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Case Number 131,2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RHANDY MASSEY,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 131, 2023
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF TO APPELLANT'S SECOND AMENDED OPENING BRIEF AND APPELLANT'S SUPPLEMENTAL OPENING BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF CITATIONS

CASES **PAGE**

STATUTES AND RULES

NATURE AND STAGE OF PROCEEDINGS

In August 2021, police arrested Rhandy Massey ("Massey") following allegations of sexual abuse made by his daughters, L.M. and M.M., who were 8 and 7 at the time.[1] (A-1 at D.I. 1).[2] In October 2021, Massey was charged with: (a) two counts of second-degree sexual abuse of a child by a person in a position of trust ("SACPPT"), first-degree unlawful sexual contact, second-degree rape, two counts of first-degree rape, first-degree unlawful sexual contact, sexual solicitation of a child, and continuous sexual abuse of a child in relation to M.M.; and (b) second-degree SACPPT, endangering the welfare of a child, two counts of first-degree unlawful sexual contact, sexual solicitation of a child, second-degree rape, and continuous sexual abuse of a child in relation to L.M. (A-1 at D.I. 4; A-12-18). On January 20, 2023 – three days before jury selection, Massey moved under 11 *Del. C.* § 3508 for an *in-camera* hearing to allow him to explore prior allegations of sexual abuse made by L.M. and M.M. against their half-brother, N.M., and against him.

[1] Because the complaining witnesses and their half-brother and cousin were minors at the time of the offenses, the State refers to them by their initials.

[2] "D.I." refers to the Superior Court docket items in *State v. Massey*, ID No. 2108001587A (A-1-11). "A-_" refers to the Appendix to Appellant's Second Amended Opening Brief.

(A-18-34). The Superior Court denied Massey's motion on January 23, 2023. (B16-38).

After jury selection, Massey moved to sever the child endangerment charge, and the Superior Court granted his unopposed motion. (A-6-7 at D.I. 55, 61-62). Subsequently, the State filed amended indictments removing the severed charge and correcting the spelling of L.M.'s name. (A-6-7 at D.I. 54-55, 59).

The Superior Court held a four-day jury trial on the remaining indicted charges from January 24 to 27, 2023. (A-6-7 at D.I. 57). At the conclusion of the State's case-in-chief, Massey moved for judgment of acquittal on the second-degree rape, first-degree rape, sexual solicitation of a child, and continuous sexual abuse of a child charges with respect to M.M.; and the sexual solicitation of a child, second-degree rape, and continuous sexual abuse of a child charges with respect to L.M. (B176-89). The Superior Court granted Massey's motion with respect to one of the first-degree rape charges regarding M.M. and denied the remainder of Massey's motion. (*Id.*). The jury found Massey guilty of all the remaining indicted charges, except the second-degree rape charge for L.M. for which the jury found Massey guilty

of the lesser-included charge of first-degree unlawful sexual contact.[3] (B263-69).

Massey subsequently moved for a new trial, arguing that the court used an incorrect legal standard in denying his motion under section 3508 by not applying *Bryant v. State*.[4] (A-45-53). In March 2023, the Superior Court denied Massey's motion[5] and sentenced him to a total of 119 years of incarceration. (B270-79).

Massey appealed and filed an opening brief, asserting that the Superior Court erred by: (1) denying his 3508 motion for an *in-camera* proceeding to allow him to determine the relevancy or the truth or falsity of the complainants' prior allegations of sexual abuse; (2) excluding evidence of past incidents of a sexual nature to show that complainants had prior sexual knowledge; (3) allowing M.M. to hold a stuffed animal during her testimony; and (4) excluding evidence that complainants had prior sexual knowledge, thereby depriving him of his right to have a meaningful opportunity to present a complete defense. Massey subsequently filed an amended opening brief,

[3] The State subsequently entered a *nolle prosequi* of the child endangering charge.

[4] 1999 WL 507300 (Del. June 2, 1999).

[5] *State v. Massey*, 2023 WL 2384784 (Del. Super. Ct. Mar. 7, 2023).

which also asserted that the State committed a *Brady*[6] violation by failing to disclose a prior 2015 incident of alleged sexual abuse committed against 2-year-old L.M. by her 11-year-old cousin A.M.

