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Case Number 282,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TREVIE BURRELL,	)	
	)	
Defendant Below,	)	
Appellant,	)	**Case No. 282, 2023**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE OF DELAWARE'S ANSWERING BRIEF

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DATE: March 8, 2024

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NATURE AND STAGE OF THE PROCEEDINGS

On July 19, 2021, a New Castle County Superior Court jury indicted Appellant Trevie Burrell with first degree murder, possession of a firearm during the commission of a felony (PFDCF), and possession of a firearm by a person prohibited (PFBPP) (resulting in serious physical injury or death).[1] A1 at D.I. 2.[2] Prior to providing discovery in the case, the State filed motions for protective orders, which the court granted. A2 at D.I. 12–14, 16, 17, 19. On March 29, 2023, defense counsel requested that the protective order be lifted so that he could share, *inter alia*, the witnesses' identities with Burrell. A9 at D.I. 41. The court granted his request later the same day. A10 at D.I. 43.

The jury was selected on March 30, 2023. A10 at D.I. 46. A bifurcated trial began on April 3, 2023. A10 at 44. On the third day of the first trial, the jury found Burrell guilty of first degree murder and PFDCF. A12 at D.I. 49, 50. The next day, after a second trial, during which the State presented a stipulation of fact that Burrell was a person prohibited from possessing a firearm at the time of the murder, the jury also found Burrell guilty of PFBPP. A12 at D.I. 47, 50. The court ordered a presentence investigation. A12 at D.I. 50.

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[1] *See* 11 *Del. C.* § 1448(e)(2) (providing for enhanced sentence when the person negligently causes serious physical injury or death while in possession of firearm).

[2] D.I. refers to items on the Superior Court criminal docket in *State v. Burrell*, DUC # 2107007983.

On July 28, 2023, the Superior Court sentenced Burrell: (1) for first degree murder, to the balance of his natural life at Level V; (2) for PFBPP (with injury), to 10 years at Level V (minimum mandatory under 11 *Del. C.* § 1448(e)(2)c);[3] and (3) for PFDCF, to 10 years at Level V, suspended after five years for decreasing levels of supervision. A12 at D.I. 50; Ex. A to Opening Br. Burrell appealed and filed a timely Opening Brief, followed by a Corrected Opening Brief. This is the State's Answering Brief.

[3] The sentencing order lists the wrong code subsection (11 *Del. C.* § 1447A) for the mandatory minimum sentence. *See* Ex. A to Op. Br. at 1.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. Although the Superior Court erred in admitting phone conversations and messages from inmate Dilip Nyala under Delaware Rule of Evidence (D.R.E.) 804(b)(6), the forfeiture by wrongdoing hearsay exception, the evidence was properly admitted under D.R.E. 801(d)(2)(E) as a coconspirator's statement. Moreover, the court properly analyzed the evidence's admissibility under D.R.E 404(b). The State established by both the preponderance of the evidence and by plain, clear, and conclusive evidence that, acting in concert with Burrell, Nyala was attempting to influence a key witness not to testify against Burrell.

II. Appellant's second claim is DENIED. The Superior Court did not abuse its discretion or violate Burrell's constitutional right to present a complete defense by requiring the redaction of the name of the individual who had shot a witness, Andre Church, on a separate occasion. The redaction did not hinder Burrell from arguing that Church's motive for telling the police that Burrell shot the victim was to achieve a better result for his own criminal charges or that Church shot the victim, not Burrell. In addition, the court did not plainly err in allowing the redaction of commentary surrounding Church's shooting. The resulting version of the statement was not likely to have caused the jury to believe that Burrell shot Church.

And, even if it did, other testimony clarified that Church's shooting was separate and distinct from the shooting in this case.

III. Appellant's third claim is DENIED. The reasonable doubt instruction did not violate due process. The instruction used language that has been consistently approved by this and other jurisdictions and its language would not reasonably have misled the jury to apply a clear and convincing evidence standard.

STATEMENT OF FACTS

In the early morning of December 10, 2017, Wilmington police officers were called out to the scene of a shooting on the 200 block of North Rodney Street in Wilmington. B28. There, they found Lionel Benson lying unresponsive on the sidewalk with a gunshot wound to his neck. B28–29. Emergency Medical Services responded to the scene shortly thereafter and transported Benson to Christiana Hospital. B30. Benson survived, but was rendered paraplegic by the gunshot wound. B19. He died a little over eight months later on August 23, 2018, as a result of complications from the treatment of his condition. B20.

Although at least two people called 911 to report the shooting, when police arrived at the scene there were no eyewitnesses present. B5. Detective Mackenzie Kirlin, the Chief Investigating Officer, was later able to locate a witness—a Lyft driver—from surveillance cameras in the area. B7. That Lyft driver, Eugene Matthews had arrived at the intersection of Second and Rodney Streets on the morning of December 10th just after the shooting to pick up a fare. B7–8. As he waited, a man approached his car and told him there was a body lying on the street and to call 911. B8. Matthews left the scene without his fare after police officers began arriving. B8.

Detective Kirlin identified Jamir Graham as the man who had ordered the Lyft. B9–10. Graham was living diagonally across the street from the site of the

shooting at the time and had ordered a Lyft to take him to work. B10–11. It was cold that morning and there was snow on the ground. B11. While Graham waited outside for the Lyft, he noticed a man clearing snow from a car a couple of houses down on the other side of the street. B11. Graham heard a gunshot. B11. Because it was still dark outside and a tree partially blocked his view, he could not see what happened but saw two men, including the man who was clearing snow off of the car, run to the middle of the street. B11–13, 15. Graham called the police and noticed that one of the men also called the police. B11. When his Lyft driver, arrived, the driver said, "who's shooting up there, . . . and pulled off," leaving Graham behind. B12.

