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Case Number 85,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THEOPALIS K. GREGORY,	:	
	:	
Defendant-below	:	
Appellant,	:	
	:	
	:	No.: 85, 2022
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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Dated: September 19, 2021

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NATURE OF THE PROCEEDINGS

On September 30, 2019, the defendant was charged via indictment with Official Misconduct in violation of 11 *Del.C.* § 1211(2) and Profiteering in violation of 11 *Del.C.* § 1212.[1] On October 25, 2021 the defendant was charged via superseding indictment with Official Misconduct in violation of 11 *Del.C.* § 1211(2), another charge of Official Misconduct in violation of 11 *Del.C.* § 1211(3), and Profiteering in violation of 11 *Del.C.* § 1212.[2] The defendant filed a motion for a bill of particulars on November 1, 2021.[3] The State responded to the bill of particulars on November 4, 2021.[4] The defendant did not object to the response or request an additional clarification.

The case went to trial beginning on November 9, 2021.[5] The defendant made an oral motion to dismiss the case immediately before trial, which the Court denied.[6] The State rested on November 10, 2021 and the defendant made a motion for judgment of acquittal.[7] The Court granted the defendant's motion as to Count

[1] A001 [D.I. 1].

[2] A005 [D.I. 29].

[3] *Id.* [D.I. 30].

[4] *Id.* [D.I. 31].

[5] A006 [D.I. 33].

[6] *Id.* [D.I. 38].

[7] *Id.* [D.I. 38].

III Profiteering, but denied the motion on the two counts of Official Misconduct.[8] On November 12, 2021 the defense rested and a prayer conference was held to discuss the jury instructions.[9] On November 15, 2021 the closing arguments were held and a jury of the defendant's peers found him not guilty of Count I, Official Misconduct in violation of 11 *Del.C.* § 1211(2) and guilty of Count II of the indictment, Official Misconduct in violation of 11 *Del.C.* § 1211(3).[10]

After trial, the defendant filed a written motion for judgment of acquittal on November 24, 2021.[11] The State responded on December 8, 2021.[12] The Court denied the motion on January 12, 2022.[13] The Defendant was sentenced on February 14, 2022 on the one count of Official Misconduct to one year of level V incarceration suspended for probation. The defendant subsequently filed this appeal. This is the State's Answering Brief on appeal.

[8] *Id.* [D.I. 38].

[9] B001

[10] A006 [D.I. 38].

[11] *Id.* [D.I. 40].

[12] A006 -007 [D.I. 41].

[13] A351 [D.I. 42].

SUMMARY OF THE ARGUMENT

I. Argument I is denied. The defendant failed to preserve this argument below and the instructions given by the Superior Court were appropriate.

   1. The defendant did not preserve the argument below by failing to object pre-trial or during the prayer conference to the jury instructions.
   2. The defendant did not preserve the argument below by changing their theory of what definition of "Official Functions" should have been given.
   3. It was not plain error, nor was it incorrect as a matter of law for the court to not *sua sponte* give a definition of the phrase "Official Functions."
   4. The definition of "Official Functions" advanced by the defendant would not have changed the outcome.

II. Argument II is denied. The Superior Court correctly determined that the State had presented sufficient evidence for the case to be decided by a jury.

STATEMENT OF FACTS

On October 13, 2016 the defendant filed paperwork to revitalize a long dormant non-profit he had run 20 years earlier, Student Disabilities Advocate (hereinafter "SDA").[14] This step was taken after the defendant lost the primary race for Mayor of the City of Wilmington. As a result, he would no longer be City Council President and out of office on January 3, 2017. Until such time, he was still the City Council President with all attendant powers, including authority over the President Grant fund which contained taxpayer funds.[15] He identified himself in the paperwork for SDA as the President of the non-profit.[16]

On November 10, 2016 Marchelle Basnight, the Deputy Chief of Staff for the defendant, emailed both the defendant and the incoming City Council President, Ms. Shabazz, to inform both of them of the remaining money in the President Grant Fund.[17] The remaining amount was $43,400.[18] This money was discretionary public money which could be allocated by the City Council President to any non-profit.[19] The defendant responded to this email, informing both Ms. Shabazz and Ms. Basnight that the email "did not make it clear that [$]40,000 of

[14] State's Exhibit 1.

[15] A-066.

