EFiled: Jun 12 2023 03:27PM EDT
Filing ID 70183101
Case Number 364,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TAHA EL-ABBADI,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 364, 2022
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

/s/ Kathryn J. Garrison
Bar I.D. No. 4622
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19947
(302) 739-4211

Dated: June 12, 2023

TABLE OF CONTENTS

Page

TABLE OF CITATIONS……...i

NATURE AND STAGE OF THE PROCEEDINGS……..……1

SUMMARY OF ARGUMENT…….2

STATEMENT OF FACTS……3

ARGUMENT

I. The Superior Court Did Not Err in Denying El-Abbadi's Request for Lesser Included Offense Instructions of Manslaughter and Criminally Negligent Homicide…….……19

II. The Superior Court Did Not Violate Due Process or the Confrontation Clause in Precluding El-Abbadi from Testifying about or Cross-Examining a Witness about a Prior Finding that Alvarez Had Neglected her Children by Leaving them at Home while She Went to a Club…….28

CONCLUSION……...35

Exhibit A: Redacted Video Statement of Taha El-Abbadi, Aug. 20, 2019 (admitted as State's Ex. 4)

TABLE OF CITATIONS

Page(s)

Cases

Ayers v. State, 844 A.2d 304 (Del. 2004) 19

Beck v. Alabama, 447 U.S. 625 (1980).....21

Bentley v. State, 930 A.2d 866 (2007) 22

Bromwell v. State, 427 A.2d 884 (Del. 1981).....29

Brown v. State, 117 A.3d 568 (Del. 2015).....28

Clark v. State, 65 A.3d 571 (Del. 2013) 22

Colon v. State, 900 A.2d 635 (Del. 2006).....23

Crane v. Kentucky, 476 U.S. 683 (1986) 32

Cseh v. State, 947 A.2d 1112 (Del. 2008) 22

Delaware v. Van Arsdall, 475 U.S. 673 (1986).....32

Feleke v. State, 620 A.2d 222 (Del. 1993).....31

Fleetwood v. State, 2016 WL 5864585 (Del. Oct. 6, 2016) 19

Government of Virgin Islands v. Mills, 956 F.2d 443 (3d Cir.1992).....33

Henry v. State, 805 A.2d 860 (Del. 2002) 21, 22

Kentucky v. Stincer, 482 U.S. 730 (1987).....31

Martini v. State, 2007 WL 4463586 (Del. Dec. 21, 2007) 28

McNair v. State, 990 A.2d 398 (Del. 2010).....28

Nance v. State, 903 A.2d 283 (Del. 2006) 28

Nevada v. Jackson, 569 U.S. 505 (2013) 31, 32

Panuski v. State, 41 A.3d 416 (Del. 2012) 28

Ross v. State, 482 A.2d 727 (Del. 1984) 32

Stickel v. State, 975 A.2d 780 (Del. 2009) 28

United States v. Lawrence, 349 F.3d 109 (3d Cir. 2003) 34

United States v. Owens, 484 U.S. 554 (1988) 31

Unitrin, Inc. v. American General Corp., 651 A.2d 1361 (Del. 1995) 23

Wainwright v. State, 504 A.2d 1096 (Del. 1986) 29

Statutes

11 *Del. C.* § 206(c) 21

11 *Del. C.* § 468(1)(c) 22, 26

11 *Del. C.* § 631 23

11 *Del. C.* § 632 23

11 *Del. C.* § 633 23

11 *Del C.* § 634(a) 22

11 *Del. C.* § 634(b)(1) 22, 23

10 *Del. C.* § 901(18) 23, 25

11 *Del. C.* § 1100(1) 22, 26

11 *Del. C.* § 1100(4) 23

Other Authorities

27 James Wm. Moore *et al*., Moore's Federal Practice ¶ 643.02 (3d ed. 2003).....34

Del. Crim. Code with Commentary § 206 (1973).....21

U.S. Const., amend. XIV 28, 31, 32

U.S. Const., amend. VI 28, 31, 32, 33

NATURE AND STAGE OF THE PROCEEDINGS

On August 20, 2019, New Castle County police arrested Appellant Taha El-Abbadi,[1] and the State subsequently charged him by indictment with murder by abuse or neglect in the first degree. A1 at DI 1, 3;[2] A9. El-Abbadi's jury trial began on February 7, 2022, and after six days of trial, on February 15, 2022, the jury found El-Abbadi guilty of murder by neglect first degree and acquitted him of the alternate theory of murder by abuse first degree. A6 at DI 28; A769–70. The Superior Court ordered a presentence investigation and sentenced El-Abbadi on September 23, 2022 to 30 years in prison, the first 15 years of which is a minimum/mandatory sentence, followed by two years of Level III probation. A6 at DI 36; A772, 791; Ex. C to Op. Br. El-Abbadi timely appealed and filed his Opening Brief. This is the State's Answering Brief.

[1] El-Abbadi was initially arrested for an assault-related charge, but the child died a few days later. *See* A1.

[2] "DI #" refers to items on the Superior Court criminal docket in *State v. El-Abbadi*, ID # 1908013052.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The Superior Court did not err in denying El-Abbadi's request for lesser included offense instructions of manslaughter and criminally negligent homicide. There was no evidence presented in this case that would have allowed the jury to have rationally acquitted El-Abbadi of murder by abuse or neglect first or second degree and instead convicted him of manslaughter or criminally negligent homicide.

II. Appellant's second claim is DENIED. The Superior Court did not violate due process or the Confrontation Clause in precluding El-Abbadi from testifying about or cross-examining a witness about a prior finding that Julian's mother had neglected her children by leaving them at home while she went to club in Philadelphia. The evidence was not material, nor did the court's exclusion of it otherwise prevent El-Abbadi from cross-examining any of the witnesses, or presenting his own to testify, about whether Julian's mother delayed getting care for Julian or caused his injuries.

