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Case Number 394,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID JEWELL,	§	
	§	No. 394, 2023
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

STATE'S ANSWERING BRIEF

Date: May 10, 2024

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NATURE OF PROCEEDINGS

On August 15, 2022, a grand jury indicted David Jewell ("Jewell") for multiple counts of Terroristic Threatening, as well as Stalking, Harassment, and Act of Intimidation. (D.I. 1 at A1).[1] Subsequently, Jewell was reindicted for Stalking, 13 counts of Harassment, 31 counts of Terroristic Threatening, and Act of Intimidation. A5-20. During Jewell's trial, the Superior Court advised the State about issues regarding the indictment. A129-30, 399-402. The State amended the indictment a second time to remove certain duplicative charges; the amended indictment charged Jewell with Stalking, Act of Intimidation, one count of Harassment, and 25 counts of Terroristic Threatening. A21-30; A402-13 ; A424; D.I. 1 at A1. After the parties rested, Jewell moved for a judgment of acquittal on the Act of Intimidation charge, which the Superior Court granted. A4 at D.I. 18; A383-84, 393. After the four-day trial, the jury found Jewell guilty of Stalking, Harassment, and 27 counts of Terroristic Threatening. D.I. 18 at A4; A476-79.

On May 1, 2023, Jewell moved to dismiss or vacate his convictions for Stalking and Terroristic Threatening, claiming that these offenses were included within the Stalking offense, and alternatively requested that the court merge those convictions into the Stalking offense for sentencing. B4 at D.I. 20. Because Jewell's

[1] "D.I._" refers to the Superior Court docket item numbers in *State v. Jewell*, ID No. 2109014213.

Harassment conviction is a lesser-included offense of Stalking, the Superior Court merged the Harassment conviction with the Stalking conviction for sentencing purposes, but otherwise denied Jewell's motion.[2] B4 at D.I.

On September 13, 2023, the State moved to declare Jewell a habitual offender for the Stalking conviction, which the Superior Court granted on September 22, 2023. B5-6 at D.I. 26, 28. The Superior Court thereafter sentenced Jewell to life plus 25 years.[3] Ex. A. Jewell filed a timely notice of appeal and an opening brief. This is the State's answering brief.

[2] *State v. Jewell*, 2023 WL 3959821 (Del. Super. Ct. Jun. 12, 2023).

[3] The Superior Court also sentenced Jewell to three years at Level V, suspended after 2 years followed by various levels of supervision, for a separate Stalking charge in another case. Ex. A.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. The Superior Court correctly admitted into evidence Jewell's text and phone messages that included his use of the N-word. The Superior Court determines whether proffered evidence is relevant within sound discretion and determines whether or not the probative value of a particular piece of evidence is substantially outweighed by the danger of unfair prejudice to the opposing party. These decisions lie particularly within the Superior Court's discretion because it has a first-hand opportunity to evaluate relevant factors. When racial epithets are admitted for a proper purpose, such as to show a true threat, then the rights of a defendant are not violated. The court correctly instructed the jury on redactions and racial epithets here.

II. The Appellant's argument is denied. Jewell's failure to object to the jury instructions on the Stalking charge constituted a waiver. Moreover, the Superior Court correctly instructed the jury on the elements for Stalking, including the required intent. Additionally, Jewell's true threats do not qualify for First Amendment protections. Jewell made his threats with an intent that can be inferred under the circumstances surrounding Jewell's actions.

III. The Appellant's argument is denied. No specific unanimity instruction was required under these facts. The State proved each element of the Terroristic Threatening beyond a reasonable doubt, including the identity of each of the victims

of Jewell's threats. Thus, a general unanimity instruction—like the one the Superior Court gave the jurors—was sufficient here.

IV. The Appellant's argument is denied. Jewell's convictions for both Counts XII and XIII and for Counts IX and XI did not violate double jeopardy. For Counts XII and XIII, Jewell threatened two different people in two different messages. Counts IX and XI also qualify as different crimes because they were made at different times and against different victims.

V. The Appellant's argument is denied. The Superior Court did not plainly err by failing to address, *sua sponte*, the sufficiency of evidence offered by the State to prove that Jewell threatened another person in Count IV. The State offered sufficient evidence for a rational factfinder to conclude Jewell threatened Jordan's next boyfriend or Drew, Jordan's long-time friend who lived in Virginia and who spoke on the phone with Jewell at one point to try to convince Jewell that Jordan no longer wanted to date Jewell. Both Jordan's next boyfriend and Drew were identified in Jewell's repeated threats. Drew was someone who actually existed and had dated Jordan in the past. Jordan's boyfriend was someone who existed in Jewell's mind and was sufficient enough to sustain the conviction for Count IV.

STATEMENT OF FACTS

Andrea Jordan ("Jordan") met Jewell at the end of 2003. A174. The two had an intense romantic relationship until 2009, which was shortly after their daughter A.J. was born.[4] A173-78. Jewell was incarcerated in 2017. A250, 712. In 2021, while Jewell was incarcerated at the Howard R. Young Correctional Institute and the Sussex Correctional Institution, he continued to communicate with Jordan via letters, texts, and phone calls. A178. During these intense communications, Jewell expressed his possessiveness and obsession of Jordan. A298-99.

Between February 1, 2021, and December 31, 2021, Jewell called Jordan 1,339 times. A102. Between February 1, 2021, and September 28, 2021, Jewell spoke via telephone with Jordan only 386 times, and all of these conversations were recorded. A95, 77, 101-04. Jewell also sent Jordan about 200 pages of text messages during the same time period. A60, 485-685.

Although Jewell had romantic feelings towards Jordan, he acted angry and jealous, and Jordan wanted to end the relationship. A134-35, 180, 182, 215, 221-222, 257, 259, 262, State's Ex. 20. Consequently, Jewell made numerous threats to Jordan and to others, including their daughter A.J., Jordan's sister Lisa, Lisa's husband Ryan, the husband of Jordan's daughter Adriana (Trevor), a friend of Jordan's named Drew, and the husband of Jewell's ex-wife Heather. A114, 120,

[4] The State has used initials for the minor victim in this case.

122-23, 133, 144, 149, 152-53, 194, 218-19, 228-29, 237-38, 240, 242-43, 246, 247, 263-65, 276, 281, 284, 288, 292, 296, 299, 302, 304, 304, 306, 309-15, 319, 321-22, 337, 339, 341, 344-46, State's Ex. 7, 20. Jewell's threats ranged from saying he would beat up Jordan's next boyfriend to saying he hoped that their daughter A.J. would be raped, abused, and murdered. A118, 144, 149, 152-53, 194, 263-65, 321.

When Jewell threatened Jordan and others, he used abusive, vulgar language, such as,

> "Fuck both of you because you mother fuckers are always out there doing shit without me . . . . You both always treat me like shit. I've fucking had it. Hope it rains every day at beach for you MFers. I'll be down there when I get home. I have a lot of getting back to do. . . . Faggot MFer going to with y'all. It's fucked you guys are always doing all these things without me. That also pisses me off. Fuck you and [A.J.], ugly MFers."

