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Case Number 394,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID JEWELL, Defendant—Below, Appellant v. STATE OF DELAWARE Plaintiff—Below, Appellee.	)	No. 394, 2023

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On August 15, 2022, David Jewell was indicted on more than fifty charges stemming from a series of communications he had, while incarcerated, between February 1, 2021 and September 28, 2021, with his ex-girlfriend Andrea Jordan. A2, D.I.#2. Prior to trial, the trial court identified various issues with the indictment, resulting in the State dismissing numerous counts. A5—20. During trial, which began on March 27, 2023 (A4, D.I.#16), the trial court identified even more problems with the indictment (A399—413), and as a result, the State dismissed ten more counts and amended others. A21—30. After the close of evidence, the trial court granted Jewell's motion for judgement of acquittal on the intimidation count. A393. The final version of the indictment charged one count of Stalking, one count of Harassment, and twenty-five counts of Terroristic Threatening. 21—30. On March 20, 2023, the jury returned guilty verdicts on all those charges. A476—79.

On September 22, 2023, the trial court granted the State's Motion to Declare Jewell a Habitual Offender and departed upwards from the State's recommended 18 years (A707) to instead incarcerate Jewell for his natural life plus twenty-five years. Exhibit B.[1] This is Jewell's Opening Brief to his timely filed notice of appeal.

[1] Exhibit B, Jewell's sentencing order, includes a stalking sentence (IN22-12-0341) from a plea in Case No. 2207015399, which is not challenged herein. The harassment conviction merged with stalking for sentencing purposes. *State v. Jewell*, 2023 WL 3959821, at *1 (Del. Super. Ct. June 12, 2023).

SUMMARY OF ARGUMENT

1. Prior to trial the State informed Jewell that it intended to submit large amounts of recorded audio (32 phone calls), and text (over two hundred pages) communications between Jewell and his ex-girlfriend Andrea Jordan. These communications contain almost sixty instances of Jewell's use of the N-word. Jewell argued that introducing his use of the N-word to the jury was extremely prejudicial and had little, if any, probative value. The trial court did not dispute Jewell's assessment of the evidence's value, but nonetheless denied Jewell's request by ruling that "it's [not] the Court's… nor is it the State's responsibility to sanitize comments that the defendant made" A42—43. This was legal error because statements of a defendant are subject to the rules of evidence which require exclusion of irrelevant evidence, and that which is substantially more prejudicial than probative. Relatedly, the impact of failing to exclude inadmissible racial epithets is so significant that it can be a due process violation.

2. To comply with First Amendment Free Speech protections, prosecutions which criminalize speech must prove that the defendant *subjectively* intended to engage in an *un*protected form of speech (such as a "True Threat"). Delaware's Stalking statute, as applied to Jewell, criminalized speech. The trial committed plain error by failing to instruct the jury that a conviction required the State to prove the subjective intent element.

3. Many of Jewell's terroristic threatening charges were indicted to allow for multiple and distinct theories of liability; and the State put forth evidence to support those theories. To convict a defendant in such circumstances, this Court requires a "specific unanimity" instruction to ensure the jury agrees on at least one theory. Because the trial court failed to do so here, there can be no confidence that the jury properly found that the State proved all elements beyond a reasonable doubt.

4. Jewell was convicted of two counts of terroristic threatening alleged to have occurred on May 27, and two more alleged to have occurred on May 29. Each "pair," respectively, involved the same crime, on the same date, *via* the same, or entirely overlapping, conduct, and thus, each "pair", respectively, violates the Double Jeopardy Clause. One conviction from each pair must be vacated.

5. The Delaware Code defines "person" as a "human being who has been born and is alive." Thus, to convict a defendant of Terroristic Threatening, the State must prove that a threat was directed at a "human being who has been born and is alive," rather than a fictional, or non-existent person. As to Count IV, the State failed to present any evidence that the unidentified "person" Jewell allegedly threatened had been born or was alive. Rather, the record shows that Jewell threatened an unidentified hypothetical man he *unreasonably* believed Andrea Jordan was with. No evidence suggests this hypothetical man was real.