[16] *Id.*

[17] State's Exhibit 2.

[18] *Id.*

[19] A-066.

the remaining [$]250,000 is earmarked for SDA."[20] Subsequent to that email, the defendant repeatedly questioned Ms. Shabazz about granting the money to SDA once she took office.[21] Ms. Shabazz indicated that she felt constant pressure to approve the grant.[22] On December 29, 2016 Ms. Basnight sent an additional email to Mr. Gregory with a draft grant application for SDA and listed steps SDA would need to take to obtain the grant funding.[23]

Because SDA did not have non-profit tax status, the defendant coordinated with the Police Athletic League of Wilmington (hereinafter "PAL-W") to receive the funds.[24] On January 4, 2017, Ms. Shabazz's first day as City Council President, the PAL-W submitted a $40,000 grant request for the SDA pilot program.[25] Ms. Shabazz approved the grant to be paid in two separate $20,000 installments.[26] The grant included a $20,000 payment to the Program Manager,

[20] State's Exhibit 2.

[21] State's Exhibit 9.

[22] *Id.*

[23] State's Exhibit 3.

[24] State's Exhibit 9.

[25] State's Exhibit 5 and 6.

[26] *Id.*

which was the defendant.[27] The defendant personally received at least $15,000 of the grant.[28]

After an investigation by the City of Wilmington Ethics Commission, the defendant agreed to and signed a stipulation admitting to the above facts.[29] He further agreed and admitted that he violated Section 2-340(f)(3) of the Wilmington Code of Ordinances.[30] Section 2-340(f)(3) of the Wilmington City Code states that "[n]o elected official, appointed official or city employee shall utilize the influence of his or her office or position for personal pecuniary gain, or to unduly influence the behavior of others, or to avoid the legal consequences of his or her personal conduct."

[27] State's Exhibit 4.

[28] State's Exhibit 9 and 7.

[29] State's Exhibit 9.

[30] *Id.*

ARGUMENT

I. THE DEFENDANT FAILED TO PRESERVE THIS ARGUMENT BELOW AND THE INSTRUCTIONS GIVEN BY THE SUPERIOR COURT WERE APPROPRIATE.

QUESTION PRESENTED

Whether the defendant preserved the argument below and whether the Superior Court's jury instructions were appropriate.

STANDARD OF REVIEW

When an issue is "not fairly presented to the trial court. . ." it may not be presented for review.[31] The Court "will generally decline to review contentions not raised and not fairly presented to the trial court for decision."[32] A "failure to object at trial usually consitutues a waiver of a defendant's right to raise the issue on appeal unless the error is plain."[33] However, the Court may consider the matter if it determines that it should be reviewed "in the interests of justice."[34] Further, the failure of the Court to *sua sponte* give a jury instruction has also been held to be reviewed as plain error.[35]

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[31] Supr. Ct. R. 8.

[32] *Probst v. State*, 547 A.2d 114, 119 (Del. 1988).

[33] *Id.*

[34] Supr. Ct. R. 8.

[35] *Dougherty v. State*, 21 A.3d 1 (Del. 2011).

Assuming *arguendo* the issue was properly raised below and preserved within the motion for a judgment of acquittal, the Court reviews denials of motions for judgment of acquittal "*de novo* to determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential elements, beyond a reasonable doubt."[36] The Court does not distinguish between direct and circumstantial evidence.[37]

MERITS OF THE ARGUMENT

1. The defendant did not preserve the argument below by failing to object pre-trial or during the prayer conference to the jury instructions.

Defendant failed to preserve the argument below, and in fact conceded that the issue of whether an act was an "official function" was a determination for a jury to make.[38] The argument made now is in violation of Supreme Court Rule 8 and Superior Court Criminal Rule 30 and this Court should decline to review the contention or alternatively review for plain error.[39] The defendant did not raise his legal argument regarding the definition of "official functions" until after the jury had rendered a verdict, in violation of Superior Court Criminal Rule 30 which clearly states, "At the close of evidence or at such earlier time during the trial as

[36] *Howell v. State*, 268 A.3d 754, 775 (Del. 2021).

[37] *Id.*

[38] A-020.