A256. He also expressed his anger with vulgarity: "I fucking hate how mad you get me and I hate how awful you and that little fucking cunt [A.J.] treats me. I deeply hate you both for how neglectful you both are to me and my overall situation. You [sic] day will come, you slut." A257-58. "Guess you're out there sucking dick, you desperate fucking stinking whore. I hate you, slut, for how you refuse to answer my calls cuz I'm a fucking secret in your life. I swear I hope you die a slow death of lung cancer. . . . " A258.

At one point Jordan said she did not think Jewell would follow through on his threats to go to Virginia after he was released "to get even" with her, but she also

said she believed Jewell would hurt her. A193, 229, 246, 310-11, 319, 321, 337, 698-99. Jordan explained her fear, stating, "Well, he sure did like to hit me in the face, side of the face, so I guess I was going to lose some more teeth. And he was going to go after my family." A340.

Jewell also threatened to send his friend Mike Garnett, a member of the motorcycle club called Thunder Guards, to hurt Jordan's friend Drew. A146, 148-49, State's Ex. 17. Jewell told Jordan in a phone conversation that Mike had driven past her house a few times and that Mike would continue to do so until Jewell was released from prison because Mike was loyal to Jewell and because Jewell was a former member of the Thunder Guards. A316-17, State's Ex. 20. Jordan felt like Mike was watching her. A181, 183-84, 187, 229, 279-80. And, Jewell threatened that Mike would harm any new man in her life. A314-14, 319. Additionally, Jewell told Jordan once that he knew her car was not outside her house, so Jordan felt like someone else was watching her, too. A183-84, 290. Jewell also commented about a barbeque that Jordan had attended and then had allegedly posted about on Facebook even though Jordan said she did not post anything on Facebook about it, which made her also feel like someone was following her. A248-49.

Jordan testified that Jewell's threats were extremely disturbing and made her fearful to leave her house. A182, 186. His threats also made Jordan feel weak, unsafe, unnerved, worried, and like an emotional wreck—all because Jewell was

abusing her from prison. A199, 203, 221, 229, 236-37. Jordan felt frustrated and humiliated because of Jewell's behavior. A204. Finally, Jordan testified that she became devastated, infuriated, and enraged whenever Jewell talked about their daughter A.J. in an abusive way. A222, 258.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR BY RULING THAT NO BASIS EXISTED TO EXCLUDE JEWELL'S OWN RACIST STATEMENTS FROM HIS TEXT MESSAGES AND HIS PHONE CALLS TO THE VICTIM.

Question Presented

Whether the Superior Court abused its discretion or otherwise erred when it admitted into evidence some unredacted statements that Jewell made to Jordan as threats, including threats using the N word.

Standard and Scope of Review

Generally, this Court reviews the admission of challenged racial epithet evidence for abuse of discretion;[5] however, "appeals of constitutional issues generally receive *de novo* review."[6] "A trial judge has abused his discretion where the judge exceeded the bounds of reason in view of the circumstances and has so ignored recognized rules of law or practice so as to produce injustice."[7] And, this

[5] *Pierce v. State*, 2007 WL 3301027, at *3 (Del. Nov. 8, 2007); *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del.1999) (noting that "[a]n abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances,' [or] . . . so ignored recognized rules of law and practice . . . to produce injustice.") (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994)).

[6] *Pierce*, 2007 WL 3301027, at *3; *Nance v. State*, 903 A.2d 283, 285 (Del. 2006) (citing *Abrams v. State*, 689 A.2d 1185, 1187 (Del. 1997)).

[7] *Anderson v. State*, 2016 WL 618840, at *3 (Del. 2016); *Charbonneau v. State*, 904 A.2d 295, 304 (Del. 2006).

Court reviews the record to determine whether competent evidence supports the Superior Court's findings of fact and whether its conclusions of law are not erroneous.[8]

Merits of Argument

Jewell argues that the State unnecessarily injected "racial animus" into his trial and thereby violated his due process rights. Opening Br. 12. He contends that the improper admission of "racially charged" evidence violates a defendant's constitutional right of due process under the Delaware Constitution. Opening Br. 9. Jewell asserts the Superior Court erred when it denied his objection to the State's proposed submission of nearly sixty statements he made to Jordan in which he used the N-word. Opening Br. 10. He maintains that none of the racial epithets were "inextricably tied to either the charged offense or the actual victim of the offense." Opening Br. 11. He maintains that the "gratuitous racist slurs" and racist comments had minimal probative value and were substantially outweighed "by inundating the jury with more than seventy uses of the N-word and a dozen or so references to Jewell's racism." Opening Br. 11. Jewell also argues the impact of the Superior Court's decision established his racist beliefs and created anti-racist bias against him. Opening Br. 12. Finally, Jewell contends that the status of the N-word "renders it

[8] *Dawson v. State*, 673 A.2d 1186, 1196 (Del. 1996).

uniquely prejudicial and thus difficult to imagine how it would not have unfairly prejudiced the jury against him."[9] Opening Br. 12. Jewell's contentions fail here.

The Superior Court correctly admitted into evidence Jewell's text and phone messages that included his use of the N-word. The Superior Court, within its sound discretion, determines whether proffered evidence is relevant; this Court will not reverse such decisions absent a clear abuse of discretion.[10] The Superior Court also determines, within its discretion, whether or not the probative value of a particular piece of evidence is substantially outweighed by the danger of unfair prejudice to the opposing party.[11] Deciding whether the probative value of proffered evidence substantially outweighs the danger of unfair prejudice lies particularly within the Superior Court's discretion based on a first-hand opportunity to evaluate relevant factors.[12] "The trial court's duty to balance the probative value of evidence against

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[9] To the extent Jewell has not argued other grounds to support his appeal that were previously raised, those grounds are deemed waived and will not be addressed by this Court. *Harris v. State*, 840 A.2d 1242, 1243 (Del. 2004); *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)).

[10] *Firestone Tire and Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988); *Lampkins v. State*, 465 A.2d 785, 790 (Del. 1983).

[11] *Firestone Tire and Rubber Co.*, 541 A.2d at 570; *Williams v. State*, 494 A.2d 1237, 1241 (Del. 1985); *see also* D.R.E. 401, 402, 403.

[12] *Williams*, 494 A.2d at 1237; *Rush v. State*, 491 A.2d 439 (Del. 1985).

its potentially prejudicial effect under D.R.E. 403 'becomes especially important when the evidence tends to be racially charged.'"[13]

Admitting into evidence racial epithets would violate due process under both the United States and Delaware Constitutions if the evidence was admitted "to establish a defendant's abstract belief and/or to create a bias against the defendant."[14] But, not every evidentiary admission of a racial epithet uttered by a criminal defendant is a constitutional violation.[15] "[E]vidence is not per se excludable where the racial epithets are attributable to a defendant and are admitted for a proper evidentiary purpose."[16] "When racial evidence is "inextricably tied either to the charged offense or the actual victim of the offense," it may be admissible at the discretion of the trial judge.[17]

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[13] *Ares v. State*, 937 A.2d 127, 133 (Del. 2007) (citing *Zebroski v. State*, 715 A.2d 75 (Del. 1998); *Zimmerman v. State*, 628 A.2d 62 (Del. 1993); *Weddington v. State*, 545 A.2d 607 (Del. 1988); *Duonnolo v. State*, 397 A.2d 126 (Del. 1978)).