Through her investigation, Detective Kirlin learned that the other two men who had been at the scene were Edwin Cabrera and Andre Church. A106, 112; B16. She interviewed Church two days after the shooting, on December 12, 2017, when he came into Probation and Parole for a scheduled visit. A106, 114, 145–46, 148. Church confirmed that he had been present during the shooting and that he had been standing next to Benson when "Trev" walked up wearing all black, approached Benson from behind and shot him unexpectedly. A112, 150. Church tried to run but fell in the street. *Id.* By the time he got up, Trev was gone and Benson was lying on the ground lifeless. *Id.* Church removed a gun that Benson had on him and got rid of it. *Id.*

Fifteen months later, on March 12, 2019, Church was arrested on a number of gun and drug charges. A131. Church confessed to the crimes and, knowing that he faced substantial prison time for them, he offered to give the police information about three shootings—his own, a shooting on Clayton Street that implicated Terrell Mobley (the "Mobley shooting"), and Benson's shooting. A151, 168–69, 179–81. Detective Kirlin interviewed him that same day. A151.

By this time, Detective Kirlin had identified "Trev" as Burrell. A163. Church (whose nickname was "Hoov") stated again that Burrell had walked up behind Benson (whose nickname was "Stink") and shot him "point blank" in the neck. A42, 128, 258, 263; *see* A309 (Mar. 12, 2019 Church interview). Church and Benson had just been talking outside about football tickets. A258, 270. Church added that "Ed" (Cabrera) was out there too. A263. Afterwards, Church tried to run but fell in the street. A274. Burrell came over to him, pointed the gun at Church, said "I should shoot you too," then took off running. A264, 274. Church recognized Burrell's gun as his own black "nine," because "they" had taken it from him when he (Church) had been shot on a prior occasion. A277. Church identified Burrell out of a six-photo spread line-up. A154–55, 269.

After attempting to contact Cabrera numerous times, Detective Kirlin was finally able to interview him on June 19, 2019. A61, 289–302; B17. Cabrera told the detective that on December 10, 2017, "late in the morning, way after midnight,"

when it was snowing, he, Benson, and Church were outside "B.S. – ing" and "[t]alking about sports." A290; *see* A309 (June 19, 2019 Cabrera Interview). Cabrera was cleaning snow off of a car with a broom. A290, 294. "[Burrell] walks past, goes into a basement, few minutes later, comes out – walks right directly behind [Benson] and shoots him in the back of the head." A290; *see* A296–97. Cabrera and Church tried to flee, Burrell shot in their direction, and then ran away. A291–92. Church fell down. A291. Cabrera called 911 but told the dispatcher that he was just walking by when he heard a gunshot and there was a guy lying on the ground with what looked like a gunshot to the head. A309 (Cabrera 911 call). Cabrera said, "I didn't see anything" and later added, "I don't want nobody thinking I'm knowing anything. . . . I'm just walking away." *Id.*

Cabrera was aware of Burrell from the neighborhood, but never socialized with him. A298. He saw Burrell once after the shooting, when Burrell said to him, "what's up, you good, we good." A299. Cabrera identified Burrell in a six-photo spread lineup. A99–101, 300–01.

Neither Cabrera nor Church testified willingly for the State at trial. Cabrera had to be detained with a material witness warrant. *See* A38, 63. He remembered many of the circumstances surrounding the shooting but testified that he did not see who shot Benson. *See* A42, 47–53, 55–56. Cabrera said he told Detective Kirlin that Burrell had shot Benson to help out Church. A70. Church had been arrested

and was facing a lot of gun charges; he asked Cabrera to corroborate his story with the detective. A74–75, 81–82, 93.

Although Church appeared willingly at trial and testified about a few details from that night, he answered most questions about the shooting with "I don't recall." *See, e.g.*, A129–32, 141–42. He also testified that he did not tell Cabrera to make up a story about the murder. A134. Church acknowledged that after he was arrested on gun and drug charges on March 12, 2019, he told a detective that he was willing to give information about three shootings—his own, the Mobley shooting, and Benson's. A180–81. Through cross-examination, Church implied that he gave information about Benson's shooting to help himself with the charges he was facing, and that the information may not have been honest. A182–84.

Church had entered a plea in his own case on July 24, 2019, to drug dealing and two counts of PFBPP. A185. He initially received a 12-year minimum mandatory sentence, but after he testified against Mobley in his murder trial, the State filed a substantial assistance motion and Church's mandatory minimum sentence was reduced. A186–87. By the time of Burrell's trial, Church had already been released from prison but was still on probation. A187, 189. Both Cabrera's and Church's redacted statements to Detective Kirlin were admitted at trial under 11 *Del. C.* § 3507. *See* A61, 150, 154, 309.

As discussed in more detail below, in the days before trial, the State discovered that Burrell had asked another inmate to contact Church to ensure that he did not testify against him. *See* A193–95. That inmate, Dilip Nyala, was able to contact Church in a phone call from the prison and Church assured Nyala he was being forced to testify, but "they can't control what I say." A239; *see* A309 (Nyala Intercepted Call, Mar. 31, 2023, 3:22 p.m.). Three redacted prison phone conversations and one redacted tablet message were admitted as evidence of Nyala's attempts to speak with Church on Burrell's behalf ("the Nyala evidence"). A58–62. Burrell did not testify at trial. B27.

ARGUMENT

I. ALTHOUGH THE NYALA EVIDENCE SHOULD NOT HAVE BEEN ADMISSIBLE UNDER D.R.E. 804(b)(6), THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE EVIDENCE UNDER D.R.E. 801(d)(2)(E) AND D.R.E. 404(b).

Question Presented

Whether the Superior Court abused its discretion in admitting the Nyala evidence under D.R.E. 801(d)(2)(E), 804(b)(6), or 404(b).

Standard and Scope of Review

This Court reviews the Superior Court's rulings on the admissibility of evidence for an abuse of discretion.[4] Legal conclusions are reviewed "*de novo* for errors in formulating or applying legal precepts."[5]

Merits of the Argument

Burrell claims the Superior Court erred and abused its discretion in permitting the State to introduce the Nyala message and phone calls under D.R.E. 801(d)(2)(E), 804(b)(6), and 404(b) as substantive evidence of Burrell's identity and guilty knowledge. Corr. Opening Br. at 19. Burrell's claim is unavailing. Although the court erred in admitting the evidence under D.R.E. 804(b)(6), the evidence was otherwise properly admissible under D.R.E. 801(d)(2)(E) and D.R.E. 404(b).

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[4] *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)).

[5] *Williams v. State*, 962 A.2d 210, 214 (Del. 2008) (citations omitted).

