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Case Number 444,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIE L. BURTON,	)	
	)	
Defendant Below-Appellant,	)	No. 444, 2023
	)	
	)	ON APPEAL FROM
	)	THE SUPERIOR COURT OF THE
v.	)	STATE OF DELAWARE
	)	ID No. 2211007240
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

OPENING BRIEF

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Dated: April 3, 2024

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NATURE OF THE PROCEEDINGS

Arrest and indictment

On February 24, 2023, New Castle County Police arrested William Burton, charging him with Drug Dealing Heroin.[1]

This case stemmed from a suspected hand to hand drug transaction that occurred on November 17, 2022.[2] Police alleged that Mr. Burton, along with Scott Johnson and Tonya Wyatt, engaged in a drug transaction with Angela Taylor.[3] Police stopped Taylor who admitted to purchasing two bags of heroin from "Willie."[4] Johnson admitted to selling heroin to Taylor and Wyatt advised she drives Johnson around so he can conduct drug contractions.[5]

On January 3, 2023, a grand jury indicted Mr. Burton, Johnson, and Wyatt and charged them with the following:

1. Drug Dealing (cocaine)
2. Drug Dealing (heroin)
3. Conspiracy Second Degree
4. Illegal Possession of a Controlled Substance (cocaine)
5. Illegal Possession of a Controlled Substance (heroin).[6]

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[1] A7-12.
[2] A9.
[3] A10.
[4] *Id.*
[5] A11.
[6] A13-16.

Pretrial, trial, and sentencing

At final case review on June 26, 2023, Mr. Burton rejected a plea offer that involved the State declaring Mr. Burton an habitual offender and capping the recommendation at eight years at Level V.[7]

The Court held a three-day jury trial beginning on October 30, 2023. During deliberations, the jury returned with a note that stated: "we are stuck on charge one and three. Do we keep going or do we stop at what we have? Charge number two is unanimous?"[8] The State responded that it was prepared to wait for a verdict. The Court, *sua sponte*, asked about giving the jury an *Allen* charge.[9] Defense counsel objected to an *Allen* charge, arguing that the jury had only been deliberating for about as long as the evidence took to come in.[10] Despite neither party requesting it, the Court *sua sponte* decided to give the *Allen* charge.[11]

The jury found Mr. Burton guilty of Drug Dealing, Possession of a Controlled Substance, and Conspiracy Second Degree.[12] The Court deferred sentencing.

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[7] A18-21.
[8] A471.
[9] *Id.*
[10] A471-472.
[11] A473.
[12] A483-484; A519. On October 26, 2023, before trial began, the State entered a *nolle prosequi* of Counts 1 and 4. A1.

On November 7, 2023, the Superior Court sentenced Mr. Burton. The State orally petitioned to declare Mr. Burton an habitual offender on the drug dealing offense, which the defense did not oppose.[13] The Court declared Mr. Burton an habitual offender and would sentence him accordingly.[14] The trial judge sentenced Mr. Burton to a total of five years of unsuspended Level V time followed by decreasing levels of supervision.[15]

Mr. Burton, through counsel, filed a timely Notice of Appeal. This is his Opening Brief.

[13] A522.
[14] A523.
[15] A543-544.

SUMMARY OF ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY *SUA SPONTE* GIVING AN *ALLEN* CHARGE OVER THE DEFENSE OBJECTION AS THE GIVING OF THAT INSTRUCTION WAS COERCIVE.

After the jury returned its note stating that they were unanimous as to count two but were stuck on the other counts, the Superior Court *sua sponte* brought up issuing an *Allen* charge. Neither party requested it. The defense objected to the Court giving the *Allen* charge, highlighting that the jury had already been deliberating for about as long as the evidence took to be presented. The State even questioned the Court as to whether an *Allen* charge was necessary.

Despite the concerns raised by both parties, the Court decided to give the *Allen* charge. Its decision was not premised on the factors delineated in case law from this Court; rather, the trial judge raised concerns with Mr. Burton's continued incarceration should the case result in a mistrial. The Superior Court's decision to give an *Allen* charge was coercive and an abuse of discretion, in violation of Mr. Burton's fundamental right to a fair trial.

II. THE SUPERIOR COURT ERRED IN DECLARING MR. BURTON AN HABITUAL OFFENDER WHEN THE STATE FAILED TO FILE A MOTION AS REQUIRED UNDER 11 *Del. C.* § 4215(b) AND SUPERIOR COURT CRIMINAL RULE 32(a)(3).

At Mr. Burton's sentencing hearing, the State orally petitioned the trial court to declare him an habitual offender. The State failed to specify under which subsection it was seeking to have Mr. Burton declared an habitual offender. Defense counsel did not oppose.

Under 11 *Del. C.* § 4215(b) and Superior Court Criminal Rule 32(a)(3), the State *shall* file a motion to declare a defendant an habitual offender. Since the State did not file such a motion here, the Superior Court committed plain error when it declared Mr. Burton an habitual offender. The Court erred in sentencing Mr. Burton as an habitual offender under 11 *Del. C.* § 4214(a).