STATEMENT OF FACTS

Meagan Alvarez's Recollection of August 19, 2019

On the morning of August 19, 2019, Meagan Alvarez left home for her job at Great Clips Salon at around 7:40 a.m. A432–33. She took her daughter, J.C.,[3] aged around five, with her. A424. She left her three-year-old son, Julian, at home with her boyfriend, El-Abbadi. A411, 424–25. Alvarez and El-Abbadi had been dating for about five months and he had been living with Alvarez and her two children for the past few months at her apartment in the Castle Brook Apartments in New Castle. A50, 411. Alvarez usually put her children in daycare while she was at work, but that day, El-Abbadi offered to watch them, as he had the day off from his job at Casanova Auto Repair in New Castle (alternately referred to as "the autobody shop"). A424, 324–25. Alvarez opted to just have Julian stay with El-Abbadi, and El-Abbadi offered to help potty train him while she was gone. A424–26. When she left for work, Julian was awake and acting normally, and he had no marks or bruises on his body. A428, 430–31.

Alvarez got to work at about 8:10 a.m. A433. She and El-Abbadi communicated by text and phone calls throughout the day. A436–51. At 10:23 a.m.

[3] The State refers to Alvarez's daughter by her initials because she is a minor. *See* Supr. Ct. R. 7(d).

El-Abbadi sent Alvarez a photo of Julian that he had just taken.[4] A437, 404–05; B29. Notably, Julian had no bruises on his face in the photo. A439; B29.

At 1:27 p.m., Alvarez spoke to El-Abbadi in a FaceTime video call. A442. He and Julian were lying on the floor of Julian's bedroom. A440–41. Alvarez noted that Julian did not appear himself; he was not talking and, although he was awake, he looked tired. A441–42. When Alvarez asked Julian what was wrong, he did not respond. A442. Instead, El-Abbadi answered for him, telling her that Julian was just tired. *Id.*

Alvarez left work at about 2:50 p.m. A365, 443. She had a couple of errands to run, so she asked El-Abbadi to watch Julian for a little bit longer. A444. Alvarez drove to her apartment complex where she visited the leasing office to get a copy of her lease, but she did not go into her apartment. A443–44. She took the lease to her daughter's elementary school, where she registered her for school. A445–46. Alvarez then visited her sister-in-law, Andrea Alvarez (Andrea), at her home in Bear. A372, 375, 446. There, Alvarez picked up some hand-me-down clothes for

[4] Detective Austin Jenkins of the New Castle County Police Tech Crimes Unit extracted data from three phones used by Alvarez and El-Abbadi. A391, 393. He was able to determine that El-Abbadi opened the message application, took the photograph through the application, and then sent it immediately afterwards at 10:23 a.m. A403–05.

Julian, some food, and J.C. went swimming for a while with Andrea's children. A446–48.

Alvarez arrived home at 5:25 p.m., but El-Abbadi and Julian were not there. A450–51. Alvarez called El-Abbadi to ask him where he was, and he told her he had gone to his job to get paid by a customer and would be home soon. A450. He also said there had been an accident with Julian, but that he would tell her about it when he got home. A452.

El-Abbadi came home with Julian at 6:15 p.m. A265. A neighbor saw him carrying Julian into the apartment building and observed that the boy was limp in his arms and looked sick. A272–73. El-Abbadi put Julian in his bed and Alvarez went in to see how he was. A453. She perceived that Julian looked like he was sleeping, he had a red mark on his cheek, and he was snoring a little louder than normal. A453. But she could not wake him up. A455. El-Abbadi told Alvarez that he had been arguing with a customer at the auto body shop when Julian got scared, ran away, and hit his head on a car lift. *Id.* He said Julian had cried after hitting his head and that El-Abbadi had given him some medicine that caused him to go to sleep. *Id.*

Alvarez became concerned that she could not wake Julian up, but thought it was because of the medicine El-Abbadi had given him. A456. At around 7 p.m., she called a friend, who was familiar with concussions because she had had a few

when she played sports as a child. A382–83, 456. The friend recommended that Alvarez call a doctor. A385. Alvarez could not reach her pediatrician, so she contacted her friend again, who gave her the contact information for an on-call doctor. A385–86. El-Abbadi did not want Alvarez to call a doctor; he was afraid that he would get in trouble, so he left at 7:44 p.m. A266, 458–59, 460. He also asked Alvarez not to tell anyone his name, texting her: "You give them my name, that's it, they going to want me, they lock me up, you don't understand. Please don't give my name, please don't. I'm begging you." A463. The doctor Alvarez contacted connected Alvarez to 911 at 7:51 p.m. A460, 463. She told the dispatcher and a police officer that arrived later the basics of the story El-Abbadi had told her, but she gave them a fake last name for El-Abbadi. A53, 461.

Julian's Treatment and Death

The first paramedics arrived on the scene at 8:05 p.m. A61. Julian was lying on his bed. *Id.* He was unresponsive, had slow respirations, and a low heart rate; he appeared pale and his eyes were open but he was not responsive in any way. A62. The paramedics knew that Julian was seriously injured and assumed that he had a head injury. A65. They requested a helicopter to transport Julian to A.I. DuPont

Children's Hospital.[5] The trooper medic who treated Julian during the helicopter flight noted that his pupils were "blown," *i.e.*, extremely large and nonreactive, and that his heart rate, breathing, and blood pressure indicated he probably had intracranial pressure. A167, 171.

