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Case Number 223,2024D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ARTHUR DAVIS,

Defendant Below,
Appellant,

v.

STATE OF DELAWARE,

Plaintiff Below,
Appellee.

No. 223, 2024D

On appeal from the Superior Court of the State of Delaware

STATE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On January 3, 2023, a Superior Court grand jury indicted Arthur Davis on charges of stalking, first-degree criminal trespass, third-degree assault, first-degree burglary, non-compliance with bond conditions ("Non-Comp Bond"), act of intimidation, two counts of criminal mischief, three counts of endangering the welfare of a child ("EWC"), and three counts of breach of conditions of bond during commitment ("Breach During Commitment").[1] The State would later dismiss one count of Breach During Commitment.[2]

Five days before trial, the State filed a written motion *in limine* to admit the out-of-court statements of victim Andrea Brown under Delaware Rule of Evidence 804(b)(6), the forfeiture-by-wrongdoing exception to the rule against hearsay.[3] Davis filed a written response.[4] The Superior Court heard argument before jury selection and opening statements and granted the motion from the bench.[5]

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[1] A1, at Docket Item ("D.I.") 2; A6–11.
[2] A461.
[3] A3, at D.I. 17; A12–41.
[4] A3, at D.I. 18; A61–73.
[5] A100–21; A217–74.

Trial began on August 14, 2023.[6] At the close of the State's case-in-chief, Davis moved for judgment of acquittal on all charges.[7] The Superior Court granted the motion in part, as to the assault charge and one count of EWC.[8] The surviving counts were submitted to the jury for deliberation.[9] The jury found Davis guilty of stalking, first-degree burglary, Non-Comp Bond, act of intimidation, one count of criminal mischief, one count of EWC, and two counts of Breach During Commitment; it found him not guilty of first-degree criminal trespass, the other count of criminal mischief, and the other count of EWC.[10]

The State filed a motion to declare and sentence Davis as a habitual offender.[11] The Superior Court granted the motion and, on May 9, 2024, imposed an aggregate sentence of 28 years in prison, suspended after 9 years for 2 years and 6 months of decreasing levels of supervision, plus fines totaling $1,775.[12]

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[6] A4, at D.I. 24.
[7] A446–60.
[8] A453–55; A462–64; A466; A468–71; A476–78.
[9] A475; A566.
[10] A4, at D.I. 24.
[11] A4, at D.I. 28.
[12] Opening Br. Ex. C; A4–5, at D.I. 31.

Davis filed a timely notice of appeal. He filed an opening brief on November 14, 2024. This is the State's answering brief.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. The Superior Court did not abuse its discretion by finding that Brown was unavailable as a witness. Despite previously promising to appear and testify at trial, Brown failed to appear for two trial-preparation meetings and the trial itself. Over the course of a month, the State had attempted to procure her attendance through the issuance of subpoenas, letters, phone calls, and visits to her home and her mother's home. These attempts satisfied the requirement to undertake good-faith, genuine, and bona fide efforts to procure her attendance, and seeking a material-witness warrant was not required.

II. The Appellant's argument is denied. The Superior Court did not abuse its discretion by admitting Brown's out-of-court statements under the forfeiture-by-wrongdoing exception to the rule against hearsay. Davis engaged in a monthslong campaign to influence, persuade, and intimidate Brown into recanting and not appearing in court. The statements were properly admitted under the exception and therefore did not violate Davis's federal or state constitutional confrontation rights.

STATEMENT OF FACTS

On December 5, 2020, at approximately 1:00 a.m., Davis started banging on Brown's front door.[13] Davis, who shared a son with Brown, was intoxicated and hostile.[14] Brown did not want to let Davis inside, and they argued.[15] Eventually, Davis walked away, grabbed an object, and struck the windshield and driver's-side window of Brown's black Kia Sorrento, breaking the glass.[16] The front door to her residence was also damaged during the incident.[17] Brown called 911 and reported that her baby's father was acting crazy.[18] She was still upset when officers arrived.[19]

Seven months later, on July 10, 2021, Davis walked into Brown's home, uninvited and without permission, reportedly to see his son.[20] Brown told Davis that he could not simply walk into her