[14] *Pierce*, 2007 WL 3301027, at *3; *Floudiotis*, 726 A.2d at 1205; *Zebroski*, 715 A.2d at 79.

[15] *Pierce*, 2007 WL 3301027, at *4; *see Zebroski*, 715 A.2d at 78–80 (finding the evidence to be highly probative of intent, where the defendant was arguing the shooting was an accident).

[16] *Pierce*, 2007 WL 3301027, at *3; *Zebroski*, 715 A.2d at 78–80 (showing intent of the defendant); *Duonnolo*, 397 A.2d at 128–30 (evidencing defendant's state of mind).

[17] *Pierce*, 2007 WL 3301027, at *3; *Floudiotis*, 726 A.2d at 1203.

Here, the State noted that Jewell used the N word about 140 times. A41. When Jewell used the word gratuitously towards the victim, the State stated that it redacted the word before trial; when Jewell used the N word as part of a threat against a victim, the State did not redact the word. A41-42. For example, when Jewell directed a threat to Jordan such as, "I pray that some N word rapes [A.J.], and I pray your grandchild dies of Covid," the State did not redact the N word because it qualified as a direct threat to the victim, and the jury needed to hear the language Jewell used to understand the threat and for the victim to testify about how that language in the threat affected her. A42.

Jewell objects to the use of the N word as being inflammatory, egregious, and offensive. A42. He argues that allowing the jury to hear the N word multiple times could remove their focus from the actual threat. A42. But, the Superior Court disagreed and reasoned as follows:

> THE COURT: Well, I don't think it's the Court's responsibility, nor is it the State's responsibility to sanitize comments that the defendant made. So I'm going to deny that application. I'm going to deny it in just about every case, because unless he didn't say it, then you don't have any basis for objecting to it. I will, however, give an instruction to the jury to the effect that—and they've already been screened during voir dire, because they've been previewed with a question that says there may be evidence which includes the use of racial epithets. I'll get a little more specific with them and tell them that they will hear the N word used. They're not to base their verdict on the simple fact that the defendant used that word, but rather on the substance of the allegations as part of what was said. So they shouldn't find him guilty because he used that word, but rather if they do, it's because the State has proven the substance of the charges beyond a reasonable doubt. I don't think

> it's on the State's burden to clean up essentially what the defendant said, nor is the Court's burden to sanitize what he said in a case where the allegation includes terroristic threatening and harassment and stalking.

A42-43.

After its ruling, the Superior Court instructed the jury on redactions and also about Jewell's use of the N word:

> [W]hen you were questioned, or when I read a number of questions to you prior to your selection, one of the questions had to do with the potential use of racial epithets. Well, you will -- the State intends to offer evidence which they say includes things that the defendant either said or wrote, and those things include the N word. Now, you know, people find that offensive for good reason, but the defendant is not charged with using that word. He is charged with certain crimes. You should consider whether he committed the crimes, and not be influenced by the fact that he used the N word, and let that be the basis of your determination of whether he is guilty or not. So I guess what I'm saying is don't be influenced by that fact in deciding the case. Look to the elements of the crime that I will instruct you and whether the State has proven those elements of the crimes, and don't judge the defendant's guilt on whether the State has proven his guilt by the mere fact that you will see evidence that the State will offer suggesting that he used the N word on occasions.

A51-53. The Superior Court's decision was correct and should be given deference.

Furthermore, even if the admission of the racial epithets had been an error, it was harmless. "Evidentiary errors with constitutional implications[] may be sustained if 'the error is harmless beyond a reasonable doubt.'"[18] Here, the record

[18] *Pierce*, 2007 WL 3301027, at *4; *Nelson v. State*, 628 A.2d 69, 77 (Del. 1993) (quoting *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991)).

demonstrates overwhelming evidence to sustain Jewell's convictions, despite the introduction of the racial epithets.[19] The State presented to the jury numerous recorded telephone calls between February 1, 2021, and September 28, 2021, wherein Jewell terrorized and threatened to kill or injure Jordan, his daughter A.J., Jordan's sister Lisa, Lisa's husband Ryan, the husband of Jordan's daughter Adriana (Trevor), a friend of Jordan's named Drew, and the husband of Jewell's ex-wife Heather over an eight month period in 2021. A114, 120, 122-23, 133, 144, 149, 152-53, 194, 218-19, 228-29, 237-38, 240, 242-43, 246, 247, 263-65, 276, 281, 284, 288, 292, 296, 299, 302, 304, 304, 306, 309-15, 319, 321-22, 337, 339, 341, 344-46, State's Ex. 3, 5-7, 10, 16, 17, and 20. The jury also read the text messages that Jewell sent to Jordan during the same time period. State's Ex. 23. Accordingly, if it had been error to admit into evidence Jewell's text messages and telephone call recordings without redacting all of the racial epithets, such error was harmless beyond a reasonable doubt.[20]

[19] *See Zebroski*, 715 A.2d at 79-80 (holding the admission of racial epithet showed the defendant viewed the victim with contempt and therefore probative of the defendant's intent and state of mind; *Massachusetts v. Abbott*, 2001 WL 1590279, at *3 (Mass. App. Ct. Dec.13, 2001) (holding that admission of unredacted tape was harmless error in light of the strong case against the defendant).

[20] *Pierce*, 2007 WL 3301027, at *4.

II. THE SUPERIOR COURT DID NOT ERR BY NOT INFORMING THE JURY, *SUA SPONTE,* THAT THE STALKING CHARGE REQUIRED SUBJECTIVE INTENT.

Question Presented

Whether the Superior Court erred by not instructing the jury, *sua sponte*, that the Stalking charge required subjective intent.

Standard and Scope of Review

This Court reviews for plain error a claim that the Superior Court erroneously failed to give a certain jury instruction when a defendant did not request the instruction.[21] "[P]lain 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."[22] Jewell has the burden to demonstrate that the alleged error was so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[23]

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[21] *Hasting v. State*, 289 A.3d 1264, 1270 (Del. 2023); *see Wright v. State*, 2019 WL 2417520, at *4 (Del. Jun. 6, 2019) (stating court was not required to instruct on lesser-included offense when not requested by the defense); *Smith v. State*, 2018 WL 2427594, at *3 (Del. May 29, 2018) (holding review is for plain error when defense does not request an alibi instruction).

[22] *Hastings*, 289 A.3d at 1270 (quoting *Lowther v. State*, 104 A.3d 840, 845 (Del. 2014)).

[23] *Wright*, 2019 WL 2417520, at *4; *Smith*, 2018 WL 2427594, at *3.

Merits of Argument

Jewell argues that the Superior Court erred when it failed to inform the jury of a "material element" of the offense of stalking, namely, his subjective intent. Opening Br. 13, 15. Because the Superior Court allegedly failed to instruct the jury on this intent element, Jewell asserts that the State failed to satisfy its constitutional burden of proving every element of the charged offense beyond a reasonable doubt. Opening Br. 15. Jewell maintains that as applied to him, the Delaware law on stalking criminalizes his conduct as speech *per se*. Opening Br. 16. He contends that First Amendment implications are critical here because he was incarcerated, and the extremely offensive nature of his words warrants heightened vigilance. Opening Br. 16. Jewell is mistaken.