STATEMENT OF FACTS

At trial, six witnesses testified for the State: Detective Anthony Randazzo, Detective Kenneth Guarino, Angela Taylor, Detective Lewis Martin, Detective Bradley Landis, and Tonya Wyatt. Two witnesses testified for the defense: Detective Randazzo and Mr. Burton. The testimony can be summarized as follows:

The State's case

Detective Anthony Randazzo

Detective Randazzo worked for the New Castle County Police Department since 2016.[16] He was assigned to the Safe Streets Task Force.[17] He conducted an investigation in the area of Route 9 and Memorial Drive at the Budget Inn on November 17, 2022.[18] Randazzo operated an undercover vehicle, meaning it did not have emergency equipment or markings on it.[19] Detective Guarino, Probation Officer Russell, Probation Officer Walker, and Detective Martin were working as part of Randazzo's team during this investigation.[20]

When Randazzo arrived at the Budget Inn, he testified that he observed a silver/gray Honda in the parking lot that was occupied by a white female driver

[16] A89.
[17] *Id.*
[18] A90.
[19] A90-91.
[20] A91.

and black male passenger.[21] This car caught Randazzo's attention because it appeared when the unmarked police cars entered the parking lot and then immediately left.[22]

Randazzo testified he later went to the Superlodge Motel ("Superlodge"), which is located across the street from the Budget Inn.[23] The Honda was in the parking lot of the Superlodge occupied by the same female driver and male passenger.[24] Police later identified the driver as Tonya Wyatt and the passenger as Scott Johnson.[25]

Randazzo climbed into the backseat of his car to conduct surveillance and used binoculars.[26] He testified he was not wearing his ballistics vest with his body-worn camera at that time since he was undercover.[27] He observed the passenger, Johnson, exit the Honda and walk towards a group of people standing between and SUV and sedan.[28] According to Randazzo, a Toyota Yaris entered the parking lot

[21] A92.
[22] A92.
[23] A93-94.
[24] A94.
[25] A95.
[26] A95-96.
[27] A97.
[28] A99-100.

and parked next to the Honda.[29] The Yaris was occupied by a white female driver and a white male passenger.[30]

Randazzo testified that a black male, that he "immediately" recognized as Mr. Burton, walked up to the driver side of the Yaris and had a conversation with the driver.[31] Randazzo testified that he saw the driver hand Mr. Burton money; then Mr. Burton walked directly to Johnson and handed Johnson the money.[32] Next, according to Randazzo, Johnson reached into his right pants' pocket, pulled out an item, and handed it to Mr. Burton.[33] Randazzo testified that Mr. Burton walked back to the driver's side of the Yaris, reached inside, appeared to exchange something, and then the driver handed Mr. Burton more money.[34] Mr. Burton walked away from the area and Yaris began to leave about 20 to 30 seconds later.[35] Randazzo believed he observed a hand-to-hand drug transaction.[36] Police did not stop Mr. Burton that day; instead, they contacted the Yaris and its occupants as it was leaving.[37]

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[29] A100.
[30] *Id.*
[31] A101.
[32] A102.
[33] *Id.*
[34] A102-103.
[35] A103.
[36] *Id.*
[37] A105-106.

On cross-examination, trial counsel questioned Randazzo about his identification of Johnson, pointing out that he initially believed he was someone else.[38] Randazzo testified police's focus was on the car and its occupants, so he was not able to interview anyone else.[39] He did not direct other officers to interview the witnesses who were at the scene in the group between the cars.[40]

Randazzo testified that two glassine baggies were recovered from Taylor, the purchaser.[41] Those bags were not processed for fingerprints or DNA.[42] He confirmed that interactions with defendants or witnesses are recorded on body-worn camera.[43] Police did not arrest Mr. Burton that day, nor did they attempt to search Mr. Burton's house or phone.[44]

When Randazzo spoke with Wyatt on the scene, the conversation was not recorded by his body-worn camera.[45] He did not realize his camera was not recording at the time.[46]

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[38] A108-109.
[39] A112-113.
[40] *Id.*
[41] A115-116.
[42] A116-117.
[43] A118.
[44] A119-120.
[45] A120-121.
[46] A121.

The State introduced the heroin bags as State's Exhibit 1, which were stamped "Rite Aid."[47] Randazzo testified they were collected from Johnson and/or Wyatt from the Honda.[48] He explained that he does not typically have the bags containing drugs tested for fingerprints or DNA.[49]

Detective Kenneth Guarino

Detective Guarino worked for New Castle County Police Department assigned to the Special Operations Safe Street Task Force.[50] He was operating an undercover vehicle on November 17, 2022.[51] He was asked to follow a car, a small silver sedan, that had left the Superlodge parking lot.[52] He was told that two occupants in the car purchased drugs.[53] Detective Martin pulled the car over.[54]

The State introduced Exhibit 2, which was Detective Martin's body-worn camera video from that day.[55] Guarino testified he did not interact with the driver of the car that he followed that day from the Superlodge.[56] There was a passenger

[47] A129.
[48] *Id.*
[49] A132.
[50] A139.
[51] A140.
[52] A140-141.
[53] A142.
[54] A142-143.
[55] A143-144.
[56] A144.

in the car, Hamilton Martell, described as an older gentleman.[57] He had no information that the passenger had done anything in this case.[58]

The State introduced Guarino's body-worn camera video as Exhibit 3.[59] He identified Taylor's car that he followed from the Superlodge as a Toyota Yaris.[60] Detectives Martin and Guarino searched the car and located contraband inside of Taylor's tote bag.[61] Guarino testified they located two bags of suspected heroin or fentanyl in the bag.[62] The stamp on the bags was "Rite Aid" and the State introduced them as Exhibit 4.[63] The State introduced the drug lab report as Exhibit 6.[64] Guarino testified that the lab determined the substance inside the tote bag was fentanyl.[65]

On cross-examination, Guarino testified that the lab report also identified methamphetamine which was also recovered from Taylor's tote bag.[66]

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[57] A144-145; A132.
[58] A145.
[59] A146-147.
[60] A151.
[61] A148.
[62] A148; A154.
[63] A154; A156-157.
[64] A157.
[65] A159.
[66] A160.

