



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE L. PEARSON,)
)
 Defendant-Below,)
 Appellant)
)
 v.) No. 268, 2024
)
 STATE OF DELAWARE)
)
 Plaintiff-Below,)
 Appellee.)

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S CORRECTED OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On March 27, 2023, Dwayne Pearson, (“Dwayne”), was indicted on unlawful sexual contact second degree, rape second degree, rape fourth degree, one count of sexual abuse of a child by a person in a position of trust, authority or supervision, (“sex abuse”), second degree and two counts of sex abuse, first degree.¹ He began a 5-day jury trial on January 22, 2024. At the end of the State’s case, defense counsel moved for a judgment of acquittal, arguing that the State failed to establish that Dwayne was a person in a position of trust, authority or supervision for purposes of the three “sex abuse” counts. The trial court deferred its ruling.²

Prior to the verdict, defense counsel reminded the judge of his “reserved decision depending on the jury verdicts[.]” Following the verdict, the judge allowed defense counsel to renew his motion in writing.³ On June 10, 2024, after briefing, the trial court issued a written decision denying the post-trial motion for judgment of acquittal.⁴

Dwayne was later sentenced to 35 years in prison followed by probation.⁵ This is his Opening Brief in support of a timely-filed appeal.

¹ Ind.

² A141; A161.

³ A161, A162. Oral Denial of Motion for Judgment of Acquittal, Ex. A.

⁴ *State v. Pearson*, 2024 WL 2891171 (Del. Super. Ct. June 10, 2024), Ex. B.

⁵ June 14, 2024 Sentence Order, Ex. C.

SUMMARY OF THE ARGUMENT

1. A rational trier of fact could not find Dwayne guilty beyond reasonable doubt of sexual abuse of a child by a person in a position of trust, authority or supervision pursuant to 11 Del. C. §778 or §778A when the State failed to establish that he was a “person in the position of trust, authority or supervision” pursuant to 11 Del. C. §761 (6) (e).

2. Title 11, section 761 of the Delaware Code is unconstitutionally vague as applied to Dwayne as it failed to fairly notify him, under the “but is not limited to” language, of which conduct is subject to enhanced punishment because it allowed the jury to come up with its own category of persons in a position of trust that is not clearly defined in the statute.

STATEMENT OF FACTS

Mill Creek Fire Company, (“Mill Creek”), located on Kirkwood Highway, is one of multiple fire companies in New Castle County that is an independently incorporated nonprofit organization composed of both emergency medical volunteers and fire fighter volunteers. The volunteer company has its own board of directors, its own set of procedures and its own chain of command which is headed by Chief Nicholas Baronie.⁶

On May 16, 2022, M.M.,⁷ a 15-year-old female, was voted in at Mill Creek as a volunteer junior firefighter.⁸ Mill Creek’s junior firefighter program is designed to train young volunteers so they can meet all requirements and pass the final evaluation to become a full firefighter when they turn 18.⁹ Joe Garone, a senior firefighter at Mill Creek, was assigned as M.M.’s mentor.¹⁰ As a result, M.M. normally reported to him. She also texted with him about matters related to work, school and life in general.¹¹ And, she received a binder with tasks to complete as part of her training.

⁶ A16, A17, A20.

⁷ Consistent with Del. Sup. Ct. R. 7 (d), Appellant has assigned pseudonyms to the complainant.

⁸ A15, A28-29.

⁹ A17-19, A21.

¹⁰ A23, A40.

¹¹ A24, A30, A43-44.

At trial, M.M. noted that within her fire company, there are different levels of people who are “in charge” like those with whom she rode on the truck.¹² However, she was clear that, since she was a junior member and Chief Baronie was the “big dog,” there was little to no interaction between the two.¹³

On July 16, 2022, two months into M.M.’s junior membership, volunteers from Mill Creek, including M.M. and her mentor Joe, participated with other fire companies in a training session in West Chester, Pennsylvania. Early that morning, Mill Creek members drove up to Belvedere, a separate fire company.¹⁴ Volunteers from both companies had donuts then headed up to the training site.¹⁵

At some point during the training, M.M. met Dwayne Pearson, a volunteer deputy fire chief at Belvedere.¹⁶ The two spent time together socializing during breaks. They sat on the back of a pick-up truck talking while several other firefighters were around talking, eating and drinking.¹⁷ According to M.M., she and Dwayne talked that day about school, sports, and “fire-related things.” She told the jury that he made her feel special and that

¹² A41-42.