STATEMENT OF FACTS

Officer Quinn Davis

Quin Davis ("Officer Davis") is a New Castle County Police Department officer. A67. On September 28, 2021, Officer Davis spoke with Andrea Jordan ("Andrea") regarding a call for help Andrea had placed regarding threatening calls and texts from David Jewell, who was incarcerated at the time. A68—69. Officer Davis contacted the prison. A70—71.

Tim Martin

Tim Martin is a Legal Services Administrator for the Delaware Department of Corrections (DOC). A75. He testified that inmates are generally permitted to make phone calls to ten preselected people whose names and numbers are submitted in advance to DOC for approval. A75—76. These calls are all recorded. A77.

Pursuant to a subpoena, Martin provided Investigator Brian Daly with recordings of Jewell's calls from January 2021 through September 2021. A79. He also produced a report which confirmed Andrea was on Jewell's call list, and that Jewell had placed a total of 1,391 to her number during the identified time period. A81—83. Andrea answered 404 of those calls. A84—85. Thirty-four calls were introduced into evidence. A159. None of the remaining 1,357 calls contained threats. A169

Martin testified that if a person on an inmate's list wanted to, they could block the inmate from calling them. A86. He testified that there are multiple ways to do this, and that the process is "relatively easy." A86. Call recipients are also informed – before every single call – that they do not need to accept the call; (A86) and that to accept, they need to actively press a button to accept. A88.

Special Investigator Brian Daly

Investigator Daly listened to all calls between Jewell and Andrea and testified about some of the people mentioned therein: Kyle and Zach are Jewell's sons, whom the State informed the jury were also incarcerated (A113); A.J.[2] is Jewell and Andrea's daughter; Drew is Andrea's friend who lives in Virginia, and whom Jewell believed Andrea was "messing around with"; Lisa is Andrea's sister. A119

Jewell's Statements to Andrea

The State introduced over 200 pages of Jewell's text messages (mostly with Andrea) (A482—A685), and hours of his phone calls. State's Exhibits 3—22. As described by Investigator Daly, some calls were "somewhat normal conversation." A110. Sometimes Jewell would express love for Andrea (A237) or his perception that Andrea and A.J. mistreated him or made him feel unloved. A249, A266, 283.

But Investigator Daly also stated that in other communications, Jewell "had kind of ramped up." A110. If Andrea missed Jewell's calls, or delayed pickups,

[2] Pseudonyms used pursuant to Supr. Ct. R. 7(d).

Jewell often became angry. A132, A137. During these communications, Jewell frequently expressed possessiveness, cruelty, and suspicion that Andrea was sexually involved with other men. A246, A266. These communications are laced with profane and horribly demeaning insults, purported threats of violence, and in some cases sexual violence, against A.J. (A122, A144, A153), Lisa (119—120), Drew (A122, A152—23, A237, A348), and Andrea (A120, A122, A133, A144—145, A153, A350). After some of the more heated calls, Jewell told Andrea that "he wanted to be better… and not have these types of phone calls anymore." A131—32.

Investigator Daly testified that Jewell brought up Mike Garnett – whom Jewell alleged was associated with a motorcycle club–Andrea, specifically in relation to "hurting" or "killing" Drew. A144—49. In one call Andrea mentions hearing motorcycles outside her house. A149. However, Investigator Daly testified that Andrea lived near an exit from I-95, she would have heard motorcycles on that exit, and that he found no direct evidence that Jewell ever contacted Mike. A163—65.

At numerous points during the combative calls, Andrea asked Jewell to stop contacting her or expressed that she did not like it. A185—86; A235; A241. In some calls, Andrea indicated she did not want to be in a relationship with Jewell anymore. A122, A135. However, Jewell continued to call, and Andrea continued to answer.

Andrea Jordan

Andrea Jordan met Jewell in 2003 and their relationship quickly became romantic. A175. They have one child together, A.J., who was born in November 2009. A178. Andrea described the relationship as "intense," in that Jewell would encourage her to spend all her time with him until the point that she "didn't have any friends anymore." A175—76.