Several days before trial, on March 29, 2023, the Superior Court lifted the protective order in Burrell's case, allowing defense counsel to discuss witness identities and share police reports with Burrell. A9–10 at D.I. 41–43. The next day, Nyala, who was housed at James T. Vaughn Correctional Center, as was Burrell, called his son, telling him, "the boy sent me a message . . . he going to trial Monday." A309 (Intercepted Nyala Call, Mar. 30, 2023, 8:46 p.m.). Nyala told his son he needed to get Hoov's (Church's) number and asked his son to look for Church's brother Darius's number.[6] *Id.* Nyala said he had just gotten the message and that he was trying to get a message out, "tell him to stand down." *Id.* Nyala and his son discussed others who might be able to contact Church, including someone named Shaq, and eventually got a third party on the phone, who Nyala asked to "get with his cousin, you know who I'm talkin' about." *Id.*

Later that night, Nyala sent a tablet message to Brittany Winder, which said "Hoov telling on Trev. Shaq ain't even try to talk him out of it. He facing the long haul." A308. The next afternoon, Nyala spoke to Church in a three-way call with his son. A309 (Intercepted Nyala Call, Mar. 31, 2023, 3:22 p.m.). Nyala told Church, "Boy sent a message, . . . you know I can't do too much, you know what

[6] Church confirmed at trial that his nickname is Hoov and that his brother's name is Darius. A128, 144.

I'm saying." *Id.* Church responded, "They making me go, 'cause of my probation, right, but they can't control what I say." *Id.*

That same night, Nyala called a different individual and told him, "Hurky Rock's got trial Monday. He had sent me a message." A309 (Intercepted Nyala Call, Mar. 31, 2023, 9:06 p.m.). Nyala told the individual about how he had spoken with Church earlier that day, but added, "It's not just him though. It's the other boy too." *Id.* Nyala stated, the "other boy" said "he only said it because boy told him to say it." *Id.* The individual responded, "We got to find out," and later added, "If I didn't have to work, I would go down to that motherfucker's." *Id.*

At trial, Cabrera testified as Nyala predicted he would, stating that he only told Detective Kirlin that Burrell was the shooter because Church told him to. And Church declined to answer most questions about the shooting, averring that he could not recall what had happened or what he had earlier told Detective Kirlin. The State moved to admit the evidence of the phone calls and message from Nyala under D.R.E. 804(b)(6), the forfeiture by wrongdoing hearsay exception, and D.R.E. 801(d)(2)(E), the coconspirator statement exclusion from the hearsay definition. *See* A193–97; B33–34. The parties also agreed that admission of the evidence would require analysis under D.R.E. 404(b) because it concerned other bad acts. *See* 230–32; B33–34. The Superior Court found the evidence admissible under all three rules

of evidence, with some limitations. *See* A238–46; B22–26. The court also gave the jury a D.R.E. 404(b) limiting instruction. *See* A245, 247, 251–52; B22.

A. The Superior Court Erred in Admitting the Nyala Evidence Under D.R.E. 804(b)(6).

D.R.E. 804 provides for exceptions to the rule against hearsay evidence when the declarant is unavailable. Under subsection (b)(6), "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the *declarant* as a witness" is excluded by the hearsay rule if the *declarant* is unavailable as a witness.[7] "Forfeiture by wrongdoing is a common law doctrine that permits the introduction of statements of a witness who was detained or kept away by the means or procurement of the defendant."[8] Here, the State sought to admit statements made by Nyala and others while attempting to persuade Church not to testify against Burrell. Nyala, one of those declarants, was ultimately "unavailable" to testify because he asserted his Fifth Amendment right against self-incrimination. *See* B26. But, as argued by Burrell (*see* Corr. Opening Br. at 22–23), Nyala's hearsay statements did not fall under the Rule 804(b)(6) exception because he was not the declarant Burrell sought to prevent from testifying, Church was. Thus, only Church's statement to Nyala that "they" could not control

[7] D.R.E. 804(b)(6) (emphasis added).

[8] *Phillips v. State*, 154 A.3d 1130, 1142–43 (Del. 2017) (quoting *Giles v. California*, 554 U.S. 353, 359 (2008)) (internal quotations omitted).

what he said, was admissible under D.R.E. 804(b)(6)[9] and the Superior Court erred in admitting Nyala's and the other individual's statements under that exception.

B. The Nyala Evidence Was Properly Admitted Under D.R.E. 801(d)(2)(E).

D.R.E. 801(d)(2)(E) provides that a statement made by a "party's coconspirator during and in furtherance of the conspiracy; provided that the conspiracy has first been established by the preponderance of the evidence to the satisfaction of the court" is not hearsay. A statement qualifies under the rule if the offering party can show by a preponderance of the evidence that: "1) a conspiracy existed; 2) the co-conspirator and the defendant against whom the statement is offered were members of the conspiracy; and 3) the statement was made during and to further the conspiracy."[10] A trial court may rely on the statement itself to establish the conspiracy.[11] Moreover, such statements are considered nontestimonial and, thus, do not violate the Confrontation Clause of the Sixth Amendment.[12]

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[9] *See* D.R.E. 804(a)(2), (3) (providing that a witness who refuses to testify about subject matter or testifies to not remembering the subject matter is unavailable).

[10] *Lloyd v. State*, 534 A.2d 1262, 1264 (Del. 1987) (citing *Carter v. State*, 418 A.2d 989, 994 (Del. 1980)).

[11] *Swan v. State*, 820 A.2d 342, 353 (Del. 2003) (citing *Lloyd*, 534 A.2d at 1264–65).

[12] *Phillips*, 154 A.3d at 1141.