¹³ A22, A41-42.

¹⁴ A16(a)-16(b); A45-46.

¹⁵ A46(a).

¹⁶ A46(b).

¹⁷ A46(ab), A49, A51.

she thought he was a “cool guy.” And, at one point, she ended up with his sunglasses on her head. She also believed she could learn a lot from him and that he could be a “potential mentor for the future.”¹⁸

Robert Johnson, the chief at Belvedere, also attended the training. He communicated concerns to Baronie regarding the manner in which Dwayne and M.M. were interacting on this first time which they met.¹⁹ Baronie informed Johnson that M.M. was “underage.”²⁰ Johnson purportedly passed this information on to Dwayne in the hopes that he would leave her alone.²¹ After the training, members from both companies returned to Belvedere for pizza and wings²² where M.M. and Dwayne continued to socialize.²³ M.M. and the rest of the Mill Creek members then went back to their station.

M.M. and Dwayne did not communicate or see each other again until July 30, 2022 when Dwayne was one of a few volunteers from other companies who pitched in at Mill Creek when a firefighter had “gone down.”²⁴ Just as they had during their first meeting, M.M. and Dwayne interactions were social in nature. They went in the radio room and talked about school

¹⁸ A47-51.

¹⁹ A145, A146-149.

²⁰ A151.

²¹ A151-152.

²² A51.

²³ A51-52

²⁴ A58.

and family. They looked at pictures on each others' phones. And, according to M.M., Dwayne made sexual comments.²⁵ Later that day, he also purportedly made a joke about M.M. sitting on his lap while she was talking with her friend on Factice.²⁶ He also obtained M.M.'s social media information²⁷ and from that date forward, the two began to communicate mostly via Snapchat.²⁸

It was close to three weeks later before the two saw each other again. The two arranged, via calls and/or texts, to meet on the evening of August 18, 2022 in the parking lot of the Dunkin' Donuts located between the Mill Creek fire house and Rita's Water Ice.²⁹ Around 8:00 p.m., Dwayne arrived in a Silverado belonging to Belvedere and pulled into a spot in Dunkin' Donuts parking lot.³⁰ M.M., who was at the firehouse, went out to meet him.³¹

Eventually, M.M. and Dwayne drove off together in the Silverado to Antonio Plaza which is about a five-minute drive.³² When the two arrived at

²⁵ A60-64.

²⁶ A66-67.

²⁷ A65.

²⁸ A68.

²⁹ A69-70.

³⁰ A73.

³¹ A83.

³² A70-71, A74.

their destination, M.M. saw an empty parking lot where she had previously done training.³³ Dwayne parked behind an abandoned building.³⁴

According to M.M., she got out of the passenger side of the truck and stood behind her opened door. Dwayne then got out of the driver's side, came around and opened the back passenger door on the extended cab. As M.M. stood between the two opened doors, Dwayne began to kiss her. She said that she was "feeling into it, so[he] kissed him back." He purportedly pulled down his pants and asked her to perform oral sex on him. When she declined, he guided her hand in stroking his penis.³⁵ After a few times, Dwayne ejaculated.³⁶ Shortly thereafter, around sunset, the two headed back to Dunkin' Donuts. M.M. got out and returned to the Mill Creek firehouse.³⁷

M.M. and Dwayne continued talking and texting with each other everyday.³⁸ According to M.M., Dwayne wanted to see her again right away but she initially said no because, "everything was sexual and he didn't really care, and ultimately stuff like that, that he just didn't care and it was all just a

³³ A75.

³⁴ A76-78.

³⁵ A79.

³⁶ A80-81.

³⁷ A82.