On November 9, 2023, pursuant to the State's request, this Court stayed briefing and remanded this case to the Superior Court to supplement the record through an evidentiary hearing concerning the complainants' prior allegations of sexual abuse as to falsity, to complete any missing record concerning the prior allegation of sexual abuse against the complainants' cousin A.M., and to afford the trial judge the opportunity to reconsider Massey's 3508 motion in light of the expanded record.

On February 21, 2024, the Superior Court held an *in-camera* hearing pursuant to 11 *Del. C.* § 3508. Following briefing and oral argument, the Superior Court issued an Opinion on July 17, 2024, making supplemental factual findings, rejecting Massey's *Brady* violation allegation, and denying Massey's motion to admit evidence under section 3508 of the prior allegations of sexual abuse against N.B. and A.M.[7]

[6] *Brady v. Maryland*, 373 U.S. 83 (1963).

[7] *State v. Massey*, 2024 WL 3443572 (Del. Super. Ct. July 17, 2024).

After this case was returned from remand, Massey filed a supplemental opening brief in October 2024. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Denied. Because this Court remanded this case to the Superior Court for an *in-camera* hearing pursuant to 11 *Del. C.* § 3508, Massey's claim that the Superior Court abused its discretion in not holding an *in-camera* proceeding is now moot.

II., III. Denied. Because defense counsel affirmatively withdrew his argument that evidence of the complainants' prior allegations of molestation was admissible to purportedly show their knowledge of sexual acts from a source other than Massey, his claim is not subject to review. Even assuming, *arguendo*, that Massey had properly preserved this claim, he would not be entitled to relief because the evidence was irrelevant and inadmissible where the prior alleged acts were remote and different in kind from the abuse alleged here.

III. Denied. Because this Court remanded this case to the Superior Court to allow any missing record to be completed based on the State's alleged withholding of *Brady* material concerning a prior allegation of sexual abuse against complainants' cousin A.M. in 2015, and the court determined, following an *in-camera* hearing pursuant to 11 *Del. C.* § 3508, that any evidence relating to A.M. would have been inadmissible at trial, Massey

cannot establish a reasonable probability of a different outcome had the material been timely disclosed. Furthermore, because defense counsel affirmatively withdrew his argument that evidence of the complainants' prior allegations of molestation was admissible to purportedly show their knowledge of sexual acts from a source other than Massey, his claim that he would have been able to procure an expert to testify as to the impact of the alleged abuse on the complainants is not subject to review. Even if not waived, any expert testimony would not have been admissible because it would directly and indirectly attack L.M.'s credibility.

IV. Denied. The Superior Court did not abuse its discretion by allowing the 8-year-old complaining witness to hold a small stuffed animal during her testimony in a sexual abuse prosecution where the State demonstrated a substantial need for the accommodation.

V. Denied. Because defense counsel affirmatively withdrew his argument that evidence of the complainants' prior allegations of molestation was admissible to purportedly show their knowledge of sexual acts from a source other than Massey, his claim that his constitutional right to present a complete defense was violated is not subject to review. Even assuming, *arguendo*, that Massey had properly preserved this claim, he would not be

entitled to relief because the evidence was irrelevant and not otherwise admissible under 11 *Del. C.* § 3508.

VI. (Supplemental I.) Denied. Following the *in-camera* hearing held on remand, the Superior Court did not abuse its discretion in ruling that L.M. and M.M.'s prior sexual abuse allegations against N.M. were irrelevant and inadmissible.

FACTS

On July 29, 2021, Inga Massey ("Inga") called 911 and brought her 7 and 8-year-old daughters, M.M. and L.M., to Bayhealth's emergency room in Milford for a sexual assault nurse exam after M.M. and L.M. disclosed to her that their father, Massey – Inga's husband – had been sexually molesting them. (B98-99, 126, 129-37, 137a-138).

At Bayhealth, L.M. and M.M. underwent pediatric sexual assault examinations. (B149-60). The nurse noted redness in L.M.'s vaginal area and that M.M. had a vaginal discharge, both of which she acknowledged could have occurred naturally. (B156-59).