Here, the State asserted that the Nyala evidence should be admissible under that rule because Burrell and Nyala conspired to commit witness tampering under 11 *Del. C.* § 1263. B33–34. Witness tampering includes acts or attempted acts of intimidation, including "knowingly and with malice prevent[ing] or dissuad[ing] . . . any witness . . . from attending or giving testimony at any trial."[13] The Superior Court found the State had met its burden to prove by "clear and convincing" evidence that a conspiracy between Burrell and Nyala existed, noting that "[Burrell] through the use of Nyala engaged in wrongdoing, the result of Nyala's misconduct being the witness tampering," and "[c]learly, [Burrell's] purpose in reaching out to Church through Nyala was to silence Church." A243–44. In so finding the court noted:

- At the time of the phone calls and message, Nyala was incarcerated at the same location as Burrell. A238.
- On March 29th, the court had lifted the protective order, which was not reflected on the docket at that time. *Id.*
- In the first phone call, which occurred the next day at 8:46 p.m., Nyala told his son that "the boy sent me a message telling me that he goes to trial on

[13] 11 *Del. C.* §§ 3532, 3534; *see* 11 *Del. C.* § 1263(3) (providing a person is guilty of witness tampering for knowingly intimidating a witness under circumstances set forth in subchapter III of chapter 35 of Title 11).

Monday," and "asked his son to get a message to Darius Church, [Church's brother] to stand down." Nyala also said he had just gotten the message 10 minutes ago. A238–39.

- At 9:56 p.m. the same day, Nyala sent a tablet message to Brittany Winder, stating "Hoov telling on Trev, Shaq ain't even trying to talk him out of it. He's facing the long haul." Trial testimony indicated that Hoov was Church. A239.
- The next day, at 3:22 p.m., Nyala called his son and they eventually got Church on the phone. "In that call, Nyala's son tells Nyala that Hoov . . . texted him. Nyala indirectly tells Church the boy said to message you." Church told Nyala that "they" were making him testify, but that they could not control what he said. *Id.*
- In the final call, that same day at 10:46 p.m., Nyala called an unknown person and confirmed again that "Hurky Rock sent him a message stating that Hurky Rock's trial starts Monday." "More importantly, Nyala talks about what [] Cabrera is going to say at trial; namely, that Cabrera said what he said to help out Church." A239–40.

The court concluded:

> The question in this case is whether the State has made a sufficient showing to tie the comments back to the defendant. In the communications, Nyala makes it clear on more than one occasion that [Burrell] asked him to reach out to Church. [Burrell's] involvement in

> this matter is buttressed by the timing of the communications, which came shortly after the Court lifted the protective order regarding the identities of the two witnesses against the defendant. . . .
>
> While [Burrell] argues that lots of people could have known Church was going to be the witness, the record evidence is that only [Burrell] knew the identity of the witnesses given the protective order. By the way, when the protective order was lifted it was not reflected on the docket at that point, only counsel knew the protective order was lifted. The communications also make clear what the second witness, Cabrera, was going to say; namely, that he was going to disown his testimony and say he lied to help Church. Even if people knew about Church because of the involvement with other crimes, they clearly did not know about Cabrera and what he was going to say. But the last call makes clear that Nyala knew what Cabrera is going to testify to and knew that Cabrera said what he said because Church asked him in order to help Church.
>
> When the context of all of these pieces are put together, I'm satisfied that the State has proven, I think by the standard I have to use as clear and convincing evidence, that Burrell and Nyala were involved in a plan against Church to pressure him not to testify.

A240–41.

Contrary to Burrell's arguments, the Superior Court did not abuse its discretion in finding the Nyala evidence admissible under D.R.E. 801(d)(2)(E). The State established by a preponderance of the evidence that Burrell and Nyala conspired to try to influence Church not to testify against Burrell.[14] Nyala clearly

[14] Although the Superior Court appears to have incorrectly applied the clear and convincing standard rather than the preponderance of the evidence standard, that mistake does not affect the result. The evidence met either standard. *See Unitrin, Inc. v. American General Corp.*, 651 A.2d 1361, 1390 (Del. 1995) ("We recognize

and implicitly stated that Burrell ("Hurky Rock"/"Trev") had messaged him to try to get him to contact Church to get him to "stand down." Even if the message had come to Nyala through a third party from Burrell, that does not mean that Nyala's statements were not those of a coconspirator to Burrell. Nyala clearly understood that the message was coming from Burrell and that that was who he was trying to help.[15] Moreover, although Nyala's and the other participant's statements were often inexplicit—they were made in phone conversations and on a tablet that the parties would have known were being monitored by the prison—it is evident from their full context that Burrell had asked Nyala to try to influence Church to not "tell on" Burrell at his trial.

C. The Superior Court Properly Found the Nyala Evidence Admissible Under Rule 404(b).

D.R.E. 404(b) forbids the State from offering evidence of a defendant's other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith. "The second sentence of D.R.E. 404(b), however, permits introduction of such evidence for reasons other than proving propensity, 'such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or

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that this Court may affirm on the basis of a different rationale than that which was articulated by the trial court.").

[15] *See* 11 *Del. C.* § 512 (providing that a person is guilty of conspiracy when that person agrees to aid another person in the planning or commission of a felony or an attempt or solicitation to commit the felony).

absence of mistake or accident.'"[16] In *Getz v. State*,[17] this Court set forth five guidelines to consider when admitting evidence subject to D.R.E. 404(b):

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.
>
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
>
> (3) The other crimes must be proved by evidence which is "plain, clear and conclusive."
>
> (4) The other crimes must not be too remote in time from the charged offense.
>
> (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.
>
> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.[18]

Burrell argues the Superior abused its discretion in permitting the Nyala evidence under Rule 404(b) because the bad acts were not proved by "plain, clear and conclusive" evidence, the third *Getz* requirement. Opening Br. at 26–27. Burrell's argument fails.

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[16] *Getz v. State*, 538 A.2d 726, 731 (Del. 1988) (quoting D.R.E. 404(b)).

[17] 538 A.2d 726.

[18] *Id*. at 734 (citation and footnote omitted).

"[This Court has] previously recognized that the testimony of an eyewitness or other witness with personal knowledge typically satisfies the 'plain, clear and conclusive' requirement."[19] Here, the phone conversations and tablet message were akin to eyewitness testimony and the sort of evidence sufficient to meet the third *Getz* requirement. Burrell argues that that evidence did not sufficiently establish that Burrell sent the message to Nyala or that the messages directed witness tampering. But, contrary to Burrell's argument, as discussed above, it is clear from the full context of the communications that Nyala understood that Burrell had sent him a message to tell Church to "stand down." Nyala's conversations with his son, the other individual, and Church, and Nyala's tablet message amount to plain, clear, and conclusive evidence that Nyala was attempting to influence Church's testimony at Burrell's behest.

