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Case Number 319,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISAAC JOHNSON,	§	
	§	No. 319, 2024
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

Statues and Rules

Other Authorities

NATURE OF PROCEEDINGS

On August 15, 2022, a New Castle County grand jury re-indicted Isaac Johnson ("Johnson") on Rape First Degree; Sexual Abuse of a Child by a Person in a Position of Trust, Authority or Supervision First Degree; six counts of Unlawful Sexual Contact First Degree; and two counts of Sexual Abuse by a Person in a Position of Trust, Authority or Supervision Second Degree.[1]

On March 13, 2024, a three-day jury trial commenced in Superior Court; after which the jury found Johnson guilty on all counts.[2] On July 19, 2024, the Superior Court sentenced Johnson as follows: (1) for Rape First Degree to 25 years at Level V; (2) for Sexual Abuse of a Child by a Person in a Position of Trust, Authority or Supervision First Degree to 25 years at Level V; (3) for each of six counts of Unlawful Sexual Contact First Degree to eight years at Level V, suspended after two years for five years at Level III; and (4) and for each of the two counts of Sexual Abuse by a Person in a Position of Trust, Authority or Supervision Second Degree to eight years at Level V, suspended after nine months for five years at Level III.[3]

On August 8, 2024, Johnson filed a notice of appeal.[4] On December 30, 2024, Johnson filed his Opening Brief on Appeal. This is the State's Answering Brief.

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[1] A2; A11-15.
[2] A8.
[3] A9; Opening Brief, at Ex. B.
[4] A9.

SUMMARY OF ARGUMENT

Denied. The Superior Court did not err or abuse its discretion or deny Johnson the constitutional right to testify or present a defense. Johnson has waived certain issues, including any challenge to the Superior Court's evidentiary rulings as they relate to the admissibility of Johnson's testimony about his sexual practices with Smith, including in their bedroom, and his argument about the motive of L.F.'s father to have coached L.F. to have falsified allegations of sexual abuse. And the Superior Court did not otherwise abuse its discretion in its evidentiary rulings. The State disputes Johnson's characterization of the record and interpretation of the Superior Court's rulings. The Superior Court did not decide that Johnson could not present evidence supporting his theory that an argument between Smith and Johnson had motivated Smith to coach L.F. to fabricate sexual abuse allegations about Johnson. Nonetheless, the Superior Court's rulings were proper as they excluded irrelevant or unfairly prejudicial testimony about Smith's sexual behavior. Johnson's claim that his Sixth Amendment right to present a defense was violated by the trial court's rulings is without merit. Alternatively, even if this Court reviews the trial court's rulings and finds error, any error was harmless.

STATEMENT OF FACTS

Evidence presented at trial established that, in January 2021, Marie Smith ("Smith"), a massage therapist, met Johnson, who at the time was a 36-year-old truck driver living in Atlanta, Georgia, through an app called the Clubhouse that discusses astrology.[5] Approximately a month later, Smith and Johnson began to communicate through Instagram.[6] Later, Smith and Johnson started to communicate predominantly through texting and Facetime.[7] Smith and Johnson also visited each other, in Georgia and North Carolina, three or four times, with the third visit occurring around June to July of 2021.[8] In October 2021, Johnson moved in with Smith at her house in Middletown, Delaware.[9] Smith also lived with her seven-year-old daughter ("L.F."), her mother, her grandmother, her brothers, and her cousin.[10] The house had two stories and a basement.[11] Johnson stayed and slept downstairs in Smith's bedroom.[12] L.F. also slept downstairs in Smith's bedroom.[13] During the day, while Smith was working, L.F. attended virtual school at the house, with Smith's mother primarily watching her, and Johnson would usually stay in the

[5] B4, B5; B51.
[6] B5, B6.
[7] B5.
[8] B5.
[9] B5.
[10] B3, B4, B35; B51.
[11] B3.
[12] B6.
[13] B3.

basement.[14] The situation progressed smoothly until around January 2022, when Smith started asking Johnson if he was working and helping or just sitting around.[15] At the time, however, Smith did not have any concerns with Johnson being around L.F.[16]

Concerning the events of February 9, 2022, Smith testified as follows. Smith went to work that day.[17] Johnson was supposed to meet with Smith during Smith's work break to buy groceries.[18] When Smith went on break, she did not see Johnson, and she was concerned because previously he had always met her when they were supposed to meet.[19] Smith went back to work and went to the grocery store afterward, which caused her to arrive home later than usual.[20] When she got home, she saw that Johnson and L.F. were both downstairs together, which was not normal, and nobody else was present with them.[21]

Smith testified that she told L.F. to get ready for bed; L.F. went to the bathroom while Smith and Johnson remained in the room.[22] Smith asked Johnson why he did not meet her earlier, and at that moment L.F. called Smith to the

[14] B6.
[15] B6.
[16] B6.
[17] B6.
[18] B6.
[19] B6, B7.
[20] B6, B7
[21] B7.
[22] B7.

bathroom.[23] When Smith went to the bathroom, L.F. told her that her "pee pee stings."[24] Pee pee was the word that L.F. used for vagina.[25] Smith assumed that soap had caused the pain, and Smith gave L.F. instructions on how to clean herself.[26] Smith then went back to Johnson to talk to him, "venting about how [her] day went with him."[27] Afterwards, Smith took L.F. to bed.[28] Smith then went back to the living room to use her computer, and Johnson told her he was going to bed.[29] The time was around 9:30 p.m., which was unusually early for Johnson to go to bed.[30] Smith stayed awake and went to bed sometime around 11:00 p.m. to midnight.[31] Johnson and Smith slept in the same bed, and Johnson was in the bed when Smith went to sleep.[32]

Smith testified that, after she climbed into the bed and closed her eyes, Johnson woke her up by saying, "I'm afraid" twice.[33] Smith asked: "Afraid of what?"[34] After a period of silence, Johnson answered, "I'm afraid of children."[35]

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[23] B7.
[24] B7.
[25] B7.
[26] B7.
[27] B7.
[28] B7.
[29] B7.
[30] B7.
[31] B7.
[32] B7.
[33] B8.
[34] B8.
[35] B8.