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[13] A303.
[14] A303.
[15] A303–04.
[16] A303–04.
[17] A371 (playing State's Exhibit 4).
[18] A301 (playing State's Exhibit 1); *see also* A480.
[19] A302.
[20] A361–62; A366 (playing State's Exhibit 3); A371 (playing State's Exhibit 4); *see also* A481.

home.[21] Davis would not leave, so Brown did and got into her car.[22] When she started to pull away, Davis threw orange soda at the vehicle.[23] Upset, Brown exited the vehicle, and then Davis poured orange soda on her, too.[24] Brown retrieved her mace and chased Davis away, up the street.[25] But Davis came back and started banging on her door again.[26] Brown came back outside, and the argument turned physical when Davis pushed and pulled Brown to the ground.[27] Brown's daughter came outside and started hitting Davis in an attempt to get him off her mother.[28] Davis fled when Brown told her daughter to call 911.[29] Brown scraped her knee during the altercation.[30] She was disheveled and distraught when the police arrived.[31]

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[21] A366 (playing State's Exhibit 3); A371 (playing State's Exhibit 4).
[22] A371 (playing State's Exhibit 4); *see also* A482.
[23] A366 (playing State's Exhibit 3); A371 (playing State's Exhibit 4); *see also* A482.
[24] A366 (playing State's Exhibit 3); A371 (playing State's Exhibit 4); *see also* A482.
[25] A371 (playing State's Exhibit 4); *see also* A482.
[26] A371 (playing State's Exhibit 4).
[27] A366 (playing State's Exhibit 3); A371 (playing State's Exhibit 4); *see also* A482.
[28] A366 (playing State's Exhibit 3); A371 (playing State's Exhibit 4); *see also* A482.
[29] A371 (playing State's Exhibit 4).
[30] A363; A366 (playing State's Exhibit 3); A371 (playing State's Exhibit 4).
[31] A363.

Six months later, on January 11, 2022, Davis entered Brown's residence again.[32] By this time, there was a no-contact order in place.[33] He got upset that Brown was about to go on a date with someone else.[34] He punched her television, smashing the screen, and left.[35] Both of Brown's children were present.[36]

After his arrest, Davis was held at Howard R. Young Correctional Institution.[37] While in custody, he called Brown 43 times from September 30 through October 31, 2022,[38] and many times after that period. In at least 25 calls, Davis suggested to Brown that she not cooperate with the State's prosecution of him.[39] For example, on September 30, Davis told Brown to get restitution for her broken television from his cousin so that she could recant her statement.[40] On October 5, Davis directed Brown to tell the State that she does not want anything to do with the case and wants the charges dropped.[41]

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[32] A386 (playing State's Exhibit 6); *see also* A483.
[33] A386–87.
[34] A386 (playing State's Exhibit 6).
[35] A386 (playing State's Exhibit 6); *see also* A483.
[36] A386 (playing State's Exhibit 6); *see also* A483.
[37] *See* A414–17.
[38] A417.
[39] A428.
[40] A418 (playing State's Exhibit 11).
[41] A419 (playing State's Exhibit 12).

On October 8, Davis told Brown to write and deliver a letter to the Attorney General recanting her statement and asking for the charges to be dismissed.[42] On October 12, Davis dictated, word for word, the recanting affidavit that he wanted Brown to write and told her to deliver it to the Prothonotary the next day.[43]

Five days later, Brown executed the affidavit and delivered it to the Attorney General's Office.[44] The affidavit, which substantially tracked what Davis dictated to Brown over the phone, stated that Davis did not want to be involved in the case, did not want to be contacted, and wanted the charges dismissed.[45]

That same day, Brown told Davis that she attempted to deliver the affidavit to the courthouse, but they would not accept it and re-directed her to the Attorney General's Office.[46] In an expletive-laden tirade, Davis berated her for not leaving a copy with the court.[47]

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[42] A422 (playing State's Exhibit 13).
[43] A424 (playing State's Exhibit 15).
[44] A40; A425–26.
[45] *Compare* A40, with A242 (playing State's Exhibit 15).
[46] A426 (playing State's Exhibit 16).
[47] A426 (playing State's Exhibit 16).