³⁸ A84.

game.”³⁹ Then, Dwayne told her he was “sorry for making [her] feel like that[.]”⁴⁰ After the apology, M.M. agreed to meet with him again.⁴¹

The couple met for only the fourth but final time on August 24, 2022 around dusk.⁴² This time Dwayne picked M.M. up on the other side of Mill Creek on a road between the firehouse and Fulton Bank.⁴³ The two then rode over to the full parking lot at the old Mill Creek firehouse which is next to the Fulton Bank.⁴⁴ Dwayne then parked the truck at the back of the lot.⁴⁵

Just as with their prior encounter, M.M. got out of the passenger side and stood behind the opened door. Dwayne got out of the truck and went to the passenger side.⁴⁶ He opened the back passenger door on the extended cab. The two stood between both open passenger doors⁴⁷ and “started making out.”⁴⁸ M.M. told the jury that Dwayne then “stuck his hand down [her] pants and then he started fingering [her], which his fingers were inside of [her].”⁴⁹ She went on to say that “he turned [her] around, pulled out his penis he bent

³⁹ A85-86

⁴⁰ A86.

⁴¹ A84.

⁴² A91(a), A91(b); A94.

⁴³ A87.

⁴⁴ A88-89, A90

⁴⁵ A91.

⁴⁶ A92.

⁴⁷ A92; A95-97.

⁴⁸ A92; A98.

⁴⁹ A92; A98-99.

[her] over, and then he stuck it in, his penis inside [her].”⁵⁰ The “sex act conclude[d]” when Dwayne ejaculated on the ground.⁵¹

M.M. testified that shortly after the sexual intercourse, they both got back in the truck and drove back to the spot where he had picked her up.⁵² M.M. then returned to the Mill Creek.⁵³ At trial, she could not remember whether the two spoke later that night. While the two did communicate on various occasions after that night, they never saw each other again.⁵⁴

Meanwhile, on September 7, 2022, Chief Baronie received a call from someone at Belvedere about the possibility of a Belvedere chief “molesting one of [Mill Creek’s] females.”⁵⁵ While the chief also had some information about M.M. riding on another company’s engine, he had no specifics. He did, however, report what he had that same day to police.⁵⁶

On September 11, 2024, Dwayne sent M.M. a Snapchat, (i.e. videochat), wherein he informed her that an allegation of a sexual nature had been made about him that possibly involved her.⁵⁷ According to M.M.,

⁵⁰ A93; A99-100

⁵¹ A102-103.

⁵² A104.

⁵³ A104.

⁵⁴ A105.

⁵⁵ A25.

⁵⁶ A26, A27

⁵⁷ A106

Dwayne told her to block him from her social media for a week and to delete from her phone any photos, communications or other history related to him.⁵⁸ She also stated that she agreed to lie if anyone asked any questions about their relationship because she thought it would ruin his career, ruin her potential career, and because she did not want her mom to find out.⁵⁹

On September 18, 2022, M.M. added Dwayne back to her Snapchat account.⁶⁰ The couple then had a rather quick conversation. Dwayne told her that a female friend was moving in with him.⁶¹ M.M. was upset and heartbroken.⁶² However, she claimed that she still wanted to have a friendship with him.⁶³ Her best friend stated that M.M. was angry when she found out about the girlfriend moving in.⁶⁴ In any event, M.M. believes that this was the last conversation she had with Dwayne.⁶⁵

On September 19, 2022, M.M.'s sister was elected as a member at Mill Creek as an EMT.⁶⁶ Both the girls and their mother were at the firehouse that

⁵⁸ A111-114.

⁵⁹ A111-114.

⁶⁰ A115-116. M.M. stated that although Snapchat does not save actual communications, she believed the call log recording is left behind and that by deleting the account for a week, that information would get deleted.

⁶¹ A118.

⁶² A119.

⁶³ A125, A126.

⁶⁴ A129.

⁶⁵ A117.