When Jewell was incarcerated in 2021, Andrea used an app, which she had to pay for, to text with him. A179. She also paid for Jewell to use the app. A161; A179. When Jewell's mother died at the beginning of 2021, Andrea provided emotional support to him. A364—67.

Andrea felt that Jewell became jealous and angry when he heard about any activity Andrea engaged in outside the home (A182—83), but also admitted that, at times, she sought to trick Jewell into believing she was with other men. A303—04. She described a point when Jewell's calls began to use more "words of violence," including towards A.J., which made her want to move on and "break away from it." A180. Andrea recognized that some of Jewell's alleged threats were fake (A308), and at times told him so directly (A444—45); but she was concerned about "Mike" (the biker) (A182—83) and believed Jewell had people watching her on his behalf. A184; A289—90.

Andrea explained that sometimes when Jewell would call, she did not want to talk and did not answer. A185. When this happened, Jewell would call repeatedly, send a lot of messages, and then "go off" on her when she eventually answered. A185. At one point Andrea admitted that she communicated with Jewell because she was hopeful their relationship would improve (A203); but elsewhere she stated that she continued for other reasons: (1) to comply with a court order she understood to mean Jewell "had the right to contact [her] to talk to [A.J.]" (A181); (2) because she was afraid of Mike; and (3) to stop the phone from ringing. A187—88.

I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY RULING THERE IS NO BASIS FOR A CRIMINAL DEFENDANT TO EXCLUDE RACIST STATEMENTS THEY MADE THEMSELVES.

Question Presented

Whether a trial court errs as a matter of law by ruling there is no basis to exclude racist statements a defendant made themselves? A39—44.

Scope of Review

A trial court's *application* of the rules of evidence is reviewed for an abuse of discretion;[3] however, a trial court's *interpretation* of the rules of evidence is a question of law subject to *de novo* review.[4] Jewell's claim, which alleges the trial court applied the wrong legal standard (as opposed to misapplying the right one) to his objection, falls into the latter category.

The improper admission of "racially charged" evidence violates a defendant's constitutional right of due process.[5]

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[3] *Bailey v. State*, 272 A.3d 1163 at n.16 (Del. 2022) ("We normally review decisions to admit or exclude evidence under the rules of evidence for abuse of discretion.")
[4] *Anderson v. State*, 21 A.3d 52, 57 (Del. 2011) ("We review *de novo* the Court of Common Pleas' formulation and application of legal principles"); *United States v. Brooks*, 723 Fed. Appx. 671, 680 (11th Cir. 2018) (reviewing district court's "interpretation" of rules of evidence *de novo*); *United States v. Torres*, 794 F.3d 1053, 1059 (9th Cir. 2015) (same); *United States v. Rogers*, 587 F.3d 816, 819 (7th Cir. 2009) (same) *United States v. Phoeun Lang*, 672 F.3d 17, 23 (1st Cir. 2012) (same); *United States v. Pope*, 467 F.3d 912, 915–16 (5th Cir. 2006) (same).
[5] Del. Const. art. I, § 7; *Pierce v. State*, 937 A.2d 140 (Del. 2007).

Merits of Argument

Prior to trial, Jewell objected to the State's proposal to submit nearly sixty statements to the jury in which Jewell, a white man, used the N-word. A39. Jewell argued that the racial epithets did not "add" anything (i.e., they were irrelevant, or had negligible probative value), and are "inflammatory and egregious and offensive that that could take their focus away from the actual threat" (i.e., highly prejudicial). A40—42. The trial court did not dispute Jewell's assessment of the evidence's value but denied Jewell's objection and held that "it's [not] the Court's… nor is it the State's responsibility to sanitize comments that the defendant made… unless he didn't say it, then you don't have any basis for objecting to it." A42—43; Exhibit B. This ruling was legal error and requires reversal.