Almost two weeks later, on October 29, Brown informed Davis that the State called her.[48] Brown told the State that she did not believe that Davis needed to be imprisoned, but the State told her that Davis's conduct was repetitive and the case would be prosecuted regardless.[49] Davis yelled at Brown for still talking to the prosecution.[50]

Later, on June 30, 2023, Davis told Brown to stop talking to the prosecutor.[51] He pleaded with Brown to leave the case alone and told her that the State could not do anything to her if she did not come to court.[52] He also suggested that she should lie about how her door was damaged.[53]

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[48] A427 (playing State's Exhibit 17).
[49] A427 (playing State's Exhibit 17).
[50] A427 (playing State's Exhibit 17).
[51] A427 (playing State's Exhibit 18).
[52] A427 (playing State's Exhibit 18).
[53] A427 (playing State's Exhibit 18).

ARGUMENT

I. The Superior Court did not abuse its discretion by finding that the victim was unavailable under D.R.E. 804(a).

Question Presented

Whether the State, as the proponent of a hearsay statement, must first seek a material-witness warrant before the declarant—who stated that she would testify (despite pressure from the defendant to recant and not cooperate), did not appear for a first trial-preparation meeting, did not respond to repeated phone calls after missing the trial-preparation meeting, did not appear for a second trial-preparation meeting (despite subpoenas being delivered to her home and her mother's home), and did not appear for trial (despite a subpoena)—can be deemed unavailable under D.R.E. 804(a).

Scope of Review

This Court reviews a trial court's decision to admit hearsay statements under D.R.E. 804 for abuse of discretion.[54] "[A]

[54] *Phillips v. State*, 154 A.3d 1130, 1143 (Del. 2017).

determination of whether the witness is 'unavailable' [under D.R.E. 804] rests within the sound discretion of the trial court."[55]

Merits of Argument

Hearsay—an out-of-court statement offered to prove the truth of the matter asserted therein—is not admissible at trial except as provided by law or the Delaware Rules of Evidence.[56] D.R.E. 804 sets forth exceptions to the rule against hearsay that may apply when the declarant is unavailable to testify. A declarant is considered unavailable as a witness if 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 or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

[55] *Younger v. State*, 496 A.2d 546, 551 (Del. 1985).
[56] D.R.E. 801(c); 802.

> (5) Is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means to procure the declarant's attendance.[57]

The statement's proponent bears the burden of establishing the declarant's unavailability by a preponderance of the evidence.[58]

Brown, the principal victim of Davis's crimes, did not appear for trial. She had reported the crimes and, on each occasion, gave statements to the police. Several of her statements were recorded by the 911 dispatch or the officers' body-worn cameras. Because she was absent from trial, the State sought to admit her prior statements under D.R.E. 804(b)(6), the forfeiture-by-wrongdoing exception. Before considering whether the exception applied, the Superior Court had to first determine whether Brown was "unavailable" within the meaning of D.R.E. 804(a).

The court found that she was, under paragraph (5).[59] In June 2023, Brown told the State's social worker that she was reluctant

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[57] D.R.E. 804(a).
[58] *Iverson v. State*, 2024 WL 4039927, at *4 (Del. Sept. 4, 2024) (stating that the burden is preponderance of the evidence); *Moss v. State*, 2017 WL 2806269, at *4 (Del. June 28, 2017) (stating that the burden rests with the proponent).
[59] A252–55.

to testify but would nonetheless do so if the case went to trial.[60] When the social worker called Brown to inform her that Davis rejected the State's plea offer, Brown agreed to attend a trial-preparation meeting on July 6, 2023.[61] She did not appear for that meeting.[62] She did not respond to phone calls or text messages, either—until July 12, 2023, when she finally answered the phone.[63] But when the social worker identified herself, Brown ended the call.[64] A trial subpoena was mailed to Brown on July 20, 2023.[65] Eight days later, in a recorded prison call, Brown told Davis that she had received notice for the trial date and a letter for a meeting with the State.[66] The State sent an investigator to Brown's residence and Brown's mother's residence to hand deliver subpoenas for a trial-preparation meeting on August 9, 2023, and for trial.[67] Brown did not appear for the August 9 trial-preparation meeting, and she did not appear for trial.[68] During this