⁶⁶ A31.

night. Chief Baronie informed M.M.'s mom about the phone call he had received earlier in the month.⁶⁷ He told her he could not be sure if the information was true or even if the information was about M.M. So, Baronie urged her to talk to M.M.⁶⁸ Shortly thereafter, while M.M. was in the parked car with her mom and sister outside the fire house, her mom confronted her. Initially, M.M. stated that she and Dwayne only kissed.⁶⁹ She then expanded her claims to those upon which the State based the charges in this case.⁷⁰

⁶⁷ A32; A120-122.

⁶⁸ A33-38.

⁶⁹ A36-38; A122-123.

⁷⁰ A39; A123-124.

I. NO RATIONAL TRIER OF FACT COULD FIND DWAYNE GUILTY BEYOND REASONABLE DOUBT OF SEXUAL ABUSE OF A CHILD BY A PERSON IN A POSITION OF TRUST, AUTHORITY OR SUPERVISION AS THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE THAT HE WAS A PERSON IN A POSITION OF TRUST, AUTHORITY OR SUPERVISION PURSUANT TO 11 DEL. C. §761 (e).

Question Presented

Whether any rational trier of fact could find Dwayne guilty beyond reasonable doubt of sexual abuse of a child by a person in a position of trust, authority or supervision when the State failed to establish that he fell within the definition of a “person in the position of trust, authority or supervision” pursuant to 11 Del. C. §761 (6) (e) (2), (7) or under the “catch all” provision.⁷¹

Standard of Review

This “Court reviews claims of insufficient evidence to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt[.]”⁷²

Argument

The State charged Dwayne with multiple offenses based on M.M.’s allegations that he engaged in sexual conduct with her. With respect to his

⁷¹A130-141; A163.

⁷² *Willingham v. State*, 297 A.3d 287 (Del. 2023).

alleged conduct on August 18th, he was charged with unlawful sexual contact second degree⁷³ and an accompanying offense of sexual abuse of a child by a person in a position of trust, authority or supervision, (“sex abuse”), in the second degree.⁷⁴ As to the claims regarding his conduct on August 24th, he was charged with: rape second degree⁷⁵ with an accompanying offense of “sex abuse” first degree⁷⁶ for purportedly engaging in sexual intercourse; and rape fourth degree⁷⁷ with an accompanying offense of sex abuse first degree,⁷⁸ for purportedly engaging in sexual penetration.

Position of Trust, Authority or Supervision.

For each “sex abuse” charge, the State was required to prove that Dwayne intentionally engaged in sexual contact,⁷⁹ (§768), sexual penetration,⁸⁰ (§ 778 (1)), or sexual intercourse,⁸¹ (§ 772) with M.M., depending on the count at issue, and that he

st[ood] in a position of trust, authority or supervision over [her], or [wa]s an invitee or designee of a person who st[ood] in a position of trust, authority or supervision over [her].

⁷³ 11 Del.C. § 768.

⁷⁴ 11 Del. C. § 778A.

⁷⁵ 11 Del.C. § 772.

⁷⁶ 11 Del. C. § 778 (1).

⁷⁷ 11 Del. C. § 770.

⁷⁸ 11 Del. C. § 778 (2).

⁷⁹ Counts 5 and 6; Unlawful Sexual Contact Second Degree.

⁸⁰ Counts 3 and 4; Rape Fourth Degree.

⁸¹ Counts 1 and 2, Rape Second Degree.

Section 761 provides the definition of “position of trust, authority, or supervision” over a child as used in the sex abuse offenses charged in our case. As described in §761 (e), a “[p]osition of trust, authority or supervision over a child” *includes, but is not limited to*” a list of seven non exclusive classes of individuals the legislature decided should be held more accountable for committing sex offenses against children. In our case, the State did not place in the indictment which category into which Dwayne fell.

Motion for Judgment of Acquittal.

At Dwayne’s jury trial, and following the State’s case, he moved for a judgment of acquittal on all three sex abuse charges. He argued that the State failed to present evidence that he was a person in a “position of trust, supervision, or authority” with respect to M.M.⁸² Therefore, the State failed to establish a necessary element of the sex abuse offenses. Rather than ruling on the motion, the judge said he would take the “matter under advisement.”⁸³

Prayer Conference.