"The overall purpose of our elaborate rules of evidence is to restrict the deliberations of jurors to that which is trustworthy, probative and relevant."[6] Those rules require the exclusion of both "[i]rrelivent evidence"[7] and any evidence whose "probative value is substantially outweighed by a danger of" unfair prejudice.[8] Moreover, this Court has stated that "the trial court's duty to balance evidence under D.R.E. 403 becomes especially important when the evidence is "racially charged" because improperly raising race as an issue in a criminal proceeding violates a

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[6] *Weddington v. State*, 545 A.2d 607, 613 (Del. 1988).
[7] D.R.E. 402.
[8] D.R.E. 403.

defendant's constitutional right of due process.[9] This Court has given guidance to trial courts addressing the admissibility of "racial evidence":

> *Racial evidence proffered to establish only a defendant's abstract beliefs or to create a bias against the defendant clearly violates this standard. But in situations where the racial evidence is inextricably tied either to the charged offense or the actual victim of the offense, the trial court has broad discretion to admit* [it if it complies with D.R.E. 402 and 403].[10]

In this case, none of the racial epithets were "inextricably tied either to the charged offense or the actual victim of the offense." Moreover, the prosecutor's relevancy argument – "[w]hen [the N-word] is just a gratuitous slur directed at the victim," it was redacted out, but when it was "a part of the threat," it was left in to ensure the jury understood how the language impacted the victim (A31—32) – is inconsistent with the record, which includes dozens of gratuitous racist slurs and racist comments. The racial slurs had minimal probative value which was substantially outweighed by inundating the jury with more than seventy uses of the N-word[11] and a dozen or so references to Jewell's racism.[12] The overwhelming

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[9] *Pierce*, 937 A.2d 140; *Weddington*, 545 A.2d at 613.

[10] *Floudiotis v. State*, 726 A.2d 1196, 1202–03 (Del. 1999).

[11] In addition to declining to redact 54 uses of the N-word in the texts, the State directly referenced its usage in its opening (A56), introduced, and played audio clips of two uses (A729, State's Exhibit 17 at 4:40—4:50) and elicited it fourteen times through witness testimony. A196, A216, A246, A259, A263, A292 (3x), A319, A321, A322 (2x), and A351 (2x).

[12] The State introduced at least three texts with racist content (but not the N-word) (A575, A596, and A601), elicited three statements from witnesses about Jewell's

impact was to "establish … [Jewell's racist] beliefs [and] to create [anti-racist] bias against him."[13]

This Court can reverse without considering harmless error,[14] But, if it does engage in a harmless error analysis it should conclude the error was not harmless beyond a reasonable doubt. As noted above, the sheer quantity of racial slurs, racist comments, and references to Jewell's racism were overwhelming. Although there are contexts when the N-word is admissible, when it's not – as in this case– its status as "the filthiest, dirtiest, nastiest word in the English language" renders it uniquely prejudicial.[15] If jurors were offended by Jewell's use of that word – as they should be – it is difficult to imagine how it would not have unfairly prejudiced them against Jewell.[16] Moreover, by unnecessarily injecting racial animus into the trial, the State violated Jewell's due process rights.[17]

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racism (A196, A227, and A293), and played audio in which Andrea references Jewell's racism. A729, State's Exhibit 20 at 6:45—6:55.

[13] *See Weddington*, 545 A.2d at 613.

[14] *Id.* at 614–15 ("the right to a fair trial that is free of improper racial implications is so basic to the federal Constitution that an infringement upon that right can never be treated as harmless error."); *see State v. White*, 285 A.3d 262, 275 (Me. 2022) (citing federal and state jurisdictions which refuse to apply harmless error analysis to the improper admission of racial animus).

[15] John McWhorter, *How the N-Word Became Unsayable*, THE NEW YORK TIMES (April 30, 2021) *available at* https://www.nytimes.com/2021/04/30/opinion/john-mcwhorter-n-word-unsayable.html.

[16] *Id.* at 613 (inadmissible racial animus "undermine[s] the jury's impartiality.").