Dr. Erin Teeple, a pediatric surgeon, was the trauma surgeon on call at the hospital when Julian arrived. A93, 95. She determined that based on Julian's symptoms, he was very severely brain injured and that his brain was swelling and herniating out of the bottom of his skull. A99. He had only the most minimal spinal reflexes left. A100. She also realized that how the injury was described to have occurred—Julian running into and hitting his head on a car lift—did not explain the severity of his injuries. A101. She called El-Abbadi with Alvarez, but he gave them the same story. A104. He said that Julian had cried after running into the car lift, but was consolable. *Id.* He reported that Julian also had a headache, so El-Abbadi had given him some medicine. *Id.*

Bernadette Clagg, a forensic nurse in the emergency department at the hospital, was called in to evaluate Julian for child abuse. A74, 76, 78. Shortly after he arrived, she photographed his injuries. A82. She documented that Julian had

[5] The hospital changed its name in the summer of 2021 to Nemours Children's Hospital. *See* https://www.delawareonline.com/story/news/health/2021/05/12/nemours-hospital-name-change/5041332001/.

observable bruising to the left side of his face, forehead, and cheeks, and bruising to both buttocks. A83; B1, 3. A cervical collar had been put on Julian to protect his spine, but he also had bruising up to the cervical collar. A74, 77.

Clagg alerted Dr. Stephanie Ann Deutsch, a child abuse specialist at the hospital, about Julian. A174, 180. Dr. Deutsch examined Julian the next morning, reviewed his records, and spoke with the doctors who had treated him. A183. She concluded that, apart from Julian's life-threatening head injury, he exhibited "obvious physical signs on his skin" of "sustained trauma . . . primarily to the face and really extensive injury to the buttocks." A186. The bilateral bruising on Julian's buttocks was consistent with inflicted trauma from a strike. A189–90. She also noted that his head injury was "inconsistent with simple accidental trauma such as a fall or head strike." A187. Julian had been assessed by an opthamologist, who determined that he had "extensive hemorrhages throughout all of the layers of the retina," and a "rip in the tissue layers," a finding, Dr. Deutsch noted, that "has only been reported in the pediatric medical literature accidentally in settings in which a child is involved in a high speed motor vehicle crash, a fatal crush injury or if they fall multiple feet." A193. In other words, the medical findings were not consistent with Julian having struck his head against a car lift in an autobody shop. A197.

Dr. Jeffery Campbell was the pediatric neurosurgeon who examined and operated on Julian on the night of August 19, 2019. A110. He noted that Julian had

a Glasgow Coma Score of 4 out of 15, with 3 being the lowest—no neurologic functioning. A116–17. Julian had some automatic movements on one side of his body, but his pupils were fixed and dilated, which is generally a sign of devastating and irrecoverable brain injury because it indicates that the brain stem has been damaged at a fundamentally core area. A120. Julian exhibited a tiny bit of brain stem function, but very little else; at that point, if he survived, he probably would have been vegetative. A121.

A CT scan revealed that Julian had a very large subdural hematoma, which evidenced a "tremendous brain injury." A122. "[Julian] had evidence of both, some initial traumatic injury but then it had been long enough that it looked like he had irreversible injury to the brain from lack of blood flow." *Id.* Dr. Campbell observed that a subdural hematoma as large as the one Julian had generally comes from "very high-force kind of injuries," such as in "kids in high speed auto accidents who are not in seat belts or people who fall several stories out of a building." A122–23; *see* A130 ("[I]t was a larger hemorrhage which is generally associated with a higher, a worse trauma, more force applied to that."). The CT scan showed that the right hemisphere of Julian's brain and a pretty good portion of the left side were probably not recoverable. A127. Dr. Campbell testified at trial that Julian's injury was one of the worst he had seen in his 22 years of practicing pediatric neurosurgery. *Id*.

Prior to operating, Dr. Campbell shaved Julian's head and noted additional bruising around the top. A133; B5. During the operation, the doctor removed a large piece of the skull from the right side of Julian's head to give the brain a place to swell out into. A128–29. But Julian's brain was so swollen that Dr. Campbell could not get the skin closed over the top of it, so he also had to remove areas of dead brain. A129. The doctor also drained the bleeding from the hematoma. A128–29.

Dr. Campbell believed that the injury had to have come from a very high force trauma, and that it was possible that a large man hitting a small child, if he was hitting the child "pretty hard with something hard," might cause such an injury. A132, 134. The multiple areas of bruising indicated that Julian was struck multiple times. A133–34. At least one blow had to have been of very high force. A150. The type of injury Julian had could not have been caused by a child running into a large, fixed structure, falling onto a carpeted floor, or being involved in a pillow fight. A139–43. Dr. Campbell opined that, given the severity of the injury, Julian would probably have been unconscious almost immediately after sustaining it and he would have gone limp and been unresponsive. A134. He might have woken up a little bit after getting knocked out, but he would not have been normal; he would not have been able to walk, talk, or eat. A134–35.

Julian survived the surgery, but most of his brain was dead. A144. He had no evidence of any brain function and eventually met the criteria for brain death. A145. Dr. Campbell noted that had they done the operation soon after Julian's injury, "he probably would have survived and may have had a pretty good outcome." A144. He pointed out that Julian really had two different injuries (A138):

> [T]he blunt force trauma caused bleeding in the subdural space from tearing of veins around the outside of the brain. And then that, both the bleeding itself creates inflammation of the brain, but then over time what happened is the swelling created increased pressure inside the head that caused the brain to die from lack of blood flow.

A147. The doctor had seen children with "large subdurals" do fine if they got to the hospital quickly, but by the time Julian was brought in, his brain was too damaged from the secondary injury caused by the swelling and bleeding. A138–39. Dr. Campbell concluded that had Julian received prompt medical treatment, he would have survived. A146.

The State medical examiner determined that Julian's cause of death was blunt force injury and his manner of death was homicide. A226.

The Police Investigation

It took police several hours to track down El-Abbadi once they learned his correct name. A275–78; B43–45, 47. After speaking with the chief investigating officer, Sergeant Jennifer Eschman, on the phone, El-Abbadi came to the police station of his own volition at around 3 a.m. on August 20th. B43–45, 47. During an

initial interview that lasted more than two hours, El-Abbadi continued to maintain that Julian had hit his head on a chassis machine at the autobody shop. A36; B49; *see* State's Ex. 2. At Detective Escheman's request, El-Abbadi agreed to go to Casanova's Auto Repair with the police to reenact what had happened. B53. The reenactment occurred at around 8:20 in the morning and was video recorded. B53–55; *see* State's Ex. 3.

