



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ARTHUR DAVIS,)	
)	
Defendant Below,)	
Appellant,)	
)	No. 223, 2024D
v.)	
)	
STATE OF DELAWARE,)	
)	
Plaintiff Below,)	
Appellee.)	

APPELLANT'S OPENING BRIEF

**ON APPEAL FROM THE SUPERIOR COURT IN AND FOR
NEW CASTLE COUNTY**

Santino Ceccotti, Esquire [#4993]
Office of the Public Defender
Carvel State Building
820 N. French St.
Wilmington, Delaware 19801
(302) 577-5150

Attorney for Appellant

DATE: November 14, 2024

TABLE OF CONTENTS

TABLE OF CITATIONS	iii
NATURE AND STAGE OF THE PROCEEDINGS	1
SUMMARY OF THE ARGUMENT	2
STATEMENT OF THE FACTS	3

ARGUMENT

I. THE SUPERIOR COURT ERRED IN FINDING THAT THE STATE DID NOT NEED TO SEEK A MATERIAL WITNESS WARRANT FOR THE COMPLAINANT IN THIS CASE.....	4
II. THE SUPERIOR COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE STATE SATISFIED D.R.E. 804(B)(6), THUS PERMITTING THE STATE TO INTRODUCE THE COMPLAINANT'S INADMISSIBLE HEARSAY AGAINST DAVIS.	8
CONCLUSION.....	13
Oral Decision Finding Complainant Unavailable	EXHIBIT A
Oral Decision Finding Complainant's Statements Admissible Under D.R.E. 804(b)(6).....	EXHIBIT B
Sentence Order	EXHIBIT C

TABLE OF CITATIONS

Cases

<i>Bryan v. State</i> , 571 A.2d 170 (Del. 1990)	9
<i>Claudio v. State</i> , 585 A.2d 1278 (Del. 1991)	9
<i>Coles v. State</i> , 959 A.2d 18 (Del. 2008)	4
<i>E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.</i> , 498 A.2d 1108 (Del. 1985)	4
<i>Giles v. California</i> , 554 U.S. 353 (2008)	10
<i>Hammond v. State</i> , 569 A.2d 81 (Del. 1989)	9
<i>Hines v. State</i> , 248 A.3d 92 (Del. 2021)	8
<i>Jones v. State</i> , 745 A.2d 856 (Del. 1999)	9
<i>Phillips v. State</i> , 154 A.3d 1130 (Del. 2017)	10, 11
<i>State v. Iseli</i> , 458 P.3d 653 (Ore. 2020)	7
<i>United States v. Burr</i> , 25 F. Cas. 30 (USDC, VA, 1807)	4
<i>Van Arsdall v. State</i> , 524 A.2d 3 (Del. 1987)	9
<i>Washington v. Texas</i> , 388 U.S. 14 (1967)	5

Constitutional Provisions:

U.S. Const., Amend. VI, XIV	<i>passim</i>
Del.Const. Art.I, §7	<i>passim</i>

Rules

D.R.E. 804(a)	<i>passim</i>
---------------------	---------------

D.R.E. 804(b)(6)*passim*

NATURE AND STAGE OF THE PROCEEDINGS

In January 2023, Arthur Davis ("Davis") was indicted on the following counts: Stalking, two counts of Criminal Mischief, Criminal Trespass First Degree, Assault Third Degree, three counts of Endangering the Welfare of a Child, Burglary First Degree, misdemeanor Non-Compliance with Bond Conditions, Act of Intimidation, and three counts of felony Non-Compliance with Bond Conditions.. A6.

On August 9, 2023 the State filed a motion in limine to introduce witness's prior out of court statements pursuant to D.R.E. 804(b)(6). D.I.#17. Davis filed a response on August 11, 2023. The Court granted the State's motion by oral ruling. *See* Oral rulings attached as Ex. A & B.