Only moments after the judge deferred his ruling on the defense motion, he conducted a prayer conference wherein the prosecutor requested that the jury be instructed on all seven definitions specifically listed within the

⁸² A130-141.

⁸³ A141; A161.

definition of the phrase “position of trust, authority or supervision” pursuant to §761 (e).⁸⁴ The judge denied the request explaining that, in general, the only portions of a statute that are read to the jury are “the sections that are relevant to the evidence.” He then made specific findings that the only definitions set out in §761 (6) (e) that would help the jury “focus in on what their mission is” are those contained in §761 (6) (e) (2) & (7). Nonetheless, the instruction that was subsequently read to the jury also contained the catch all language that allowed the jury to find Dwayne was in a position of trust if he fit some other undefined criteria:

Position of trust, authority or supervision over a child" *includes, but is not limited to:* [(6) (e) (2)] A teacher, coach, counselor, advisor, mentor, or any other person providing instruction or educational services to a child or children, whether such person is compensated or acting as a volunteer; Or, [(6) (e) (7)] any person who because of that person's familiar relationship, profession, employment, vocation, avocation, or volunteer service has regular direct contact with a child or children, and in the course thereof, assumes responsibility, whether temporarily or permanently, for the care or supervision of a child or children.⁸⁵

Closing Arguments.

Prior to closing arguments, even though there was no objection by the State, the trial court told defense counsel he could not address the other

⁸⁴ A142-143.

⁸⁵ A155-156. (emphasis added).

enumerated definitions in order to assist the jury because it was “not really relevant.”⁸⁶ Yet, in the prosecutor’s effort to convince the jury that it could find Dwayne was in some position of trust other than the the two defined by the court, she did refer to what she believed to be the nature of those other definitions:

But it's not limited to [§761 (6) (e) (2) & (7)]. And that's important for you to think about. And I say it's important to think about only in the event that you do not think that the Defendant falls into one of those categories that were read and that are included in your instruction. Ordinarily, when someone is in a position of trust or authority or supervision, it can be held by any person having direct contact with the child due to the nature of their role, and the way they show position of power, the way they show authority and control over that child. And it can be permanent; it can be temporary.⁸⁷

Renewed Motion.

Prior to the return of the verdict, defense counsel reminded the judge of his “reserved decision depending on the jury verdicts[.]”⁸⁸ Following the verdict, the trial court allowed defense counsel to renew his motion and asked

⁸⁶ A144.

⁸⁷ A157.

⁸⁸ A161-162. The record is clear that defense counsel’s requests with respect to the jury instructions were alternative arguments to his motion for a judgment of acquittal A142-144.

that it be submitted in writing.⁸⁹ Defense counsel filed the motion, the State responded and the trial court denied the motion.

There Was Insufficient Evidence That Dwayne Was A Person In A Position Of Trust, Authority Or Supervision Over A Child As Defined By §761 (6) (e) (2).

The State failed to establish that Dwayne was a “teacher, coach, counselor, advisor, mentor, or any other person providing instruction or educational services to a child or children, whether such person is compensated or acting as a volunteer” as required by §761 (6) (e) (2). The State did very little to support this theory of the case. As previously indicated, The indictment did not assert that Dwayne was in a position of trust under this section. And, there was never any claim made that he was ever M.M.’s teacher, coach, counselor or advisor.

The State did appear to erroneously try to characterize Dwayne as M.M.’s mentor. During closing, the prosecutor stated, “[h]e does fit in as a mentor. He does fit in as one of those people in a position of trust, and the evidence in this case supports that.”⁹⁰ Yet, all evidence is to the contrary. He was never her mentor.

⁸⁹ A162.

⁹⁰ A160.

Joe Garone was M.M.'s mentor from the first day she started volunteering at Mill Creek.⁹¹ She reported to him and he helped to train her.⁹² Dwayne did not work in her fire company. He was not within her chain of command. She did not meet him until two months after she started volunteering.