After the forensic examinations were completed, Inga took L.M. and M.M. to the Children Advocacy Center ("CAC") the next day to give statements. (B138)). In her interview, 8-year-old L.M. disclosed that Massey touched her vaginal area, inserted his finger into her anus, and exposed himself to her by "wagging" his penis at her. (B49). L.M. said that Massey had been touching her for nearly two years, since she was 7. (*Id.*). L.M. said that when Massey used his finger on her vagina, he pushes down hard, and it hurts. (*Id.*).

L.M. estimated that Massey had touched her inappropriately at least once a week, but had only penetrated her anus digitally a couple of times. (*Id.*). She stated that Massey had also licked her vagina and rubbed his penis on her leg. (*Id.*). L.M. also reported instances where she woke up on the couch to find Massey's hand down her pants. (*Id.*). L.M. further stated that Massey had watched and showed her pornographic videos, including videos of a boy putting his penis in a girl's butt, and had rubbed his penis in front of her. (*Id.*). She said that Massey's penis gets hard and then clear stuff comes out of his penis, which she had seen a lot. (*Id.*). The clear stuff got on her hand once, and she said it felt gooey and wet. (*Id.*). Massey told her that the stuff made babies. (*Id.*). L.M. described a rainbow-colored towel and pink blanket that Massey would use to clean himself after masturbating. (*Id.*).

L.M. also disclosed that Massey had begged her to put her mouth on his penis and had wrapped her hand around his penis and moved it up and down. (*Id.*). Massey told L.M. that she was the only one who could make his penis hard, but she did not believe him because he sometimes came into the living room with his penis already erect. (*Id.*). L.M. also said that Massey told her that if she kept doing things with him, she was going to want to have babies with him. (*Id.*).

When asked about the last time Massey touched her vagina, L.M. said Massey last touched her on July 26, 2021, while they were on the couch. (*Id.*). She had woken up and gone in the living room where she saw Massey rubbing himself under the blanket, which was sticking up because of his penis. (*Id.*). After Massey went to sleep, L.M. got under the blanket next to Massey and fell asleep. (*Id.*). A few hours later, Massey, who was naked, woke her up and told her to go to bed. (*Id.*). When L.M. told Massey she did not want to go to bed, Massey told her to put her mouth on his penis instead. (*Id.*). L.M. then went to her bedroom because she did not want to do that. (*Id.*). Before she left, Massey put his hand inside her underwear and pushed his hand down hard on top of her vagina and moved it around, which caused it to burn when she urinated. (*Id.*).

L.M. also witnessed Massey touching M.M.'s vagina area with his hand and disclosed that M.M. told her that Massey had touched her vagina and licked it, which hurt. (*Id.*). L.M. waited to tell her mother about the abuse because she was scared that her mother would be mad that she had not told her for two years. (*Id.*).

During her CAC interview, 7-year-old M.M., who was crying at times, disclosed that Massey began having sexual contact with her when she was

around 6. (B48). M.M. reported witnessing Massey viewing pornography and putting lotion on his penis and rubbing it. (*Id.*). Massey also asked her to hold his penis. (*Id.*). M.M. stated that she had slept on the couch naked under a blanket, and on occasions when Massey was also sleeping on the couch, he had put his finger in her anus. (*Id.*). She stated that once, he licked his finger before putting it in her anus and stopped after she told him it hurt. (*Id.*).

M.M. also reported that Massey had touched her vagina with his fingers and tongue. (*Id.*). When asked about a time that Massey licked her vagina, M.M. stated it was a long time ago when they got their new couch and that she had been asleep and woke up when she felt Massey's tongue and lips touching her vagina.[8] (*Id.*). M.M. stated that Massey stopped because L.M. was coming back inside the house. (*Id.*).

M.M. also reported that once when Massey had his hand in her underwear and was rubbing and moving his hand inside her vagina, she tried to pull his hand away, but Massey forced it into her and would not remove it. (*Id.*). Her vagina hurt afterward, and it also hurt when she urinated. (*Id.*).