[17] *Pierce*, 937 A.2d 140.

II. THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO INFORM THE JURY OF A MATERIAL ELEMENT OF THE STALKING CHARGE: SUBJECTIVE INTENT.

Question Presented

Whether a trial court commits plain error by failing to inform a jury of a material element of an offence?[18]

Scope of Review

Unpreserved objections to jury instructions are reviewed for plain error.[19]

Merits of Argument

"The First Amendment guarantees the right of free speech… [such that t]he regulation of speech *per se* without the accompaniment of undesirable conduct may be prohibited by the State only when the speech, itself [falls into one of "a few limited areas,"[20] including that which] creates a clear and present danger of violen[ce]"[21] and "*true* threats" of violence,[22] which are distinguished from "jests, hyperbole, or other statements that when taken in context do not convey a real possibility that violence will follow."[23]

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[18] Supr. Ct. R. 8.
[19] *Hastings v. State*, 289 A.3d 1264, 1267 (Del. 2023).
[20] *United States v. Stevens*, 559 U.S. 460, 468 (2010); *Robinson v. State*, 600 A.2d 356, 363 (Del. 1991) (noting First Amendment generally prohibits content-based regulations other than certain excluded categories of speech).
[21] *State v. Ayers*, 260 A.2d 162, 168 (Del. 1969).
[22] *Virginia v. Black*, 538 U.S. 343, 359, 123 (2003).
[23] *Counterman v. Colorado*, 600 U.S. 66, 74 (2023).

Even when a statement is *objectively* threatening,

> *the First Amendment may still demand a subjective mental-state requirement shielding some true threats from liability. The reason relates to what is often called a chilling effect. Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries…[thus an] important tool to prevent that outcome…is to condition liability on the State's showing of a culpable mental state*.[24]

This Court addressed the interaction of First Amendment free speech protections and criminalized speech in *Andrews*, which held that our terroristic threatening statute avoids first amendment scrutiny by "appl[ying] only to speech made with a subjective intent to threaten."[25] Importantly, by deriving its rule from *Virginia v. Black*, a United States Supreme Court decision addressing a statute criminalizing flag burning, the *Andrews* Court signaled that its analysis was not unique to terroristic threatening. And in fact, this Court has elsewhere recognized that (a prior, and substantially similar, version of) our Stalking statute similarly criminalizes speech.[26] It certainly does so as applied to Jewell, who's only allegedly

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[24] *Id.* at 75—76 ("the First Amendment precludes punishment…unless the speaker's words were 'intended' (not just likely) to produce imminent disorder.")

[25] *Andrews v. State*, 930 A.2d 846, 847 (Del. 2007). Although the *Andrews* Court did not decide if subjective intent was necessary or adequate for a "true threat," *Lowther v. State* suggests the former. *Lowther v. State*, 104 A.3d 840, 845 (Del. 2014) ("This Court's construction of the statute exempts statements that were not true threats by requiring that the speaker … had the subjective intent to make a threat.")

[26] *McDade v. State*, 693 A.2d 1062, 1065 (Del. 1997) (rejecting First Amendment challenge to Stalking Statute but presuming free speech doctrine is implicated).

criminal conduct was speech *per se*. Moreover, the United States Supreme Court has for twenty years "plainly set[] out a conception of true threats as including a *mens rea* requirement,"[27] and has explicitly applied this rule to a Colorado stalking statute functionally identical to ours.[28]

Because Jewell's jury was never informed that his subjective intent was a material element[29] of the offense, the State did not satisfy its constitutional burden to "prove…every factual element of a charged offense beyond a reasonable doubt."[30] The failure to properly define an essential element requires reversal.[31] Additionally,

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[27] *Counterman*, 600 U.S. at 91 (Justice Sotomayor, concurring and citing *Virginia v. Black* for proposition that "'[t]rue threats' …encompass those statements where the speaker *means to* communicate a serious expression of an intent to commit an act of unlawful violence." 538 U.S. at 359).