Angela Taylor

Before Taylor testified, the parties addressed at sidebar regarding issues with the admissibility of her criminal history.[67] The parties agreed that certain convictions would be admissible and the Court allowed the defense to ask about whether she was on probation at the time but precluded asking about the type of charge.[68]

Taylor testified that she previously used illegal drugs for over 10 years.[69] In November of 2022, she was using heroin and meth.[70] On November 17, 2022, she was driving a Toyota Yaris with Hamilton Martell, who was now deceased.[71] Martell picked her up, they went to the grocery store, and then they went to the Superlodge motel.[72]

She testified her purpose of going to the Superlodge was to buy two bags of heroin.[73] When she arrived at Superlodge, "Fug" aka Mr. Burton, approached her car and asked what she needed.[74] She told him she needed "two bags of down" which is heroin.[75] According to Taylor, Mr. Burton went over towards the cluster

[67] A161-163.
[68] *Id.*
[69] A164-165.
[70] A165.
[71] A165-166.
[72] A166.
[73] *Id.*
[74] A169.
[75] *Id.*

of people and then brought the heroin back over.[76] Mr. Burton handed the heroin bags to her.[77] She did not see the person who Mr. Burton got the drugs from.[78] She paid him $20 for the heroin and also gave him an extra $2 afterwards.[79]

After she left the Superlodge, police pulled her over.[80] She initially told police that she just came from the grocery store, which was a lie, but immediately changed her answer and admitted to being at the motel.[81] Taylor testified that police told her they saw her at the Superlodge; she told them she was there to buy dope.[82] She told them the drugs were in her purse.[83] She recalled telling Detective Martin on November 17th that she purchased the drugs from Mr. Burton.[84] The State then asked her about her criminal history and probationary status at the time of her arrest.[85] She could not recall if she was on Level I probation at the time, but did plead guilty to a misdemeanor theft charge in May of 2023.[86] She also admitted to prior theft and prior lying to police convictions.[87] She testified that she

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[76] A169-170.
[77] A187.
[78] A182.
[79] A169-170.
[80] A171.
[81] A171-172.
[82] A172.
[83] *Id.*
[84] A173.
[85] A174-175.
[86] A174.
[87] A176.

did not have any agreements with the State in regards to her testifying against Mr. Burton.[88]

The State played her prior statement that was captured on Martin's body-worn camera.[89] This refreshed her recollection that the stamp on the heroin was "Rite Aid."[90] She admitted to telling Martin that she didn't want to get locked up when she was initially pulled over.[91] She testified that no one told her she wouldn't get locked up if she told police that Mr. Burton sold her drugs.[92] She had known Mr. Burton since 2007 and did not have any doubt that he was the person from whom she purchased the drugs.[93]

On cross-examination, Taylor recalled the officer saying to her "just work with me and we'll see what we can do."[94] At sidebar, the defense decided he would get in the relevant portion of the body-worm camera through Martin.[95] She agreed that in the video of her statement to police, Martin first mentioned the name "Willie" and she then brought it up.[96] Taylor testified that she spoke to Wyatt

[88] A176.
[89] A178-179.
[90] A184.
[91] A184-185.
[92] A186.
[93] A186-187.
[94] A193.
[95] A195.
[96] A196.

when they came out of the jail, but didn't recall what she said.[97] She later admitted they were not supposed to be talking due to the no contact order put in place by the judge.[98]

Detective Lewis Martin

Detective Martin also worked for the New Castle County Police Department and was assigned to Safe Streets.[99] He operated an unmarked silver Tahoe that was equipped with emergency equipment.[100] He activated his body-worn camera as part of this investigation on November 17, 2022.[101] He was asked to stop a Toyota Yaris.[102] Detective Randazzo informed Martin that he observed a suspected drug transaction at the Superlodge involving that car.[103]

Martin testified that Taylor exited the car and he questioned her about where she came from.[104] She initially said she came from the grocery store and then said she came from the grocery store and the motel.[105] Martin denied telling Taylor that

[97] A198.
[98] A201; 203.
[99] A205.
[100] A206.
[101] *Id.*
[102] A207.
[103] A210.
[104] *Id.*
[105] A210-211.

she would not get locked up if she told police who sold her the drugs.[106] Martin determined that "Fug" is a nickname that Mr. Burton previously used.[107]

Sergeant Bradley Landis

Sergeant Landis had been employed by the New Castle County Police Department for thirteen years and was the supervisor of the Safe Streets Task Force.[108] The State introduced his body-worn camera video as Exhibit 7.[109] He operated an unmarked police car that had emergency equipment.[110]

Landis testified he was not physically at the Superlodge on November 17th when Randazzo was conducting surveillance.[111] He went to the Superlodge and stopped the silver or gray Honda occupied by Wyatt and Johnson.[112] Landis testified that suspected heroin or fentanyl fell to the ground approximately five feet from the passenger door when Johnson exited the car.[113] Landis recognized the drugs as those admitted in State's Exhibit 1.[114]

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[106] A211-212.
[107] A216.
[108] A227-229.
[109] A227-228.
[110] A229.
[111] A229-230.
[112] A230.
[113] A232; A234.
[114] A233.