[8] Inga testified that they got the new couch in 2020. (B127-28).

During another incident on the couch, M.M. tried to get up, but Massey would not let her leave. (*Id.*). He eventually put lotion on his penis and rubbed his penis in his hand in front of her while he watched pornography until he said, "it's coming, it's coming" and "stuff came out." (*Id.*). M.M. said he caught the white, watery "stuff" in his hand and went to the bathroom to wash it. (*Id.*).

M.M. also reported that she had witnessed Massey touching L.M. and saw L.M. rubbing Massey's penis once. (*Id.*).

Based on L.M. and M.M.'s interviews, Delaware State Police Officers obtained and executed a search warrant for Massey's home. (B138-41). They found a pink blanket and t-shirt, which contained Massey's semen, a rainbow towel, and a bottle of lotion. (B141-48, 158-75).

L.M. and M.M..'s video recorded CAC interviews were played for the jury at Massey's trial. (B53-56, 91-92). L.M. also testified that Massey touched her vagina with his hand, rubbed her butt with his hand, and rubbed his penis on her face and back. (B88-90).

Trial counsel cross-examined both girls about the alleged abuse and inconsistencies in their CAC statements. (B57-87, 93-124). Massey also testified in his defense. (B190-244). Massey flatly denied that any sexual

contact occurred when he was with his daughters. (B232). He claimed that L.M. and M.M. had seen Inga and him having sex four or five times and often asked questions about it, such as why Inga "was down there on me and what this wet stuff was." (B203-04). Massey stated that he had told them, "that's where babies come from," and that they needed to ask Inga if they had questions about their bodies. (B204-05). He also testified that he began sleeping on the couch in February 2021 because of back pain while Inga slept in their bedroom. (B198-201, 229-30).

Massey also claimed that the weekend before the allegations came about, Inga and he were fighting because he had refused to deposit a "substantial" amount of money that he was going to receive from selling land that he inherited into their joint account. (B209-13). On the day that Inga reported the alleged abuse, Massey had an argument with Inga and "told her that we either needed a break and then I was leaving," which his daughters overheard. (B213-16). Massey told his daughters, who were upset, that he would be home for dinner and told Inga, who was "really mad," that they needed to talk. (B216). Massey also testified that after the abuse allegations, he deposited the money he received from the land sale into an individual account, and Inga filed for divorce and sought $130,000 in child support.

(B227-28). On cross-examination, Massey admitted that he used the pink blanket when he slept on the couch. (B242).

The defense argued in closing that the incidents had been fabricated by Massey's daughters when Inga questioned them after Massey told Inga that their marriage was over and on the same day that he was going to receive a large amount of money. (B254-62).

ARGUMENT

I. THE SUPERIOR COURT'S CONDUCTING OF AN *IN-CAMERA* HEARING PURSUANT TO 11 *DEL. C.* § 3508 ON REMAND RENDERS MOOT MASSEY'S CLAIM THAT THE COURT ABUSED ITS DISCRETION IN FINDING HIS OFFER OF PROOF WAS INSUFFICIENT TO HOLD SUCH A HEARING.

Question Presented

Whether an appeal from the denial of a motion for an *in-camera* hearing pursuant to 11 *Del. C.* § 3508 was rendered moot when the case was remanded for such a hearing and the hearing has now been conducted by the Superior Court.

Standard and Scope of Review

Mootness precludes review of this claim.[9]

Argument

Massey contends that the Superior Court abused its discretion in finding his offer of proof insufficient to hold an *in-camera* hearing pursuant to 11 *Del. C.* § 3508 to determine the relevancy or the truth or falsity of the complaining witnesses' prior accusations of sexual abuse. (Opening Br. 13-23). Massey's claim is now moot.

[9] *Gural v. State*, 251 A.2d 344 (Del. 1969).