The Superior Court did not err when it instructed the jury regarding the Stalking charge for Jewell—and Jewell did not object to the jury instructions on Stalking during his trial.[24] This Court will generally decline to review contentions neither raised nor fairly presented to the trial court for decision.[25] Jewell's failure to

[24] Instead, Jewell objected to the jury instructions on the Terroristic Threatening counts because he alleged that the instruction lacked a subjective intent; however, the Superior Court rejected Jewell's additional language, finding that acting intentionally was sufficient under the statute for Terroristic Threatening. A413-18.

[25] *Chance v. State*, 685 A.2d 351, 354 (Del. 1996); *Probst v. State*, 547 A.2d at 119.

object to the jury instructions on the Stalking charge constitutes a waiver.[26] Consequently, any objection may be reviewed on appeal only for plain error.[27]

The Superior Court instructed the jury regarding the Stalking count as follows:

> Count 1 of the indictment charges the defendant with stalking. In order to find the defendant guilty of stalking, you must find the State has proved the following four elements beyond a reasonable doubt: First, the defendant engaged in a course of conduct directed at a specific person; second, the defendant's conduct would cause a reasonable person either to, A, fear physical injury to herself or to another person; or B, suffer other significant mental anguish or distress that may but does not necessarily require medical or other professional treatment or counseling.
>
> In order to find that the State has proved this element, you must find unanimously that the State has proved either that the defendant's conduct would cause a -- excuse me. You must find either that the defendant's conduct caused a reasonable person to either suffer fear of physical injury to herself or another person; or suffer other significant mental anguish or distress that may but that does not necessarily require medical or other professional counseling, or both. In other words, you have to find unanimously either A or B or both.
>
> Third, the defendant's conduct included a threat of death or threat of serious injury to Andrea Jordan [or] to another person; and 4, the defendant acted knowingly.
>
> "Physical injury" means any impairment or physical condition or substantial pain. "Serious physical injury" means physical injury which creates a substantial risk of death or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of a function of any bodily organ.

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[26] *McDade v. State*, 693 A.2d 1062, 1064 (Del. 1997).

[27] Supr. Ct. R. 8; Super. Ct. Crim. R. 30; *McDade*, 693 A.2d at 1064; *Chance v. State*, 685 A.2d 351, 354 (Del. 1996); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

> "Knowingly" means the defendant knew or was aware that he was engaging in the course of conduct alleged. "Course of conduct" means three or more separate incidents, including but not limited to, acts of which the person directly, indirectly, or through third parties by any action, method, device, or means threatens or communicates to or about another, or interferes with, jeopardizes, damages, or disrupts another's daily activities, property, employment, business, career, education, or medical care.
>
> In order to find that the State has established three or more separate incidents, you must unanimously agree as to each of those separate incidents. "Reasonable person" means a reasonable person in the alleged victim's circumstances.
>
> If after considering all of the evidence you find that the State has established beyond a reasonable doubt the defendant acted in such a manner to satisfy all of the elements that I have just stated on or about the date and at or about the place stated in the indictment, you should find the defendant guilty of stalking. If you do not so find or if you have reasonable doubt as to any element of this offense, you must find the defendant not guilty of stalking.

A456-58.

The Superior Court correctly informed the jury of the elements for Stalking. The Superior Court instructed the jury that they had to unanimously find Jewell: (a) engaged in a course of conduct directed at a specific person; (b) his conduct would cause a reasonable person to either fear physical injury to herself or to another person, or to suffer other significant mental anguish or distress; (c) his conduct included a threat of death or threat of serious injury to Andrea Jordan or to another person; and (d) acted knowingly. A456-58. The court also instructed the jury that "knowingly" meant that Jewell knew or was aware that he was engaging in the

course of conduct alleged, and "course of conduct" meant three or more separate incidents. A458. The court's instructions followed Delaware law and were an accurate statement of the law regarding the "knowing" element of Stalking.

Delaware law also provides that a "defendant's intention . . . at the time of the offense for which the defendant is charged may be inferred by the jury from the circumstances surrounding the act the defendant is alleged to have done."[28] In making the inference of the defendant's intention, "the jury may consider whether a reasonable person in the defendant's circumstances at the time of the offense would have had or lacked the requisite intention . . . ."[29] Additionally, when a defendant's intention is an element of an offense, the State may establish a prima facie case by proving circumstances surrounding the act which the defendant is alleged to have committed from which a reasonable juror might infer the defendant's intention was of the sort required for commission of the offense.[30]

Here, the evidence at trial overwhelmingly demonstrated that Jewell knowingly engaged in a course of conduct directed at Jordan, A.J., Drew, Adriana's husband, and Heather's husband which spanned an eight month period. Jewell's

[28] 11 *Del. C*. § 307(a).

[29] 11 *Del. C.* § 307(a).

[30] 11 *Del. C*. § 307(b).

conduct is a prime example of exactly the pattern of behavior the stalking statute was designed to address.

In addition, Jewell's speech is not entitled to First Amendment protections. Although a Delaware criminal statute cannot impose liability upon what is otherwise constitutionally protected First Amendment freedom of expression,[31] such protections do not extend to "true threats."[32] "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[33] The speaker need not actually intend to carry out the threat.[34] Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur."[35] Intimidation proscribed by the

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[31] *McDade v. State*, 693 A.2d 1062, 1065 (Del. 1997); *Texas v. Johnson*, 491 U.S. 397 (1989). For example, one who engages in "lawful labor picketing" or any other form of a constitutionally protected exercise of the right of freedom of speech or expression cannot be convicted under Delaware's stalking statute, even without any specific exception. *McDade*, 693 A.2d at 1065; *see Johnson*, 491 U.S. at 397.

[32] *Virginia v. Black*, 538 U.S. 343, 359 (2003); *Cohen v. California*, 403 U.S. 15, 20, (1971); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940))].

[33] *Virginia*, 538 U.S. at 359.

[34] *Id*.

[35] *Id.* at 360; *R.A.V. v. City of Saint Paul*, 505 U.S. 377, 388 (1992) ("And the Federal Government can criminalize only those threats of violence that are directed against the President, *see* 18 U.S.C. § 871—since the reasons why threats of violence are

Constitution qualifies as a type of true threat when a speaker directly threatens a person or group of persons by intending to place the victim in fear of bodily harm or death.[36] Thus, "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[37]

Here, Jewell's threats qualify as either "true threats" of violence or threats creating a clear and present danger of violence and thus do not qualify for the protections of the First Amendment. Jewell threatened, for example to knock out the teeth of Heather's husband, to beat up Jordan's friend Drew, and to kill Jordan. A114, 120, 133, 144, 149. His exact words were of violence and not entitled to the protections of the First Amendment.

Jewell asserts in a footnote that he is not arguing the Stalking statute is unconstitutional, but that the constitutional avoidance cannon requires courts to read in a subjective intent requirement. Opening Br. 15-16, n.31. Nevertheless, the impact of Jewell's argument results in a contrary position. Delaware case law holds

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outside the First Amendment (protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur) have special force when applied to the person of the President.").

[36] *Virginia*, 538 U.S. at 359–60.