At the training session where they met, Dwayne had no authority over M.M.⁹³ In fact, members from M.M.'s chain of command were present, including her mentor. The evidence at trial supports the conclusion that the couple's communication at the training was social in nature. There was also no evidence presented that Dwayne ever provided M.M. with mentorship or instruction in any of his further meetings with her.

Significantly, in response to the written motion for judgment of acquittal, the State did not argue that Dwayne was a person in the position of trust, authority or supervision pursuant to §761 (6) (e) (2). Accordingly, it cannot make any such argument now. Further, the trial court's finding that there was sufficient evidence to find that Dwayne was in a position of trust, authority or supervision was based solely on §761 (6) (e) (7). The trial court made no finding with respect to §761 (6) (e) (2). Therefore, to the extent

⁹¹ A23, A40.

⁹² A24, A30, A43-45.

⁹³ A45-46.

Dwayne's sex abuse convictions are based on a finding that he was in a position of trust, authority or supervision pursuant to §761 (6) (e) (2), they must be vacated.

There Was Insufficient Evidence That Dwayne Was A Person In A Position Of Trust, Authority Or Supervision Over A Child As Defined By §761 (6) (e) (7).

The State failed to establish that Dwayne was a “person who because of that person's familiar relationship, profession, employment, vocation, avocation, or volunteer service has regular direct contact with a child or children, and in the course thereof, assumes responsibility, whether temporarily or permanently, for the care or supervision of a child or children” as required to satisfy §761 (6) (e) (7). The State presented no evidence that , *because of* his volunteer service Dwayne “ha[d] regular direct contact” with M.M. and “*assume[d] responsibility, whether temporarily or permanently, for [her] care or supervision[.]*”

The prosecutor told the jury that due to his role as a deputy fire chief, Dwayne assumed a “level of care and duty... to not abuse that authority.” She also reminded the jury of M.M.'s testimony that she admired and felt connected to Dwayne because they were both firefighters.⁹⁴ It is not clear whether the State's main argument regarding the “position of trust” was

⁹⁴ A160.

actually rooted in §761 (6) (e) (7) or was simply an appeal to a broader sense of work place authority.⁹⁵ However, this rationale is not supported by statute or jury instructions.

The State cited to the facts that Dwayne was working in his official capacity when he had contact with M.M. The prosecutor also noted that, in at least two instances, they were both actively volunteering in their respective firefighter positions.⁹⁶ Nowhere did the State point to any facts satisfying the requirement under §761 (6) (e) (7) that Dwayne “assume[d] responsibility, whether temporarily or permanently, for the care or supervision of M.M.”⁹⁷

There were only two times that M.M. and Dwayne were together in their capacity as volunteer firefighters, July 16th and July 30th. There is no evidence in the record that Dwayne had assumed responsibility for M.M.’s care or supervision on either of these dates.

On July 16th, at the training session, M.M. was accompanied by members of her own firehouse, including her mentor. She socialized with Dwayne but he was not even within her chain of command. On July 30th, M.M. unexpectedly found Dwayne had arrived at Mill Creek while she was on a call. She was already working with other firefighters. There is no

⁹⁵ A158-159.

⁹⁶ A173.

⁹⁷ A173.

evidence that he was in a position wherein he assumed any responsibility for M.M.'s care or supervision on that day. The only evidence presented regarding their interactions was that they were social in nature.⁹⁸

Contrary to the State's argument, Dwayne cannot be considered to have been a person in a "position of trust" on the two days in which M.M. drove off in his truck. That they were in an "official" truck does not define whether "because of" Dwayne's volunteer services he assumed responsibility for M.M.'s care and supervision.

Similarly, in its decision on Dwayne's motion for judgment of acquittal, the trial court found sufficient evidence that he was a person of trust under §761 (6) (e) (7) primarily because the couple met through volunteer service and Dwayne was working in an official capacity.

Interestingly, the history of § 761 suggests that the State's closing argument urging the jury find Dwayne was in a position of trust with respect to M.M. simply by virtue of their employment is simply wrong. The relationship of a firefighter to a child/junior firefighter could have been explicitly included by statute as a person of "trust, authority, or supervision over a child" but was not so included. Section 761(e)(6) provides that any "law-enforcement officer, as that term is defined in section § 222 of this title

⁹⁸ A60-64, A66-67.