In November 2023, pursuant to the State's request and Massey's agreement, this Court stayed briefing and remanded this case to the Superior Court with instructions to hold an *in-camera* hearing pursuant to 11 *Del. C.* § 3508, supplement the record concerning the complainants' prior allegations of sexual abuse as to falsity, complete any missing record concerning the prior allegation of sexual abuse against the complainants' cousin A.M., and to reconsider Massey's 3508 motion in light of the expanded record. The Superior Court subsequently held an evidentiary hearing on February 21, 2024, at which M.M., L.M., and their mother testified and L.M. and M.M's 2015 and 2017 CAC interviews were introduced. (B292-386). Following briefing and oral argument, the Superior Court issued an Opinion on July 17, 2024, making supplemental factual findings, rejecting Massey's *Brady* claim, and denying Massey's 3508 motion to admit evidence of the prior allegations of sexual abuse against N.B. and A.M.[10]

"Mootness arises when controversy between the parties no longer exists such that a court can no longer grant relief in the matter."[11] "This Court will

[10] *Massey*, 2024 WL 3443572, at *4-8.

[11] *Mentor Graphics Corp. v. Shapiro*, 818 A.2d 959, 963 (Del. 2003).

ordinarily decline to decide moot issues.'[12] "The doctrine of mootness is grounded in the policy against wasting judicial resources on academic disputes."[13] Because an *in-camera* hearing pursuant to section 3508 was held by the Superior Court on remand, any decision now on whether the Superior Court erred in denying Massey's request for a section 3508 *in-camera* proceeding would amount only to an impermissible advisory opinion.[14] By virtue of the *in-camera* hearing held by the Superior Court on remand, Massey's claim that the court erred in denying his request is moot.

[12] *American Littoral Soc., Inc. v. Bernie's Conchs, LLC*, 2008 WL 2520634, at *2 (Del. June 24, 2008) (cleaned up).

[13] *Diamond State Port Corp. v. International Longshoremen's Assoc.*, 2011 WL 891201, at *1 (Del. Ch. Feb. 24, 2011) (cleaned up).

[14] *Sannini v. Casscells*, 401 A.2d 927, 930 (Del. 1979).

II. BECAUSE TRIAL COUNSEL AFFIRMATIVELY WAIVED HIS CLAIM THAT EVIDENCE OF PRIOR ALLEGATIONS OF SEXUAL ABUSE OF THE COMPLAINANTS SHOULD HAVE BEEN ADMITTED AT TRIAL TO SHOW COMPLAINANTS' PRIOR KNOWLEDGE OF SEXUAL ACTIVITY, HIS CLAIM IS NOT ENTITLED TO REVIEW.[15]

Question Presented

Whether Massey can seek review of his claim that evidence of prior allegations of sexual abuse of L.M. and M.M. should have been admitted at trial to show the complainants' knowledge of sexual acts from a source other than Massey where trial counsel affirmatively waived such claim on remand.

Standard and Scope of Review

This Court reviews the Superior Court's rulings on the admission of evidence for abuse of discretion when there is a proper objection.[16] However, "[e]videntiary issues that are affirmatively waived are not reviewable on appeal."[17]

---

[15] Because Claim II and a portion of Claim III of Appellant's Second Amended Opening Brief concern Massey's claim that evidence of alleged past incidents of sexual abuse pertaining to the complainants was admissible at trial to show that they had a source of sexual knowledge separate and distinct from the abuse alleged, the State responds to those claims together.

[16] *Baumann v. State*, 891 A.2d 146, 148 (Del. 2005).

[17] *Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016); *Pumphrey v. State*, 2019 WL 507672, at *3 (Del. Feb. 8, 2019); *Jones v. State*, 2015 WL 6941516, at *3 (Del. Nov. 9, 2015).

Argument

On the eve of Massey's 2023 trial, defense counsel sought to introduce evidence that L.M. and M.M. made allegations in August 2017 when they were three and four-years-old, respectively, that their then-12-year-old half-brother, N.M., had touched their vaginas with his hand, tried to put his finger in M.M.'s buttocks, and made M.M. put his penis inside her mouth.[18] (A-18-34; A-61-87). Massey claimed that "the prior claims of sexual abuse were relevant to show an antecedent knowledge of sexual activity – before the accusations of sexual abuse against the[ir] father, the daughters [L.M. and M.M.] clearly had knowledge of sexual activity as proven through their allegations."[19] (A-19-21). The State opposed Massey's motion, arguing that, although the State did not prosecute, there was no evidence indicating the

[18] Although Massey initially also moved to introduce evidence of a babysitter's statements about sexual contact between L.M. and M.M. and an allegation against Massey M.M. made in 2018, unrelated to the current charges (A-18-34), Massey subsequently withdrew his request to introduce evidence of these incidents before trial. (A-66-67, A-77-78; B306-07). He has thus waived any such claims.