[39] Supr. Ct. R. 8; Del. Super. Ct. Crim. R. 30.

the court reasonably direct, any party may file written requests that the court instruct the jury on the law as set forth in the requests."[40] In a motion to dismiss made just prior to trial the defendant admitted,

> "if [the State] wants to argue that that's an official function, maybe they're entitled to an opportunity to do so and maybe a jury would be entitled to an opportunity to hear evidence on that issue. If [the State] wanted to argue any number of other things that took place in the case were somehow official functions performed by Theo Gregory in furtherance of the crime, then I believe that the government might actually be entitled to make that argument, Judge."[41]

Further, during the prayer conference, the defendant did not raise this argument, nor ask for any definition of "official functions."[42] Instead, the defendant waited until after a guilty verdict to file a motion for a judgment of acquittal arguing that the court should have defined the term and requesting the court to overrule the jury verdict.[43]

Superior Court Criminal Rule 30 states that "[n]o party may assign as error any portion of the charge or omission therefrom *unless the party objects thereto before or at a time set by the court immediately after the jury retires to consider its verdict* . . ."[44] The United State Supreme Court has clarified that under Federal

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[40] Super. Ct. Crim. R. 30.

[41] A-020.

[42] B-1-13

[43] A-338; [D.I. 40].

[44] Super. Ct. Crim. R. 30, Emphasis added.

Rule 30, which mirrors the Delaware Rule 30, ". . . objections raised after the jury has completed its deliberations do not [preserve a claim of error]."[45] Despite this clear instruction, the defendant contends the court below was in error for not *sua sponte* defining "official functions."

Moreover, the legal means by which the defendant objected, a motion for a judgment of acquittal, is an argument that the "evidence is insufficient to sustain a conviction. . ." [46] The defendant concedes that this is "a question of law" and not fact.[47] Notably, a motion for judgment of acquittal is not an argument regarding the law to be applied. Superior Court Criminal Rule 12(f) notes that "[f]ailure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof . . ."[48] The defendant did not raise this issue until after a jury verdict, when the appropriate time to make such legal arguments was pre-trial or during the prayer conference. This Court has repeatedly found that a "failure to object at trial usually constitutes a waiver of a defendant's right to raise the issue on appeal unless the error is plain."[49] The defendant failed to object pre-trial or during the prayer conference to the instructions given, and any

[45] *Jones v. U.S.*, 527 U.S. 373, 388 (1999).

[46] Super. Ct. Crim. R. 29(a).

[47] Op. Brf. at p. 10.

[48] Super. Ct. Crim. R. 12.

[49] *Probst*, 547 A.2d at 119.

argument regarding their sufficiency should be deemed waived unless the error was plain, which it was not.[50]

The use of a motion for a judgment of acquittal, after the discharge of a jury, for the purpose of arguing a legal question is not an appropriate use of Superior Court Criminal Rule 29 and does not preserve the argument since the court below could not fairly consider the argument in a timely manner. "There is, however, a distinction between a judgment of acquittal and its formulation of an instruction to the jury that clearly instructs the jury on statutory principles of law that apply to the facts of a case."[51] In a separate but related context, this Court has previously noted that a motion for a judgment of acquittal on a challenge to the sufficiency of an indictment at such a late time was a "questionable application of Criminal Rule 29."[52] The Court further noted that a motion for judgment of acquittal is "no substitute for a pre-trial challenge to the indictment."[53] The Court here is presented with a very similar scenario, a belated challenge to the sufficiency of the jury instructions, rather than a factual contention. The remedy sought by a motion for a judgment of acquittal is an acquittal, when the appropriate remedy here would have

[50] *Medley v. State*, 2022 WL 2674303, *3 (Del. 2022).

[51] *Bullock v. State*, 775 A.2d 1043, 1048 (Del. 2001).

[52] *Id.* at 1093.

[53] *Id.*

been a timely objection which would have allowed the court to determine the merits of the argument.

The defendant did raise pre-trial challenges to the indictment, most notably by requesting a Bill of Particulars which the State answered.[54] The defendant neither objected to the sufficiency of that response, nor did the defendant object to the jury instructions given at the close of the case explaining the law to the jury. Only after the close of the case did the defendant raise this issue, which deprived the court of being able to fairly consider it until it was too late. The defendant's argument regarding the legal sufficiency of the jury instructions given comes too late and this Court should deem the argument waived or apply, as it did in *Dougherty*, a plain error review to the decision below.[55]

2. The defendant did not preserve the argument below by changing their theory of why the definition of "Official Functions" which was given was inappropriate.