Smith asked: "What do you mean?"[36] Johnson then said, "I may have touched [L.F.]."[37] Smith then jumped out of bed, ran to L.F. to wake her up, and brought L.F. to the bathroom to put cold water on her face to help her wake up.[38] Smith asked her: "[L.F.], when you told me that your pee pee stings, can you tell me what happened?"[39] L.F. responded that Johnson had rubbed his "pee pee" on her "pee pee."[40] Smith then took L.F. upstairs and left her in the care of Smith's mother.[41] After taking L.F. upstairs, Smith went back downstairs to Johnson.[42] Smith described Johnson's demeanor as going through several emotions over the course of the night—confusion, anger, questionable, and aggressive.[43] Smith also explained that Johnson said, "I'm sorry," and said that he was not leaving and then said that he was leaving.[44] Smith's focus over the night was to keep Johnson separate from her family, to keep knives out of sight, and to prevent Johnson from hearing her call the police.[45] Early in the morning, Smith was able to contact the police.[46]

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[36] B8.
[37] B8.
[38] B8.
[39] B8.
[40] B8.
[41] B8.
[42] B8.
[43] B8, B9.
[44] B8.
[45] B8.
[46] B8.

When the police arrived, they took Johnson from the house.[47] At the time, Smith testified that she was "shocked" and focused on what was happening at the house at that time and did not yet tell the police about what L.F. had told her.[48] After Johnson was taken away, Smith called L.F.'s father and told him what had happened.[49] The father told her that he would come over, and later that day they went to the police station to tell the police about what Johnson had done to L.F.[50] When they arrived at the police station, they were informed that they would need to come back the next day because the officers on the case were not there.[51] The next morning, Smith went back to the police station and told them what happened to L.F.; the police told her to bring L.F. to a facility to take a rape test, and the police interviewed Smith.[52] Later that day, the police went to Smith's house to collect potential evidence.[53]

Smith's mother, who was L.F.'s grandmother, also testified at trial.[54] She stated that, on the night of February 9, 2022, Smith brought L.F. to her (Smith's mother's) bedroom.[55] Smith was crying, and Smith asked her mother if she could

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[47] B9.
[48] B9.
[49] B9.
[50] B9.
[51] B9.
[52] B9.
[53] B10.
[54] B25.
[55] B28.

leave L.F. with her.[56] Smith told her mother that Johnson had touched L.F., and Smith went back downstairs.[57] Smith's mother questioned L.F., and L.F. told her that Johnson had rubbed "his pee pee on her pee pee."[58] Smith's mother went downstairs at one point, and she described Johnson as "very agitated, speaking loud, yelling" and "[k]ind of violent, unhinged."[59] Smith's mother then went upstairs and stayed there for the rest of the night.[60] She then testified that Johnson was acting violent before the police came the following morning and then he became very "well-behaved" when the police arrived.[61] She further testified that, while the police were at the house, Johnson said, "[L.F.], I'm sorry" more than once.[62]

Sergeant Joshua Stafford of the Middletown Police Department testified on the investigation of Johnson.[63] After Smith reported to the police that L.F. had been sexually assault by Johnson, Sgt. Stafford and other detectives took Smith back to her residence where they took photographs and collected potential evidence, such as L.F.'s clothing and bedding.[64] The officers looked for seminal fluids but found

[56] B28.
[57] B28.
[58] B29.
[59] B29.
[60] B29.
[61] B29, B30.
[62] B30.
[63] B46.
[64] B47.

none.[65] Sgt. Stafford also sent L.F. and Smith to the hospital to receive a sexual assault kit test.[66] Sgt. Stafford stated that an examination of L.F showed no specific physical findings consistent with abuse but that such a result is common in pediatric sexual abuse.[67]

Sgt. Stafford testified that he interviewed Johnson.[68] Johnson told him that there was no argument with him, Smith, or Smith's mother.[69] Sgt. Stafford stated that Johnson said that he could not recall the incident on February 9, 2022, and Johnson denied any touching.[70] Sgt. Stafford explained that, at one point, Johnson admitted that on two or three occasions L.F. had touched his penis.[71]

On February 14, 2022, L.F. was interviewed at the Child Advocacy Center ("CAC").[72] L.F. said that on February 9, 2022, Johnson put her on her mom's bed, Johnson told her that her body is pretty, Johnson took her pants off, Johnson pulled down his pants, Johnson rubbed his "pee pee" on her "pee pee," and Johnson told her that this is how people love each other.[73] She also said that Johnson's "pee pee"

[65] B47.
[66] B48.
[67] B49.
[68] B49.
[69] B50.
[70] B50.
[71] B50.
[72] B37-B40.
[73] CAC Interview, Court Exhibit 1; B38.