Detective Escheman began interviewing El-Abbadi a second time at 1:17 p.m. B58. At first, he maintained the same story, but soon after, he claimed that he had dropped Julian off with a friend who lived in Claymont and whose last name he could not remember, and that when he went back to pick Julian up "that's how he was." State's Ex. 4 (Ex. A) at 13:29:42-50. Shortly after that, El-Abbadi changed his story and said Julian had been injured when he was confronted by a man who thought he (El-Abbadi) had stolen a gun from him. Ex. A at 13:34:56–13:35:04. The man, whose name he only remembered as "Jeffe" (ph.) was following El-Abbadi as he drove to the autobody shop. *Id.* at 13:36:54–13:37:10. When he stopped to confront him, El-Abbadi claimed the man had swung at him but missed and hit Julian instead. *Id.* at 13:35:58-13:36:03. Then, El-Abbadi asserted that the man hit Julian with his car. *Id.* at 13:36:21–13:36:27. During his telling of that version of events, El-Abbadi also admitted that he had spanked Julian that morning because he had peed in the bed. *Id.* at 13:35:23–13:35:30.

Finally, El-Abbadi settled on a story that he and Julian had been play pillow fighting and that he hit Julian too hard in the head with a pillow, and Julian went flying and hit the back of his head on the floor. A614; Ex. A at 13:48:18–24. Julian lay there afterwards, his eyes stayed half-way open, and he did not get up. A608; Ex. A at 14:03:20–25. El-Abbadi said that happened at around 3 p.m. Ex. A at 13:48:26–28. He tried to wake Julian up by putting him in the shower, but that did not work. A609, 614; Ex. A at 14:03:26–29. El-Abbadi "freaked out" and rushed out of the house, carrying Julian with him, because he knew that Alvarez was coming home soon. A609, 623; Ex. A at 13:47:10–13. He went to the autobody shop where he stayed until he later came back home, at which time he carried Julian in and put him in his bed; Alvarez was already home. Ex. A at 13:24:26–31.

El-Abbadi also admitted that, before the pillow fight, he had hit Julian with his hand to the side of his face because Julian was not listening to him—"I smacked him that day in the face because he wasn't listening, he was like telling me in my face no, no, no, and . . . I said, let's go. And he started crying, so I just smacked him, like I turned around and I just like, and that was it." A602–03; Ex. A at 14:08:36–14:09:00. Julian fell to the floor and started crying. A602; Ex. A at 14:09:03–06. El-Abbadi put ice on Julian's butt and cream on his face. Ex. A at 14:09:17–30. Later, they started playing, which is when the devastating injury from the pillow hit

occurred. *Id.* at 14:09:55–14:10:0. El-Abbadi also admitted to Detective Escheman that he had not given Julian any medication. *Id.* at 14:02:08–10.

The New Castle County Police obtained video surveillance from the Castle Brook Apartments. A252–54. The surveillance footage showed Alvarez leaving with J.C. at 7:35 a.m. A261. She did not come back until later in the day. A261. At 8:34 a.m., El-Abbadi's friend, Cristian Cabrerra, arrived at the apartment. A262. He later exited the building at 10:15 a.m. and just afterwards El-Abbadi exited with Julian walking behind him. *Id.*; B7-10. El-Abbadi and Julian returned at 11:34 a.m. A262. It appeared that they could not initially gain entrance to the building, so they walked off camera towards the leasing office and appeared back on camera at 11:45 a.m. when they were able to enter the building. A263; B11–20. At 3 p.m., El-Abbadi exited the building, walked to his car carrying Julian, and left.[6] A264–65; B21–24. Alvarez and J.C. finally arrived home to stay[7] at 5:24 p.m. and went back and forth from Alvarez's car carrying bags. A265. At 6:15 p.m., El-Abbadi arrived back at the apartment and carried Julian inside. *Id.*; B25–28. He drove off again by himself at 7:44 p.m. A266.

[6] Phone records revealed that Alvarez called El-Abbadi at 2:59 p.m.; he left the apartment carrying Julian immediately after she called. A449, 620–22.

[7] Alvarez came back to the apartments sometime after 3 p.m. to get a copy of her lease from the leasing office, but she did not go into her apartment and El-Abbadi had already left with Julian. *See* A264–65, 365, 369, 443–44.

A neighbor who saw El-Abbadi arrive at Alvarez's apartment building at 6:15 p.m. noted that the boy he was carrying was "limp in his arms" and "looked sick." A273. A woman who knew El-Abbadi well, whom he referred to as "Ma," Lisa Velez,[8] said that El-Abbadi had called her on the afternoon of August 19, 2019 and told her that Julian was playing at a friend's house and had fallen. A326. She then had a second phone conversation with El-Abbadi in which he said that Julian was sleeping and he would not wake up; he was unresponsive. A327. She told El-Abbadi to take Julian to his mother. *Id.* New Castle County police confirmed through El-Abbadi's phone records that El-Abbadi had called Velez on August 19, 2019 at 11:56 a.m. and she had then called him at 12:23 p.m. A328.

Cabrerra also saw El-Abbadi later that day at Casanova's Auto Repair at around 5 or 6 p.m.; Cabrerra was outside and saw El-Abbadi in his car. A344. Julian was in the front seat of El-Abbadi's car and appeared to be asleep. A345. Cabrerra noticed some purple marks on Julian's face.[9] *Id.*

[8] Velez was also the office manager at Casanova Auto Repair. A324.

[9] Cabrerra had not seen Julian when he visited the apartment earlier in the day. A341–42.