Additionally, the defendant's argument to this Court is different than the argument made below and should be considered waived. For the first time on appeal the defendant introduces a new definition of "official functions" that he

[54] D.I. 30 and 31.

[55] *Dougherty*, 21 A.3d at 1-2 "The issue is whether the trial judge committed plain error by not, *sua sponte*, giving a specific unanimity instruction . . . . We conclude that the trial judge did not commit plain error . . . ."

believes should be applied, a definition that was not supplied to the lower Court.[56] In the motion for judgment of acquittal below, defendant argued that the State "failed to establish that the above list is a legally sufficient definition of "official functions.""[57] The defendant did not ask the Court below to apply a specific definition of "official functions", instead he argued that the State had failed to define it.

In his Opening Brief, the defendant now argues that the Superior Court should have applied a definition of "official functions" found in either New York or New Jersey.[58] The defendant did not present this alternate definition to the Court below and it was not fairly considered. He raises it for the first time on appeal. The Court generally,

> "will not permit a litigant to raise in this Court for the first time matters not argued below where to do so would be to raise an entirely new theory of his case, but when the argument is merely an additional reason in support of a proposition urged below, there is no acceptable reason why in the interest of a speedy end to litigation the arguments should not be considered."[59]

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[56] *See* Defendant's Motion For Judgment of Acquittal.

[57] A-340.

[58] Op. Brf. at pp. 14-15.

[59] *Kerbs v. California Eastern Airways*, 90 A.2d 652, 659 (Del. 1952).

The defendant's argument below concerned the sufficiency of the definition of "official functions" while the defendant's argument on appeal is that a new, alternate definition should have been applied.

While the Court may determine that this is merely "an additional reason in support of a proposition urged below", the State contends that this new definition was not fairly argued or considered below.[60] No alternate definition was supplied nor considered, as the Court below noted in its order, "[t]he parties did not identify, and the Court could not locate, Delaware, secondary, or persuasive authority that defines or sets limits upon what constitutes an "official function."[61] As discussed *infra* the Court could not identify a definition of "official functions" because the alternate definitions proposed now by the defendant are from statutes which use the phrase in a different context. Failing to *sua sponte* include this definition in the jury instructions was not a material defect which was basic, serious or fundamental in character and therefore was not plain error by the court below.[62]

[60] *Id.*

[61] Order Denying Defendant's Motion For Judgment of Acquittal, p. 7, A-357.

[62] *See generally Waters*, 21 A.3d 1 (Del. 2011).

3. It was not plain error, nor was it incorrect as a matter of law for the court to not *sua sponte* give a definition of the phrase "Official Functions."

Applying a plain error review to the decision below it is clear that the decision was not "so clearly prejudicial to [a defendant's] substantial rights as to jeopardize the very fairness and integrity of the trial process."[63] The "doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[64]

Specifically, the Court is inquiring into "whether the instructions to the [] jury were erroneous as a matter of law and, if so, whether those errors so affected [the defendant's] substantial rights that the failure to object at trial is excused."[65] The Court does provide that "some inaccuracies may appear in the jury instructions, [but] this Court will reverse only if such deficiency undermined the ability of the jury "to intelligently perform its duty in returning a verdict.""[66] The instructions are not "grounds for reversible error if it is "reasonably informative

[63] *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982).

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

[65] *Probst v. State*, 547 A.2d 114, 119 (Del. 1988).

[66] *Id., quoting Storey v. Castner*, 314 A.2d 187, 194 (Del. 1973).

and not misleading, judged by common practices and standards of verbal communication."[67] As a practical matter however, regardless of the standard of review utilized by the Court, "[t]he trial court's duty include[s], regardless of what trial counsel request[s] or submit[s], the obligation to supply the jury with a correct statement of the law in accordance with the facts of th[e] case."[68] The Court did not provide, nor was it asked to supply a definition in this case, which was a correct statement of the law.