A four day jury trial commenced on August 14, 2023. Davis was convicted of Stalking, burglary first degree, criminal mischief, endangering the welfare of a child, non-compliance of bond conditions, act of intimidation and two counts of breach of conditions of bond during commitment. A586. Has was acquitted on all remaining counts. Davis was sentenced on May 9, 2024 under habitual offender status to 23 years at Level 5 followed by various levels of probation. *See* Sentence Order attached as Ex. C. Davis filed a timely appeal. This is his Opening Brief as to why his convictions must be reversed.

SUMMARY OF THE ARGUMENT

1. The trial court erred in finding that the complainant was unavailable. Here, the complainant failed to fall within one of five categories of D.R.E. at 804(a). More importantly, the State, under subsection (5), did not by process or other reasonable means procure the declarant's attendance. The State should have been required to issue a material witness warrant. Reversal is now required.

2. Under 804(b)(6), the State was required to prove that Davis “engaged or acquiesced in wrongdoing that was intended to, and did, procure the declarant's [i.e., the complainant's] unavailability. They failed to do so. The trial court's ruling that Davis' wrongdoing procured the complainant's unavailability and thus admitting her out-of-court statements under D.R.E. 804(b)(6), was erroneous under Delaware law and violated Davis' right to confrontation under the Sixth Amendment to the U.S. Constitution, Del. Const., art. I, § 7 and due process rights to a fair trial under the Fourteenth Amendment. Thus, reversal is now required.

STATEMENT OF FACTS

Davis and the complainant, Andrea Brown, had a tumultuous relationship spanning nearly two years between December 2020 and October 2022. Davis was the father of the complainant's child however the couple were not married. The couple had multiple domestic disputes that became physical. A377. At times these resulted in the complainant calling 911 and police responding to her residence. A362. As a result of these encounters, the complainant obtained no-contact orders against Davis. A388.

Davis was arrested on September 29, 2022 for the allegations against the complainant. A390. While incarcerated, Davis and the complainant had telephone conversations that were recorded. A416. Following these conversations, the complainant drafted an affidavit rescinding her previous statements and asking for the charges against Davis be dropped. A425.

The complainant did not testify at Davis' trial. Instead, the Court permitted the State to introduce all the complainant's prior recorded statements, including 911 calls and body-worn camera interviews as evidence pursuant to D.R.E. 804(b)(6). This evidence resulted in Davis' convictions.

I. THE SUPERIOR COURT ERRED IN FINDING THAT THE STATE DID NOT NEED TO SEEK A MATERIAL WITNESS WARRANT FOR THE COMPLAINANT IN THIS CASE.

Question Presented

Whether Superior Court erred in denying Davis' request to have the State issue a material witness warrant for the complainant? The issue was preserved by defense counsel's objection to the State's motion in limine to introduce witness's prior out of court statements. A61.

Standard and Scope of Review

This Court reviews Superior Court's refusal to issue a material witness warrant for abuse of discretion.¹ Constitutional claims and questions of law are reviewed de novo.²

Argument

The Sixth Amendment to the United States Constitution and Article I, §7 of the Delaware Constitution provide for the use of compulsory process to obtain witnesses. The Compulsory Process is not a highly litigated section of our federal constitution. Nonetheless, in one of its earliest references *United States v. Burr*, 25 F. Cas. 30(USDC, VA, 1807), Chief Justice John Marshall opined that this right should be

¹ *Coles v. State*, 959 A.2d 18, 22-24 (Del. 2008).

² *E.I. DuPont de Nemours & Co., Inc. v. Shell Oil Co.*, 498 A.2d 1108 (Del. 1985).

deemed sacred by the courts. Failing to allow its use leaves a void in the page of our country's judicial history. Like many portions of the Bill of Rights, its extension to the states did not occur for many years. In *Washington v. Texas*, 388 U.S. 14 (1967) the Warren Court applied the Fourteenth Amendment in holding that a defendant must have the right to present a defense.