El-Abbadi's Testimony

El-Abbadi testified at trial that he left Alvarez's apartment on Sunday morning, August 18, 2019, and had not come home until the early morning hours on August 19, 2019. A517–18. He awoke to the sounds of Alvarez screaming and yelling at Julian. A518. Julian's face was all red from crying and he did not have his diaper on. A519. Alvarez left Julian with him because she did not want to take him to his daycare. A520. El-Abbadi later noticed that Julian had marks on his face and on his butt. A524, 584.

Cabrerra came over and they smoked marijuana together outside of Julian's presence and then they all ate food together. A521–52. When Cabrerra left, El-Abbadi took Julian with him at around 10:30 a.m. to drop off a dealer tag with a dealer he knew. A522–23. They returned about 11:20, but he had lost his key to the outer apartment building door, so they could not get in until someone came through the door. A523–24.

El-Abbadi acknowledged that he spoke with Velez on the phone at 11:57 and 12:23 that day, but claimed that they did not talk about Julian but instead discussed car parts. A522, 605–07. Alvarez FaceTimed him in the afternoon. A523. He asked Alvarez to come pick Julian up because Julian had marks on his face and his butt and El-Abbadi "really [didn't] want to be in this predicament that [she] put [him] in." A524. But Alvarez said she still had errands to run. A525. El-Abbadi left at

around 3 p.m. to go to the autobody shop. *Id.* He carried Julian to the car because he was tired. A526. He noted that Julian just seemed tired and sad. A525. While El-Abbadi worked in the shop, Julian stayed in the car watching videos on El-Abbadi's phone; El-Abbadi left the car air conditioning on for him. A525. They left the shop at around 5:30 or 5:40 p.m. A527. On the way home, Julian fell asleep and would not wake up. A528. El-Abbadi carried him into his bedroom when he got home because Julian was still not waking up. *Id.* Alvarez was home and El-Abbadi says he told her, "I don't know what you did that morning or weekend, . . . but you got to fix your situations." A530.

El-Abbadi testified that Alvarez told him to tell the story about Julian hitting his head on something in the autobody shop. A530. Alvarez was reluctant to call 911. *Id.* But when she did call 911, El-Abbadi left and begged Alvarez not to give the authorities his name because he had warrants for his arrest for a pending case and he had "car tickets." A540. El-Abbadi said he was not aware of how severe Julian's condition was. *Id.* He made up the stories he told to the police because he had been drinking and smoking marijuana prior to turning himself in and was not in his right mind. A541–42. He said Alvarez told him to tell the story about the autobody shop injury and that he made up all of the later stories and eventually took the blame for what happened to Julian to cover for Alvarez. A542, 569–70, 600. El-Abbadi testified that Alvarez was responsible for all of Julian's injuries. A548. He

claimed he lied to Detective Escheman about spanking or hitting Julian to protect Alvarez. A570, 573–74, 597, 599. El-Abbadi testified that Julian had been "up with [him] during the whole day, he just looked tired." A604. It was not until the ride home that Julian lost consciousness and could not be roused. *See* A527–28.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR IN DENYING EL-ABBADI'S REQUEST FOR LESSER INCLUDED OFFENSE INSTRUCTIONS OF MANSLAUGHTER AND CRIMINALLY NEGLIGENT HOMICIDE.

Question Presented

Whether the Superior Court erred in denying El-Abbadi's request for lesser-included offense instructions of manslaughter and criminally negligent homicide.

Standard and Scope of Review

"This Court reviews the denial of a requested jury instruction *de novo*."[10]

Merits of the Argument

El-Abbadi requested that the Superior Court instruct the jury on the lesser included offenses of murder by abuse in the second degree, manslaughter, and criminally negligent homicide. *See* A657–59. The State objected to the inclusion of the instructions for manslaughter and criminally negligent homicide. A662–64. The Superior Court granted El-Abbadi's request for a lesser included offense instruction on murder by abuse or neglect in the second degree, but found that there was no rational basis in the record to support lesser included instructions for manslaughter and criminally negligent homicide, noting:

> The LIO of murder by abuse or neglect second contains the mens rea of criminal negligence. Thus the only difference between that charge

[10] *Fleetwood v. State*, 2016 WL 5864585, at *2 (Del. Oct. 6, 2016) (citing *Ayers v. State*, 844 A.2d 304, 309 (Del. 2004)).

> and criminally negligent homicide would be the absence of a finding of abuse or neglect.
>
> Abuse under Title 11, Section 1100 of the Delaware Code is defined as causing injury to a child through unjustified force as defined in Section 468, Subsection 1 of the code which includes any act that is likely to cause or does cause physical injury.
>
> Based on the evidence in the record, the jury could either find that the defendant did not commit the alleged act at all, or his actions that led to Julian Cepeda's injury which was serious physical injury was abuse.
>
> As a result, I am not including the . . . request for the lesser included offense of criminal negligent homicide.
>
> As to manslaughter, the only difference between that charge and murder by abuse first is the component of the victim being a child in murder by abuse first; hence a finding of murder by abuse first would cover that charge.

A695–96.

El-Abbadi claims the Superior Court erred as a matter of law when it denied his request for instructions on the lesser included offenses of manslaughter and criminally negligent homicide. Opening Br. at 14–20. Specifically, he argues the court erred in concluding that "the age of the victim was the only distinction between the instructed offenses and either Manslaughter or Criminally Negligent Homicide." *Id.* at 17. He asserts that a rational trier of fact could have found El-Abbadi guilty of manslaughter instead of murder by abuse or neglect "by finding that he recklessly caused Julian's death through conduct that falls within the broader definitions of 'negligent' or 'criminally negligent' but does not fall within the narrow definition of

neglect applicable to Murder by Neglect." *Id.* at 18. Similarly, he argues that there was harm in the court's failure to instruct the jury on criminally negligent homicide, because the jury did find El-Abbadi's conduct amounted to negligence, which conduct falls within the broader definition of criminally negligent homicide. El-Abbadi's claim is unavailing.