The State introduced another drug lab report as Exhibit 9.[115] Landis testified that the drugs came back as fentanyl and acetylfentanyl.[116] He also believed that cocaine was found on Johnson.[117] Landis clarified that the bundle of seven bags was recovered from the ground and the other bags were from Johnson's person.[118] All of the bags were stamped "Rite Aid,"[119] which was the same stamp on the two bags found by Martin and Guarino.[120] Landis testified that he has never gotten DNA on little drug baggies.[121] He also explained that there was no one left at the Superlodge to interview as people generally don't stay when there is a police presence.[122]

Landis testified that no attempts were made to canvas the area for the suspect believed to be Mr. Burton.[123]

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[115] A239.
[116] A240.
[117] *Id.*
[118] A241.
[119] *Id.*
[120] A246.
[121] A243.
[122] A246.
[123] A248-249.

Tonya Wyatt

Wyatt testified she used crack cocaine up until January of 2023.[124] She was at the Budget Inn and Superlodge on November 17, 2022.[125] She was arrested at the Superlodge in a silver Honda accord.[126]

She knew Johnson as "TY" and he asked her to drop him off at several places in the morning of November 17th.[127] She took Johnson to the Budget Inn and shortly thereafter the Superlodge.[128] She knew that he sold drugs like "blue bags, crack cocaine, pills."[129] She saw what she believed to be unmarked or undercover police cars at the Budget Inn so they left that parking lot.[130]

When they were at the Superlodge, Johnson got in and out of her car and she noticed other people there.[131] She testified that she saw Mr. Burton walk up to the window of a car that pulled in next to her that had a Caucasian woman in it.[132] She observed Mr. Burton walk over to Johnson for a brief period and then went back to

[124] A250-251.
[125] A251.
[126] *Id.*
[127] A252.
[128] A253-255.
[129] *Id.*
[130] A254-255.
[131] A257-258.
[132] A258-259.

the other woman's car.[133] According to Wyatt, Mr. Burton went in and hugged her and the woman handed Mr. Burton a dollar.[134]

Wyatt explained she was arrested on November 17th and charged with a number of drug offenses that carried a maximum penalty of 19 years of incarceration.[135] Wyatt met with the prosecutor in May 2023 and her proffer letter was admitted as State's Exhibit 10.[136] Wyatt testified she was not forced to have this meeting and was not promised anything in exchange for her statement.[137] During that meeting, she provided information about this case.[138]

Wyatt met with the prosecutor again the Friday before trial and she signed a cooperation agreement.[139] The State admitted her cooperation agreement and plea agreement as Exhibits 11 and 12.[140] Wyatt understood that there were no promises being made to her when they met the second time.[141] The day before her testimony, Wyatt entered a guilty plea to misdemeanors and was sentenced to probation.[142]

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[133] A260.
[134] *Id.*
[135] A261.
[136] A262-263.
[137] *Id.*
[138] A263.
[139] A264-265.
[140] A265.
[141] A266.
[142] A266-267.

Wyatt admitted to speaking with Taylor after they were released from custody, and they discussed the case.[143] She denied that she told Taylor what to say or vice versa.[144] Wyatt testified that Johnson put drugs in his private area when they were being stopped by police.[145] She indicated that all of her statements have been truthful.[146]

On cross-examination, Wyatt testified that Taylor told her she put pills in her mouth before getting arrested.[147] In her prior statement in May, Wyatt said that Taylor believed that Mr. Burton set her up.[148]

Wyatt's arrangement with Johnson was that she would give him rides in exchange for crack cocaine and gas.[149] She gave him rides the night before into the early morning, took a brief break, and then started again after Johnson texted her.[150] Johnson continued to deal and give Wyatt crack cocaine which she would consume.[151]

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[143] A268-269.
[144] A269.
[145] A270-271.
[146] A272-274.
[147] A279.
[148] A280.
[149] A281-282.
[150] A283.
[151] A284.

Defense counsel questioned her about the plea offer to misdemeanors and probationary sentence that she received in her case.[152] She agreed that she was facing felony charges and faced up to 19 years in jail.[153] But after she cooperated, she received a misdemeanor plea offer with probation.[154]

The State rested after Wyatt's testimony.

The defense case

Detective Anthony Randazzo

The defense recalled Detective Randazzo. Randazzo confirmed that police located drugs in Johnson's socks when he was searched at turnkey, despite Wyatt's testimony that Johnson placed drugs in his private parts.[155]

Willie Burton

Before Mr. Burton decided to testify, the parties discussed his prior convictions that the State would seek to admit, including escape and theft related convictions.[156] After consultation with counsel, Mr. Burton elected to testify.[157]

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[152] A288-293.
[153] A293.
[154] *Id.*
[155] A308-309.
[156] A301-303.
[157] Defense counsel noted that there would be two areas of testimony. One would be what happened and it would likely be in the narrative and the second related to subsequent contact with Randazzo where there was some reference to Mr. Burton "working off" the charges. A303-304. The defense did not intend to elicit the second part, but the State intended to ask him about it on cross-examination. A304-305.

Mr. Burton testified that he lived about 10 blocks from the Superlodge.[158] He explained he knew Taylor since 1997, although they "hadn't seen each other until 2007."[159] According to Mr. Burton, they would get high off cocaine together.[160]

Mr. Burton testified that Johnson arrived at the Superlodge on November 17th.[161] Mr. Burton was three cars over from Johnson, who got out and started dealing with other people.[162] Mr. Burton got out because he was going to purchase crack cocaine from Johnson.[163] Then Taylor pulled in and she asked Mr. Burton where to get "dope;" he responded, "maybe over there."[164] According to Mr. Burton, Taylor got out of the car and walked over to the group of people.[165] Mr. Burton explained that "he gave her two bags," Taylor gave "him" money, and she went back to her.[166] At her car, Mr. Burton asked Taylor for a couple of dollars to buy crack; he then went to buy crack from Johnson.[167]

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[158] A311.
[159] *Id.*
[160] A311-312.
[161] A312.
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] A312-313.
[167] A313.

