IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S REPLY BRIEF

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

The trial court's legal reasoning should be reviewed de novo and rejected.

The trial court permitted every single one of the nearly sixty racial slurs the State sought to admit based on the rationale that "it's [not] the Court's… responsibility to sanitize comments that the defendant made." A42—43. Jewell argued that this legal reasoning is a *misinterpretation* of the rules of evidence, which unlike a *misapplication* of the rules, is reviewed *de novo*. Op. Br. n.4 (citing cases). Nowhere does the Answer address this distinction or explain how the trial court's reasoning was anything but a misinterpretation of the rules. In fact, the Answer's review of the analysis which *should have* occurred below, highlights what *did not* occur: by permitting the evidence simply because the slurs were "comments that the defendant made," the trial court avoided assessing (and issuing findings related to) whether or not the slurs "[(1) had] probative value … [] substantially outweighed by the danger of unfair prejudice…[; (2) were] inextricably tied either to the charged offense or the actual victim of the offense[; or (3) were admitted] to establish [Jewell's] abstract belief and/or to create a bias against" him. Answer at 11—12.

Relatedly, the State's explanation as to why deference to the trial court is practically warranted– it "ha[d] a first-hand opportunity to evaluate relevant factors"

(Answer at 3) – is misplaced. The Superior Court was *not* in a better position to evaluate recorded materials than is this Court; and, the trial court's ruling was not based on factual findings about the materials, their prejudice, or probative value.

The State's description of the unredacted slurs is unsupportable.

The Answer (at 13) notes that the trial prosecutors represented that they redacted the N-word when used gratuitously, but not when used as part of a threat. A41—42. That representation is inconsistent with the record, which includes over twenty (gratuitous and unredacted) uses of the N-word outside of a threat. A497 ("that's why you reached out to …a wannabe country n****"); A542 ("I guess your mans there u whore n***** lover"), ("Hope you had fun sucking n***** dick today."); A575 ("didn't even send me a text … cuz you had some n***** dude over last night"); A592 ("Hope you had fun out in the bars tonight or at some n***** house"); A593 ("what bar are you at you fucking n***** loving ho bag"), ("why didn't u answer my calls u n***** loving fat pig"), ("ALL you cocco girls can pick up is n*****"); A594 ("HOPE YOU ENJOYED WHOEVER YOUR FAT N***** LOVING SISTERS HOOKED YOU UP WITH"), ("you even sound different… n***** loving talk"); A597 ("read all my text … whenever you stop thinking about your n***** loving tainted sisters"); A598 ("Your fat nasty n*****loving tainted ass is finally getting some attention"); A602 ("Now fuck off white n*****"); A604 ("fuck you you n***** loving stinking fucking c***"); A619 ("YOULL FUCK

ANYBODY DESPERATE ASS N***** LOVERS"); A650 ("You probably smell like a fat ashtray!! Fucking nasty n**** lover") ("I hope you die a slow death of Lung cancer! I'll be the first to come piss on your grave you unfit mother, nigger loving whore!!!), ("WHAT DUDE TURNED YOU OUT TO SMOKING, SAME N**** THAT HAD YOU STRUNG OUT ON CRACK"), ("enjoy your smokes! And the n***** who turned you out"), ("what fucking guy turned you on to smoking you nasty n**** lover"); A651 ("who's the n**** that's got you smoking?"), ("N**** loving whore! I AM SO DONE!"); A675 ("lying ass ho n***** lover u got me blocked cocco n**** lover") ("I hate Lisa cause she fucks n****"); A676 ("u don't even check in on me… Whatever white n****").[1] Since the State has never argued that slurs outside of threats are admissible –and instead relied on a misrepresentation that it never sought to admit such usages—such an argument is waived and this Court should hold that at least those instances were admitted in error.