Due Process requires a lesser-included offense instruction, when requested, if the evidence would permit a jury rationally to convict the defendant of a lesser offense and acquit of the greater.[11] "The Delaware General Assembly has also provided for that protection by statute."[12] Section 206 of Title 11 of the Delaware Criminal Code provides: "The court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense."[13]

This Court uses a four-part test to determine whether a lesser-included offense instruction is merited:

---

[11] *Henry v. State*, 805 A.2d 860, 864 (Del. 2002) (citing *Beck v. Alabama*, 447 U.S. 625, 635-38 (1980)).

[12] *Id.* (citing 11 *Del. C.* § 206(c))

[13] 11 *Del. C.* § 206(c); *see Del. Crim. Code with Commentary* § 206 at 16 (1973) ("The jury need not be bothered with a charge on a lesser included offense unless there is a rational basis in the evidence for a verdict convicting the defendant of the lesser offense.").

> (1) the defendant makes a proper request; (2) the lesser included offense contains some but not all of the elements of the charged offense; (3) the elements differentiating the two offenses are in dispute; and (4) there is some evidence that would allow the jury rationally to acquit the defendant on the greater charge and convict on the lesser charge.[14]

A defendant satisfies the fourth prong "if there 'is any evidence fairly tending to bear upon the lesser included offense,' even if the evidence is weak."[15] Conflicting testimony regarding the element distinguishing the two offenses generally satisfies this standard."[16]

El-Abbadi was charged with murder by abuse or neglect in the first degree for recklessly causing the death of a child through an act of abuse or neglect.[17] *See* A9. "Abuse" is defined as "causing any physical injury to a child through unjustified force as defined in § 468(1)(c) of [Title 11], torture, negligent treatment, sexual abuse, exploitation, maltreatment, mistreatment or any means other than accident."[18] Relevant to El-Abbadi's case, "neglect" means that a person is "responsible for the care, custody, and/or control of the child" and "has the ability and financial means to provide for the care of the child" and "[f]ails to provide necessary care with regard

---

[14] *Cseh v. State*, 947 A.2d 1112, 1114 (Del. 2008) (citing *Henry*, 805 A.2d at 864; *Bentley v. State*, 930 A.2d 866, 875 (2007)).

[15] *Clark v. State*, 65 A.3d 571, 582 (Del. 2013) (quoting *Henry*, 805 A.2d at 865).

[16] *Id.*

[17] 11 *Del C.* § 634(a).

[18] 11 *Del. C.* § 634(b)(1); 11 *Del. C.* § 1100(1).

to: food, clothing, shelter, education, health, medical or other care necessary for the child's emotional, physical, or mental health, or safety and general well-being."[19]

The Superior Court granted El-Abbadi's request for a lesser included offense instruction on murder by abuse or neglect in the second degree, which is the same in all respects except that the *mens rea* is criminal negligence instead of recklessness.[20] The court denied El-Abbadi's request for an instruction on the lesser-included offenses of criminally negligent homicide, for which a person is guilty when he, with criminal negligence, causes the death of another person,[21] and manslaughter, for which a person is guilty when he recklessly causes the death of another person.[22] Here, the Superior Court did not explicitly analyze El-Abbadi's request for lesser include instructions under this Court's four part test, but, even so, the court's ruling was not in error. [23] Manslaughter carries the same *mens rea* as murder by abuse or neglect in the first degree, but the amount of behavior that it encompasses is broader

---

[19] 11 *Del. C.* § 634(b)(1); 11 *Del. C.* § 1100(4); 10 *Del. C.* § 901(18); *see* A746 (jury instruction).

[20] *See* 11 *Del. C.* § 633.

[21] 11 *Del. C.* § 631.

[22] 11 *Del. C.* § 632.

[23] *See Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995) ("We recognize that this Court may affirm on the basis of a different rationale than that which was articulated by the trial court."); *Colon v. State*, 900 A.2d 635, 638 n.12 (Del. 2006) ("While the judge articulated a different rationale for his ruling in this case, we may affirm on grounds other than those relied upon by the judge." (citations omitted)).

than murder by abuse or neglect; it is not limited to acts of abuse or neglect. The same is true for criminally negligent homicide and murder by abuse or neglect second degree. Both require a *mens rea* of criminal negligence, but criminally negligent homicide is not limited to acts of abuse or neglect. Therefore, as correctly noted by the Superior Court (at least with respect to murder by abuse second degree and criminally negligent homicide), the element differing between each of the two sets of charges—manslaughter and murder by abuse or neglect first degree and criminally negligent homicide and murder by abuse or neglect second degree—is whether El-Abbadi committed an act of abuse or neglect. Based on the facts presented in this case, there were no set of circumstances pursuant to which a rational jury could have found that El-Abbadi did not commit an act of abuse or neglect but was still guilty of criminally negligent homicide or manslaughter. If the jury accepted any one of El-Abbadi's versions of events—that Julian ran into a chassis machine in the autobody shop; that another person (the woman in Claymont, "Jeffe," or Alvarez) caused the head injury; that someone he knew hit Julian with a car; or that he accidentally hit Julian too hard with a pillow, causing him to fly across the room and hit his head—it would have had to either find him guilty of murder by abuse or neglect or not guilty of any crime.

If the jurors believed that someone else caused Julian's head injury or that Julian was accidentally injured when he ran into the chassis machine, they would

have had to have found El-Abbadi guilty of either murder by *neglect* first or second degree or acquitted him of any crime. There was no dispute that El-Abbadi was responsible for the care of Julian, that he had the ability and financial means to provide care for Julian, and that he did not get necessary medical treatment for Julian.[24] Thus, the only issue in dispute, if the jury believed those stories, would be whether El-Abbadi recklessly or with criminal negligence failed to provide necessary medical treatment for Julian. If the jurors found El-Abbadi's failure to get necessary medical treatment for Julian did not amount to criminal negligence or recklessness, for example because they believed he did not realize that Julian was injured or that Julian had an injury that required prompt medical treatment, they could only have found him not guilty. And they would have had no basis to instead convict El-Abbadi of criminally negligent homicide or manslaughter because they would have already rejected the underlying *mens reas* for each of those crimes.