Mr. Burton testified that the State's scenario of what happened was not accurate.[168] He explained that Taylor gave Johnson the money and the money she gave Mr. Burton was for him to buy crack from Johnson.[169]

When asked by the State if everyone else was lying except for him, Mr. Burton agreed that's what he was saying.[170] The State questioned Mr. Burton about his prior criminal history, including for retail theft in 2022, felony receiving stolen property in 2002, felony theft in 2005, receiving stolen property in 2010, conspiracy second and felony theft in 2014, and escape second degree in 2018.[171]

He could not explain why no one else testified that Taylor got out of the car, but he said that was what happened.[172] Mr. Burton agreed that he was present in the courtroom during the other witnesses' testimony and could have adjusted his testimony based on this.[173]

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[168] A313.
[169] *Id*.
[170] A314.
[171] A314-315. A few of the earlier convictions raised by the State were inadmissible as more than 10 years had elapsed since the date of conviction as provided by Delaware Rule of Evidence 609. Defense counsel failed to object to their admission. Since there was no objection, this Court would review for plain error. Given that other admissible convictions were used to impeach Mr. Burton, this issue does not give rise to an appellate claim.
[172] A315.
[173] A317.

Mr. Burton was still at the Superlodge when police arrived but admitted that he did leave the scene.[174] He told the jury that he was at the other end of the motel but was watching the whole thing.[175] He testified that the video played at trial didn't show him selling drugs and the State was relying on what the other witnesses were saying about that day.[176]

The State also questioned Mr. Burton about his offer to Detective Randazzo to "work off [his] charges."[177] Mr. Burton explained that Randazzo picked him up, asked him to buy drugs for him, and Randazzo would see what he could do about Mr. Burton's charges.[178]

On re-direct, Mr. Burton clarified that he used the proceeds from his prior property crimes to get money for drugs.[179] He denied selling drugs.[180] After Mr. Burton's testimony, the defense rested.[181]

Prayer conference

During the prayer conference, the State move to amend the indictment as to the possession of a controlled substance charge to remove reference to heroin.[182]

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[174] A318-319.
[175] A318.
[176] A319-320.
[177] A320.
[178] A321.
[179] A323.
[180] *Id.*
[181] A324-325.
[182] A333-334.

Before trial began, the State filed a pretrial motion to amend the indictment as to the drug dealing charge for the same reason, but failed to amend the drug possession charge.[183] Trial counsel did not object to the amendment to the drug possession charge, noting that he thought the State was going to amend that charge when it amended the other one.[184]

The following morning after the prayer conference, but before closing arguments, the defense requested a missing evidence instruction under *Lolly/Deberry*. Trial counsel requested the instruction as to the police's failure to record their initial contact and interview with Wyatt.[185] Although Wyatt testified and could have been asked about this initial statement, trial counsel explained that he did not question her about it because he would have been stuck with her answer without any extrinsic evidence of the recording to challenge her with.[186] After argument from both parties, the trial judge denied the request for this instruction finding no prejudice to Mr. Burton.[187] The Superior Court noted that Wyatt's statement was recorded in the officer's report, the undercover detective was not required to wear a body-worn camera per statute, and the defense had an

[183] A333.
[184] A334-335.
[185] A348
[186] A355-356.
[187] A371-378.

opportunity to cross-examine the witnesses.[188] The Court held this was not the type of situation outlined in *Lolly/Deberry* since the statement was recorded, but not in the form requested by the defense.[189]

Jury notes and verdict

The jury returned two notes. The Court addressed the first note by re-reading a portion of the jury instructions.[190] The second note stated "we are stuck on charge one and three. Do we keep going or do we stop at what we have? Charge number two is unanimous?"[191] The State responded that it was prepared to wait for a verdict. The Court, *sua sponte*, asked about giving the jury an *Allen* charge.[192] Defense counsel objected to an *Allen* charge, arguing that the jury had only been deliberating for about as long as the evidence took to come in.[193] The State asked whether it was appropriate to give the *Allen* charge or if the Court should just tell the jury to continue deliberating since the note only asked if they should keep going.[194] The Superior Court determined that it was going to give an *Allen* charge, citing concerns with Mr. Burton's continued incarceration if there is a hung jury.[195]

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[188] *Id.*
[189] A376-378.
[190] A467-471.
[191] A471.
[192] *Id.*
[193] A471-472.
[194] A473-474.
[195] A473.

After the *Allen* charge and continuing to deliberate, the jury returned a verdict of guilty as to all three charges.[196] The Court deferred sentencing.[197]

Sentencing

At the sentencing hearing on November 7, 2023, the State orally petitioned to have Mr. Burton declared an habitual offender for the drug dealing offense.[198] The State did not file a written motion. The State also did not specify under which subsection it sought to have Mr. Burton declared an habitual offender. Trial counsel did not oppose the oral petition.[199] The trial court noted that Mr. Burton was previously declared an habitual offender under 11 *Del. C.* § 4214(a) in 2014.[200] The Court granted the State's petition and declared Mr. Burton an habitual offender on the drug dealing offense.[201]

The trial judge noted that the Illegal Possession of a Controlled Substance charge merged with the Drug Dealing for sentencing purposes.[202] The Superior

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[196] A483-484.
[197] Before recessing for the day, the State asked defense counsel: "Do I need to prepare an actual – I provided [defense counsel] with the certified copies of—." A489. Defense counsel stated he was not disputing the record. *Id.* Based on the context of the question and response, it is inferred that the State was asking whether it needed to file an actual motion to declare Mr. Burton an habitual offender given that it provided counsel with certified copies of his criminal history already.
[198] A522-523.
[199] A522.
[200] A523.
[201] *Id.*
[202] A543.