went inside her "pee pee."[74] She said that her "pee pee" hurt afterwards.[75] Additionally, she stated that, during the "winter," there were times when she touched Johnson's "pee pee" at his request.[76] During the interview, the interviewer used anatomical diagrams to confirm the area of the body for a male and female that L.F. referred to as a "pee pee."[77] At trial, L.F. testified that she had told the CAC interviewer that Johnson "was messing around with my private part" and confirmed that she had been telling the truth.[78]

At trial, Johnson testified and provided his version of the events. He explained that, on February 9, 2022, he recalled that Smith went to work at around noon and that Smith's mother, grandmother, two brothers, L.F., and Johnson remained at the house.[79] Johnson stated that he was not at home the entire day and that, on that day, he took books to the post office, sat in his car in the parking lot, worked on a book that he was writing, and used social media.[80] He stated that when he arrived back to the house at between three and four o'clock, he saw that L.F. was alone downstairs talking to her father on Facetime.[81] Johnson testified that he heard L.F. ask her father

[74] CAC Interview, Court Exhibit 1; B38.
[75] CAC Interview, Court Exhibit 1; B38.
[76] CAC Interview, Court Exhibit 1; B38.
[77] CAC Interview, Court Exhibit 1; B39.
[78] B36.
[79] B61.
[80] B61.
[81] B61.

if he could take her back to the ice cream place they went to the other day and that this statement from L.F. "kind of prick[ed] [Johnson's] ears up."[82] After L.F. finished talking to her father on Facetime, Johnson claimed that he asked her when her father got ice cream with her because Smith and Johnson were recently out of town and Johnson wanted to know if L.F.'s father had been at the house while they were away.[83] According to Johnson, L.F. told Johnson that Smith, L.F.'s father, and L.F. had all been together when Johnson was not around.[84]

Johnson testified that, at some point during the day, he spoke with Smith over the phone about L.F. telling him that Smith had been with L.F.'s father when Johnson was not around, and Johnson told Smith that he wanted to talk about it when she got home.[85] Johnson further testified that he thinks that Smith got home between 6:30 p.m. and 7:00 p.m., L.F. was playing with a dog downstairs when Smith came home, Smith showed no concern, and everyone was talking or relaxing.[86] Johnson then stated that L.F. went to the bathroom but she did not say anything; Smith did not go to the bathroom; after L.F. was finished in the bathroom she went bed; Smith and Johnson told L.F. goodnight; and they all prayed together.[87]

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[82] B62.
[83] B62.
[84] B62.
[85] B62.
[86] B62, B63.
[87] B63.

Johnson testified that, after L.F. went to bed, Smith asked Johnson what he wanted to talk about.[88] Johnson testified:

> So I let her know that I heard [L.F.] on the phone talking with her dad. I'm letting her know that [L.F.] has told me that her dad had came down here, and her mom, pretty much [Smith], they were all together, and I said, Was this when I went back to Atlanta?[89]

Johnson continued:

> At this point [Smith] shuts down for a moment, and so I kind of try to reassure her that we can work it out, because we had a prior situation that happened six months prior regarding the same type of thing, but that was with a client she had. So I wanted to just get clarity. And so that was what the conversation was about. And then it kind of just spiralled [sic] after that. So that's what that was about.[90]

Johnson alleged that he made Smith mad by saying "I can see why your phone stopped ringing when I got to Delaware" and that "[m]aybe I should go back to Atlanta if you're going to be with your ex-husband."[91] Johnson claims that Smith's mother came downstairs to see what the argument was about, Smith's mother then went back upstairs, Smith called Johnson's brother telling him to tell Johnson that Johnson needed to leave, and Smith started to pack Johnson's belongings and told him to leave.[92] Johnson testified that after arguing, Smith took his keys and phone

[88] B63.
[89] B63.
[90] B63, B64.
[91] B66.
[92] B64.

and went upstairs, he stayed downstairs and smoked marijuana, and he eventually went to sleep.[93]

Johnson stated that the next morning Smith came downstairs and told Johnson that someone wanted to speak to him, Smith took the phone, it was someone from 911 or a crisis hotline, the person asked Johnson if he wanted to kill himself, and this made Johnson "even madder."[94] Johnson further stated that Smith then told him to go upstairs because the police are coming, he got more angry, and he told Smith that they are supposed to be family.[95] Johnson testified that when the police arrived they asked him if he was trying to kill himself, the police took him to the police station, and at some point the police interviewed Johnson about the allegations made against him.[96] Johnson stated that he did not learn about the allegations concerning L.F. until he was at the police station.[97]

At trial, Johnson denied touching L.F. "in any type of way," rubbing his "penis against [L.F.'s] private parts," or causing L.F. "to touch [his] private parts."[98] He further denied that he told Smith that he had touched L.F. or that he told L.F. that he was sorry.[99] When asked at trial whether L.F. had ever seen him naked, Johnson

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[93] B66.
[94] B67.
[95] B67.
[96] B67.
[97] B66.
[98] B69.
[99] B66.

stated that L.F. slept in the same room where he and Smith had sex and that one time L.F. woke up from a dream, L.F. saw Johnson and Smith naked, Johnson and Smith covered up, and L.F. went back to sleep.[100] Johnson stated that, another time, L.F. came into the bathroom while Johnson was in the bathroom wearing his boxers.[101] Johnson testified that he did not think that L.F. ever saw his private parts.[102] Johnson admitted that he told Sgt. Stafford that L.F. had touched his penis two to three times but testified that he meant that she had touched his "groin area" and that it was not sexual.[103]

[100] B68, B71.
[101] B68.
[102] B68.
[103] B71-B73.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ERR OR ABUSE ITS DISCRETION AND DENY JOHNSON'S RIGHT TO TESTIFY OR PRESENT A DEFENSE.