The same is true if the jurors had believed El-Abbadi's story that he caused the injury that led to Julian's death during a pillow fight or they believed the State's theory that he caused it while disciplining Julian. In either case, such a hit amounted to abuse under its definition. As noted above, abuse includes causing *any physical injury* to a child through *inter alia*, unjustified force, negligent treatment,

[24] *See* 10 *Del. C.* § 901(18).

mistreatment, "*or any means other than accident.*"[25] Moreover, use of force is only justifiable "if it is reasonable and moderate," the defendant is responsible for the care and supervision of the child, the "force is used for the purpose of safeguarding or promoting the welfare of the child, including the prevention or punishment of misconduct," and the force is intended to benefit the child.[26]

Again, under the facts of this case, and as correctly noted by the Superior Court, there was no dispute that Julian suffered a physical injury inflicted by a large amount of force. Thus, the only issue in dispute was whether, if the jury believed El-Abbadi caused the injury by hitting Julian with a pillow or by hitting him while disciplining him, El-Abbadi hit Julian with recklessness or criminal negligence. If he did so, then he was guilty of murder by abuse in the first or second degree. If he did not, then he was not guilty and the jury would have had no basis to find him guilty of either criminally negligent homicide or manslaughter.

Nor does El-Abbadi's claim that he unintentionally caused Julian's death by hitting him with a pillow too hard while playing with him change the analysis. Such an act still fits the definition of abuse. In that scenario, El-Abbadi intended to hit Julian with the pillow, but he hit him so hard that Julian flew across the room and hit his head on the floor, causing a catastrophic brain injury. He caused physical

[25] 11 *Del. C.* § 1100(1) (emphasis added).

[26] 11 *Del. C.* § 468(1)(c).

injury to a child, as a person responsible for the child's care, through the use of unjustified force. Whether El-Abbadi should be held liable for that act would be determined by the jury when it assessed whether him hitting Julian too hard with the pillow amounted to criminal negligence or recklessness.

The Superior Court did not err in denying El-Abbadi's requests for jury instructions for the lesser included offenses of manslaughter and criminally negligent homicide. There was no evidence presented that would have allowed the jury to rationally have acquitted El-Abbadi of either murder by abuse or neglect first or second degree and convicted him instead of manslaughter or criminally negligent homicide.

II. THE SUPERIOR COURT DID NOT VIOLATE DUE PROCESS OR THE CONFRONTATION CLAUSE IN PRECLUDING EL-ABBADI FROM TESTIFYING ABOUT OR CROSS-EXAMINING A WITNESS ABOUT A PRIOR FINDING THAT ALVAREZ HAD NEGLECTED HER CHILDREN BY LEAVING THEM AT HOME WHILE SHE WENT TO A CLUB.

Question Presented

Whether the Superior Court violated the Due Process or Confrontation Clauses by precluding El-Abbadi from testifying about and cross-examining a witness about a prior finding that Alvarez had neglected her children by leaving them at home while she went to a club in Philadelphia.

Standard and Scope of Review

This Court reviews the Superior Court's rulings on the admissibility of evidence for an abuse of discretion.[27] Claims of constitutional violations are reviewed *de novo.*[28] Claims not raised below, are reviewed for plain error.[29] 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

[27] *Brown v. State*, 117 A.3d 568, 579 (Del. 2015) (citing *McNair v. State*, 990 A.2d 398, 401 (Del. 2010); *Stickel v. State*, 975 A.2d 780, 782 (Del. 2009)).

[28] *See Panuski v. State*, 41 A.3d 416, 419 (Del. 2012); *Martini v. State*, 2007 WL 4463586, at *2 (Del. Dec. 21, 2007).

[29] *See Nance v. State*, 903 A.2d 283, 285 (Del. 2006) ("Constitutional issues that are not raised in the trial court are reviewed for plain error.").

clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[30]

Merits of the Argument

During Dr. Deutsch's testimony, she stated that she had reviewed Julian's medical records, "which notably included a hospital presentation in February of 2019 related to flu symptoms and concern for supervisory neglect." A184. On cross-examination, El-Abbadi's counsel began to ask Dr. Deutsch about that prior finding, and the State objected. A201. The State argued the information was not relevant and would confuse the jury and explained that the report involved an incident in which Alvarez had left her children at home alone while she went out to a club in Philadelphia. A202–03. Someone had called the police, and Julian was taken to the hospital with flu-like symptoms. A202. As a result, Alvarez had been charged with endangering the welfare of a child and had entered a probation before judgment plea. *Id.* El-Abbadi's counsel argued that the information was relevant because Alvarez denied hitting Julian, she was with him the morning of the injuries, El-Abbadi was also charged with murder by neglect for not taking Julian to the hospital, and "it would be relevant if the mother had a history of a pattern of neglect." A205. The court sustained the State's objection (A209), finding:

[30] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Bromwell v. State*, 427 A.2d 884, 893 n. 12 (Del. 1981)).

> [T]o now inject not physical abuse by the mother in February 19th [sic] but simply that she was neglectful because she left the children, not minimizing left the children and went to a club, have that before the jury to sort of extrapolate from that that she could have, one, struck Julian to cause bruising, or two, obviously cause his brain injury when she wasn't present at the time, I think creates an unnecessary level of confusion in 403.

A208. The court further noted that the information was arguably relevant because of the breadth of the definition of relevance, but that its probative value was outweighed by its prejudicial effect. *Id.* The court later gave the jury an instruction clarifying that Dr. Deutsch's prior involvement with Julian had nothing to do with El-Abbadi. A232–33.