[28] *Counterman*, 600 U.S. at 70 (addressing Colo. Rev. Stat. Ann. §18-3-602 (criminalizing "[r]epeatedly ... make[ing] any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person ... to suffer serious emotional distress.")). A prior iteration of Delaware's stalking statute had a "subjective mental-state requirement." *Williams v. State*, 756 A.2d 349, 350 (Del. 2000) (noting that, before its April 3, 1996 revision, 11 *Del. C.* §1312A required proof that the defendant had "the intent to place that person in reasonable fear of death or serious physical injury."). 1312A was modified to an *objective* test: proof that the defendant "intentionally engages in a course of conduct directed at a specific person which would cause a reasonable person to fear …" *Id.* And in 2008, 1312A was repealed, and replaced with 1312, which maintained an objective test.

[29] In *Counterman*, the United States Supreme Court held that *reckless* was the minimum *mens rea* required to criminalized speech. 600 U.S. at 79.

[30] *Mills v. State*, 732 A.2d 845, 849–50 (Del. 1999).

[31] *Taylor v. State*, 464 A.2d 897, 899 (Del. 1983) ("To assure a fair and impartial trial, a jury must be adequately informed. . . [of] all the essential elements."). However, to be clear, Jewell's argument does not suggest that our Stalking Statute

the First Amendment implications are especially critical here because (1) Jewell was incarcerated such that the allegedly criminal conduct was necessarily speech *per se*, and (2) the extremely offensive nature of his words warrants heightened "First Amendment vigilance…because the undesirability of such speech will place a heavy thumb in favor of silencing it."[32]

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is unconstitutional, but that the constitutional avoidance cannon requires courts to read in a subjective intent requirement.

[32] *Counterman*, 600 U.S. at 87 (Justice Sotomayor, concurring).

III. THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO PROVIDE SPECIFIC UNANIMITY INSTRUCTIONS REGARDING NUMEROUS COUNTS OF TERRORISTIC THREATENING, DESPITE THAT THE JURY WAS INSTRUCTED TO CONSIDER, AND PROVIDED EVIDENCE REGARDING, MULTIPLE THEORIES OF CRIMINAL LIABILITY.

Question Presented

Whether a trial court commits plain error by failing to provide a specific unanimity instruction despite that the jury was instructed to consider, and provided evidence regarding, multiple theories of criminal liability?[33]

Scope of Review

Unpreserved objections to jury instructions are reviewed for plain error.[34]

Merits of Argument

Ten counts of Jewell's indictment – III, V, IX, X, XI, XII, XIV, XV, XX, XXIV – allowed for multiple distinct theories of liability by alleging that Jewell committed terroristic threatening against "another person" or "Andrea Jordan and/or another person." A22—29. "When the State chooses to prosecute under alternative or multiple theories, it must prove at least one of the theories beyond a reasonable doubt to the satisfaction of the entire jury."[35] Both the United States' and Delaware's

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[33] Supr. Ct. R. 8.
[34] *Hastings v. State*, 289 A.3d 1264, 1267 (Del. 2023).
[35] *Probst v. State*, 547 A.2d 114, 121 (Del. 1988); Super. Ct. Crim. R. 31(a) ("The verdict shall be unanimous.").

constitutions require "the jury [to] (unanimously) decide which method—if any—was used to commit the alleged offense."[36]

"In the routine case, a general unanimity instruction is sufficient to insure that the jury is unanimous on the factual basis for a conviction."[37] "A general unanimity instruction informs the jury that the verdict must be unanimous."[38] However, a specific unanimity instruction is required "if (1) a jury is instructed that the commission of any one of several alternative actions would subject the defendant to criminal liability, (2) the actions are conceptually different and (3) the [S]tate has presented evidence on each of the alternatives."[39] A "specific unanimity instruction indicates to the jury that they must be unanimous as to which specific act constitutes the offense charged."[40]

Specific unanimity instructions were required, but not provided for each of the above-mentioned counts. As noted above, as to each, the indictment enabled the jury to convict Jewell on multiple distinct theories of liability (different alleged victims), thus satisfying factors (1) and (2).[41] As to factor (3), the State presented