Court sentenced Mr. Burton to 20 years at Level V suspended after five years at Level V for two years at Level IV DOC discretion suspended after six months at Level IV for 18 months at Level III for Drug Dealing and two years at Level V suspended 18 months at Level III for Conspiracy Second Degree.[203]

[203] A543.

ARGUMENT

I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY *SUA SPONTE* GIVING AN *ALLEN* CHARGE OVER THE DEFENSE OBJECTION AS THE GIVING OF THAT INSTRUCTION WAS COERCIVE.

A. Question Presented

Whether the trial judge erred in *sua sponte* giving an *Allen* charge when it failed to consider the relevant factors and neither party requested it. The defense preserved this issue by objecting to the Court giving the *Allen* charge.[204]

B. Scope of Review

This Court reviews a trial court's *Allen* charge under an abuse of discretion standard.[205]

C. Merits of Argument

Applicable legal precepts

To determine whether an *Allen* charge was coercive, this Court considers: "(1) the timing of the instruction, (2) the words used in the instruction, (3) the length of the deliberations both before and after the instruction, and (4) the complexity of the case."[206]

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[204] A471-472.
[205] *Collins v. State*, 56 A.3d 1012, 1019 (Del. 2012).
[206] *Id.* at 1020 (citing *Desmond v. State*, 654 A.2d 821, 826 (Del. 1994)).

Supplementary instructions, often referred to as an *Allen* charge or "dynamite charge" are generally proper.[207] To eliminate the potential coercive effect of an *Allen* charge, the Court should have the "charge include an admonition that each individual juror not surrender his or her honest convictions and not return any verdict contrary to the dictates of personal conscience."[208]

The* Allen *charge was coercive due to the timing of the instruction and the length of deliberations before and after the instruction.

Mr. Burton's trial began on October 30, 2023 with jury selection and opening statements.[209] The evidence began and concluded on October 31, 2023.[210] The evidence concluded at approximately 2:40 p.m., meaning all of the evidence was introduced in less than six hours.[211]

After dealing with the *Lolly/Deberry* issue, the parties made their closing arguments on the morning of November 1, 2023.[212] It is not known from the record how long the jury deliberated before its first note.[213] This first note asked when Mr. Burton was arrested.[214] The parties quickly agreed about how the Court

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[207] *Brown v. State*, 369 A.2d 682, 684 (Del. 1976).
[208] *Davis v. State*, 1999 WL 86055, at *3 (Del. Jan. 20, 1999) (quoting *Brown*, 369 A.2d at 684).
[209] A42-84.
[210] A85-329.
[211] A325.
[212] A380-440.
[213] A467.
[214] A470.

should respond and after providing an instruction, the jury began to deliberate again.

After an unknown period of time, the jury returned with its second note.[215] This note read "We are stuck on charge one and three. Do we keep going or do we stop at what we have? Charge number two is unanimous."[216]

The trial court asked for the State's position on the note. The prosecutor indicated that she had "another hour and 14 minutes to wait."[217] Although not stated explicitly, it would appear that the prosecutor was indicating that there was an hour and 14 minutes until the close of business, i.e., 4:30 p.m. After giving her response, the Court stated "So you'd like me to do a charge?"[218] The Court clarified it was referring to an *Allen* charge.[219]

Defense counsel objected to the *Allen* charge.[220] He noted that the jury had been deliberating for about as long as it took for the evidence to come in.[221] He also pointed out that the first jury note came about two hours ago.[222]

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[215] A471.
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] A471-472.
[221] A472.
[222] *Id.*

The trial judge then asked about the bond on Mr. Burton's charges.[223] The Court expressed concern with Mr. Burton's continued incarceration if there was no verdict reached.[224] The trial court explained it believed it was time for an *Allen* charge and did not know if the jury was deliberating for as long as the evidence took to come in.[225] The prosecutor explained that the evidence was introduced the day before until 3:00 p.m.[226] She also questioned whether to give the *Allen* charge "or just tell them to keep deliberating?"[227]

The Court explained that it wanted "to have this case resolved" and noted that it already sentenced two people in the case.[228] The Court did not believe that Mr. Burton was as bad as Johnson, considering that Johnson immediately started dealing drugs after he was released from prison and Mr. Burton did not have previous drug dealing convictions.[229] After deciding to give the *Allen* charge, the trial judge read it to the jury.[230] After excusing the jury to continue deliberating, the trial judge continued to explain why it believed the charge was appropriate.[231]

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[223] A472-473.
[224] A472-473; A474-475.
[225] A473.
[226] *Id.*
[227] A473-474.
[228] A474.
[229] A474-475.
[230] A475-481.
[231] A481-483.

The Court thought "it would be difficult to retry this case as well as it has been by both parties."[232]

Sometime after the *Allen* charge, the jury returned with guilty verdicts as to all charges.[233]

The trial court erred when it gave the *Allen* charge in this case. No party requested the *Allen* charge. The defense objected to it and the State asked whether it was even necessary. The Court did not consider any of the factors when determining whether to give the *Allen* charge. The trial court incorrectly focused on Mr. Burton's possible continued incarceration if the trial resulted in a hung jury and mistrial. Whether a defendant will continue to be incarcerated should have no bearing on whether the trial court gives an *Allen* charge.