. . ." is a person of trust for purposes of section § 778. Significantly, section § 222 (18) outlines with specificity as persons in a "position of trust, authority, or supervision over a child" includes persons considered "law-enforcement officers" in Delaware include: "state fire marshals, municipal fire marshals that are graduates of a Delaware Police Academy which is accredited/ authorized by the Police Officer Standards and Training Commission, sworn members of the City of Wilmington Fire Department who have graduated from a Delaware Police Academy which is authorized/accredited by the Police Officer Standards and Training Commission . . The exclusion of firefighters or fire company officers from the above definition implies that they are not persons of trust as envisioned by statute.

Glaringly absent from the trial court's analysis is the complete definition of a "position of trust" pursuant to §761 (6) (e) (7).

Initially, the court correctly set out the entire definition

any person who because of that person's familiar relationship, profession, employment, vocation, avocation, or volunteer service has regular direct contact with a child or children, and in the course thereof, *assumes responsibility*, whether temporarily or permanently, *for the care or supervision of a child or children*.

But, when the court delved into its analysis, it twice left off the key phrase "for the care of supervision of a child or children" which quoting the statute:

The witnesses' testimony at trial confirms the jury's verdict that Mr. Pearson was a person in a position of trust. The following facts were educed from the testimony and evidence at trial that support Mr. Pearson was "in a position of trust ... because of [his] employment/volunteer [and had] regular direct contact with the child ... in the course of [his] assumed responsibility, whether temporarily or permanently."⁹⁹

[...]

The facts on the record indicate that Mr. Pearson, while working in his capacity as a Deputy Chief of the Belvedere Fire Company, is included in the nonexclusive list enumerated in 11 Del. C. § 761(e)(7) as a "person in a position of trust ... because of [his] profession, employment ... or volunteer service [and had] regular direct contact with the child ... in the course of [his] assumed responsibility, whether temporarily or permanently." Thus, the challenged list in 11 Del. C. § 761(e) is inclusive of the behavior that defines a "person in a position of trust."¹⁰⁰

As the decision reveals, the court made no finding that Dwayne assumed responsibility "for the care of supervision of M.M."

Significantly, in response to the written motion for judgment of acquittal, the State did not cite to §761 (6) (e) (7). It failed to present any evidence that *because of* his volunteer service Dwayne "ha[d] regular direct contact" with M.M. and "*assume[d] responsibility*, whether temporarily or permanently, *for [her] care or supervision[.]*" Further, the trial court made no finding that Dwayne assumed responsibility "for the care of supervision of M.M." §761 (6) (e) (7). Therefore, to the extent Dwayne's sex abuse

⁹⁹ *State v. Pearson*, 2024 WL 2891171, at *3 (Del. Super. Ct. June 10, 2024).

¹⁰⁰ *Id.*

convictions are based on a finding that he was in a position of trust, authority or supervision pursuant to §761 (6) (e) (7), they must be vacated.

There Was Insufficient Evidence That Dwayne Was A Person In A Position Of Trust, Authority Or Supervision Over A Child Under Any Definition Not Expressly Listed In §761 (6) (e).

The jury was given the opportunity to conjure up any reason it wanted, other than the two specifically provided, to decide that Dwayne was a person in a position of trust. In fact, the State urged the jury to consider options other than the two provided to it. In doing so, the prosecutor identified her own formula for the jury to follow in deciding whether an “unlisted” trust relationship existed. Because no interrogatories were given to the jury and no specific non listed category was offered, there is no way to know if and what non listed category the jury may have come up with.

The trial court’s decision that there was sufficient evidence to find that Dwayne was in a position of trust, authority or supervision was based solely on §761 (6) (e) (7). The trial court made no finding with respect to whether any unenumerated definition was satisfied. Therefore, to the extent Dwayne’s sex abuse convictions are based on a finding that he was in a position of trust, authority or supervision pursuant to any definition of a position of trust pursuant to the catch all phrase in §761 (6) (e), they must be vacated.