At trial, it was the complainant's unavailability upon which the 804(b)(6) determination was based. This was error. Here, The State was in possession of hearsay statements by the complainant. It was the crux of its case. The State sought to have the complainant declared unavailable so they could instead use the statements. A12. Successfully, they introduced hearsay statements, including 911 calls and body-worn camera interviews, through the hearsay exception of forfeiture by wrongdoing and in the process deprived Davis of his constitutional confrontation rights.

In this case, the State mailed one subpoena for the August 14 trial date. A225. Yet, because the subpoenas to have the complainant present for trial preparation and previous trial dates were unsuccessful, they convinced the court that they made every reasonable attempt to bring her to trial. A224.

The fatal flaw made by the Superior Court was finding that the complainant was unavailable. An analysis of forfeiture by wrongdoing necessarily begins with a witness who is unavailable or "forfeited." Delaware Rule of Evidence 804 (a) makes clear that a witness is considered unavailable if he or she:

- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
- (2) refuses to testify about the subject matter despite a court order to do so;
- (3) testifies to not remembering the subject matter;
- (4) cannot be present to testify at the trial or hearing because of a death or a then existing infirmity, physical illness, or mental illness; or
- (5) is absent from the trial and the statement's proponent has not been able, by process or other reasonable means to procure the declarant's attendance.³

Here, the complainant failed to fall within one of five categories. More importantly, the State, under subsection (5), did not by process or other reasonable means procure the declarant's attendance. It is however surprising given the State often uses this tool to ensure key witnesses are available. No witness could be more key than the

³ *D.R.E.* 804(a).

complainant. The remedy was not to simply seek wholesale admission of inadmissible hearsay testimony.

The Oregon Supreme Court recently addressed this same issue and explained that the State did not establish that a witness was unavailable because the totality of the circumstances required the State to intensify its efforts to procure victim's attendance, such as requesting a material witness warrant or initiating remedial contempt proceedings.⁴

Here the trial judge abused her discretion. As a result of the Court's ruling, Davis was forced to have trial by videotape and lost the right to confront the most important witness against him. Reversal is now required.

⁴ *State v. Iseli*, 458 P.3d 653 (Ore. 2020).

II. THE SUPERIOR COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT THE STATE SATISFIED D.R.E. 804(B)(6), THUS PERMITTING THE STATE TO INTRODUCE THE COMPLAINANT'S INADMISSIBLE HEARSAY AGAINST DAVIS.

Question Presented

Whether the Superior Court erred and abused its discretion in finding that the State satisfied D.R.E. 804(b)(6), thus permitting the State to admit inadmissible hearsay evidence and to deprive Davis of his constitutional confrontation rights. Trial counsel objected to the trial court's ruling and preserved this issue. A255-258.

Standard and Scope of Review

This Court reviews a trial court's decision on the admissibility of evidence under an abuse of discretion standard.⁵

Argument

The trial court's ruling that Davis' wrongdoing procured the complainant's unavailability and thus admitting her out-of-court statements under D.R.E. 804(b)(6), was erroneous under Delaware law and violated Davis' right to confrontation under the Sixth Amendment to the U.S. Constitution, Del. Const., art. I, § 7 and due process rights to a fair trial under the Fourteenth Amendment.

⁵ *Hines v. State*, 248 A.3d 92, 99 (Del. 2021).

In the same way that many state constitutions have been interpreted by state courts to provide greater protections than the federal Constitution, this Court has held that the Delaware Constitution provides individuals with greater rights in some areas than those afforded by the United States Constitution.⁶ "For example, we have held that the Delaware Constitution provides greater rights than the United States Constitution in the preservation of evidence used against a defendant, the right of confrontation, the right to counsel, and the right to trial by jury."⁷

The Delaware Constitution guarantees that an accused person has the right to "meet the witnesses in their examination face to face."⁸ This confrontation right "necessarily includes the right to cross-examine; indeed, 'the main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.'"⁹

Here, the Court stripped Davis of his constitutional confrontation rights to confront the witnesses against him. The Court's finding

⁶ *Jones v. State*, 745 A.2d 856, 863 (Del. 1999).