[19] *Chavis v. State*, 235 A.3d 696, 700 (Del. 2020) (citing *Johnson v. State*, 983 A.2d 904, 934 (Del. 2009)).

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION OR VIOLATE BURRELL'S RIGHT TO PRESENT A COMPLETE DEFENSE BY EXCLUDING THE NAME OF CHURCH'S SHOOTER FROM HIS STATEMENT, NOR DID THE COURT ERR IN PERMITTING THE REDACTIONS SURROUNDING CHURCH'S DISCUSSION OF HIS SHOOTING.

Question Presented

Whether the Superior Court abused its discretion or violated Burrell's constitutional right to present a complete defense by permitting the State to redact from Church's statement the name of the man who shot him on a previous occasion.

Whether the Superior Court abused its discretion or clearly erred in approving the redaction of the discussion of Church's shooting as proposed by the State.

Standard and Scope of Review

This Court reviews the Superior Court's rulings on the admissibility of evidence for an abuse of discretion.[20] Claims of constitutional violations are reviewed *de novo.*[21] When a party did not object at trial to the admissibility of evidence, this Court reviews the issue for plain error.[22] Under that standard, "the error complained of must be so clearly prejudicial to substantial rights as to

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[20] *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)).

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

[22] *Muto v. State*, 2004 WL 300441, at *3 (Del. Feb. 12, 2004) (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

jeopardize the fairness and integrity of the trial process."[23] "[T]he 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."[24]

Merits of the Argument

At some point prior to Benson's shooting, Church was shot by Thomas Payne. *See* A23–24, 260–61. When Church was arrested on March 12, 2019, he offered to give the police information about his own shooting, the Mosley shooting, and Benson's shooting. During the subsequent interview with Detective Kirlin, the following exchange took place:

> DETECTIVE KIRLIN: . . . You know I have Stink shooting.
>
> CHURCH: I know that.
>
> DETECTIVE KIRLIN: But I know about yours too.
>
> CHURCH: Uh-huh.
>
> DETECTIVE KIRLIN: So. So, what do you know about Stink's?
>
> CHURCH: Trev did it.
>
> DETECTIVE KIRLIN: Trev? So, what happened that day?
>
> CHURCH: Same situation how I explained it to you. Right? (Inaudible) he was talking. There was conversation. I was looking up

[23] *Wainwright*, 504 A.2d at 1100.

[24] *Id.*

down the street at a car coming up. When I turned around, we had seen Trev walk behind us and go down to the basement. He beelined turn right back around, stood behind me, shot him in the head.

DETECTIVE KIRLIN: When you say walked down the basement, what basement?

CHURCH: Bag's basement.

DETECTIVE KIRLIN: Oh, okay, So, the house that you guys are at?

CHURCH: That we used to be at.

***

DETECTIVE KIRLIN: Huh. Okay. So, were they all like friends? Were they friends or just what?

CHURCH: I'm not going to say that. Them motherfuckers were cordial. I'm not going to say they was really friends or anything like that.

DETECTIVE KIRLIN: Just work together.

CHURCH: You know how like it ain't even work together. But you know how like some people don't like one person, so they take sides or something for someone.

DETECTIVE KIRLIN: Right.

CHURCH: And it was all surrounding what took place with me. [redacted].

DETECTIVE KIRLIN: What with the 3rd Street thing?

CHURCH: When I got shot.

DETECTIVE KIRLIN: On 3rd Street, right?

CHURCH: It all surrounding that. Because I wasn't supposed to be shot that night. That shit wasn't meant for me. It was meant for Bags.

DETECTIVE KIRLIN: You and Bags are fucking complete height difference.

CHURCH: I was standing there with him. I stuck up for him. I said something to the dude.

DETECTIVE KIRLIN: Oh.

CHURCH: The dude was standing behind the truck. I said, who the fuck is that. What you got me in? I said, Bags, n****r got a gun. I already got information that he was mugging on Bags. I was telling him that. Them motherfuckers left me out there.

DETECTIVE KIRLIN: So, Bags ran?

CHURCH: And left me out there.

DETECTIVE KIRLIN: That's dirty. . . .

CHURCH: Thomas Pain [sic], that's who shot me.

DETECTIVE KIRLIN: Thomas Pain [sic]? So, was he by himself?

CHURCH: Yeah.

DETECTIVE KIRLIN: No way, that's –

CHURCH: Yes. He was by himself. Shot me with an AR-15.

DETECTIVE KIRLIN: Right. No, I remember that.

CHURCH: He shot me in my leg, then he came down slowly on top of me and shot me.

DETECTIVE KIRLIN: Have you ever seen him back out?

CHURCH: Never seen him again. If I did, it probably be another situation.

DETECTIVE KIRLIN: Right. Huh. Where's Bags been? I haven't seen him.

A259–61.

Prior to trial, the State argued that Church's statement should be redacted to exclude references to when Church was shot. A23. Defense counsel agreed that the portions of the statement in which Church discusses "Bags" should be redacted but asserted that his shooting was relevant to his credibility and motive for coming forward with information when he did, and tied into Church's later statement that he recognized the gun that was used to shoot Benson because it was his gun taken from him when he was shot. A24–26, 30–31. The Superior Court held that Church's shooting was relevant and admissible, but that who shot him was not. A28–29, 30–31. Defense counsel expressed concern that the jury might not understand from the redactions why Church knew who shot him. A32–33. The court advised counsel that he could educate the jury in closing and ask Church during cross examination if he knew who shot him and how he knew that. A33.

As redacted, the relevant portion of Church's statement read:

CHURCH: You know how like it ain't even work together. But you know how like some people don't like one person, so they take sides or something for someone.

DETECTIVE KIRLIN: Right.

CHURCH: And it was all surrounding what took place with me. [redacted].

> DETECTIVE KIRLIN: What with the 3rd Street thing?
>
> CHURCH: When I got shot.
>
> [redacted].
>
> CHURCH: He shot me in my leg, then he came down slowly on top of me and shot me.
>
> DETECTIVE KIRLIN: Have you ever seen him back out?
>
> CHURCH: Never seen him again. If I did, it probably be another situation.