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[60] *See* A18; A245.
[61] *See* A26; A104–05; A245–46.
[62] *See* A105; A248.
[63] *See* A26; A105–06; A248–49.
[64] *See* A26; A106; A248–49.
[65] *See* A117; A224.
[66] *See* A107; A119–20.
[67] *See* A26; A107–08; A249–50.
[68] *See* A108; A250.

time, Davis was attempting to persuade Brown to not cooperate with the prosecution.[69] The Superior Court thus concluded that the State was unable to procure Brown's attendance by process or other reasonable means.[70]

Davis argues that the Superior Court erred by finding Brown to be unavailable under paragraph (a)(5).[71] According to Davis, the State was required to intensify its efforts to procure her attendance, such as by seeking a material-witness warrant, before the rule allowed the court to reach such a finding.[72]

This Court rejected the same argument in *Iverson v. State*.[73] Citing the importance of protecting his confrontation rights, the appellant in *Iverson* argued that a declarant cannot or should not be considered unavailable under D.R.E. 804(a)(5) unless the State first seeks a material-witness warrant for her.[74] This Court disagreed and stated that "[a] material-witness warrant was unnecessary."[75] The rule

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[69] *See* A245–50.
[70] A252–55.
[71] Opening Br. 4–7.
[72] Opening Br. 6–7.
[73] 2024 WL 4039927, at *4–5 (Del. Sept. 4, 2024).
[74] *Id.* at *5.
[75] *Id.*

required the State to undertake reasonable means to procure the witness's attendance, not to exhaust all available means or take any specific step.[76] The State had received a commitment from the witness to testify, attempted to subpoena her, called her phone, and sent an investigator to her home when she missed a trial-preparation meeting.[77] With these efforts, the State satisfied its burden.[78]

Davis ignores *Iverson* and instead relies on *Oregon v. Iseli*.[79] The Oregon Supreme Court held that, before an absent victim could be deemed unavailable under Oregon Evidence Code 804(1)(e), the prosecution was required to intensify its efforts to procure her attendance beyond issuing a subpoena and sending out a detective to locate her.[80] The court reached this conclusion because the circumstances of the case indicated that more-intrusive means of process had an increased likelihood of success: (i) the victim had a history of not cooperating, not attending court when subpoenaed, and making last-minute decisions regarding attendance; (ii) the prosecutor

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[76] *See id.*
[77] *Id.*
[78] *Id.*
[79] 458 P.3d 653 (Or. 2020). Opening Br. 7.
[80] 458 P.3d at 658–59, 669.

spoke with the victim the night before trial and therefore knew she was in the area; and (iii) the prosecutor knew the victim's home and work addresses.[81] Thus, under these circumstances, the prosecutor was required to first seek a material-witness warrant or initiate remedial contempt proceedings before the victim could be deemed unavailable.[82]

This case is distinguishable from *Iseli*. The victim in *Iseli* was responsive to outreach from the prosecution and police.[83] When she did not appear for a preparation meeting the day before trial, the detective managed to find her and transport her to the meeting.[84] Even when she skipped trial, she informed the detective of her intention that morning via text message.[85] Conversely, in this case, the State lost contact with Brown for more than a month before trial. Attempts to contact her by phone, mail, at her home, and through her mother all failed. When the State's investigator visited Brown's residence to deliver the subpoena, there was no answer at the door.

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[81] *Id.* at 669.
[82] *Id.*
[83] *Id.* at 658–59.
[84] *Id.*
[85] *Id.*

Brown, in other words, was not so easily found. Thus, an increased likelihood that a material-witness warrant would successfully procure the declarant's attendance did not exist here as it did in *Iseli*.

The State's efforts in this case exceeded its efforts in *Iverson*, and the likelihood that a material-witness warrant would be successful was even lower. In *Iverson*, the victim missed only one trial-preparation meeting, and an investigator was able to then locate and speak to her.[86] Here, Brown missed two trial-preparation meetings and, except for one phone call where she promptly hung up on the State's social worker, evaded all the State's efforts to contact her—by phone, by mail, in person, and through her mother.