And even if the trial prosecutors had made the redactions as represented, their belief that racial slurs within a threat are necessarily non-gratuitous reflects an egregiously false dichotomy. The example flagged in the Answer– "I pray that some N-word rapes [A.J.]" – is illustrative of a slur which is *both* gratuitous, and part of a threat. This is why the proper test does not ask if the slur is "part of the threat," (A41)

[1] For convenience, pertinent sections of the appendix are highlighted and resubmitted as Exhibit A hereto.

but instead, requires the trial court to ensure each usage's (1) probative value is not substantially outweighed by a danger of" unfair prejudice,[2] and (2) is "inextricably tied either to the charged offense or the actual victim of the offense?"[3] The trial court did not find, or even suggest, that any of the dozens of usages complied with either requirement. Afterall, given that the trial prosecutors did not redact any slurs within threats, it would have been an incredible coincidence if each instance (unintentionally) satisfied the requirements.

The unredacted N-word usages were highly prejudicial and had minimal, if any, probative value.

The Answer (at 13) claims that its representative example – "I pray that some N-word rapes [A.J.]" – was properly admitted 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." This argument is not supported by the record. Comparing the admitted statement, with a redacted version – *e.g.* "I pray that some[one] rapes [A.J.]" – demonstrates that a redaction need not come at the expense of the statement's offensive and threatening nature and that the slur lacks the probative value which the State attributes to it. A jury is perfectly capable of "understand[ing] the threat"

[2] D.R.E. 403.
[3] *Floudiotis v. State*, 726 A.2d 1196, 1203 (Del. 1999).

without knowing the race of the hypothetical perpetrator; and the Answer has not identified any evidence suggesting that N-word had a material impact on the victim.

This Court should reverse without conducting a harmless error analysis.

As noted in the opening brief, and waived through the Answer's failure to respond, this Court can reverse without considering harmless error.[4] Op. Br. at 12. Doing so would recognize the N-word is uniquely impactful, and that its impermissible use is "repugnant to the core principles of integrity and justness upon which a fundamentally fair criminal justice system must rest,"[5] such that this Court

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[4] *Weddington v. State*, 545 A.2d 607, 614—15 (Del. 1988) ("[infringement of] the right to a fair trial that is free of improper racial implications … can never be treated as harmless error."). A footnote in *Zimmerman v. State*, can be read as suggesting that in *Dawson v. State* this Court abandoned *Weddington*'s holding regarding the impropriety of harmless error review. *Zimmerman v. State*, 628 A.2d 62, 65 n. 2 (Del. 1993). Such a reading is an error. In the *Dawson* direct appeal ("*Dawson I"*), this Court held that evidence of Dawson's racism, which largely focused on his membership in the Arian Brotherhood, was properly admitted. *Dawson v. State*, 581 A.2d 1078 (Del. 1990). The United States Supreme Court's review of *Dawson I* addressed the Arian Brotherhood evidence in terms of racial prejudice, *and* Dawson's First Amendment Freedom of Association; and in reversing and remanding, it relied solely on the latter. *Dawson v. Delaware*, 503 U.S. 159, 167 (1992) ("Dawson's First Amendment rights were violated by the admission of the Aryan Brotherhood evidence.") Thus, the harmless error analysis engaged in by the *Dawson* Court on remand ("*Dawson II"*) was not inconsistent with *Weddington*'s harmless error rule because *Dawson II* was not addressing a due process error from "improper racial implications"; it was assessing the harm of a First Amendment violation. *Dawson v. State*, 608 A.2d 1201, 1204—05 (Del. 1992). Further, post-*Zimmerman* this Court has continued to cite *Weddington*. *Anderson v. State*, 660 A.2d 393 (Del. 1995) (declining to apply *Weddington* (on grounds distinguishable from Jewell's case) but presuming its rule to be alive).

[5] *State v. Monday*, 257 P.3d 551, 558–59 (Wash. 2011) (Madsen, C.J., concurring)

cannot hold that the verdict uninfluenced by anti-racist bias. This is one reason why D.R.E. 403, which was entirely overlooked here, "becomes especially important when the evidence tends to be racially charged."[6]

The improper admission of dozens of racial slurs was not harmless error.