See A309 (Mar. 12, 2019 Church Interview).

Burrell claims the Superior Court's decision allowing the State to redact the name of Church's shooter violated his right to a fair trial and to present a defense. Opening Br. at 33. He asserts that inclusion of the name was necessary to allow Burrell to argue that Church was only naming names to get himself out of trouble—"Church's naming of Payne only when it could get him out of trouble, absent any suggestion of prior intimidation, was 'critical corroborative defense evidence.' Simply put, if he is playing that game when he is a victim, how can the jury believe he would not when he is merely a witness?" *Id.* at 34. Burrell also argues that the full redaction caused the statement to suggest that Burrell shot Church, which had a "devastatingly prejudicial impact." *Id.* at 34–36. Burrell's claim is unavailing.

Although the Due Process Clause "guarantees criminal defendants a meaningful opportunity to present a complete defense,"[25] 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, prejudice, [or] confusion of the issues.'"[26] 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.[27] Only evidentiary rulings that "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve" violate the federal constitution.[28]

The Superior Court did not violate Burrell's constitutional right to present a complete defense by requiring that the name of the man who shot Church be

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

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

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

[28] *Holmes v. South Carolina*, 547 U.S. 319, 324–25 (2006) (cleaned up); *see 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.").

redacted. Without the shooter's name, Burrell was still able to present the substance of his argument, i.e., that although Church knew who shot him, he did not come forward until he was arrested in March 2019 and, thus, had a suspect motive for providing information. *See* A30–31. Defense counsel elicited from Church on cross-examination that, after his arrest, he told the detective that he had information on three shootings, one of which was his own, and he (Church) had identified that shooter. A180. In addition, Church acknowledged that he told the detective that his shooting was the one in which he had stated that his "black nine" was taken. A181.

In his closing argument, defense counsel pointed out that, after Church's arrest, "he told the officer he had information on three shootings, not just this one"—"[h]e said he had information on the person that shot him, he said he had information that Terrell Mobley was the shooter in another case, and he said he had information on this shooting." B31–32. Counsel pointed out that Church was facing 28 gun and drug charges and being sentenced as a criminal habitual offender and that "[Church] did what he needed to do to survive." B32. "So he just threw whatever he could against the wall to see what would stick." *Id.* Counsel argued that Church had a motive to make up a story. *Id.* Defense counsel also used the information Church gave about his own shooting to argue that Church shot Benson, not Burrell:

> Now his gun. During his interview on March 12, 2019, [] Church's interview, you heard him tell Detective Kirlin that it was his gun that shot Lionel Benson. He said the gun that shot and killed [] Benson was a black nine-millimeter and he knew it was a black nine-

> millimeter because he said it was his gun, it was his gun that they took from him when he got shot.
>
> Now, why would he tell the police that the gun that killed [] Benson was his gun. And again, as the State said, use your common sense. One reason someone would say this is to make an excuse as to why his fingerprints or his DNA may later come up on the murder weapon if the police ended up finding it.

B32.

Burrell's counsel was not hampered in any way in asserting his defense simply because the court ordered that the name of the man who shot Church be redacted. Counsel was still able to argue that Church's motive for providing information about his own and the other two shootings was to help himself out in his own case. And counsel was also able to use Church's statements about his shooting to present a defense that Church was the shooter, not Burrell. Neither argument was dependent upon Burrell's ability to give the name of Church's shooter. As such, the Superior Court did not violate the federal constitution in excluding reference to the shooter's name.

Furthermore, the manner in which Church's statement was redacted was not likely to have confused the jury. Burrell's argument about how the jury could have interpreted the statement is speculative. After telling Detective Kirlin that "Trev" shot "Stink" and that Trev had gone down into "Bag's" basement prior to the shooting, the detective asked Church if "they" were friends. *See* A258–59. Church told her they were not really friends, mentioned that some people take sides, and

added that "it was all surrounding what took place with me," "when I got shot." A259–60. Following the redaction, Church then says, "He shot me in my leg, then he came down slowly on top of me and shot me." A261. Church adds that he has not seen "him" again and that if he did, "it probably be another situation." *Id.* The detective then asked Church about Bags and another individual, David Smith. A262. Later, she circled back to asking more questions about Benson's shooting. A263. An equally reasonable interpretation of the flow of Church's commentary with the redaction is that Burrell shot Benson as a result of some dispute that started with Church's shooting, not that Burrell shot Church.

In any case, even if the jury was confused by the redaction, other testimony clarified that Burrell did not shoot Church. Later in his statement, Church stated that, after shooting Benson, Burrell pointed his gun at Church, told him "I should shoot you too," and then ran off. A264. Church told Detective Kirlin that he recognized the gun that Burrell used to shoot Benson because "[i]t was my gun that they kept when I got shot." A277. No evidence was presented that anyone other than Benson was shot during the December 10, 2017 incident. Defense counsel further clarified that Church's shooting was distinct from Benson's shooting when he cross-examined Detective Kirlin and Church about the fact that the gun used in Benson's shooting used to belong to Church and that Church had offered to provide information on three separate shootings—his own, the Mobley shooting, and

Benson's. *See* A172–73, 180–81. Defense counsel also re-emphasized that evidence in his closing argument. A122, 124.

Defense counsel initially expressed concern below that, if not properly redacted, the flow might make it sound like Church was shot by his client. A35. But counsel agreed that his concern was satisfied by the State's proposal to keep in the information that "[i]t was all surrounding what took place with me, the Third Street thing when I got shot." A35–36. Thus, counsel did not object to the final approved redaction and Burrell has failed to show that any redaction error was so clearly prejudicial to a substantial right that it jeopardized the fairness and integrity of the trial process.

III. THE REASONABLE DOUBT INSTRUCTION GIVEN IN BURRELL'S CASE WAS CONSTITUTIONALLY SOUND.

Question Presented

Whether the reasonable doubt instruction given by the Superior Court violated due process.