Question Presented

Whether the Superior Court erred or abused its discretion and denied Johnson's right to testify and present a defense.

Standard and Scope of Review

This Court normally reviews a trial court's decision to admit or exclude evidence for abuse of discretion.[104] "An abuse of discretion occurs when a court has exceeded the bounds of reason in light of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice."[105] Moreover, this Court reviews *de novo* alleged constitutional violations related to a trial court's evidentiary rulings.[106] But the failure to object at trial constitutes the waiver of an issue on appeal, unless the error is plain.[107] The doctrine of plain error is limited to material defects which: (1) "are apparent on the face of the record;" (2) "are basic,

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[104] *McCrary v. State*, 2023 WL 176968, at *8 (Del. Jan. 13, 2023); *Milligan v. State*, 116 A.3d 1232, 1235 (Del. 2015); *Edwards v. State*, 925 A.2d 1281, 1284 (Del. 2007); *McGriff v. State*, 781 A.2d 534, 537 (Del. 2001).
[105] *McCrary*, 2023 WL 176968, at *8; *Thompson v. State*, 205 A.3d 827, 834 (Del. 2019) (quoting *McNair v. State*, 990 A.2d 398, 401 (Del. 2010)).
[106] *Banks v. State*, 93 A.3d 643, 646 (Del. 2014).
[107] Supr. Ct. R. 8; *Pierce v. State*, 270 A.3d 219, 229-30 (Del. 2022) (admission of evidence).

serious, and fundamental in their character;" and (3) clearly deprive an accused of a substantial right, or clearly show manifest injustice.

Merits of Argument

On appeal, Johnson posits that the Superior Court abused its discretion and denied Johnson his constitutional right to present a defense by preventing him from explaining to the jury the motive of L.F. or her parents to fabricate allegations of sexual abuse against him.[108] More specifically, Johnson appears to argue that the judge precluded him from presenting his defense based on his confrontation with Smith over Smith's "potential infidelity" with L.F.'s father that led to L.F. making false allegations against him.[109] Johnson argues that this testimony concerning L.F.'s father was relevant to attacking Smith's credibility.[110] Johnson also seems to suggest that the court's evidentiary rulings prevented him from arguing that a confrontation over Smith's "potential infidelity" with L.F.'s father was the motive for L.F.'s allegations against Johnson.[111] Johnson contends that "Smith's relationship with L.F.'s father was relevant to the credibility of the complaint" because "[w]hen she called [the] police, Smith made no claims regarding L.F. [, but] [i]nstead, she called L.F.'s father" [and] that it was "only after" discussing it with

[108] Opening Br. at 14.
[109] *Id.* at 15.
[110] *Id.* at 20-21.
[111] *Id.* at 15-20.

L.F.'s father "that L.F.'s claim was relayed to [the] police."[112] Johnson concludes that, "[b]y ordering the jury to disregard Johnson's testimony with respect to Smith's relationship with L.F.'s father, the judge prevented him from allowing the jury to consider whether the claim was made up after Johnson alleged that [Smith] was cheating on [Johnson] with L.F.'s father and whether L.F.'s father may have, because of a relationship with Smith, coached L.F. to lie."[113] Johnson asserts that, "[a]ccordingly, [his] right to present a defense was violated and his convictions must be reversed for a new trial."[114] For the reasons below, Johnson's arguments fail.

A. Superior Court's Evidentiary Rulings

At trial, prior to Johnson testifying, the State made an oral motion *in limine* for the court to rule on the relevancy of Johnson testifying about any of his sex life with Smith.[115] The State submitted that "any sexual acts between [Johnson] and [Smith], or their typical sexual practices, or any sort of deviant sexual behavior that he may claim has occurred with Ms. Smith is not proper testimony for the defendant, is not relevant to the charges, and it does not tend to prove or disprove any of the charges that are in front of the Court."[116]

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[112] *Id.* at 20-21.
[113] *Id.* at 21.
[114] *Id.*
[115] A82.
[116] A82-83.

Defense counsel responded that he did not know what Johnson was going to testify to "concerning that" and that he had "no intentions on asking him."[117] But defense counsel argued that "the court is very limited on what [it] could limit [Johnson] to talk about."[118] He reasoned that "in looking at this, it would explain the way, because they share a bedroom, and because my client says that they would literally have sex where the child was sitting there, it would explain why the child would, one, be curious…"[119] Defense counsel further argued that "[i]t would also explain why the child would have seen [Johnson] naked, as well."[120] He then stated that "I understand there's a short leash on this, but I don't know where my client's going to go, but I think that the Court cannot interfere with his right to defend his case and defend himself…"[121] The trial judge responded that she did not understand how it would be relevant.[122] The judge also stated that she thinks it would be unfairly and highly prejudicial and that she does not remember Johnson mentioning anything in his statement to the police about having sex in the bed next to L.F.[123] The judge

[117] A83.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] A83-84.
[122] A84.
[123] *Id.*

then asked defense counsel whether Johnson was "saying it now at trial," and defense counsel said, "[w]ell no, he said it to me prior to trial."[124]