To establish unavailability under D.R.E. 804(a)(5), "[g]enerally, the proponent must show a good-faith, genuine, and bona fide effort to procure the declarant's attendance."[87] In *Potts v. State*,[88] failing to even issue subpoenas for the witnesses' attendance did not suffice. In *Iverson*, issuing a subpoena and attempting multiple ways to contact the witness did.[89] The State's efforts in this case exceeded both. The

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[86] *Iverson*, 2024 WL 4039927, at *2.
[87] *Moss*, 2017 WL 2806269, at *4.
[88] 458 A.2d 1165, 1169 (Del. 1982).
[89] 2024 WL 4039927, at *5.

Superior Court therefore did not abuse its discretion in finding Brown to be unavailable under D.R.E. 804(a)(5).

II. The Superior Court did not abuse its discretion by admitting Brown's out-of-court statements under D.R.E. 804(b)(6), the forfeiture-by-wrongdoing exception.

Question Presented

Whether an absent victim's out-of-court statements are admissible under D.R.E. 804(b)(6) where the defendant engaged in a monthslong campaign to convince the victim to recant, to not cooperate with the prosecution, and to not appear at trial (or to appear but change her story).

Scope of Review

This Court reviews a trial court's decision to admit hearsay statements under D.R.E. 804(b)(6) for abuse of discretion.[90] A trial court abuses its discretion when it exceeds the bounds of reason under the circumstances or when it ignores recognized rules of law or practice in a way that produces injustice.[91] On questions of fact, this Court examines the record to determine whether competent evidence

[90] *Phillips*, 154 A.3d at 1143.
[91] *McNair v. State*, 990 A.2d 398, 401 (Del. 2010).

supports the trial court's findings.[92] It considers legal and constitutional questions *de novo*.[93]

Merits of Argument

After finding that Brown was unavailable under D.R.E. 804(a), the Superior Court turned its attention to the forfeiture-by-wrongdoing exception under D.R.E. 804(b)(6). With its motion, the State offered the numerous prison calls between Davis and Brown in which he attempted to influence her decision whether to cooperate and appear.[94] In addition to the calls played at trial, the calls offered with the motion revealed that:

(i) on April 30, 2023, Davis told Brown that he wants her to come to court, recant, and request that the charges be dropped;[95]

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[92] *Neal v. State*, 80 A.3d 935, 941 (Del. 2013).
[93] *Cabrera v. State*, 173 A.3d 1012, 1018 (Del. 2017).
[94] A19–25.
[95] A21; A244.

(ii) on May 3, 2023, Davis directs Brown to recant in a letter and hands the phone to another inmate who states that they drafted an affidavit for her;[96]

(iii) on May 4, 2023, Davis again hands the phone to the other inmate, who dictates the affidavit to Brown;[97]

(iv) on June 12, 2023, Davis tells Brown that he is in prison because of her and directs her to take the affidavit to defense counsel;[98]

(v) on June 27, 2023, Davis tells Brown that if there is no victim, there is no case;[99]

(vi) on June 29, 2023, Davis, crying, tells Brown that he needs her and tells her to change her story in his favor;[100]

(vii) on July 2, 2023, Davis tells Brown that he will get a better plea offer because she will not appear in court;[101]

(viii) on July 10, 2023, Davis tells a person named Markevis Vace to "stay up on the girl," apparently referring to

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[96] A21–22; A244–45.
[97] A22; A245.
[98] A22–23; A245.
[99] A23; A246.
[100] A23; A246–47.
[101] A24; A247.

Brown, and Vace confirms that he had a long talk with her;[102] and

(ix) on August 1, 2023, Davis gets mad that Brown is not scheduling visits with him and says that he normally must beat her up to get her to do what he wants.[103]

Considering the nature of their relationship—including Davis's admitted violence toward Brown—and his efforts to persuade Brown, which included collusion to disrupt the process, the Superior Court found that Davis engaged in wrongdoing that was intended to, and did, procure Brown's unavailability.[104] The court ruled that the forfeiture-by-wrongdoing exception applied and admitted the statements.[105]

Davis argues the Superior Court erroneously concluded that he engaged in wrongdoing, that he intended to procure Brown's unavailability, and that he did procure it.[106] He further argues that, by admitting the hearsay statements, the court "stripped Davis of his