Standard and Scope of Review

Claims of constitutional violations are reviewed *de novo.*[29] "When counsel does not object to a jury instruction at trial, the appropriate standard of review is plain error."[30] However, when a reasonable doubt instruction is constitutionally deficient, the error is structural and requires reversal of the conviction.[31]

Merits of the Argument

Burrell claims the Superior Court committed structural and plain error by giving an "inadequate reasonable doubt instruction, which was the equivalent of the clear and convincing evidence standard." Opening Br. at 39. Specifically, Burrell takes issue with the language "[p]roof beyond a reasonable doubt is proof that leaves you *firmly convinced* of the defendant's guilt" because it was not paired with the language noted with approval by Justice Ginsburg in dicta in *Victor v. Nebraska* that

[29] *See Panuski*, 41 A.3d at 419; *Martini*, 2007 WL 4463586, at *2 .

[30] *Whittaker v. Houston*, 888 A.2d 219, 224 (Del. 2005) (citing *Bullock v. State*, 775 A.2d 1043, 1046–47 (Del. 2001)); *accord Mills v. State*, 732 A.2d 845, 849 (Del. 1999).

[31] *Mills*, 732 A.2d at 850 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)).

the jury must acquit if there is a "real possibility" that the defendant is innocent. Opening Br. at 40 (emphasis added).[32] Burrell's claim is unavailing.

"[Th]e Due Process Clause of the Fourteenth Amendment requires the government to prove the defendant's guilt by presenting sufficient evidence to establish every factual element of a charged offense beyond a reasonable doubt."[33] The United States Constitution "neither prohibits trial courts from defining reasonable doubt nor requires them to do so as a matter of course."[34] A court need only instruct the jury on "the necessity that the defendant's guilt be proved beyond a reasonable doubt."[35] However, when instructing the jury as to reasonable doubt, "[the trial court] must not lead the jury to convict on a lesser showing than the Due Process Clause's requirement that the government prove the criminal defendant's guilt beyond a reasonable doubt."[36] A court that improperly instructs the jury regarding reasonable doubt in a manner that violates the Due Process Clause, commits a structural error requiring reversal.[37]

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[32] Citing *Victor v. Nebraska*, 511 U.S. 1, 27 (1994) (Ginsburg, J., concurring).

[33] *Mills*, 732 A.2d at 849-50 (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

[34] *Victor*, 511 U.S. at 5.

[35] *Id.*

[36] *Mills*, 732 A.2d at 852 (citing *Victor*, 511 U.S. at 22).

[37] *See id*. at 850 ("[A] jury instruction defining reasonable doubt that violates the Due Process Clause is a structural defect and, therefore, cannot be a harmless error.").

Delaware is a jurisdiction in which trial judges have historically defined reasonable doubt for juries.[38] In 1999, in *Mills v. State*, this Court upheld the use of a reasonable doubt instruction that was almost identical to a model instruction proposed by the Federal Judicial Center.[39] That instruction, which was cited with approval in Justice Ginsberg's concurring opinion in *Victor v. Nebraska* reads, in part:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.[40]

Justice Ginsburg found the instruction to be "clear, straightforward, and accurate," noting:

> This instruction plainly informs the jurors that the prosecution must prove its case by more than a mere preponderance of the evidence, yet not necessarily to an absolute certainty. The "firmly convinced" standard for conviction, repeated for emphasis, is further enhanced by the juxtaposed prescription that the jury must acquit if there is a "real possibility" that the defendant is innocent. This model instruction

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[38] *Id.* at 851; *see* 11 *Del. C.* § 302(a) ("[T]he defendant is entitled to a jury instruction that the jury must acquit if they fail to find each element of the offense proved beyond a reasonable doubt.").

[39] *Mills*, 732 A.2d at 852 (citing Federal Judicial Center, *Pattern Criminal Jury Instructions*, Instr. 21 (1987) ("FJC Instr. 21").

[40] FJC Instr. 21, *quoted in Victor*, 511 U.S. at 27.

> surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly.[41]

Substantially the same, although slightly different, the instruction approved by this Court in *Mills* provided:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Therefore, if, based on your conscientious consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you should find the defendant guilty. If, on the other hand, you think there's a reasonable possibility, *or in other words, a reasonable doubt that the defendant is not guilty*, you must give the defendant the benefit of that doubt by finding the defendant not guilty.[42]

A decade later, in *McNally v. State*, this Court again upheld the *Mills* instruction in the face of a challenge that the instruction created a higher threshold for acquittal than is constitutionally permitted.[43] This Court found that, contrary to McNally's argument, the instruction could not be fairly interpreted as requiring the jury to be "firmly convinced" that he did not commit the acts in order to *acquit* him.[44] The Court noted:

> McNally misreads the instruction. The instruction requires a jury to be firmly convinced of proof *beyond* a reasonable doubt before convicting him, not be firmly convinced of innocence before acquitting. Thus, in

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[41] *Victor*, 511 U.S. at 27 (Ginsburg, J., concurring).

[42] *Mills*, 732 A.2d at 852 (emphasis added).

[43] 980 A.2d 364, 368 (Del. 2009).

[44] *Id.*

> order to *convict* McNally the jury must be firmly convinced of each element of the crimes as charged.[45]

Although finding the instruction as given not plain error, the *McNally* Court also urged the Superior Court to remove the phrase "you think there is a real possibility" from the pattern instruction "to prevent any potential confusion," and advised the trial courts to instead simply state "if you have a reasonable doubt about the defendant's guilt."[46] As a result, the last paragraph of the Superior Court pattern criminal jury instruction for presumption of innocence/reasonable doubt provides:

> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Therefore, based upon your conscientious consideration, if you are firmly convinced that the defendant is guilty of the crime charged, you should find the defendant guilty. If, on the other hand, you think there is a reasonable doubt that the defendant is guilty, you must give the defendant the benefit of the doubt by finding the defendant not guilty.[47]

Thus, the very language Burrell claims is necessary for the reasonable doubt instruction to be constitutionally adequate, the "real possibility" language, is the very language this court suggested be removed in *McNally*.

Here, the Superior Court gave the pattern jury instruction to the jury prior to opening statements. B4. After closing argument, the court gave a presumption of

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[45] *Id.* (emphasis in original).