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[36] *Zugehoer v. State*, 980 A.2d 1007, 1013 (Del. 2009); *In re Winship,* 397 U.S. 358, 364 (1970).
[37] *Probst*, 547 A.2d at 120.
[38] *Jones v. State*, 227 A.3d 1097 (Del. 2020).
[39] *Castaneda v. State*, 700 A.2d 735 (Del. 1997).
[40] *Jones*, 227 A.3d 1097.
[41] Although Counts VIII and XVI satisfy factors (1) and (2), the State only presented evidence regarding one alleged victim (Drew) on the indicted dates (May 27 and

evidence of multiple theories of liability by admitting statements in which Jewell is purported to have threatened multiple victims on the indicted date:

- **Count III (February 28, 2021):** A729, State's Exhibit 3 at 1:00—2:45 (Heather and Heather's Husband).

- **Count V (May 22, 2021):** A729, State's Exhibit 6 at 2:20—2:38 (Andrea), 2:50—2:55 (Lisa), and 3:00—3:11 (Drew).

- **Counts IX and XI (May 29, 2021):** A632 (Andrea); A632 (Drew).

- **Count X (May 28, 2021):** A633 (Andrea); A633 (Drew).

- **Count XII (June 2, 2021):** A729, State's Exhibit 10 at 1:25—1:35, 8:45—9:31, and 12:25—12:35 (Andrea); 1:35—1:45 (Lisa); 1:35—1:45 (Lisa's husband).

- **Count XIV (August 14, 2021):** A557 (Ariana); A558 (Drew, Ariana, and Ariana's husband); A559 (Arianna's husband).

- **Count XV (September 14, 2021):** A729, State's Exhibit 16 at 0:50—1:05 (Andrea); 1:00—1:10 (Andrea and A.J.).

- **Count XX (September 25, 2021):** A493 (Andrea); A494 (Andrea and A.J.); A496 (Drew).

- **Count XXIV (September 10, 2021):** A524 (Drew) A525 (Drew and Andrea); A526 (Drew).

September 16); therefore, they do not satisfy factor (3), and the failure to provide a specific unanimity instruction as to those counts was not plain error.

When a specific unanimity instruction is required but not provided, as was the case here, the jury is unable to find that each element was proved beyond a reasonable doubt. Even without a request from the parties, records like this "reflect[] that [a specific unanimity] instruction should have been considered" by the judge.[42] This Court has found, and the State has (elsewhere) conceded, that the failure to give a specific unanimity instruction when required, constitutes plain error.[43]

[42] *Luttrell v. State*, 97 A.3d 70, 78 (Del. 2014) ("Although Luttrell did not request a specific unanimity instruction … such an instruction should have been considered.").
[43] *Dobson v. State*, 80 A.3d 959 (Del. 2013). On the other hand, when there are conflicting authorities on the need to give a specific unanimity instruction (which is NOT the case here) the Court has declined to find plain error. *Dougherty v. State*, 21 A.3d 1, 6 (Del. 2011) (addressing whether a specific unanimity instruction is required for a conspiracy charge's "overt act" element).

IV. PAIRS OF TERRORISTIC THREATING CONVICTIONS FOR IDENTICAL OR OVERLAPPING CONDUCT VIOLATE THE CONSTITUTIONAL PRINCIPLE OF DOUBLE JEOPARDY AND MUST BE VACATED.

Question Presented

Whether convictions for the same crime and the same conduct violate constitutional principles of double jeopardy?[44]

Scope of Review

Issues not fairly raised to the trial court are reviewed for plain error.[45]

Merits of Argument

"The constitutional principle of double jeopardy protects a defendant against … multiple charges under the same statute."[46] Jewell's double jeopardy rights were violated, separately, by two pairs of convictions: Counts XII and XIII, as well as Counts IX and XI.