If this Court does conduct a harmless error analysis it should conclude that numerous factors – the uniquely impactful nature of the N-word, trial counsel's objection, the State' misleading description of the redactions, the unprecedented quantity of its use in this trial (including in the State's opening (A56)),[7] and the trial court's failure to engage in any 403 analysis whatsoever – prevent a finding that the error was harmless beyond a reasonable doubt. The overwhelming, if not exclusive, impact of allowing the State to inform the jury of Jewell's repeated use of the N-word was to "establish[Jewell's] racist beliefs and create[] anti-racist bias against him." Op. Br. at 12. Neither the trial judge, nor the Answer dispute that the evidence in fact produced this prejudice. This leaves the slurs admitted in this case far more analogous to those which prompted reversal in *Floudiotis*[8] than those properly

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[6] *Floudiotis*, 726 A.2d at 1203.

[7] It's unclear if the State reminded the jury of Jewell's N-word usages during closing because the record does not capture which exhibit(s) were played. A433

[8] *Floudiotis* involved a multi-defendant conspiracy to assault a couple. As in our case, the victim(s) and defendant(s) are all white. *Id.* at 1202. Nonetheless, in *Floudiotis* the State introduced evidence that, prior to the assault, one of the defendants stated "[i]'m going to have some black meat tonight" in ear shot of a witness who was black. *Id.* at 1204. The State argued the comment was relevant to "the existence of [a] conspiracy … intent to assault … and that the offensive

admitted in *Zebroski*.[9] In fact, unlike either of those precedents (or any Delaware precedent Counsel has found), Jewell's jury was inundated with almost sixty of his irrelevant uses of the slur, making it extremely unlikely they were able to put aside its impact.

comment could help the jury understand [the victim's] state of mind." *Id* at 1205. Just as in our case, the trial court failed to conduct a 403 analysis. *Id.*

[9] In *Floudiotis*, this Court descried *Zebroski v. State* (715 A.2d 75 (Del. 1998)) as follows: "the trial court properly admitted a racially charged statement made by a white defendant … involving the shooting death of a black [victim]. During trial, a witness testified that … the defendant admitted to him that he "shot the n[-word]. The trial court admitted this statement over defendant's objections, relying primarily on the State's contention that admission of this statement was necessary to rebut the defendant's claim that the shooting was accidental." *Floudiotis*, 726 A.2d at 1203.

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

Jewell's Opening Brief (at 13—14) argued that, because the stalking charge sought to criminalize Jewell's speech, the State was not only required to prove that his speech fell into a First Amendment excepted category, such as "true threats," but in accordance with *Counterman v. Colorado*,[10] in order to avoid a "chilling effect" on permissible speech, it must also prove that Jewell acted with a reckless subjective intent. The Answer (at 21) responds that "Jewell's speech is not entitled to First Amendment protections" because his statements were "true threats." The Answer, however, does not dispute mention *Counterman*'s reasoning, suggest it is anything but controlling precedent, or even mention the central case.

The State also takes issue with a footnote which explains that this claim does not imply that our stalking statute is unconstitutional, but only that, in accordance with the avoidance cannon, the subjective intent requirement must be read into the statute.[11] The State notes its disagreement, presumably, to benefit from the statute's presumption of constitutionality, but fails to recognize how that presumption

[10] 600 U.S. 66, 74 (2023).

[11] *But see State v. Reeves*, 2024 WL 2240234, at *13 (Del. Super. Ct. May 17, 2024) ("Section 1312 applies a negligent state of mind requirement to the result element. Post-*Counterman*, any application of the Statute to 'true threats,' will be unconstitutional under the First Amendment.")

operates. It is precisely *because* of the "strong judicial tradition in Delaware … [of a] presumption of the constitutionality of a legislative enactment … [that] interpreting court[s] strive to construe the legislative intent so as to avoid unnecessary constitutional infirmities" (i.e., employ the avoidance canon).[12]

Finally, the Answer (at 20) argues that the trial court's failure to inform the jury of the subjective intent requirement was not error because a "defendant's intention . . . may be inferred…" This argument misunderstands the issue, which does not challenge the adequacy of the State's evidence, but the adequacy of the instructions. That the evidence *permitted* the jury to do so, is different than evidence which *required* them to;[13] and because the jury was not instructed to make the finding, this verdict does not reflect that the jury in fact inferred (or otherwise found) anything about Jewell's subjective state of mind. Because the State has not disputed that "the failure to properly define an essential element requires reversal" (Op. br. at 15), should this Court agree there was error, it should reverse.