[37] *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940)).

that a legislative enactment is presumed to be constitutional.[38] Thus, Jewell has the burden of rebutting this presumption of validity and constitutionality that accompanies every statute.[39] "All reasonable doubts as to the validity of a law must be resolved in favor of the constitutionality of the legislation."[40] Here, Jewell has not demonstrated—or even attempted to demonstrate—that the Delaware Stalking statute is unconstitutional on its face.[41] Jewell cannot show plain error here.

[38] *McDade*, 693 A.2d at 1065; *see State v. Blount*, 472 A.2d 1340, 1346 (Del. Super. 1984), *aff'd*, 511 A.2d 1030 (Del. 1986).

[39] *McDade*, 693 A.2d at 1065; *Wilmington Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978); *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974).

[40] *McDade*, 693 A.2d at 1065; *Atlantis I Condominium Ass'n v. Bryson*, 403 A.2d 711, 714 (Del. 1979).

[41] *McDade*, 693 A.2d at 1065.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR BY NOT PROVIDING, *SUA SPONTE*, A SPECIFIC UNANIMITY INSTRUCTION FOR THE DIFFERENT THEORIES OF CRIMINAL LIABILITY FOR JEWELL'S TERRORISTIC THREATENING CHARGES.

Question Presented

Whether the Superior Court abused its discretion or otherwise erred by not giving a specific unanimity instruction, *sua sponte*, for the different legal theories of criminal liability for Jewell's Terroristic Threatening charges.

Standard and Scope of Review

Because Jewell did not request a specific-unanimity instruction, this Court reviews this claim for plain error.[42] An error is plain when it is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[43] The defects must be plain and clear from the record and be of a "'basic, serious and fundamental' character such that they deprive the defendant of a fundamental right or reflect manifest injustice.'"[44]

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[42] *Jones v. State*, 2020 WL 1845887, at *5 (Del. Apr. 13, 2020); *Dougherty v. State*, 21 A.3d 1, 3 (Del. 2011).

[43] *Jones*, 2020 WL 1845887, at *5; *Mills v. State*, 201 A.3d 1163, 1167 (Del. 2019); *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (citing *Wainwright*, 504 A.2d at 1100).

[44] *Blake v. State*, 65 A.3d 557, 562 (Del. 2013) (citing *Wainwright,* 504 A.2d at 1100).

Merits of Argument

Jewell argues that specific unanimity instructions were required in this case, but the Superior Court failed to give them for Counts III, V, IX, X, XI, XII, XIV, XV, XX, and XXIV. Opening Br. 18. He contends that a specific unanimity instruction is required if (1) the "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." Opening Br. 18. Jewell asserts that the indictment "enabled the jury to convict [him] on multiple distinct theories of liability (different alleged victims)," which satisfies the first two factors. Opening Br. 18. Jewell also asserts the State presented evidence of multiple theories of liability by admitting statements in which he was purported to have threatened multiple victims on certain dates. Opening Br. 18-19. Finally, Jewell maintains that when a specific unanimity instruction is required but not given to a jury, "the jury is unable to find that each element was proved beyond a reasonable doubt." Opening Br. 20. Jewell misunderstands the facts of this case and the law.

The Superior Court gave the following jury instruction for all of the counts of Terroristic Threatening:

> In order to find the defendant guilty of terroristic threatening, you must find that the State has proven the following two elements beyond a reasonable doubt: First, the defendant threatened to commit a crime likely to result in death or serious injury to Andrea Jordan and/or

another person; and second, the defendant acted knowingly—intentionally or knowingly. "Intentionally" means it was the defendant's conscious objective or purpose to threaten to commit a crime likely to result in death or serious injury or serious damage to property. "Knowingly" means the defendant was aware the defendant was threatening to commit a crime likely to result in serious injury or serious damage to property. "Serious physical injury" means physical injury which created a substantial risk of death, which causes serious and prolonged disfigurement, prolonged impairment of health, prolonged loss and impairment of function of any bodily organ.

Terroristic threatening statute imposes criminal liability for the use of words. The crime is complete when a person threatens to commit a crime that would result in death or serious injury. Therefore, the State is not required to prove the defendant intended to carry out the defendant's threat or that the threatened act was completed. As to each separate count if after considering all the evidence you find that the State has established beyond a reasonable doubt that the defendant acted in such a manner to satisfy all of the elements that I have just stated on or about the date and at or about the place stated in the indictment, you should find the defendant guilty of terroristic threatening. As to each separate count, if you do not so find or you have a reasonable doubt as to any element of this offense, you must find the defendant not guilty of terroristic threatening. The law presumes that every person charged with a crime is 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 of the facts necessary to establish each and every element of the crime charged beyond a reasonable doubt.

. . . .

Members of the jury, there are 27 counts charged in the indictment in this case and therefore 27 verdicts will be required. . . . [A]s to Counts 3 through 27, terroristic threatening, your counts should be either guilty or not guilty. And on the verdict sheet each count is identified by the particular date that the count in the indictment alleges. Your verdicts must be unanimous.

A460-62, 470-71.

"[A] general unanimity instruction is usually sufficient in the absence of a defense request for a specific instruction or in the absence of unusual circumstances creating a potential for confusion, *e.g.*, alternative incidents that subject the defendant to criminal liability."[45] "[E]ven where an indictment alleges numerous factual bases for criminal liability," "a 'general unanimity instruction will ensure that the jury is unanimous on the factual basis for a conviction.'"[46] "[T]his does not mean one has a right to insist on an instruction requiring unanimous agreement on the means by which each element is satisfied."[47] When "a statute enumerates alternative routes for its violation, it may be less clear . . . whether these are mere means of committing a single offense (for which unanimity is not required) or whether these are independent elements of the crime (for which unanimity is required)."[48]

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[45] *Jones v. State*, 2020 WL 1845887, at *6 (Del. Apr. 13, 2020); *Probst*, 547 A.2d at 122.

[46] *U.S. v. Smukler*, 991 F.3d 472, 492 (3d Cir. 2021) (citing *United States v. Gonzalez*, 905 F.3d 165, 184 (3d Cir. 2018) (quoting *United States v. Cusumano*, 943 F.2d 305, 312 (3d Cir. 1991))).

[47] *United States v. Yeaman*, 194 F.3d 442, 453 (3d Cir. 1999).

[48] *Gonzalez*, 905 F.3d at 183; *United States v. Beros*, 833 F.2d 455, 460 (3d Cir. 1987).

"[J]ury instructions must be viewed as a whole."[49] Even if the jury instructions contain a few inaccuracies, "this Court will reverse only if such deficiency undermined the ability of the jury 'to intelligently perform its duty in returning a verdict.'"[50] A trial court's jury instruction "will not serve as grounds for reversible error if it is 'reasonably informative and not misleading, judged by common practices and standards of verbal communication.'"[51]

Although this Court has not ruled as such, the Third Circuit Court of Appeals has held that a specific unanimity instruction is not needed to avert potential juror confusion where "the government did not allege different sets of facts, and the only possible confusion arose from the disjunctive nature of the charge under the statute."[52] And, the Third Circuit has never "required that jurors be in complete agreement as to the collateral or underlying facts which relate to the manner in which the culpable conduct was undertaken."[53]

Here, the Superior Court correctly gave a general unanimity instruction on the Terroristic Threatening counts of III, V, IX, X, XI, XII, XIV, XV, XX, and XXIV,

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[49] *Jones v. State*, 2020 WL 1845887, at *5 (Del. 2020); *Probst v. State*, 547 A.2d 114, 119 (Del. 1988).