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[102] A24; A248.
[103] A25; A249.
[104] A262–66.
[105] A266.
[106] Opening Br. 10–12.

constitutional confrontation rights" under the Sixth Amendment to the United States Constitution and article I, § 7 of the Delaware Constitution ("Section 7").[107] Finally, he contends that the court should not have admitted the statements "without a hearing and an opportunity to confront witnesses about the steps taken to deprive of that [confrontation] right in the first place."[108]

Davis's argument fails on all counts. The States satisfied its burdens under the three-part test used to evaluate the admissibility of hearsay statements offered under D.R.E. 804(b)(6). Because the forfeiture-by-wrongdoing exception existed at common law, both the United States and Delaware constitutions contemplate its application, and admitting hearsay under the exception is consistent with a defendant's federal and state confrontation rights. Finally, it was appropriate for the Superior Court to make its ruling without a hearing on the State's efforts to effectuate its process. Therefore, the court did not abuse its discretion by admitting Brown's out-of-court statements.

[107] Opening Br. 8–10.
[108] Opening Br. 10.

A. Brown's out-of-court statements were admissible under the three-part test used to evaluate hearsay offered into evidence under D.R.E. 804(b)(6).

If a declarant is deemed unavailable under D.R.E. 804(a), as Brown was, the proponent of the hearsay statement must next establish that an exception under paragraph (b) applies. One of those exceptions, forfeiture by wrongdoing, aims to "remov[e] the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them."[109] To invoke that exception, the proponent must establish that the statement is being 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." The burden of proof is by a preponderance of the evidence.[110]

Courts consider the admissibility of hearsay evidence under this exception using a three-part test where the proponent must show that: (i) the defendant engaged or acquiesced in wrongdoing; (ii) the wrongdoing was intended to procure the declarant's unavailability; and (iii) the wrongdoing did procure the unavailability.[111] The State is

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[109] *Giles v. California*, 554 U.S. 353, 374 (2008).
[110] *Iverson*, 2024 WL 4039927, at *4.
[111] *Phillips*, 154 A.3d at 1143.

not required to show that the defendant's sole motivation was to procure the declarant's absence; only that he was motivated in part by a desire to silence the witness.[112] The State satisfied each prong of the test with respect to the admission of Brown's statements.

First, the State established that Davis engaged or acquiesced in wrongdoing. The Sixth Circuit defined such wrongful acts to include "any significant interference" with the interest in "the disclosure of relevant information at a public trial."[113] As courts in other jurisdictions have held that "wrongdoing" under this exception is not limited to criminal acts.[114] Courts have recognized that "wrongdoing" can include: (i) murder; (ii) threats; (iii) intimidation; (iv) encouragement and influence; (v) persuasion and control; (vi) collusion or joint planning to avoid testifying; (vii) the wrongful nondisclosure of information; and (viii) directing the declarant to exercise the Fifth Amendment privilege.[115]

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[112] *Id.* (quoting *United States v. Dhinsa*, 243 F.3d 635, 653 (2d Cir. 2001)).
[113] *Steele v. Taylor*, 684 F.2d 1193, 1201 (6th Cir. 1982).
[114] *E.g.*, *Iowa v. Hallum*, 606 N.W.2d 351, 356 (Iowa 2000).
[115] *Iverson*, 2024 WL 4039927, at *4; *Phillips*, 154 A.3d at 1143; *Massachusetts v. Edwards*, 830 N.E.2d 158, 168–69 (Mass. 2005); *Hallum*, 606 N.W.2d at 356.

Davis argues that his actions did not rise to the level of wrongdoing because Brown accepted his calls and he did not kill her to silence her, as the defendant in *Phillips* did.[116] As the cases cited above demonstrate, however, misconduct far short of murder can satisfy the wrongdoing element, and the declarant's involvement in or acquiescence to the wrongdoing does not defeat a finding of wrongdoing.