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[12] *State v. Baker*, 720 A.2d 1139, 1144 (Del. 1998). Additionally, as noted in *Reeves* (2024 WL 2240234), *Counterman* only calls into question the stalking statute's applicability to true threats.

[13] Notably, much of trial counsel's summation argued that the State had not proven subjective intent. A437—39.

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

Jewell's third claim identified ten counts of the indictment which required specific unanimity instructions because they satisfy the three-part test adopted in *Probst:* (1) the jury was instructed about multiple theories of criminal liability, (2) those theories are conceptually different, and (3) the state has presented evidence on each.[14] Op. Br. at 17—18. The Answer does not suggest that any of these requirements were unsatisfied, and instead asks this Court to adopt (what it sees as) a new rule, pursuant to which specific unanimity instructions are unnecessary so long as "the government did not allege different sets of facts." Answer at 28.[15] Even if this Court were to adopt the rule (which is arguably already encompassed in the *Probst* test), it was satisfied. As to each of the identified counts, the State presented

[14] *Probst v. State*, 547 A.2d 114 (Del. 1988).

[15] The Answer (at 28) cites *United States v. Cusumano*, a thirty-year-old Third Circuit decision, for this proposition. 943 F.2d 305, 312 (3d Cir. 1991). But the Answer does not explain how *Cusumano* is applicable to Jewell's case, which appears far more analogous to *United States v. Beros*, a Third Circuit decision in which "the defendant violated [a] statute by engaging in three separate and different acts," and regarding which the *Cusumano* Court held a specific unanimity instruction was properly given. 833 F.2d 455 (3d Cir. 1987).

evidence of threats against different victims (Op. Br. at 19), which of course entails a "different sets of facts."

The bulk of the Answer's treatment of this claim is, confusingly, dedicated to an irrelevant proposition: "the State presented evidence [sufficient to] support[]a specific argument and a specific victim." Answer at 28. Sufficient evidence of one of multiple theories of liability does not cut against the need for specific unanimity *unless* there was no evidence of an alternative theory. Such an argument was not made by the State and is unsupportable. Op. Br. at 19.

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

One type of multiplicity arises from "charging of a single offense in more than one count of an indictment."[16] Jewell presented such a claim which focused on Counts IX and XI, *identical* counts which each charge terroristic threatening against "another person" on May 29, 2021 (A24); and Counts VII and VIII, each of which charge terroristic threatening on May 27, 2021, and are only distinguishable in that Count VII identifies the victim as Andrea Jordan, while Count VIII broadly classifies the victim as "another person." Op. Br. at 21—22; A23—24. The State does not dispute that "the charges in each pair respectively allege identical, or entirely overlapping conduct." Op. Br. at 21.

Without acknowledging the leap it makes, the Answer assumes that because the State produced evidence at trial which *could have* established distinct crimes for each count, the (undisputed) overlapping of those counts (as indicted) is of no moment. Answer at 35—37. The State cites no support (or even provide a rationale) for this assumption, and does not address the fact that it was argued below, and rejected by the trial court:

[16] *Sisson v. State*, 903 A.2d 288, 309 (Del. 2006).

THE COURT: *Count 9 alleges terroristic threatening against Andrea Jordan on the 25th of May and Count 14 alleges terroristic threatening against Andrea Jordan on the 25th of May in identical language. So what's a jury to do here?*

PROSECUTOR: *Count 9 is for a prison call.*

THE COURT*: No, it's not…you can't add in facts to the indictment now. You have chosen to word the indictment the way you've chosen to word it and you worded them identically on the same day. How is a jury supposed to know what you're referring to? You've got two charges which are identical … how is the jury supposed to identify that this count relates to these facts and that count relates to other facts? There's nothing in the indictment to let them know that … How is that not just multiplicity of counts?*

PROSECUTOR: *It's for two separate*

THE COURT: It doesn't say that…You can draft the indictment any way you want to do it. You could have said did commit terroristic threatening by stating in a telephone call to Andrea Jordan, by stating in the text message and the jury has a basis for knowing what you're talking about. Somebody looking back on this saying that's not double jeopardy because you're dealing with two separate incidents, two separate acts. But you didn't do that. What you did was for reasons that are completely unknown to me but within your total control allege two identical counts alleging the same victim on the same day with no other explanation that the jury has. And you can't add that in later and say this count relates to this or this count relates to that because the grand jury didn't say that. (A400—02).