The term "official functions" is not defined in the Code and the Court appropriately left the decision as to whether the facts of the case constituted "official functions" up to the jury to determine pursuant to Title 11 of the Delaware Code § 221(c). This was not a material defect which was basic, serious or fundamental in character and therefore was not plain error by the court below. Title 11 of the Delaware Code § 221(c) states that where a word is not defined by the Code "it has its commonly accepted meaning. . ." According to Merriam-Webster "function" is defined in relevant part as: "the job or duty of a person."[69] Merriam-Webster defines "official" in relevant part as: "of or relating to an office,

[67] *Id., quoting Baker v. Reid*, 57 A.2d 103, 109 (Del. 1947).

[68] *Bullock v. State*, 775 A.2d 1043, 1052 (Del. 2001).

[69] "Function", *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/function. Accessed 6 Dec. 2021.

position, or trust."[70] This definition therefore requires the jury to find that the actions taken by the defendant were related to the job or duty of a person in an office, position or trust. The Court left the factual determination of whether the defendant's actions were official functions, to the common sense of a jury. The defendant did not object to this approach, instead appropriately making an argument to the jury that the facts did not establish an official function.[71]

No definition needed to be provided either, as a jury could readily apply their common sense to the issue of what is an "official function." While from time to time it may be necessary for a court to issue an instruction where one is not available, that was not at issue in this case.[72] In *Waters*, this Court found that it was plain error for the Court below not to *sua sponte* define the term, "cruel, wicked, and depraved indifference to human life" when that term had been previously defined in other cases and directly impacted the *mens rea* at issue.[73] The Court made this finding, aware that as a consequence of a conviction, death was a possible punishment. Unlike *Waters*, there is no prior instruction under Delaware law which was available here. Additionally, the term "cruel, wicked,

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[70] "Official", *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/official. Accessed 6 Dec. 2021.

[71] A-312 "The State says that there was official functioning, earmarking, the testimony shows that earmarking is no official function."

[72] *Waters*, 21 A.3d 1 (Del. 2011).

[73] *Id.*

and depraved indifference to human life" directly impacts state of mind, whereas the phrase "official functions" does not. Whether or not a specific action is an "official function" is a factual inquiry that a jury is equipped to undertake.

The defendant argues for the first time that the Court below should have adopted a new definition for "official functions" from New York or New Jersey. However, New York and New Jersey do not have a statute analogous to 11 *Del.C.* § 1211(3). The cases cited by the defendant do not define "official functions" in the same context as our statute. In New York the applicable law for official misconduct is N.Y. PENAL § 195.00 which states that it is a crime for the defendant to "commit[] an act *relating to his office* but constituting an unauthorized exercise of his official functions."[74] Similarly, the New Jersey statute for official misconduct also requires the additional element that the act must "*relat[e] to his office* but constituting an unauthorized exercise of his official functions."[75] These statutes are narrower in context than 11 *Del.C.* § 1211(3) which does not require the additional element of "an act relating to his office." With this additional element in mind, it is logical that New York and New Jersey would take a narrower view of "official functions" as defined under their statutes

[74] Emphasis added.

[75] N.J. Stat. Ann. § 2C:30-2. Emphasis Added.

since it is required that the "official functions" statutorily must "relate[] to his office."[76]

Delaware's statute contains no such requirement, merely that the act taken was an "official function."[77] The commonly accepted meaning defines official as "of or relating to an office", but this definition is not built into the statute in the same way that it is in New York and New Jersey. Where our statute is silent on the matter, what acts do and do not relate to an office is for the parties to support with facts and for a jury to determine. When interpreting a statute "[w]ords and phrases shall be read with their context and shall be construed according to the common an approved usage of the English language."[78] Comparing these three statutes, it is clear that both the New York and New Jersey statute were intentionally drafted to be narrower in application than Delaware's. The defendant asks this Court to apply this narrower definition, when such is not supported by the context of the words within our statute.

The defendant argues that the term "official functions" is ambiguous. When the court interpets a statute it "must first determine whether the statute is

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[76] *Id.*

[77] 11 Del.C. § 1211(3) "The public servant performs official functions in a way intended to benefit the public servant's own property or financial interests under circumstances in which the public servant's actions would not have been reasonably justified in consideration of the factors which ought to have been taken into account in performing official functions…"

[78] *Wiggins v. State*, 227 A.2d 1062, 1066 (Del. 2020).

ambiguous, because if it is not, then the plain meaning of the statutory language controls."[79] Futher, simply because "the parties disagree about the meaning of the statute does not create ambiguity."[80] If the statute is unambiguous and "contains words or phrases that are undefined, those "[w]ords and phrases shall be read with their context and shall be construed according to the common an approved usage of the English language.""[81] Here, the phrase "official functions" is not ambiguous as it has a commonly accepted meaning which the jury applied.