Showing concern over the admission of irrelevant and prejudicial evidence, the court responded that it found it concerning that defense counsel did not "know where [Johnson's] going to go."[125] Defense counsel responded, "[w]ell, I told you, I'm not going to be asking him about that, but if it triggers anything, I can't, I'm not going to limit him."[126] The judge responded: "Well, I'm going to" and that "we're going to proceed really cautiously."[127] The judge noted that it "would be in appropriate to get into those facts, if they are facts," and she was "not going to allow this record to be cluttered with that when it's wholly irrelevant."[128]

The court then instructed Johnson to "answer the question that's asked" when testifying.[129] The court again asked defense counsel why testimony on Smith and Johnson's sexual behavior would be relevant.[130] Defense counsel responded that "if the Court's asking me whether or not their sexual behavior is relevant, I can't say that it is," but "whether or not he's walking around naked, whether or not that was a

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[124] *Id.*
[125] A84-85.
[126] A85.
[127] A83-85.
[128] A85.
[129] *Id.*
[130] A85.

practice between the two of them, that is relevant."[131] After defense counsel stated that he had no intention of asking Johnson about sex with Smith, the court asked: "So if he follows your instructions and answers only what's asked, then we'll be good, right?"[132] Defense counsel responded, "I agree."[133]

The State then clarified its position:

> The State is not saying that direct statements that were made can't be rebutted, but as far as the sex practices of the defendant with [L.F.'s] mother are not appropriate under, in the State's opinion. Whether or not there was any walking around naked, that's a question that could be asked and answered, but not her sex practices, not the mom's sex practices with the defendant, or whether [L.F.] was regularly exposed to the two of them having sex.[134]

Defense counsel recalled asking Smith on cross-examination about "whether or not they had had sex while [L.F.] was there."[135] The court expressed skepticism that the evidence was relevant and admissible.[136] The court then asked Johnson if he had any "questions or concerns or confusion about what . . . we've talked about;" Johnson said that he "got the gist of it" and that "the sex practices is not what [he] would even be talking about," but "it would be about more in the nature of when these things happened."[137] The court said that "the fact that you and her mom may

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[131] A85-86.
[132] A87.
[133] *Id.*
[134] A88.
[135] *Id.*
[136] *See* A88-89.
[137] A89.

have had sex in the bed next to [L.F.'s] and she was asleep, that's not relevant to the issues."[138]

Later, Johnson testified that Smith wanted him out of the house "because I said some type of crazy things to her that kind of got her ticked off."[139] Defense counsel asked Johnson what he said.[140] Instead of answering the question, Johnson talked about how Smith is a massage therapist, that her phone used to ring a lot prior to Johnson moving in with her, and that she is a doula or midwife.[141] Johnson then said that Smith had at some point "confessed and told [him] that she had sex with the client."[142]

The State objected to the irrelevant testimony about Smith allegedly having sex with one of her clients and, at side bar, asked that the statement be stricken from the record.[143] Defense counsel responded: "Your Honor, all I wanted to know is what did he say to make her angry, I didn't really want the supposition that went with it."[144] The court then asked: "Why does it matter?" and posited that "[t]he fact that they had an argument [the judge] understand[s], maybe this is you're trying to

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[138] *Id.*
[139] A105.
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] A106.
[144] *Id.*

lay groundwork for why she might lie about that."[145] When defense counsel confirmed the strategy, the court then said that it "could be done in a more sanitized way without bringing up some illicit affair as a massage therapist" and that "[t]his is exactly what [the judge] wanted to avoid."[146] Defense counsel explained that:

> [M]y client's position is that the reason why this happened is because the mother wanted to get him out of the house, so she made it, she couched [sic] the little girl to make up these stories, that's his position, that's his defense.[147]

The court responded that "she could have just kicked him out on her own, she had to come up with the idea that her daughter had been molested" and stated: "I mean, come on, we are so far afield here."[148] Defense counsel asserted that his plan was to ask Johnson what he had said that made Smith mad and then move on and that he thought Johnson was going to testify that "he called her a h-o, whore."[149] The court responded: "Well, he could have just answered that."[150]

The judge then removed the jury from the courtroom.[151] The court then ruled that Johnson's statement about Smith having sex with a client was inflammatory and irrelevant.[152] The court noted the defense's prior question to Johnson about "what

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[145] *Id.*
[146] A107.
[147] A108.
[148] *Id.*
[149] A109.
[150] *Id.*
[151] *Id.*
[152] *Id.*

did he say to her to make her angry" and instructed Johnson to "[a]nswer the question you're asked."[153] The court advised Johnson to not discuss "her sleeping with her clients, nothing like that" and that the State had "mentioned sexual activity of the mom, alleged sexual activity of the mom."[154] The court understood that Smith's "credibility is at issue," but it again instructed Johnson to "[a]nswer the question you're asked."[155]

After the jury returned to the courtroom, the court provided the following instruction:

> Ladies and gentlemen of the jury, you're to disregard the defendant's statement about the alleged prior sexual behavior of Marie Smith. You are not to consider that statement in your deliberations…[156]

Subsequently, the defense asked Johnson: "[W]hat did you say to Marie that made her angry?"[157] Johnson responded: "I said, I can see why your phone stopped ringing when I got back to Delaware" and that "[m]aybe I should go back to Atlanta if you're going to be with your ex-husband."[158] Johnson also testified about him and Smith having sex while L.F. was in the room, claiming that when L.F. "woke up . . . , she went back to sleep, we covered up, and that was it."[159] Johnson said that "[i]t was