The trial court's reasoning is correct. A jury is bound by the indictment,[17] and judge's instructions.[18] A179 ("[attorneys'] statements and arguments are merely made to assist you in organizing the evidence"). The description of the charge advanced in the Answer was absent in the indictment, the judge's instructions, and *not even* advanced in the trial prosecutors' arguments;[19] so, not only was the jury not bound by the prosecution's unindicted theory, it was not even aware.

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[17] *Duncan v. State*, 791 A.2d 750 (Del. 2002) ("the State has an obligation to prove [its case] … in a manner consistent with the facts set forth in the indictment."); *United States v. Sunia*, 643 F. Supp. 2d 51, 60 (D.D.C. 2009) ("[a]dherence to the language of the indictment is essential because the Fifth Amendment requires that criminal prosecutions be limited to the unique allegations of the indictments returned by the grand jury"); *United States v. Bear Robe*, 2022 WL 102266, at *1 (D.S.D. Jan. 11, 2022) ("multiplicity challenges to the indictment must be examined in light of the language of the indictment and not the government's factual assertions");

[18] *See Mills v. State*, 201 A.3d 1163, 1179–80 (Del. 2019) ("the jury is supposed to listen to the judge, not the lawyers, when it comes to the law.")

[19] The State's closing argument lumped all the May 2021 evidence into a single summary: "[f]or month of May the defendant dialed Andrea's phone number approximately 154 times. She accepted around 49 of these calls and there were approximately 26 pages of tablet messages. The defendant is charged with seven counts of terroristic threatening for his conduct for the month of May." A428—29.

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

The Answer (at 39) begins by acknowledging that Jewell's position –the threatened "person" in a terroristic threatening prosecution must have "been born and is alive" – is based on statute. Op. Br. at 24 (citing 11 *Del. C.* §222 (21)). Yet then proceeds to challenge arguments which were never made: "[t]he United State Supreme Court has never held that a threat must be particularized to constitute a 'true threat,'" and "[Jewell's position] assum[es] that particularization is an essential element." Answer at 39—40. These arguments are irrelevant.

Later the Answer (at 40) asserts that the State did prove the threat was directed at a "person," because, "[i]n Jewell's mind, Jordan had a boyfriend, and such person was very much real to him." This argument is inadequate because the statute requires proof of a "human being who *has been* born and *is* alive," not "[*believed by the accused* to have] been born and alive."

Finally, the State asserts that the March 14, 2021 threat was directed at Drew, who is a qualifying "person." Answer at 41. This argument is legally sound, but unsupported by the record. It is true that the record contains threats to Drew, but as the State's record citations (A119; A232—33) show, those threats occurred long

after the March 14, 2021 (the indicted date). A119 refers to May 22, 2021; and A232—33 refers to May 26, 2021. The record cannot support that prior to these calls, which took place over two months after the indicted count, Jewell believed Drew to be Jordan's boyfriend. When it comes to the date at issue, the most the State can say is, "between February 1, 2021, and September 28, 2021, Jewell frequently accused Jordan of dating or sleeping with *other men*," which of course would not allow a jury to infer that Jewell had Drew in mind on March 14, 2021.

Further, when Jewell threatened Drew, he did so by name (or specific insults he had assigned to Drew, such as "hillbilly") (A489—95), whereas his language in the threat at issue ("I know you're seeing someone") indicates that Jewell believed Jordan had a boyfriend but did not know whom. And in fact, Special Investigator Brian Daly's interpretation, elicited by the State, supports Jewell's interpretation. A118 (indicating this statement referred to "the next possible boyfriend").

CONCLUSION

For the reasons and upon the authorities cited herein, this Court should grant relief as identified in Jewell's Opening Brief (at 25).

Respectfully submitted,

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