[50] *Jones*, 2020 WL 1845887, at *5; *Probst*, 547 A.2d at 119.

[51] *Jones*, 2020 WL 1845887, at *5; *Probst*, 547 A.2d at 119.

[52] *United States v. Cusumano*, 943 F.2d 305, 312 (3d Cir. 1991).

[53] *Gonzalez*, 905 F.3d at 185; *United States v. Jackson*, 879 F.2d 85, 88 (3d Cir. 1989).

and the State presented sufficient evidence, including testimony, text messages, and recorded telephone calls, for the jury to find Jewell guilty of each count of Terroristic Threatening. For each of these counts, the State presented evidence supporting a specific argument and a specific victim. Thus, even if the indictment may have named more than one alternative victim for a count, the evidence was sufficient for the jury to find Jewell guilty of each count. Specifically, for Count III, the State presented recorded telephone records and testimony that on or about February 28, 2021, at approximately 10:00 a.m., Jewell threatened to make his ex-wife's current husband "eat his teeth." A113-14; State's Ex. 3. For Count V, the State introduced recorded telephone records and testimony establishing that on or about May 22, 2021, Jewell threatened to harm Jordan by saying, "You wait until I get home MFer. You think it's all good now. I'm going to make your life hell, MF'er. Watch me. I'm going to make you regret some shit." A118-20; State's Ex. 6 at 2:20- 2:38. For Count IX, that State presented recorded telephone records and testimony that on or about May 29, 2021, Jewell threatened to hurt Jordan's "new man" Drew by saying, "You're lucky I'm in jail. You're lucky I'm in jail, man. You're lucky I'm in jail. You're lucky I'm in jail. No, you're going to get them. You're going to get 'em. My son and I are going to beat the fucking life out of your new man. I already talked to Zack yesterday about that. Me and Zack are in the best

fucking shape of our lives right now. I'm going to cause you so much problems." State's Ex. 9.

For Count X, text messages were introduced, establishing that on or about May 28, 2021, Jewell threatened Jordan by saying, "I'm done talking. . . . My actions you'll see in 2024. Fuck you." A633.

For Count XI, the State introduced text messages that on or about May 29, 2021, Jewell threatened to hurt Jordan's friend Drew by saying, "I'm so upset N hurt that your [sic] doing me like you are!!!!!! Feel like I need to get even. You hurt me so I need to hurt you!!! I want you to feel my pain!!!! You think your all that cuz some MFer is giving U attention N UR going to beach N Virginia plus other shit!!!! Now UR good to me huh!!!!! I'll make sure you regret all this!!!!! Just know that!!!!! Tell your man Im [sic] coming for him!!!! He wants to take my spot, hes [sic] gonna have to earn it thru me!!!!! Promised made promised will be kept!! Enjoy yourself!!!!!!" A632.

For Count XII, the State presented evidence through telephone records and testimony that on or about June 2, 2021, at approximately 9:00 a.m., Jewell threatened to harm Jordan by saying "I'm gonna catch a life charge for you when I get home. I'm afraid of what I'm gonna to do to you. You think this is a fucking joke. Not only am I going to do to you. " A122; State's Ex. 8.

For Count XIV, the State introduced testimony and telephone records that on or about August 14, 2021, Jewell threatened Jordan's son-in-law as follows: "Adriana ran her mouth to me when I was in Pennsylvania on the phone, alright? When I come home, I'm coming after her husband and gonna put him in the hospital. I swear I am. Watch me. Watch me." A140; State's Ex. 14.

For Count XV, the State established that on or about September 14, 2021, Jewell threatened Jordan's friend by saying, "I don't want to be with you anymore. I don't want to be with you anymore. I just want to know who--I wanna to know--- I wanna know who this MFing dude is because I'm gonna fucking destroy his ass. I'm gonna have my boy Mike find out who this is and have the Thunder Domes beat him the fuck up." State's Ex. 15, 16.

For Count XX, the State introduced evidence that on or about September 25, 2021, Jewell threatened by telephone recording to beat up Drew as follows: "Drew's gonna get beat the fuck up and shot. I'm tellin' you. You think you're gonna go back to him? You keep--if you think you're gonna go back to him, you've got another think comin'." A153-54; State's Ex. 19.

Finally, for Count XXIV, the State introduced evidence that on or about September 10, 2021, Jewell threatened to beat up Jordan's new man (Drew) when he sent Jordan the following text messages: "Andrea, who is this new guy?? Before I send my boy mike over to your house??? YOU BETTER FUCKING TELL ME,

CAUSE IM GONNA have the shit beaten out of the dude!! Now tell me Andrea he's name???? I want his name n address now??? . . . . NOW WHO THE FUCK IS HE????? . . . . NOW, I need to find out where he lives, n his nameso [sic] he can pay the price he has not clue! I'm coming for him, and others will be soon, --- as someone follows n find out where he lives . . . I'm blocking you now. Just know whore, you fucked up! Don't get mad at me now! when shit happens!" A525.

No unanimity instructions were required under Delaware law, and the State proved its case beyond a reasonable doubt. Consequently, there was no plain error.

IV. JEWELL'S TERRORISTIC THREATING CONVICTIONS FOR COUNTS XII AND XIII, AS WELL AS FOR COUNTS IX AND XI, DID NOT VIOLATE DOUBLE JEOPARDY.

Question Presented

Whether the actions supporting Counts XII and XIII and Counts IX and XI were different threats made by Jewell on the same day but at different times and directed to different victims and therefore did not violate double jeopardy.

Standard and Scope of Review

Ordinarily, this Court reviews claims for constitutional error *de novo*.[54] However, this Court generally declines to review arguments or questions not raised below and not fairly presented to the trial court for decision "unless the interests of justice require such review."[55]

Merits of Argument

Jewell argues that his double jeopardy rights were violated by both the pair of convictions for Counts XII and XIII and the pair of convictions for Counts IX and XI. Opening Br. 21. He contends that all four charges are for Terroristic Threatening under 11 *Del. C*. § 621. Opening Br. 21. He also contends the charges in each pair respectively allege identical or entirely overlapping conduct. Opening

[54] *Thomas v. State*, 293 A.3d 139, 141 (Del. 2023); *Cooke v. State*, 977 A.2d 803, 841 (Del. 2009).

[55] *Id.* at 141–42; Supr. Ct. R. 8; *Williams v. State*, 796 A.2d 1281, 1284 (Del. 2002).

Br. 21. Specifically, Jewell maintains that Counts IX and XI are both identical charges for Terroristic Threatening on May 29, 2021, committed by Jewell against another person. Opening 21. And, Jewell contends that Count VII is "entirely subsumed" by Count VIII because the former is for Terroristic Threatening on May 27, 2021, against Jordan, while the latter is for Terroristic Threatening on May 27, 2021, against "another person," which he claims is also Jordan. Opening Br. 21-22. Because Jewell has failed to adequately brief a state constitutional claim, it is waived.[56] Jewell's remaining arguments fail here.