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[153] A110.
[154] *Id.*
[155] *Id.*
[156] A112.
[157] A112-13.
[158] A113.
[159] A117.

not like [he's] walking around nude."[160] The State did not object to these responses, nor did the court *sua sponte* intervene. Johnson denied confessing to Smith that he had touched L.F., advising Smith to apologize to L.F., or any inappropriate contact with L.F.[161] On cross-examination by the State, Johnson said that "[o]nce again, the only time that I know [L.F.] seen me and her mother naked together was when we were having sex and she woke up in the middle of the night."[162]

B. Certain Issues Waived

On appeal, Johnson does not appear to challenge the Superior Court's rulings as they relate to the admissibility of Johnson's testimony about the sexual practices between him and Smith, including in their bedroom. At trial, although defense counsel appear to have hedged his position on the State's motion *in limine* by seeming to take a wait-and-see approach based on how the trial unfolded, he indicated to the court that he was not planning to ask Johnson about his (Johnson's) practices with Smith, and Johnson advised the court that he would not be testifying about the sex practices between him and Smith but the "nature of when these things happened."[163] To the extent Johnson intended to raise a challenge in this regard, his

[160] *Id.*
[161] A114-18.
[162] B71.
[163] A89.

position at trial in relation to the State's motion and/or his failure to have properly raise this contention in his opening brief waives the issue on appeal.[164]

Further, the rulings that Johnson cite arose in the context of Johnson's anticipated testimony about Smith's sexual practices with him and Johnson's testimony about Smith's sexual behavior with one of her clients. There was a dearth of any discussion at trial regarding the admissibility of Smith's potential infidelity with L.F.'s father as motivating the *father* to have coached L.F. to have made false allegations against Johnson. L.F.'s father did not testify at Johnson's trial, and the issue was raised in the context of Smith's sexual activity with others having motivated *Smith* to coach L.F. to have fabricated evidence.[165] Johnson's failure to have fairly presented this contention to the Superior Court in the first instance waives this argument on appeal, and Johnson has not demonstrated plain error as the Superior Court properly excluded evidence of Smith's sexual activity for the reasons below.

C. No Abuse of Discretion

The Superior Court did not abuse its discretion in its evidentiary rulings. As an initial matter, the State disputes Johnson's characterization of the record and interpretation of the Superior Court's rulings. To be sure, the State's objection to

[164] Supr. Ct. R. 14(b)(vi)(A)(3); *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993).
[165] *See* A108.

Johnson's testimony about Smith's alleged sexual conduct with a client arguably expanded the State's initial motion *in limine* regarding anticipated testimony about the sexual practices between Smith and Johnson to include Smith's sexual activity in general. But the Superior Court did not rule that Johnson could not present evidence supporting his theory that an argument between Smith and Johnson had motivated Smith to coach L.F. to fabricate sexual abuse allegations about Johnson. In fact, the Superior Court recognized that Smith's credibility as a witness was an issue.[166] Johnson presented evidence for what he asserts was the motive for Smith to have coached L.F. to fabricate allegations of sexual abuse—a confrontation between Smith and Johnson over Smith's relationship with L.F.'s father.[167] He testified that he had a confrontation with Smith because he found out that Smith had been with L.F.'s father while Johnson was away.[168] Evidence was also presented that Smith talked to L.F.'s father before informing the police about L.F.'s allegations against Johnson.[169] And defense counsel cross-examined Smith about her talking to L.F.'s father before informing the police about L.F.'s allegations.[170]

In any event, the Superior Court's evidentiary rulings were proper and not an abuse of its discretion. The court excluded irrelevant or unfairly prejudicial

[166] *See* A110.
[167] B63, B64, B66.
[168] B63, B64, B66.
[169] B9, B10.
[170] B17.

testimony. Rule 402 of the Delaware Rules of Evidence provides that all relevant evidence is admissible in a trial unless otherwise provided by statute or rule.[171] Evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action."[172] In other words, "[i]n order for evidence to be considered relevant, "the purpose for which the evidence is offered must be material and probative."[173] Under Rule 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[174] Additionally, "the Constitution permits judges 'to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'"[175] Under the Delaware Rules of Evidence, it was proper for the Superior Court to have exercised its gatekeeping function in inquiring about the relevancy of testimony on sexual behavior or alleged deviant sexual conduct involving Smith after the State moved to exclude such evidence as irrelevant.[176] "The determinations of relevancy

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[171] D.R.E. Rule 402.
[172] D.R.E. Rule 401.
[173] *Bailey v. State*, 2007 WL 1041748, at *4 (Del. Apr. 9, 2007).
[174] D.R.E. Rule 403.
[175] *Holmes v. South Carolina*, 547 U.S. 319, 326–27 (2006).
[176] *Mercedes-Benz of N. Am. Inc. v. Norman Gershman's Things to Wear, Inc.*, 596 A.2d 1358, 1366 (Del. 1991) ("Determination of relevancy under D.R.E. 401 and

and unfair prejudice are 'matters within the sound discretion of the trial court, and will not be reversed in the absence of clear abuse of discretion.'"[177] The Superior Court properly found that evidence of Smith's sexual conduct with others was not relevant and thus inadmissible. Johnson's contention that L.F. fabricated evidence or was coached to do so is speculative and unsupported by the record. Indeed, L.F. testified at trial that the allegations she made were true.[178] Evidence of a sexual encounter, is "just that, evidence of a sexual relationship," and, without more, is irrelevant to the issues of bias, motive, or credibility.[179] Johnson merely provides inferences and innuendo about Smith having had a "potential" sexual relationship with L.F.'s father, which are insufficient to demonstrate the tendency for a fact to be "more or less probable than it would be without the evidence."[180]

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unfair prejudice under D.R.E. 403 are matters within the sound discretion of the trial court, and will not be reversed in the absence of clear abuse of discretion.").