First, all four charges are lodged pursuant to the same statute: 11 *Del C.* § 621, Terroristic Threating. Second, the charges in each pair respectively allege identical, or entirely overlapping conduct: Counts IX and XI are identical as each charges terroristic threatening on May 29, 2021 against "another person" (A24); and Count

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[44] Supr. Ct. R. 8.
[45] *Williams v. State*, 796 A.2d 1281, 1284 (Del. 2002) (finding plain error in violation of double jeopardy).
[46] *Washington v. State*, 836 A.2d 485, 487 (Del. 2003).

VII, which charges terroristic threatening on May 27, 2021, against Andrea Jordan is entirely subsumed by Count VIII which charges terroristic threatening (also) on May 27, 2021, against "another person," (and Andrea Johnson is, of course, another person). A23—24.

V. NO RATIONAL TRIER OF FACT COULD FIND BEYOND REASONABLE DOUBT THAT JEWELL THREATENED ANOTHER "PERSON" ON MARCH 14, 2021, BECAUSE NO EVIDENCE PERMITTED A RATIONAL INFERENCE THAT HE DIRECTED A THREAT AT A "HUMAN BEING WHO HAS BEEN BORN AND IS ALIVE."

Question Presented

Whether a trial court commits plain error by failing to instruct a jury regarding a material element of an offence?[47]

Scope of Review

Generally, this "Court reviews claims of insufficient evidence to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt[.]"[48] When a defendant does not "motion for acquittal to the trial court," this Court reviews "the sufficiency of the evidence to convict" for plain error.[49] A conviction obtained despite the State's to failure "prove a criminal defendant's guilt beyond a reasonable doubt" is a due process violation[50] and must be considered plain.

Merits of Argument

Count IV charged Jewell with Terroristic Threatening in that,

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[47] Supr. Ct. R. 8.
[48] *Willingham v. State*, 297 A.3d 287 (Del. 2023).
[49] *Id.* at n.15.
[50] *Mills v. State*, 732 A.2d 845, 852 (Del. 1999).

> *DAVID JEWELL, on or about the 14th day of March 2021, in the County of New Castle, State of Delaware did threaten to commit a crime likely to result in death or serious physical injury to another person*. A22.

The record evidence contains only one statement on March 14th which might fit this charge: during a phone call, Jewell said to Andrea, "I know you're seeing someone… I will beat the fucking shit out of them when I come home…when I come home if there's a guy around my daughter, I will fucking destroy him." A729, State's Exhibit 5 at 11:30—12:25.

This evidence, even in a light most favorable to the State, cannot sustain a conviction. Terroristic Threatening, as the trial court informed the jury, requires proof that "the defendant threatened to commit a crime likely to result in death or serious injury to …*[a] person*."[51] A460 (emphasis added). "[W]hen used in th[e] Criminal Code ... 'Person' means a human being who has been born and is alive."[52] In this case, the State presented no evidence that could enable a rational conclusion beyond a reasonable doubt that this threat was directed at "a human being who has been born and is alive." No person was ever identified. Jewell did not know who the person might have been and had no reasonable basis to believe they even existed.

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[51] 11 *Del. C.* §621 ("A person is guilty of terroristic threatening when that person …threatens to commit any crime likely to result in death or in serious injury to *person* or property") (emphasis added).

[52] 11 *Del. C.* §222(21) (2016); *see Evans v. State*, 212 A.3d 308, 319 (Del. Super. Ct. 2019) (reversing 11 *Del C.* §907(1) criminal personation conviction for failure to prove alleged victim was "a human being who has been born and is alive.")

CONCLUSION

For the reasons and upon the authorities cited herein **Claim I** requires all of Jewell's convictions to be vacated; **Claim II** requires Jewell's Stalking conviction to be vacated; **Claim III** requires Jewell's convictions of Counts III, V, IX, X, XI, XII, XIV, XV, XX, and XXIV to be vacated; **Claim IV** requires Jewell's convictions of Count XII *or* XIII, as well as Count IX *or* XI to be vacated; and **Claim V** requires Jewell's conviction of Count IV to be vacated.

Respectfully submitted,

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