II. THE PHRASE “PERSON IN A POSITION OF TRUST” DID NOT GIVE DWAYNE, A MAN OF ORDINARY INTELLEGECE, A FAIR WARNING FOR PURPOSES OF CONVICTION OF SEX ABUSE OFFENSES ENHANCING HIS PENALTIES . THUS, SECTION 761 UNCONSTITUTIONALLY VAGUE AND HIS RIGHT TO DUE PROCESS WAS VIOLATED.

Question Presented

Whether §761 is unconstitutionally vague as applied to Dwayne as it failed to fairly notify him, under the “but is not limited to” language, of which conduct is subject to enhanced punishment because the jury was permitted to come up with its own category of persons in a position of trust not clearly defined in the statute.¹⁰¹

Standard of Review

Challenge to constitutionality of a statute involves a question of law, and thus the standard of review is *de novo*.¹⁰²

Argument

The “void for vagueness” doctrine requires penal statutes to “define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not

¹⁰¹ A164.

¹⁰² *State v. Baker*, 720 A.2d 1139, 1144 (Del. 1998).

encourage arbitrary and discriminatory enforcement.”¹⁰³ In our case, §761, which provides the definition of “person in a position of trust” for the sex abuse offenses set out in §778 and §778A, is unconstitutionally vague as applied to Dwayne as it failed to fairly notify him, under the “but is not limited to” language, of which conduct is subject to enhanced punishment.

Section 761 provides 7 clearly defined classes of people who fall within a position of trust, authority or supervision. However, the statute also mandates that the definition is “not limited” to just those enumerated classes. At trial, the judge narrowed down the number of enumerated classes the jury could consider from seven to two. Yet, the jury instructions maintained the “not limited to” language. Thus, the jury had the option to consider some other, undefined class as one that falls within its own idea of a position of trust.

The catch all phrase, “includes but is not limited to,” creates a dangerously large net for law enforcement and requires “the courts to step inside and say who could be rightfully detained and who should be set at large.”¹⁰⁴ In our case, there is no way to know how large the net was cast.

¹⁰³ *Grace v. State*, 658 A.2d 1011, 1015 (Del.1995) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)) (internal quotations omitted). See *Baker*, 720 A.2d at 1148.

¹⁰⁴ *Id.*

The State did not allege in the indictment the nature of the purported trust relationship between Dwayne and M.M. During closing argument, the prosecutor urged the jury to consider some trust position that was not specifically defined. When the jury returned its verdict, it was not required to disclose its finding as to the nature of the position. Because the evidence does not support a conclusion that Dwayne was in a position of trust under either §761 (6) (e) (2) or §761 (6) (e) (7) the jury's conclusion could only have been based on the vague portion of the statute.

Section 761 provides no guidance in determining what non listed class of people fall within the definition of “position of trust, authority, or supervision over a child.” Nor do any other statutes or case law speak to this non listed class. As such, there are no “minimal guidelines” that can be said to prevent arbitrary and discriminatory enforcement of the law.¹⁰⁵

Here, because the jury was permitted to come up with its own category of person of trust without being given any direction, it was compelled to create from the facts a definition of which Dwayne had never been given fair notice as constitutionally required. Further, without knowing what facts the jury found or did not find in creating its own category, there can be no confidence

¹⁰⁵*Baker*, 720 A.2d at 1148. *Grace v. State*, 658 A.2d 1011, 1015 (Del.1995) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)) (internal quotations omitted). See *Baker*, 720 A.2d at 1148.

that the State proved Dwayne guilty of the sex abuse offenses beyond reasonable doubt.

Accordingly, to the extent any of Dwayne's sex abuse convictions are based on a finding that he was person in a position of trust not specifically listed within § 761, those convictions are void for vagueness and must be vacated.

CONCLUSION

For the reasons and upon the authorities cited herein, Pearson's conviction of one count of sexual abuse of a child by a person in a position of trust, authority or supervision, second degree and two counts of sexual abuse of a child by a person in a position of trust, authority or supervision, first degree must be vacated.

Respectfully submitted,

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