Jewell's convictions do not violate double jeopardy principles. The Double Jeopardy Clause in the Fifth Amendment to the United States Constitution applies to the states through the Fourteenth Amendment.[57] It provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb[.]"[58] The Double Jeopardy Clause protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after

[56] *See Wallace v. State*, 956 A.2d 630, 637 (Del. 2008) ("This Court has held that 'conclusory assertions that the Delaware Constitution has been violated will be considered to be waived on appeal.'" (quoting *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005)).

[57] *Martin v. State*, 308 A.3d 1121, 1132 (Del. 2023); *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

[58] *Martin*, 308 A.2d at 1132; U.S. Const. amend. V.

conviction; and (3) multiple punishments for the same offense."[59] "When a defendant has been once convicted and punished for a particular crime, principles of fairness and finality require that he not be subjected to the possibility of further punishment by being again tried or sentenced for the same offense."[60] When the "same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[61]

Here, Jewell threatened two different people in two different communications on May 27, 2021—both of which support the separate crimes in counts in County VII and County VIII. First, Special Investigator Brian Daly testified about State's Exhibit 8, which was a recorded telephone call to Jordan on May 27, 2021, in which Jewell threatened to harm Drew by saying he would fight Drew when Jewell was released from prison. A122; State's Ex. 8. Second, Jordan testified about a threat she received via a text message from Jewell on May 27, 2021: "I want us to be together forever. Please take back what you said. Save yourself for me. Please. I want to go to Virginia with you when I get out as a fucking couple. I fucking love you. I'll go down swinging before I let go of you." A236. Jewell's statements

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[59] *Martin*, 308 A.3d at 1133; *Blake v. State*, 65 A.3d 557, 561 (Del. 2013) (citing *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)).

[60] *Blake*, 65 A.3d at 561(citing *Pearce*, 395 U.S. at 717).

[61] *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

caused Jordan to feel extremely frustrated—like she was locked in and the situation was never going to end. A236. She felt like she was going to have to endure the abuse to keep A.J., her other children, and her family members safe from Jewell. A236-37. These two statements by Jewell—one by text and one by telephone—had different, identifiable victims, were made via different mediums, and were made at different times. Each of the threats that Jewell made at different times on May 27, 2021, support a different count—Counts VII and VIII, respectively—and do not violate the principles of Double Jeopardy.

Counts IX and XI also qualify as different crimes because Jewell made different threats on the same day—May 29, 2021— at different times and against different victims. As discussed above, on or about May 29, 2021, the State introduced evidence that Jewell threatened on the phone to hurt Jordan's "new man" by saying, "My son and I are going to beat the fucking life out of your new man." State's Ex. 9. In addition, on or about May 29, 2021, the State presented evidence that Jewell threatened in text messages to Jordan to hurt Jordan's friend Drew by saying, "I'm so upset N hurt that your [sic] doing me like you are!!!!!! Feel like I need to get even. You hurt me so I need to hurt you!!! I want you to feel my pain!!!! You think your all that cuz some MFer is giving U attention N UR going to beach N Virginia plus other shit!!!! Now UR good to me huh!!!!! I'll make sure you regret all this!!!!!!" A632. Based on the separate times and methods of the threats, both of

these messages on May 29, 2021, qualify as separate crimes and do not violate the Double Jeopardy Clause.

V. THE STATE PRESENTED SUFFICIENT EVIDENCE TO ALLOW A RATIONAL FACTFINDER TO FIND BEYOND A REASONABLE DOUBT THAT JEWELL COMMITTED TERRORISTIC THREATENING ON MARCH 14, 2021.

Question Presented

Whether the Superior Court committed plain error by failing to consider the sufficiency of evidence establishing that Jewell committed Terroristic Threatening on March 14, 2021.

Standard and Scope of Review

Where the defendant fails to make a motion for acquittal to the trial court, the defendant has failed to preserve the right to appeal the issue of the sufficiency of the evidence, and the Court applies the plain error standard of review.[62] Waiver may be excused where the Court "finds the trial court committed plain error requiring review in the interests of justice."[63] The doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character; and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.[64] Plain error must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial

[62] Supr. Ct. R. 8; *Williamson v. State*, 113 A.3d 155, 157 (Del. 2015); *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).

[63] *Monroe*, 652 A.2d at 563.

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

process.[65] "The standard of review in assessing an insufficiency of evidence claim is 'whether *any* rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt.'"[66]

Merits of Argument

Jewell argues the evidence does not support his conviction for Terroristic Threatening under Count IV because the only possible statement he made on March 14, 2021, refers to an unidentified person in a telephone call to Jordan. Opening Br. 24. Jewell contends that under the Delaware Code, Terroristic Threatening requires proof that a defendant threated to commit a crime likely to result in death or serious injury to a person, and a person must be a human being "born and alive." Opening Br. 24. Because no person was allegedly ever identified in the indictment, Jewell asserts that he had no reasonable basis to believe that the person even existed. Jewell is mistaken.

The United State Supreme Court has never held that a threat must be particularized to constitute a "true threat." Jewell also cites no precedent in which an appellate court overturned a conviction because a threat lacked sufficient particularization. But, assuming that particularization is an essential element for a

[65] *Id*.

[66] *Id.* (citations omitted) (emphasis in original).

Terroristic Threats conviction, the test is whether a "rational trier of fact could have found the essential element[ ] of the crime beyond a reasonable doubt."[67]

Here, the Superior Court did not plainly err. Viewing the evidence in the light most favorable to the State, a rational jury could find beyond a reasonable doubt that Jewell's threats to injure "another human being" on March 14, 2021, targeted a particular person.[68] In Jewell's mind, Jordan had a boyfriend, and such person was very much real to him. Indeed, the record in this case demonstrates from testimony and from State's Exhibit 5 that Jewell's telephone call to Jordan on March 14, 2021, showed that Jewell threatened to beat up Jordan's next boyfriend. A116-18; State's Ex. 5. The specific conversation was as follows:

> "I know you are seeing somebody. I know--you never use that stuff. You always use Dove."
>
> "I do use Dove."
>
> "Who the fuck are you seeing, Andrea? Because I will fucking beat the fucking shit out them when I come home. Who is it?"
>
> "I'm not David."
>
> "Andrea, you always use fucking Dove soap."
>
> "So what, if I want, oh, my God."

---

[67] *United States v. Zayas*, 32 F.4th 211, 217 (3d Cir. 2022) (cleaned up), *cert. denied*, — U.S. ——, 143 S. Ct. 830 (2023).

[68] *United States v. Davitashvili*, 2024 WL 1356983, at *4 (3d Cir. Apr. 1, 2024).

> "You're obviously getting some kind of smell. Someone is coming over tonight when A.J. goes to asleep, ain''t it?"
>
> "Nope, I'm just getting body wash, and facial cleanser, and toilet paper."
>
> "You never use body wash. You always use fucking Dove."
>
> "This is ridiculous. I can't believe this is happening right now."
>
> "Well, I'm lettin' you know, I come home, and there's a guy around my daughter, I will fucking destroy him. And then a prosecutor would have me a reason to put me in jail for a long time. Then I'll give the fucking cunt a reason to put me in jail. I knew you were up to fucking up to something, MFer. I won't call tonight. I'll let you enjoy your night. I hope he wears a condom cuz you don't need a kid."