During El-Abbadi's testimony, he claimed that Alvarez had been hesitant to call 911 because she was on probation for a prior conviction with her children. A530. The State objected, and El-Abbadi's counsel acknowledged that the issue had already been ruled on and he had instructed El-Abbadi that he could not talk about it unless Alvarez opened the door. A532. Counsel believed Alvarez had not opened the door to discussion of her criminal proceeding. *Id.* The court instructed El-Abbadi not to mention Alvarez's past criminal involvement, pointing out to him that the court had made a distinction in its ruling between neglect and what was alleged to have transpired in El-Abbadi's case. A534–35. The court then instructed the jury to disregard El-Abbadi's last statement, noting "it has no bearing or is not germane to the issues in this case." A537.

El-Abbadi claims the Superior Court violated his right to confrontation, cross-examination, and to present a defense when it precluded him from cross-examining Dr. Deutsch about the prior incident of neglect involving Alvarez and from letting El-Abbadi testify about Alvarez's prior criminal proceeding involving her children. Opening Br. at 21–27. El-Abbadi's claim is unavailing.

As a preliminary matter, El-Abbadi did not argue in the trial court that the court's exclusion of the evidence violated the Confrontation Clause or due process. Thus, his claim must be reviewed for plain error. The Confrontation Clause of the Sixth Amendment guarantees a defendant's right to confront the witnesses against him; however, it "guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'"[31] In addition, although the Due Process Clause "guarantees criminal defendants a meaningful opportunity to present a complete defense,"[32] the United States Supreme Court has held that "the Constitution leaves to the judges who must make [evidentiary] decisions 'wide latitude' to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment,

[31] *United States v. Owens*, 484 U.S. 554, 559 (1988) (emphasis in original) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)), *quoted in Feleke v. State*, 620 A.2d 222, 228 (Del. 1993).

[32] *Nevada v. Jackson*, 569 U.S. 505, 509 (2013) (internal quotations and citations omitted).

prejudice, [or] confusion of the issues.'"[33] Only rarely has the United State Supreme Court held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence.[34]

Here, the Superior Court's exclusion of the evidence about the prior finding of Alvarez's neglect in no way rises to the level of a Due Process or Confrontation Clause violation. The evidence was neither exculpatory, nor material. In addition, the court's exclusion of the evidence did not prevent El-Abbadi from cross-examining any of the witnesses about whether Alvarez delayed getting care for Julian or caused his injuries. Nor did the decision prevent El-Abbadi from presenting his own case and his own witnesses.[35] Indeed, El-Abbadi testified that Alvarez was responsible for Julian's injuries even though Julian was in his care most of the day. But El-Abbadi's theory, first, that the prior incident exhibited a pattern of neglect and, second, that the jury could infer from that that Alvarez caused Julian's traumatic brain injury was simply too far removed from the facts of the case.

El-Abbadi also attempted to use the prior conviction in his direct examination to explain why Alvarez would have been reluctant to call 911, and, thus to argue that

---

[33] *Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)).

[34] *Jackson*, 569 U.S. at 509.

[35] *Cf. Ross v. State*, 482 A.2d 727, 742 (Del. 1984) (finding no merit to defendant's claim of constitutional error in exclusion of hearsay testimony when defendant was not deprived of right to present witnesses in his own behalf).

she was the one who neglected to get Julian prompt medical care. But the amount of time it took Alvarez to call 911 was only a small portion of the time during which Julian's condition was neglected. And the court's exclusion of the evidence did not prevent El-Abbadi from arguing that Alvarez was responsible for Julian's death. The crux of his defense, however, was that Alvarez must have caused the injury before leaving Julian with El-Abbadi (*see* A725–31), and, even so, if the seriousness of the injury was not obvious to Alvarez, Julian's mother, then why would it have been obvious to El-Abbadi (*see* A733). The fact that Alvarez might have been reluctant to call 911 because of a prior conviction was not material to El-Abbadi's defense. Moreover, El-Abbadi is not claiming that the court restricted his cross-examination of Alvarez. Indeed, El-Abbadi's counsel acknowledged that he did not believe Alvarez's testimony opened the door to raising the issue of the prior neglect finding and he did not question her about it.

In sum, the Superior Court did not violate the Due Process or Confrontation Clauses in excluding references in Dr. Deutch's and El-Abbadi's testimony to the prior neglect finding related to Alvarez.[36]

---

[36] *Cf. Gov't of Virgin Islands v. Mills*, 956 F.2d 443, 445 (3d Cir. 1992) (establishing three-part test for determining whether a limitation on the right to present witnesses rises to the level of a constitutional violation, consisting of whether: (1) the defendant was "deprived of the opportunity to present evidence in his favor;" (2) "the excluded testimony would have been material and favorable to his defense;" and (3) "the deprivation was arbitrary or disproportionate to any legitimate evidentiary or procedural purpose."); *accord Savage*, 116 F. App'x at 339. *See also*

United States v. Lawrence, 349 F.3d 109, 120 (3d Cir. 2003) ("[T]he right to cross-examine is neither absolute nor unbounded. Rather, it is 'tempered by the practical aspects of conducting a criminal trial,' and 'a reasonable limitation on cross-examination will [therefore] not necessarily violate the Sixth Amendment.'" (quoting 27 James Wm. Moore *et al.*, Moore's Federal Practice ¶ 643.02 (3d ed. 2003))).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

/s/ Kathryn J. Garrison
Bar I.D. No. 4622
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19947
(302) 739-4211

DATED: June 12, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TAHA EL-ABBADI,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 364, 2022
	)	
	)	
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 Time New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 8,063 words, which were counted by Microsoft Word 2016.

/s/ Kathryn J. Garrison
Kathryn J. Garrison (No. 4622)
Deputy Attorney General
Department of Justice

DATE: June 12, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TAHA EL-ABBADI, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	)))))))))	Case No. 364, 2022

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S EXHIBIT 4
(submitted on disc)