The defendant also argues that prior case law implies that the term should be narrowly defined as only including "specific duties of office."[82] The defendant relies upon *Howell v. State,* to distinguish between the statute at issue here, 1211(3) and the statute at issue in *Howell*, 1211(2).[83] The Court in *Howell* did not specifically define "official functions" except to contrast that term with subsection (2), which it determined had a broader application because it "is not confined to the failure of a public servant to perform his official powers, functions or duties."[84]

However, the Court in *Howell* noted that "[t]he Commentary on section 1211, as well as the legislative intent, was to "not narrowly confine the statutory

[79] *Id.*

[80] *Id.*

[81] *Id.;* 1 *Del.C.* § 303.

[82] Op. Brf. at p. 25.

[83] 421 A.2d 892 (Del. 1980).

[84] *Id.* at 897.

offense to that of misconduct in official duties but rather described the offense as "misconduct in office."[85] The Court found that "the use of such broadly-stated terms is consistent with the language and evident legislative intent of s 1211(2)."[86] The Court in *Howell* found that the offense of Official Misconduct in general was broadly written and that subsection (2) was consistent with that, not that subsection (2) specifically was broadly written, while the other sections were narrowly written. This is corroborated by the Commentary to section 1211 which states, "[t]he sections relating to offenses against public administration, considered as a whole, regulate the area of official misconduct more completely than the former common-law rules."[87] A finding that subsection (3) should be narrowly tailored would seem to contradict both the Court's interpretation of Official Misconduct and the legislative intent animating the statute.

The Commentary to subsection (3) notes that it was specifically designed to capture discretionary conduct like at issue here. Subsection (3) is a codification of the common law crime of "misfeasance in office." "Misfeasance by a public officer, in the context of this case, is the performance of a discretionary act with an improper or corrupt motive . . . [u]nder a charge of misfeasance the State is required to show that the act in question was a discretionary one, and that in doing

[85] *Id.*

[86] *Id.*

[87] Delaware Code Commentary, p. 346.

it the accused acted with a corrupt or evil intent."[88] Compare this to subsection (1) which the commentary describes as "[a] public officer who commits any breach of trust is relation to his official duty is guilty of malfeasance in office."[89] Here, the defendant had discretionary authority over taxpayer funds, and he "earmarked" and used the influence of his office generally, to pressure and persuade those funds to be granted for his personal benefit.

The actions of the defendant in using his authority to steer public money towards himself, and an entity in which he was interested, is precisely the conduct Official Misconduct was meant to prohibit. The defendant cites to secondary sources for the proposition that "[t]here must be a connection between the official misconduct charged and the duties of office."[90] As cited by the defendant, "existence of a duty owed the public is essential to be liable for misconduct in office, for otherwise the offending behavior becomes merely the private misconduct of one who happens to be an official."[91] That is not the case here, the defendant admitted in the stipulation that his actions were a violation of Wilmington City Code, and directly involved the authority given to the defendant

[88] *Id.* at p. 345, *quoting State v. Matushefske,* 215 A.2d 443, 448 (Del. Super. Ct. 1965).

[89] *Id., quoting State v. Wallace,* 214 A.2d 886, 890 (Del. Super. Ct. 1963).

[90] 63C Am. Jur. *Public Officers and Employees* §358 (2022).

[91] *Id.*

as a public official.[92] "No elected official . . . shall utilize the influence of his or her office or position for personal pecuniary gain, or to unduly influence the behavior of others, or to avoid the legal consequences of his or her personal conduct."[93] This was not a Driving Under the Influence charge unrelated to his official duties, this was public conduct involving authority given to someone by the people and using public money.

4. The definition of "Official Functions" advanced by the defendant would not have changed the outcome.

Assuming *arguendo* that the Court below should have *sua sponte* given the definition of "official functions" now advanced by the defendant to the jury for their consideration, failing to do so was harmless error as it would not have changed the outcome. It is undisputed that the defendant, as the President of City Council, had authority and discretion to approve grants using taxpayer funds.[94] Additionally, it was undisputed that he was advocating for his personal interests while in office and using the authority of his office, and intended to use a taxpayer grant to fund a non-profit he had founded.[95] He also sent an email "earmarking"

[92] State's Exhibit 9.