Davis's actions between his arrest and trial can fall under several of the recognized categories of wrongdoing. He exercised a measure of control over Brown, being the father of her child, promising her money and restitution, and beating her up when he needs her to do what he wants. Using that control, he spent months attempting to persuade Brown to recant her story and not appear in court, or to come to court and change her story. These efforts were also encouragement and influence and, at times, rose to the level of intimidation, when Davis yelled and cursed at Brown if she failed to do what he requested, when he requested it. Obviously, he also engaged in joint planning or collusion—with Brown herself, to submit

[116] Opening Br. 11.

the affidavit; with other inmates, to prepare the affidavit and pressure Brown; and with Vace, to influence Brown from outside prison on his behalf. The Superior Court correctly found that Davis's conduct rose to the level of wrongdoing.

Second, the State established that Davis engaged in the wrongdoing with the intent to procure Brown's unavailability. Davis refutes this by pointing to multiple phone calls where he told Brown "to come to court" to say that he did not commit the crimes or that she would like the charges dropped.[117]

Davis cherry picks statements he made throughout his varied and desperate attempts to derail his prosecution. On other occasions, he told Brown: (i) to not cooperate with the State;[118] (ii) that the State could not do anything to her if she did not appear;[119] (iii) that if there was no victim, there was no case;[120] and (iv) that he will get a better plea offer if she does not appear.[121] Davis wanted to silence Brown's truthful testimony, one way or the other. The fact that he vacillated on

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[117] Opening Br. 11.
[118] *E.g.*, A428.
[119] A427 (playing State Exhibit 18).
[120] A23; A246.
[121] A24; A248.

what he considered to be the best means to accomplish this—by convincing her to recant and not appear, or to appear and perjure herself—does not alter the fundamental nature of his intentions. The Superior Court correctly found that Davis intended to procure Brown's unavailability.

Finally, the State also proved that Davis procured Brown's unavailability. Davis disputes this, arguing "it is clear that [Brown] was making her own decisions" because she was initially uncooperative with the prosecutors.[122]

The extent to which Brown was making her own decisions is not conclusive, however. As the Massachusetts Supreme Judicial Court previously stated: "[F]orfeiture by wrongdoing may be established regardless of whether the witness already decided on her own not to testify."[123] At any rate, in this case, Brown's own decision-making cannot be disentangled from Davis's wrongdoing. The State reported that Brown was initially uncooperative: her initial contact with the prosecution was dropping off the recanting affidavit.[124] But

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[122] Opening Br. 12.
[123] *Massachusetts v. Szerlong*, 933 N.E.2d 633, 638–39 (Mass. 2010) (cleaned up).
[124] *See* A18.

this initial contact between Brown and the State came well after Davis had already started his influence campaign on her. Indeed, Brown later admitted to the State's social worker that she drafted the affidavit only under pressure from Davis.[125] Thus, even from the outset, Davis's misconduct and Brown's decision-making were inextricably intertwined. Brown's back-and-forth on her level of cooperation and willingness to appear in court showed that she struggled with honoring the subpoenas, on the one hand, and the influence of Davis, on the other. The record belies the notion that Davis's wrongdoing did not have a causal effect on Brown's decision to appear. Thus, the Superior Court correctly found that Davis procured Brown's unavailability.

Because the State satisfied all three prongs of the test by a preponderance of the evidence, the Superior Court correctly determined that Brown's out-of-court statements were admissible under D.R.E. 804(b)(6).

[125] *See* A18.

B. Admitting Brown's out-of-court statements did not violate Davis's confrontation rights.

Davis next argues that admitting the hearsay statements violated his confrontation rights under the Sixth Amendment and Section 7.[126]

On the state constitutional claim, Davis repeats this Court's conclusion in *Van Arsdall v. State*[127] that Section 7 offers greater confrontation protections than those afforded by the Sixth Amendment.[128] But *Van Arsdall* concerned limitations on cross-examination, not the application of hearsay exceptions.[129] Davis does not cite a case on point that identifies greater *and relevant* protections of Section 7, nor does he engage in the type of analysis required under *Jones v. State*[130] to identify them for the first time now. His state constitutional claim must fail on that basis alone. Regardless, a review of this Court's decisions reveals that Section 7, like the Sixth Amendment, tolerates the admission of hearsay through exceptions recognized at common law—which would include the forfeiture-by-wrongdoing exception.