[46] *Id.*

[47] Super. Ct Pattern Crim. Jury Instr. 2.6.

innocence/reasonable doubt jury instruction that was slightly different but substantially the same as the pattern jury instruction. It read:

> The law presumes every person charged with a crime to be innocent. This presumption of innocence requires a verdict of not guilty, unless you are convinced by the evidence that the defendant is guilty beyond a reasonable doubt.
>
> The burden of proof is upon the State to prove all facts necessary to establish each and every element of the crime charged. Reasonable doubt is a practical standard.
>
> On the one hand, in criminal cases the law imposes a greater burden of proof than in civil cases. Proof that a defendant is probably guilty is not sufficient.
>
> On the other hand, there are very few things in this world we know with absolute certainty. Therefore, in criminal cases, the law does not require proof that overcomes every possible doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. Therefore, based upon your conscientious consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime, you must find the defendant guilty. If, on the other hand, you have a reasonable doubt about the defendant's guilt, you must give the defendant the benefit of the doubt by finding the defendant not guilty.

A249.

Contrary to Burrell's argument, the phrase "firmly convinced" does not equate the reasonable doubt standard given in his instruction to a clear and convincing evidence standard. Simply because both employ the word convince does not mean the two are the same. And it is the jury instruction reviewed as a whole that must

correctly convey the concept of reasonable doubt,[48] not simply individual phrases alone. Moreover, the phrase "firmly convinced" has been routinely and consistently accepted by courts in many different jurisdictions as a constitutionally adequate tool for defining reasonable doubt.[49] And other jurisdictions have rejected the argument that the use of firmly convinced equates the reasonable doubt standard with the less burdensome clear and convincing evidence standard.[50] The Ninth Circuit so held in *United States v. Velasquez*.[51] And the instruction given in that case did not contain the "real possibility" language.[52]

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[48] *See Cage v. Louisiana*, 498 U.S. 39, 41 (1990) ("In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole."); *accord Mills*, 732 A.2d at 850.

[49] *See, e.g., State v. Davis*, 975 N.W. 2d 1, 11 (Iowa 2022) (noting "'firmly convinced' is a legally adequate formulation of reasonable doubt" and that "several academics, respected jurists, and multiple courts also [] endorsed the 'firmly convinced' formulation"); *State v. Jackson*, 925 A.2d 1060, 1065 (Conn. 2007) ("[A]s a general matter, instructions describing proof beyond a reasonable doubt in terms of the jury's responsibility to be 'firmly convinced' of the defendant's guilt before rendering a guilty verdict routinely have been accepted as constitutionally sufficient, even if they do not utilize the [FJC's] proposed charge verbatim." (collecting cases)).

[50] *See United States v. Velasquez*, 980 F.2d 1275, 1278 (9th Cir. 1992); *Com. v. Russell*, 23 N.E.3d 867, 874 (Mass. 2015); *Jackson*, 925 A.2d at 1067 (collecting cases); *People v. Williams*, 2013 WL 3789090, at *4, 6 (Cal. Ct. App. Jul. 1, 2013).

[51] 980 F.2d 1275, 1278 (9th Cir. 1992) ("Considering the instruction given as a whole, the use of the 'firmly convinced' language did not indicate to the jury that the prosecutor had a lesser burden than that implied by the use of the term 'reasonable doubt' standing alone.").

[52] *Id.* at n.1 ("Proof beyond a reasonable doubt is proof that leave [sic] you firmly convinced that the defendant is guilty. If after a careful and impartial consideration

Similarly, in *State v. Jackson*, the Connecticut Supreme Court rejected the exact argument that Burrell makes here.[53] That court reasoned:

> We find the Appellate Court's concern, that lay jurors, whom we know generally are unfamiliar with the three tiers of burden of proof in our jurisprudence, when hearing the firmly convinced language somehow would equate it with the "clear and convincing standard," to be unfounded. First, jurors typically lack the familiarity with the clear and convincing standard of proof that would give rise to the risk that they would equate the "convinced" language with that intermediate burden of proof. Second, even if some jurors are aware of the clear and convincing standard, that standard would require only a "high probability[.]" Indeed, the juxtaposition in the present case of the two concepts, "firm conviction" and "a reasonable doubt," made it abundantly clear that proof beyond a reasonable doubt requires more that a "high probability" that the state's allegations were true. The instruction properly informed the jury that the standard in criminal cases mandates a "firm conviction" of guilt that is devoid of any rational basis for questioning the truth of the allegations.[54]

The same reasoning applies to the reasonable doubt jury instruction given by Delaware courts. Like Connecticut's, Delaware's proof by clear and convincing evidence standard requires proof that is "highly probable." A253. Moreover, some other jurisdictions have expressed concern over the "real possibility" language.[55]

. . . of all the evidence, you are not convinced beyond a reasonable doubt that the defendant is guilty, it is your duty to find the defendant not guilty.").

[53] 925 A.2d at 1067 ("Although the trial court did not further define reasonable doubt as a "real possibility," as does the model definition, that omission did not convert the state's burden of proof to one of clear and convincing evidence or suggest to the jury that something less than proof beyond a reasonable doubt was sufficient.").

[54] *Id.* at 1067–68 (internal citations and footnotes omitted).

[55] *See Davis*, 975 N.W. 2d at 16 (noting inclusion of the "real possibility" language in the FJC instruction could confuse the jury) (collecting cases)); Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt About*

Thus, as Delaware has, they too have urged caution in using that language in their reasonable doubt instructions.[56]

The reasonable doubt instruction given to Burrell's jury, when read in context, correctly conveyed the concept of reasonable doubt and did not violate due process. There is no reasonable likelihood that the jurors would have somehow equated the firmly convinced language with a clear and convincing evidence standard. Thus, the Superior Court did not err in using that instruction.

Reasonable Doubt, 78 Tex. L. Rev. 105, 117–18, 147 (Nov. 1999) (noting that the last line of the FJC instruction, which contains the "real possibility" language tends to improperly shift the burden of proof; recommending the language be removed).

[56] *See United States v. McBride*, 786 F.2d 45, 51–52 (2d Cir. 1986) (suggesting that the district courts use caution in the use of the "real possibility" language "as it may provide a basis for confusion and may be misinterpreted by jurors as unwarrantedly shifting the burden of proof to the defense," but not finding its use constitutes reversable error).

CONCLUSION

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

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DATED: March 8, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

TREVIE BURRELL,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	**No. 282, 2023**
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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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.

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DATE: March 8, 2024