[93] Wilm. City Code § 2-340(f)(3).

[94] A-066.

[95] State's Exhibit 2, 3, and 9.

taxpayer funds for his later personal use.[96] Applying the narrower definition from New York and New Jersey to the facts here, his actions clearly "related to his office" and were "official functions."

The defendant narrowly argues that "earmarking" is not an official function, while ignoring the additional evidence and testimony elicited at trial regarding his actions to use his office to advance his personal interests. The defendant testified at trial that the term "earmark" was a term of art which meant merely "important."[97] In closing, the defendant made this same argument to the jury.[98] The defendant's definition of "earmarking" is belied by the commonly accepted meaning. "Earmarking" is defined by Merriam-Websters as "to designate (something, such as funds) for a specific use or owner."[99] This definition was corroborated by the testimony of Ms. Basnight who testified that she understood that term to mean "placeholder."[100] The term "earmarking", when used by the defendant in his capacity as the sole discretionary authority to spend that public money, implies that those funds have already been accounted for and delegated to a specific purpose. It is not unreasonable on this record that a jury would find that

[96] State's Exhibit 2.

[97] A-258.

[98] A-293.

[99] "Earmark", *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/earmark. Accessed 9 Aug. 2022.

[100] A-085.

the defendant exericised "official functions" when he claimed those public funds were earmarked. The defendant's action in "designating [taxpayer funds] for a specific use or owner", specifically himself and the non-profit in which he was interested, was an "official function" as contemplated under 11 *Del.C.* § 1211(3).

Further, this Court has previously found the use of public funds, as opposed to private funds, to be a dispositive fact indicating that the actions were official. The *Howell* Court distinguished that case from the Superior Court case of *Green* by noting, "Green did not involve the misuse of public funds . . . While Green's actions were found to be ethically reprehensible, they did not involve criminal conduct or the use of his authority as a public officer to obtain personal benefits from public funds."[101] There is no doubt here that the defendant "use[d] [] his authority as a public officer to obtain personal benefits from public funds."[102]

The other evidence at trial established that the defendant took numerous actions, while in office and using the power and authority of his office, to advance his own interests. During the pertinent time frame he had authority, discretion and control over the public funds at issue.[103] The evidence showed that he sent an

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[101] 421 A.2d at 897. *See also State v. Burge*, 1987 WL 860863 (Del. C. P May 1, 1987) Trader, J., "*Howell v. State*, Del.Supr., 421 A.2d 892 (1980) is distinguishable because the *Howell* case involved the misuse of public funds."

[102] *Id.*

[103] A-054, A-097-098, A-113, A-146, A-168.

email which "earmarked" that public money for his own interests.[104] That he communicated with the incoming President, while still in office, about granting the money to the non-profit.[105] That he had a draft grant prepared while he was in office, and that he gave presentations about the grant while in office.[106] That he had a personal interest in the grant which he did not disclose, and that he had an interest in the non-profit which received the funding.[107] The jury properly interpreted these facts to find that the actions of the defendant were "official functions" and violated 11 *Del.C.* § 1211(3). The narrower definition would not have changed the outcome based on these facts.

[104] State's Exhibit 2.

[105] A-143.

[106] State's Exhibit 3.

[107] State's Exhibit 9.

II. THE SUPERIOR COURT CORRECTLY DETERMINED THAT THE STATE HAD PRESENTED SUFFICIENT EVIDENCE FOR THE CASE TO BE DECIDED BY A JURY.

QUESTION PRESENTED

Whether the Superior Court correctly determined that the State had presented sufficient evidence to establish a *prima facie* case of Official Misconduct pursuant to 11 *Del.C.* § 1211(3).[108]

STANDARD OF REVIEW

This Court reviews sufficiency of the evidence claims *de novo*.[109] The standard of review is whether "any rational trier of fact, viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt of all the elements of the crime."[110] The Court "does not distinguish between direct and circumstantial evidence" and "the State need not disprove every possible innocent explanation."[111]

MERITS OF THE ARGUMENT

Regardless of how this Court chooses to interpret the phrase "official functions", the evidence at trial was sufficient to permit a rational trier of fact to

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[108] *Cushner v. State*, 214 A.3d 443 (Del. 2019).