⁷ *Id.* at 863 (citing *Hammond v. State*, 569 A.2d 81, 87 (Del. 1989) (preservation of evidence); *Van Arsdall v. State*, 524 A.2d 3, 6-7 (Del. 1987) (confrontation); *Bryan v. State*, 571 A.2d 170, 176 (Del. 1990) (counsel); *Claudio v. State*, 585 A.2d 1278, 1298 (Del. 1991) (trial by jury)).

⁸ Del. Const., art. I, § 7.

⁹ *Van Arsdall*, 524 A.2d, 6 (quoting J. Wigmore, *Evidence* § 1395 (3rd ed. 1940)).

regarding the availability of the complainant should have only been made after a hearing and testimony regarding, *inter alia*, the steps taken by the Department of Justice to procure the complainant for trial. It was truly perverse to deprive Davis of his constitutional confrontation rights without a hearing and an opportunity to confront witnesses about the steps taken to deprive him of that right in the first place.

The State also failed to prove, as required by D.R.E. 804(b)(6), that Davis' wrongdoing procured the complainant's unavailability. Forfeiture by wrongdoing is a common law doctrine that has been codified in both the Federal and Delaware Rules of Evidence.¹⁰ Under this doctrine, out of court statements made by a witness whose unavailability the defendant procured through " wrongdoing" may be introduced at trial as an exception to the rule against hearsay.¹¹ Rule 804(b)(6) provides: "A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness" is "not excluded by the hearsay rule if the declarant is unavailable as a witness."

¹⁰ *Phillips v. State*, 154 A.3d 1130, 1142 (Del. 2017) (citing D.R.E. 804(b)(6) and D.R.E. 804 cmt. ("[D.R.E. 804(b)(6)] tracks F.R.E. 804(b)(6).")).

¹¹ *Id.* at 1142 (citing *Giles v. California*, 554 U.S. 353,359 (2008)).

Davis' alleged actions do not rise to the level of wrongdoing. Davis making phone calls that were accepted by the complainant do not come close to the standard set forth in *Phillips* where this Court permitted hearsay testimony through forfeiture by wrongdoing when the defendant killed a witness who was going to testify about that same defendant committing a separate murder.¹² Here, the State even conceded in its submissions to the Superior Court that "[Davis] is not threatening [the complainant] outright." A30-31.

Moreover, Davis did not intend to procure unavailability. In fact, Davis actually "tells [the complainant] he wants her to come to court and tell us that he didn't burglarize her place and that she feels he has done his time and she wants the charges dropped." A21. Another time, Davis tells [the complainant] that she "may have to come to court and say he didn't do it." A23. Davis was specifically asking the complainant to be available and to go to Court.

Witnesses may decide not to participate in the court process for a myriad of reasons. One witness may have lied to police and does not want to deal with that fact. Another witness may have decided that participating is far too inconvenient. Another witness may choose not to

¹² *Phillips*, 154 A.3d at 1143.

participate because she believes treatment is the solution instead of incarceration. Yet another witness may have moved on with his or her life and decided that he or she does not want the trauma of getting back involved with the criminal justice system.

Here, it is clear that the complainant was making her own decisions. The State admitted that "[the complainant] was initially uncooperative with the State" and that "[s]he contacted the State to drop charges and recant." A31. This is incongruous with the State's position that Davis "wore her down with emotional manipulation and constant demands of getting the charges dropped." A31. The complainant was an uncooperative witness who changed her story. She voluntarily answered the phone when Davis allegedly called her. She has chosen not to answer when the Department of Justice contacted her. In sum, there is no way to determine, on this record, that Davis caused the complainant's unavailability as required by the Delaware Rules of Evidence. Reversal is now required.

CONCLUSION

For the reasons and upon the authorities cited herein, the undersigned counsel respectfully submits that Arthur Davis' convictions and sentences must be reversed.

Respectfully submitted,

/s/ Santino Ceccotti
Santino Ceccotti, Esquire

DATED: November 14, 2024