On appeal, this Court should consider the timing of the instruction, the words in the instruction itself, the length of the deliberations before and after the instruction, and the complexity of the case to determine whether the *Allen* charge was coercive and whether the trial judge abused its discretion in giving the instruction.

First is timing of the *Allen* charge in relation to the case. The instruction was given less than one hour and 15 minutes before the end of the day. The jury

[232] A481-482.
[233] A483-484.

could have been asked to continue to deliberate and even came back the following day, if necessary. The lateness in the day when the instruction was given leans towards it being coercive.

In *Davis v. State*, this Court addressed whether the Superior Court erred in giving the jury an *Allen* charge when the jury in that case announced it was unable to reach a verdict after four hours of deliberation.[234] This Court noted that the instruction was given early in the day in response to a note from the jury.[235] In *Collins v. State*, this Court explained that in *Davis* it found there was no coercion when the charge had been given early in the day.[236] The *Collins* Court found that the timing of the charge in that case at 10:58 a.m. was not coercive.[237]

Mr. Burton's case differs from both *Davis* and *Collins* in that the trial judge gave the jury the *Allen* charge towards the end of the day at about 3:15 p.m. This timing of the charge was coercive.

In examining the length of the deliberations before and after the instruction, it is evident from the record, that the jury deliberated for almost as long as the evidence took to come in. The jury heard evidence for less than six hours on

[234] *Davis*, 1999 WL 86055, at *3.
[235] *Id.*
[236] *Collins*, 56 A.3d at 1021.
[237] *Id.*

October 31, 2023. The jury began deliberating after closing arguments and jury instructions on November 1, 2023.

Although the exact amount of time is not known, estimates can be inferred from the record about how long the jury deliberated before and after the instruction. The jury deliberated for some period before having its first note. Two hours later, the jury returned with the second note, indicating that the jury deliberated for at least two hours before the instruction. At the time the instruction as given, the jury only had approximately one hour and 15 minutes to continue deliberating (i.e., until 4:30 p.m.). They returned a verdict that same day, which would have been within an hour and 15 minutes.

The record reflects that the jury spent several hours deliberating before the instruction and returned a guilty verdict on all counts in less than one hour and 15 minutes after the *Allen* charge. Again, this establishes the coercive nature of the *Allen* charge.

This Court must also look at the complexity of the case when determining whether the *Allen* charge was coercive. This was not a complex case and centered on witness credibility as multiple versions of events were presented to the jury. The trial itself did not exhaust a significant amount of resources, nor would it be

difficult to re-try.[238] The introduction of evidence lasted less than six hours and the entire case finished in less than three days.

Lastly, the words used in the instruction itself mirrored the language in the pattern instruction; as such, the language itself was not coercive.

Here, the factors demonstrate that the *Allen* charge was coercive.

The Superior Court erred in* sua sponte *giving the* Allen *charge over defense counsel's objection.

Despite neither party requesting the *Allen* charge, the trial court *sua sponte* told the parties that it was considering giving the instruction. After the defense objected and the State questioned whether the *Allen* charge was appropriate, the Court decided to give the instruction. The jury returned to deliberations before rendering a verdict of guilty on all charges.

It is also important to highlight the content of the jury's note that led to the *Allen* charge. The jury indicated it was stuck on charges one and three and asked whether they should stop or keep going. The jurors did not say that they were absolutely deadlocked and would not be able to reach a unanimous decision. Instead of giving the *Allen* charge, the trial judge could have just responded to the jury's direct question.

[238] *State v. Lum*, 2016 WL 3639975, at *6 (Del. Super. June 29, 2016) (finding that the simplicity of the case weighed against giving an *Allen* charge).

The trial court abused its discretion in giving the *Allen* charge *sua sponte*. Mr. Burton's convictions should be reversed and remanded for a new trial.

II. THE SUPERIOR COURT ERRED IN DECLARING MR. BURTON AN HABITUAL OFFENDER WHEN THE STATE FAILED TO FILE A MOTION AS REQUIRED UNDER 11 *Del. C.* § 4215(b) AND SUPERIOR COURT CRIMINAL RULE 32(a)(3).

A. Question Presented

Whether the Superior Court erred in declaring Mr. Burton an habitual offender when the State failed to file a motion as required under Delaware law. Despite defense counsel's failure to object to the State's oral application, the interests of justice require this Court to consider this question presented pursuant to Supreme Court Rule 8.[239]

B. Scope of Review

This Court applies a plain error standard of review for contentions not raised before the trial court, such as when a party fails to raise a timely objection.[240] Under a plain error standard of review, "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[241] Since defense counsel did not object to the State's oral application to declare Mr. Burton an habitual offender, this Court reviews for plain error.

[239] Supr. Ct. R. 8.
[240] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[241] *Id.* (citing *Dutton v. State*, 452 A.2d 127, 149 (Del. 1982)).