[177] *Banks v. State*, 93 A.3d 643, 647 (Del. 2014).

[178] B36.

[179] *See Commonwealth v. Jerdon*, 229 A.3d 278, 288 (Pa. Super. Ct. July 1, 2009) (finding that evidence of a sexual relationship between the complaining witness and another witness was "insufficient alone to infer a motive on her part to contrive the present allegations of sexual assault" and was not relevant to show the complaining witness's bias or "attack her credibility"), *appeal denied*, 227 A.3d 870 (Pa. 2020) .

[180] D.R.E. 401; *State v. Zebadua*, 2009 WL 491577, at *2 (Ariz. Ct. App. Feb. 26, 2009) (finding that evidence that complaining witness was "flirting" with the defendant's cousin in a bar was insufficient to show that the witness had engaged in sexual conduct and, even if evidence of sexual conduct, was not relevant to show that the witness had a motive to have fabricated her accusation against the defendant).

Even if Smith's alleged sexual relations with a client had somehow been relevant to the issue of motive, the Superior Court properly excluded it as it posed an undue risk of unfair prejudice that far outweighed any probative value. Details of intimate sexual activity can be unfairly prejudicial, and they can cause confusion with the jury, cause the jury to make a decision based on emotion, or be a waste of time.[181] As the Superior Court indicated, evidence about Smith's sexual activities with others would have shifted the focus of the fact-finder away from determining Johnson's culpability.[182] Instead, this evidence risked smearing Smith's character and "inflam[ing] the minds of the fact-finders."[183] And, as the Superior Court noted (and defense counsel seemed to agree with), the defense could have sanitized this

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[181] *See United States v. Bauldwin*, 627 F. Supp. 3d 1242, 1250 (D.N.M. 2022) ("Unfair prejudice is that which creates "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."); *State v. Bravo*, 343 P.3d 306, 311-12 (Utah Ct. App. 2015) (stating that Utah's version of "Rule 403 therefore represents a bulwark against 'the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details…'"); Fed. R. Evid. 403 Advisory Note ("The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time…"). *See also State v. Martin*, 423 P.3d 12 54, 1267 (Utah 2017) (holding that probative values of testimony on victim's mother's past sexual accusations substantially outweighed by danger of confusion of the issues and waste of time).

[182] *See* A107.

[183] *Jerdon*, 229 A.3d at 288.

type of evidence related to Smith's motive.[184] Accordingly, under Rule 403, the court properly used its discretion to exclude this evidence.[185] Therefore, Johnson's claim that the court abused its discretion and reversal is required is without merit.

D. No Sixth Amendment Violation

Under the Sixth Amendment of the United States Constitution, "the exclusion of critical evidence can lead to a due process violation."[186] "But the defense does not have an unfettered right to present any evidence it wishes."[187] "Although the Due Process Clause 'guarantees criminal defendants a meaningful opportunity to present a complete defense,' 'the Constitution leaves to the judges who must make [evidentiary] decisions 'wide latitude' to exclude evidence that is 'repetitive ..., only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'"[188] For the following reasons, Johnson's argument that his Sixth Amendment right to present a defense is without merit.

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[184] *See* A106-07; *see Jerdon*, 229 A.3d at 289 (in finding that evidence of complaining witness's sexual affair inadmissible, noting that "defense counsel can cross-examine the complaining and [other witness] concerning the 'close relationship' Appellee maintains the two continue to share . . . in an effort to show bias on the part of each").

[185] *See Banks*, 93 A.3d at 650 (holding that the Superior Court correctly excluded testimony under D.R.E. 403 that the defendant argued showed motive for the victim to make a false allegation against the defendant, because its probative value was substantially outweighed by the danger of confusion of the issues").

[186] *Burrell v. Delaware*, 2024 WL 4929021, at *10 (Del. Dec. 2, 2024) (*citing Nevada v. Jackson*, 569 U.S. 505, 509 (2013)).

[187] *Id*.

[188] *Id.* (*citing Crane v. Kentucky*, 476 U.S. 683, 689–90 (1986)).

Here, Johnson asserts that the trial court prevented him from presenting his defense that Smith coached L.F. into making false allegations against him and that the motive for them to coach L.F. was the confrontation between Smith and Johnson over Smith's potential infidelity with L.F.'s father. Despite Johnson's claim, the record shows that he testified that this confrontation occurred, and Johnson fails to point to anywhere in the record where the trial court ruled that he could not argue to the jury that an altercation was the motive behind the allegations.