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[126] Opening Br. 8–10.
[127] 524 A.2d 3 (Del. 1987).
[128] Opening Br. 9.
[129] 524 A.2d at 5–6.
[130] 745 A.2d 856, 863–65 (Del. 1999).

This Court previously considered the interplay between hearsay and confrontation rights under Section 7 in *Gannon v. State*.[131] When Section 7 is read *in pari materia*, the clause that guarantees criminal defendants the right "to meet the witnesses in their examination face to face" is qualified by the clause "by the law of the land." In other words, they collectively guarantee the accused "a trial in accordance with the contemporary common law rules of evidence."[132] Because the excited-utterance exception to the rule against hearsay existed at common law, the admission of such hearsay statements did not violate Section 7.[133]

Later, this Court recognized that the forfeiture-by-wrongdoing exception is also a common-law doctrine, now codified in the Delaware Rules of Evidence.[134] It follows, then, that Section 7's confrontation clause incorporates this exception, as well. Thus, regardless of the extent to which Section 7 offers greater protections than the Sixth Amendment, the rights afforded by them are both subject to the forfeiture-by-wrongdoing exception.

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[131] 704 A.2d 272, 275–78 (Del. 1998).
[132] *Id.*
[133] *Id.*
[134] *Phillips*, 154 A.3d at 1142.

In *Davis v. Washington*,[135] the United States Supreme Court ruled that forfeiture by wrongdoing "extinguishes confrontation claims on essentially equitable grounds." This Court employed that same equitable doctrine to resolve a confrontation claim in *Phillips*.[136] Thus, whether Davis has a cognizable confrontation claim at all turns on whether the hearsay statements were properly admitted under D.R.E. 804(b)(6). In other words, the inquiry is one in the same. Because Brown's out-of-court statements were admissible under D.R.E. 804(b)(6), no violation of Davis's confrontation rights occurred by admitting them.

C. The Superior Court appropriately decided the State's motion without an evidentiary hearing.

Within his argument, Davis complains that the Superior Court granted the State's motion to admit Brown's hearsay statements without an evidentiary hearing.[137] Davis believes he was entitled to

[135] 547 U.S. 813, 833 (2006).
[136] 154 A.3d at 1142.
[137] Opening Br. 9–10.

"confront witnesses about the steps taken to deprive him of [his right to confront Brown] in the first place."[138]

To the extent he argues that consideration of the hearsay statements during the review of the motion *in limine* violated his confrontation rights, Davis is mistaken. Constitutional confrontation rights apply only in criminal trials, not during preliminary proceedings such as suppression or immunity hearings.[139]

As a procedural matter, the Superior Court was not required to conduct an evidentiary hearing. Superior Court Criminal Rule 12(c) only requires the court to schedule a hearing "if required." When the only factual issues in dispute are procedural—such as the State's efforts to procure Brown's attendance by process or other reasonable means—a formal evidentiary hearing is unnecessary. For example, in *Chapman v. State*,[140] defense counsel—"an officer of the court"—reported on the circumstances of the defendant's execution of a waiver. With that report and a copy of the signed waiver, the Superior

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[138] Opening Br. 10.
[139] *Ebert v. Gaetz*, 610 F.3d 404, 414 (7th Cir. 2010) (suppression hearing); *Shockley v. State*, 269 A.2d 778, 781 (Del. 1970) (immunity hearing).
[140] 2008 WL 4750342, at *2 (Oct. 30, 2008).

Court was not required to conduct a hearing to explore the matter further.[141]

Likewise, the Superior Court here had copies of the subpoenas, copies of the recorded prison calls, and the prosecutor's report of the State's efforts to procure Brown's attendance. While it may have been a better or more formal practice for the State's social worker and investigator to submit affidavits along with the motion *in limine*, attesting to the facts stated in the motion, it was not required under these circumstances. The Superior Court could properly rely on the report from the officer of the court and the other recorded and written evidence submitted.

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[141] *Id.*

CONCLUSION

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

Respectfully submitted,

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Dated: December 16, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ARTHUR DAVIS, Defendant Below, Appellant, v. STATE OF DELAWARE, Plaintiff Below, Appellee.	No. 223, 2024D On appeal from the Superior Court of the State of Delaware

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Dated: December 16, 2024

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