C. Merits of Argument

Applicable legal precepts

Under 11 *Del. C.* § 4214, the State may seek to declare a defendant an habitual offender.[242] Subsection (a) provides:

> Any person who has been 2 times convicted of a Title 11 violent felony, or attempt to commit such a violent felony, as defined in § 4201(c) of this title under the laws of this State, and/or any comparable violent felony as defined by another state, United States or any territory of the United States, and who shall thereafter be convicted of a subsequent Title 11 violent felony, or attempt to commit such a violent felony, as defined in § 4201(c) of this title, or any person who has been 3 times convicted of any felony under the laws of this State, and/or any other state, United States or any territory of the United States, and who shall thereafter be convicted of a subsequent felony is declared to be an habitual criminal. The court, upon the State's petition, shall impose the applicable minimum sentence pursuant to subsection (b), (c) or (d) of this section and may, in its discretion, impose a sentence of up to life imprisonment, unless the felony conviction allows and results in the imposition of capital punishment. Under no circumstances may the sentence imposed pursuant to this section be less than the minimum sentence provided for by the felony prompting the person's designation as a habitual offender.[243]

Section 4214 further elaborates the possible ways in which a defendant can be sentenced as an habitual offender under subsections (b), (c), and (d).[244] Each of these subsections dictate the possible sentence that could be imposed based upon the person's prior criminal history.

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[242] 11 *Del. C.* § 4214.
[243] 11 *Del. C.* § 4214(a).
[244] 11 *Del. C.* § 4214.

Pursuant to 11 *Del. C.* 4215(b), "if, at any time after conviction and before sentencing, it shall appear to the Attorney General…, by reason of such conviction and prior convictions, a defendant should be subjected to §4214 of this title, the Attorney General *shall* file a motion to have the defendant declared an habitual criminal…"[245] The Court shall enter an order declaring a defendant an habitual offender if the Court is satisfied at a hearing on the motion that the defendant falls within §4214.[246]

Superior Court Criminal Rule 32(a)(3) further explains that the prosecutor "*shall* file a motion to declare the defendant an habitual offender pursuant to 11 *Del. C.* § 4214 promptly after conviction and before sentence."[247]

In *Loncki v. State*,[248] this Court held that the defendant waived the procedural requirements of a motion to declare him an habitual offender and the hearing to determine his status since he stipulated he was an habitual offender in the plea agreement and in open court.[249]

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[245] 11 *Del. C.* § 4215(b) (emphasis added).
[246] *Id.*
[247] Super. Ct. Crim. R. 32(a)(3) (emphasis added).
[248] 2007 WL 71108 (Del. Jan. 9, 2007).
[249] *Id.* at *1.

The State failed to file a petition to declare Mr. Burton an habitual offender.

At the time of sentencing, the State orally moved to have Mr. Burton sentenced as an habitual offender as to the drug dealing charge.[250] No written petition or motion was filed before the sentencing hearing. The State noted that the Court previously declared Mr. Burton an habitual offender in a 2013 case.[251] Defense counsel did not oppose the State's request.

The prosecutor's request did not specify under which subsection of §4214 the State sought to have Mr. Burton declared an habitual offender. The Superior Court's decision to declare him an habitual offender was also devoid of the subsection under which he was being sentenced. The Court merely stated that another judicial officer in 2014 determined that he satisfied the standards under §4214(a) to be declared an habitual offender.[252]

In contrast to *Loncki*, which involved the defendant pleading guilty and agreeing that he was an habitual offender under § 4214(a), Mr. Burton went to trial and did not accept a plea that included him agreeing he was an habitual offender. Unlike *Loncki*, Mr. Burton did not waive the procedural requirements of a motion and hearing.

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[250] A522-523.
[251] *Id.*
[252] A523.

The trial court erred in declaring Mr. Burton an habitual offender after the State failed to file a motion pursuant to 11* Del. C. *§ 4215(b) and Superior Court Criminal Rule 32(a)(3).

Delaware law requires that the Attorney General file a motion before sentencing if it seeking to have the defendant declared an habitual offender under § 4214.[253] Although this Court in *Loncki* held that the procedural requirements of the motion and hearing were waived by the defendant, Mr. Burton's case is different.

Mr. Burton proceeded to a jury trial, rather than accept a guilty plea like in *Loncki*. The defendant in *Loncki* admitted and agreed that he was an habitual offender under § 4214(a) as it was included as part of the plea agreement.[254] Mr. Burton did not stipulate through a plea that he was an habitual offender. He also did not admit in open court that he was an habitual offender. Mr. Burton's situation differs from that in *Loncki* since he did not himself stipulate to being an habitual offender.

Defense counsel, seemingly unaware of the statutory requirements of a motion, did not object to the State's oral application to declare Mr. Burton an habitual offender. But this was not a decision that defense counsel could make.

[253] *See* 11 *Del. C.* § 4215(b) and Super. Ct. Crim. R. 32(a)(3).
[254] *Loncki*, 2007 WL 71108, at *1.

The procedure of § 4215(b) and Criminal Rule 32(a)(3) mandates that the State file a motion and the Court hold a hearing on the motion.

At Mr. Burton's sentencing hearing, the State began by requesting to declare Mr. Burton an habitual offender. In its request, it wholly failed to cite to the specific subsection of § 4214 that was applicable to Mr. Burton. As such, Mr. Burton could not have been put on notice of the particular method upon which the State sought to declare him an habitual offender.

The Superior Court erred in granting the State's oral petition and committed plain error in declaring Mr. Burton an habitual offender. The State is required to file a motion to declare a defendant an habitual offender and its failure to do so was plain error that warrants relief.

This Court should reverse and remand for resentencing consistent with Mr. Burton not being declared an habitual offender.

CONCLUSION

For the foregoing reasons, Appellant Willie Burton respectfully requests that this Court reverse the judgements of the Superior Court and remand for a new trial and/or resentencing.

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