Johnson testified:

> So I let her [Smith] know that I heard [L.F.] on the phone talking with her dad. I'm letting her know that [L.F.] has told me that her dad had came down here, and her mom, pretty much [Smith], they were all together, and I said, Was this when I went back to Atlanta?[189]

Johnson continued:

> At this point [Smith] shuts down for a moment, and so I kind of try to reassure her that we can work it out, because we had a prior situation that happened six months prior regarding the same type of thing, but that was with a client she had. So I wanted to just get clarity. And so that was what the conversation was about. And then it kind of just spiralled after that. So that's what that was about.[190]

Johnson then testified that he made Smith mad when he told her that "[m]aybe I should go back to Atlanta if you're going to be with your ex-husband."[191] Johnson

[189] B63.
[190] B63, B64.
[191] B66.

then testified that after this confrontation, the accusations of sexually abusing L.F. were made against him.[192]

As such, it is clear from the record that Johnson was not prevented from presenting his stated defense that a confrontation over Smith's relationship with another individual motivated the allegations against Johnson. Nothing in the record shows that the jury was prevented from drawing any inference that the confrontation served as a motive behind the accusations against Johnson. Additionally, Johnson provides no support, or argument, that his counsel was prevented from arguing at closing that this confrontation over Smith's relationship with L.F.'s father caused Smith, or L.F.'s father, to coach L.F. into making false claims against Johnson.

Even if the Superior Court's rulings somehow had the effect of excluding evidence that would have been relevant to Johnson's stated defense, such an exclusion would not have violated Johnson's Sixth Amendment rights, even if error had occurred, because he suffered no prejudice significant to deny his right to a fair trial or to present favorable evidence.

In *Banks*, the defendant, who was accused of assaulting his girlfriend, wanted to present testimony that he argued would show the girlfriend had a motive for making allegations against him.[193] The State argued that the testimony had limited

[192] B66, B67
[193] *Banks*, 93 A.3d at 650–51.

relevance, would create confusion, be a waste of time, be duplicative, and create a trial within a trial.[194] The court found that the testimony was irrelevant and excluded it.[195] In assuming *arguendo* that the trial court abused its discretion in excluding testimony that was relevant to show motive for allegations, this Court found that the defendant's constitutional rights would not have been violated because "such error did not cause significant prejudice so as to deny Banks' right to a fair trial or his right to present favorable evidence."[196] This Court explained that "[t]he test is whether the jury is in possession of sufficient information to make a discriminating appraisal of the witness' possible motives for testifying falsely in favor of the government."[197] This Court pointed out that "[t]he jury had before it evidence from which Banks could argue that his version of events was correct—i.e., that [the victim] was so upset by Banks' infidelities and by Banks telling her that they were just going to be friends that she assaulted him; that he defended himself; and that [the victim] fabricated the story that he was the aggressor."[198] Thus, "even if the Superior Court abused its discretion in limiting [certain] testimony, Banks did not suffer significant prejudice

[194] *Id*. at 648.
[195] *Id*. at 649.
[196] *Id*. at 650–51.
[197] *Id.*
[198] *Id.* at 651-52.

such that his constitutional rights to a fair trial and to present a defense were violated."[199]

Here, despite the Superior Court's rulings excluding evidence of Smith's sexual activities with others, Johnson presented favorable evidence to support his defense. And "[t]he jury had before it evidence from which [Johnson] could argue that his version of events was correct,"[200] i.e., Smith and Johnson had an altercation and Smith coached L.F. to fabricate the allegations against Johnson. Thus, "even if the Superior Court abused its discretion in limiting [certain] testimony, [Johnson] did not suffer significant prejudice such that his constitutional rights to a fair trial and to present a defense were violated."[201] Therefore, Johnson's claim that his Sixth Amendment right to present a defense was violated by the trial court's evidentiary rulings is without merit.

E. Harmless Error

Even if this Court were to review the Superior Court's evidentiary rulings and find error somewhere, any error was harmless. "Under a harmless error analysis, '[t]he defendant has the initial burden of demonstrating error,' and then the State has the burden to demonstrate that any error was harmless beyond a reasonable

[199] *Id.*
[200] *Id.*
[201] *Id.*

doubt."[202] "This Court has […] explained that, when reviewing claims for harmless error, '[t]he reviewing court considers the probability that an error affected the jury's decision'" and that "[t]o do this, it must study the record to ascertain the probable impact of error in the context of the entire trial."[203] As a result, "[a]ny harmless error analysis is a case-specific, fact-intensive enterprise."[204]

Here, the record shows that the Superior Court's evidentiary rulings regarding Smith's sexual behavior could not have affected the jury's decision. Johnson has not established that this portion of the testimony had any relevance. But even if it somehow had relevance, its exclusion was not important because it did not add anything to Johnson's claim that he had a confrontation with Smith over Smith's relationship with L.F.'s father and that this confrontation prompted L.F. to make false allegations against him. Moreover, these rulings did not preclude Johnson from raising the defense that an altercation over Smith's close relationship with L.F.'s father led to L.F. asserting false allegations against Johnson. Additionally, there was substantial evidence of Johnson's guilt in the form of L.F.'s CAC interview, L.F.'s testimony that she told the truth at the interview, Smith's testimony that Johnson stated that he may have touched L.F., Johnson's statement to the police that L.F.

[202] *Williams v. State*, 98 A.3d 917, 922 (Del. 2014).
[203] *Hansley v. State*, 104 A.3d 833, 837 (Del. 2014).
[204] *Id*.

touched his penis on multiple occasions, and Smith's mother's testimony that Johnson told L.F. that he was sorry. Accordingly, any error was harmless.

CONCLUSION

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

Respectfully submitted,

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Date: January 29, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ISAAC JOHNSON,	§	
	§	No. 319, 2024
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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Date: January 29, 2025

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