Webster dictionary which includes no consideration of the legal definition of the term. In essence, Appellant is requesting an appropriate definition of “official functions”, whereas the State is requesting no definition.

Second, the State compounds this argument by arguing that the Superior Court was permitted to allow the jury to “apply their common sense” to the issue of “official functions”, but this again is directly in contradiction with 1 Del. C. § 303. Appellant’s Opening Brief provides ample support that “official functions” has a technical and peculiar definition in Delaware, other persuasive jurisdictions and secondary authority; and yet, the State and Superior Court would request that this Court ignore this authority in favor of no definition at all. *See, State ex rel. Jennings v. Capriglione*, 2021 Del. Super. LEXIS 383 (Del. Super. May 4, 2021); *Smith v.*

*City of Milford Police*, 1996 Del. Super. LEXIS 586 (Del. Super. Dec. 19, 1996).

There are no grounds under which this argument can be reconciled with 1 Del. C. § 303, as the State advocates for a definition that avoids the common law all together. The issue of public misconduct, which involves the criminal liability of elected officials is too important to provide no guidance on the scope of liability public officials may incur. To that end, Delaware law commands that “official functions” be interpreted consistent with Appellant’s interpretation; and accordingly, the Superior Court’s failure to do so constitutes reversible error.

**C. The Superior Court’s Incorrect Interpretation of “Official Functions” Changed the Outcome of the Trial.**

Finally, the Superior Court’s use of a colloquially definition of “official functions” satisfies a plain error standard of review because none of Appellant’s conduct alleged at trial were done in the scope of his actual or apparent authority as City Council President. The State argues that the interpretation of “official functions” was harmless error and/or that the State met the sufficiency of the evidence, but such an argument is belied by the facts relied on by the State to support its conviction. The State repeatedly argues that Appellant “earmarked” funds and that the incoming City Council President Ms. Shabazz felt a “constant push”, but the State never establishes that those actions were done in the context of Appellant’s actual authority as City Council President. As asserted in Appellant’s Opening Brief, the City Council President has no authority to “earmark” funds, nor did

Appellant have the authority to disburse funds for his own benefit. (A98, A108, A131-32). Appellant furthermore did not act with the authority of the City Council President when he communicated with Shabazz about the grant, applied for the grant or revived the SDA. (A98, A108, A131-32, A186-87, A242-244). All the State's evidence lacks the authority of the City Council President, which in turn evidences the prejudicial effect the Superior Court's interpretation had on Appellant's trial. The State's evidence may have satisfied the jury's colloquial interpretation of "official functions"; however, those actions have no bearing on the proper common law definition of "official functions" because they were not done with Appellant's actual authority as City Council President.

The proper definition of "official functions" would have additionally affected the jury's interpretation of the surrounding testimony, particularly that of the City Council members who testified that Appellant did not have the authority to appropriate funds from the City budget. The testimony on record, which is supported by provisions of the Wilmington City Code, established that the appropriation to the SDA was done through the actual authority of Hanifa Shabazz, who was the sitting City Council President at the time, and that Appellant had no authority, control, or influence over that action as the former City Council President. (A113-14, A124, A186-87). *See, Wilmington, Delaware Code of Ordinances* §2-201; *Wilmington, Delaware Code of Ordinances* §2-300. The State argues that this



was an issue for jury credibility; however, the jury's verdict goes against the weight of multiple council members and straight-forward provisions of the City Code. This evidence must be considered in an entirely different light under Appellant's definition of "official functions" which requires reversal under any standard of review.

**D. Appellant's Appeal Is a Request for Clarity, Which Greatly Affects Public Service.**

As a final note, Appellant's appeal is a request for clarity to a statute which greatly affects public service in the State of Delaware. As stated earlier, Appellant advocates for a definition of "official functions" that is merely consistent with the common law, whereas the State argues for a definition with no predictability for juries, prosecutors, and public officials. The term "official functions" carries too much weight for this Court to allow a definition which incorporates no legal meaning; and therefore, the State's definition would permit elected public servants to be guilty under 11 Del. C. § 1211 for any action which done in or around the official's service. This substantially expands the scope of this term compared to surrounding jurisdictions, and will only serve to create greater uncertainty for prosecutors and public servants in the future. To that end, Appellant's appeal must be considered on the merits and Appellant's definition must be adopted to provide clarity to 11 Del. C. § 1211.

## **CONCLUSION**

For all the reasons stated herein, and in Appellant's Opening Brief, Appellant respectfully requests that Appellant's conviction be vacated.

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