[109] *Id.*

[110] *Id.* at 446.

[111] *Id.*

find the defendant guilty beyond a reasonable doubt of all elements of the crime. Significant time in the trial was spent establishing that the defendant, as President of City Council, had sole discretionary authority over the grant funds.[112] That those funds were public money.[113] That during his time as President of City Council he re-incorporated the non-profit and advocated for those funds to be granted to him and the non-profit.[114] That he did not disclose his conflict of interest.[115] That he "earmarked" the funds for that specific, and personal, purpose.[116] That he spoke to the incoming President about granting the funds despite his conflict of interest.[117] That he gave presentations about the funds and prepared the grant while he was in office.[118]

In addition to the testimony at trial, the State also entered into evidence the Stipulation from the Wilmington Ethics Commission which the defendant agreed to and signed.[119] Within that Stipulation the defendant agreed that he "pressured" and exerted a "constant push" on the incoming City Council President Ms. Shabazz

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[112] A-054, A-097-098, A-113, A-146, A-168.

[113] A-066.

[114] State's Exhibit 1.

[115] A-137-138.

[116] State's Exhibit 2.

[117] State's Exhibit 9.

[118] *Id.*

[119] *Id.*

to grant the money.[120] He agreed that he questioned her about the grant, while he was in office.[121] He also agreed that he had a draft application prepared while in office.[122] He further admitted that his actions were a violation of the Wilmington City Code of Ethics.[123] While the defendant and even Ms. Shabazz attempted to downplay the significance of their prior statements and events, the jury was free to weigh their credibility against the Stipulation when determining guilt. These facts are sufficient to establish a *prime facie* case of Official Misconduct.

The defendant makes a number of additional arguments, not made below, all of which are unavailing. The defendant contends that the Court below improperly relied upon evidence of the defendant's conduct from after January 3, 2017 when he was no longer in office and therefore no longer exercising official authority.[124] The defendant suggests that the evidence "in the City Ethics Commission's stipulation that Gregory "pressured" Shabazz after Gregory left office. . ."[125] This is not true, the stipulation clearly states that "[a]fter sending the November 10, 2016 Email, Gregory questioned Shabazz and Basnight on multiple occasions about the status of the SDA grant proposal. Shabazz felt "pressure" and a

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] Op. Brf. at p. 30.

[125] *Id.*

"constant push" from Gregory about granting the request."[126] At no point does the stipulation describe actions of the defendant from after January 3, 2017 except insofar as he received a personal benefit after that date.

The defendant also claims that the Court below incorrectly relied upon the fact that both the defendant and Ms. Shabazz, as the incoming City Council President, shared authority over the discretionary fund.[127] While it is true they did not concomitantly exercise discretionary authority over the fund, they did at separate times in the same fiscal year exercise discretionary authority over the same funds.[128] The Court below did not suggest in its order that they both had the authority at the same time, merely that they both had that authority at some point in time.[129]

It was undisputed at trial that until January 3, 2017 the defendant had sole discretionary authority over those funds. During that same time he advocated for, and in fact "earmarked" those funds to be disbursed for his personal benefit, or to benefit a non-profit in which he was interested. He exercised the authority of his office for his own personal benefit, a violation of 11 *Del.C.* § 1211(3).

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[126] State's Exhibit 9.

[127] Op. Brf. at pp. 35-36

[128] A-140-141

[129] *Id.*

CONCLUSION

For the foregoing reasons, the defendant failed to preserve their argument below and the Superior Court correctly permitted the jury to determine whether the defendant's actions were "official functions." The Superior Court also correctly denied the defendant's motion for judgment of acquittal. The State respectfully requests that this Court **AFFIRM** the Superior Court's decision.

Respectfully submitted,

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Dated: September 19, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

THEOPALIS K. GREGORY,	:	
	:	
Defendant-below	:	
Appellant,	:	
	:	
	:	No.: 85, 2022
v.	:	
	:	
STATE OF DELAWARE	:	
	:	
	:	
	:	
Plaintiff-below,	:	
Appellee.	:	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 6,333 words, which were counted by Microsoft Word.

Dated: September 19, 2022 /s/ *David C. Skoranski*