A116; State's Ex. 5.

Even if directing a threat to a person whom Jewell believed was alive is not specific enough to sustain his conviction for Terroristic Threatening, Jewell's threats to Drew—whom Jewell believed was Jordan' boyfriend—would be sufficient evidence. Count IV charged Jewell with threatening to commit a crime likely to result in death or serious physical injury to another person on or about March 14, 2021. A22. Between February 1, 2021, to September 28, 2021, Jewell was convinced that Jordan was romantically involved with Jordan's friend named Drew. Drew and Jordan had been friends since they were young children and dated each other when Jordan was in her 20s; however, since then, Drew had married a different woman, and the two had children together. A232, 303. Nevertheless, Jewell was convinced that Jordan was romantically involved with Drew again. A119, 232-33.

In fact, between February 1, 2021, and September 28, 2021, Jewell frequently accused Jordan of dating or sleeping with other men. A239-40, 242-43, 245-47, 258, 260, 272, 289, 291, 313-14. Although Jordan denied this fact routinely, at one point in August 2021, Jordan told Jewell that she was involved with Drew even though she was not. A233, 302-03. And, she had Drew talk to Jewell on the phone so that Jewell would think that the romance between Jordan and him was over. A233, State's Ex. 17. Because Jewell believed the Drew was Jordan's boyfriend, his threats against such person are sufficient enough to sustain his conviction for the March 14, 2021 telephone call.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

/s/ Julie M. Donoghue

Julie (Jo) M. Donoghue (# 3724)
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Wilmington, DE 19801
(302) 577-8500

Date: May 10, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID JEWELL,	§	
	§	No. 394, 2023
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains **9,929** words, which were counted by Microsoft Word.

Date: May 10, 2024

/s/ Julie M. Donoghue
Julie (Jo) M. Donoghue (# 3724)
Deputy Attorney General

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

VS.

DAVID JEWELL

Alias: No Aliases

DOB: [redacted]1976
SBI: 00313027

CASE NUMBER:
N2207015399
N2109014213

IN AND FOR NEW CASTLE COUNTY
CRIMINAL ACTION NUMBER:
IN22-08-1006
STALKING(F)
IN22-08-1005
TERROR THREAT(M)
IN22-08-1008
TERROR THREAT(M)
IN22-08-1010
TERROR THREAT(M)
IN22-08-1015
TERROR THREAT(M)
IN22-08-1016
TERROR THREAT(M)
IN22-08-1017
TERROR THREAT(M)
IN22-08-1018
TERROR THREAT(M)
IN22-08-1021
TERROR THREAT(M)
IN22-08-1022
TERROR THREAT(M)
IN22-08-1023
TERROR THREAT(M)
IN22-08-1025
TERROR THREAT(M)
IN22-08-1029
TERROR THREAT(M)
IN22-08-1033
TERROR THREAT(M)
IN22-08-1038
TERROR THREAT(M)
IN22-08-1040
TERROR THREAT(M)
IN22-08-1041
TERROR THREAT(M)
IN22-08-1043
TERROR THREAT(M)
IN22-08-1044
TERROR THREAT(M)
IN22-08-1045
TERROR THREAT(M)
IN22-08-1046
TERROR THREAT(M)

Exhibit A

STATE OF DELAWARE
VS.
DAVID JEWELL
DOB: [redacted]1976
SBI: 00313027

IN22-08-1048
TERROR THREAT(M)
IN22-08-1050
TERROR THREAT(M)
IN22-08-1053
TERROR THREAT(M)
IN22-08-1054
TERROR THREAT(M)
IN22-08-1056
TERROR THREAT(M)
IN22-12-0341W
STALKING(F)

COMMITMENT
ALL SENTENCES OF CONFINEMENT SHALL RUN CONSECUTIVE

SENTENCE ORDER

NOW THIS 22ND DAY OF SEPTEMBER, 2023, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. Costs are hereby suspended. Defendant is to pay all statutory surcharges.

AS TO IN22-08-1006- : TIS
STALKING

The defendant shall pay his/her restitution as follows:
$1494.91 TO VICTIMS COMP ASSISTANCE PROG

Effective September 22, 2023 the defendant is sentenced as follows:

- The defendant is declared a Habitual Offender and is sentenced pursuant to 11 Del. C. 4214(c) on this charge.

- The defendant is placed in the custody of the Department of Correction for the balance of his/her natural life at supervision level 5

AS TO IN22-08-1005- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1008- : TIS

STATE OF DELAWARE
VS.
DAVID JEWELL
DOB: [redacted]1976
SBI: 00313027

TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1010- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1015- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1016- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1017- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1018- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1021- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1022- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1023- : TIS
TERROR THREAT

STATE OF DELAWARE
VS.
DAVID JEWELL
DOB: [redacted]1976
SBI: 00313027

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1025- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1029- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1033- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1038- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1040- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1041- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1043- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1044- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

STATE OF DELAWARE
VS.
DAVID JEWELL
DOB: [redacted]1976
SBI: 00313027

AS TO IN22-08-1045- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1046- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1048- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1050- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1053- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1054- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-08-1056- : TIS
TERROR THREAT

- The defendant is placed in the custody of the Department of Correction for 1 year(s) at supervision level 5

AS TO IN22-12-0341-W : TIS
STALKING

- The defendant is placed in the custody of the Department of Correction for 3 year(s) at supervision level 5

- Suspended after 2 year(s) at supervision level 5

STATE OF DELAWARE
VS.
DAVID JEWELL
DOB: [redacted]1976
SBI: 00313027

- For 1 year(s) supervision level 4 **DOC DISCRETION**

- Suspended after 6 month(s) at supervision level 4 **DOC DISCRETION**

- For 6 month(s) supervision level 3

- Hold at supervision level 5

- Until space is available at supervision level 4 **DOC DISCRETION**

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
DAVID L JEWELL
DOB: [redacted]1976
SBI: 00313027

CASE NUMBER:
2109014213
2207015399

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Have no contact with the victim(s) Andrea Jordan , the victim's family or residence.

Have no contact with the victim(s) Amber Jewell , the victim's family or residence.

See Notes

For the purposes of ensuring the payment of costs, fines, restitution and the enforcement of any orders imposed, the Court shall retain jurisdiction over the convicted person until any fine or restitution imposed shall have been paid in full. This includes the entry of a civil judgment pursuant to 11 Del.C. 4101 without further hearing.

NOTES

The charge of Harassment, Criminal Action Number IN22-08-1007, was merged with the charge of Stalking, Criminal Action Number IN22-08-1006, by the court for sentencing purposes.

JUDGE FERRIS W WHARTON

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
DAVID L JEWELL
DOB: [redacted]1976
SBI: 00313027

CASE NUMBER:
2109014213
2207015399

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	1494.91
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	28.00
DELJIS FEE ORDERED	28.00
SECURITY FEE ORDERED	280.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	420.00
SENIOR TRUST FUND FEE	
AMBULANCE FUND FEE	
TOTAL	2,250.91