[19] Massey also made the contradictory argument that L.M. and M.M. had fabricated the allegations against N.M. (A-18-25; B302-18). Trial counsel informed the court that, if the allegations were admissible at trial, he was "going to argue to the jury that, … there's a real risk, a real possibility, it was fabricated…. And if it wasn't fabricated, then they've been exposed to prior sexual abuse and they may be putting it onto my client." (A-83).

prior sexual abuse allegations were false. (A-35-44). The State also contended that the allegations against N.M. were dissimilar to the allegations against Massey and were thus irrelevant and would only serve to confuse the jury and create a trial within a trial. (A40-42). The Superior Court ultimately denied Massey's motion, finding Massey failed to establish a proper purpose for introducing the evidence. (B39-40).

After the jury's verdict, Massey moved for a new trial. (A-45-53). In denying Massey's motion, the court noted that it "continue[d] to believe that an appropriate purpose for introduction of this evidence was not shown by [Massey]."[20]

In his opening brief on appeal, Massey argued that the court abused its discretion by excluding evidence of L.M.'s and M.M.'s allegations against N.M. (Opening Br. 24-32). Massey contended that "[r]egardless of the truth or falsity of the alleged prior sexual interactions or sexual abuse of the complaining witnesses[,] the evidence was admissible to show how two girls, of tender years, could have had knowledge – apart from the alleged abuse – of sexually mature subject matter and the ability to articulate such." (*Id.* 26). Massey also claimed that undisclosed evidence that N.M. and L.M. had made

[20] *Massey*, 2023 WL 2384784, at *1-2.

allegations in 2015 that A.M., L.M.'s then-11-year-old cousin, allegedly engaged in penile-vaginal intercourse with then-2-year-old L.M., would have also shown how L.M. acquired knowledge of sexual interaction, putting her in a position to conjure false allegations. (*Id.* 33-39).

Subsequently, this Court granted the State's unopposed motion to remand this case to afford Massey the opportunity to ask L.M. and M.M. at an evidentiary hearing whether their prior allegations against N.M. were false, to allow any missing record to be completed concerning L.M.'s allegation against A.M., and, to the extent that Massey claimed that allegation was false, to secure a complete evidentiary record as to falsity on that claim as well. (B280-88).

At the *in-camera* hearing, Massey asked L.M. and Inga about L.M.'s 11-year-old cousin A.M. allegedly engaging in penile-vaginal intercourse with two-year-old L.M. in 2015. L.M. was unable to answer any questions regarding this incident because she had no recollection of the incident. (B318-20, 325-29). Inga also had little recall of the incident, stating that a babysitter had called her at work to report that N.M. had told a teenager that N.M. had observed A.M., with his pants down, insert his penis into L.M. (B348-58,

364-69, 379-80). The State also played L.M.'s 2015 CAC interview in which she states that A.M. touched her vagina and butt. (B289, 318-20).

Massey also asked L.M., M.M., and Inga about the 2017 incident where 12-year-old N.M. allegedly touched his half-sisters, 4-year-old L.M. and 3-year-old M.M.'s, vaginas with his hand, tried to put his finger in M.M.'s buttocks, and made M.M. put his penis inside her mouth. L.M. was unable to answer questions regarding this incident because she had no recollection of the incident other than going to the hospital to see if N.M. had done anything wrong. (B320-24, 329-36). M.M. also had no recollection. (B339-46). L.M. stated, however, that they do not see N.M. anymore because their mother does not want them to see him. (B320).

When asked about the 2017 incident involving N.M., Inga testified that Massey told her that L.M. had woken him and said that N.M. had touched her private parts and made M.M. suck his penis. On the drive to the hospital, L.M. told Inga that N.M. asked M.M. to suck his penis, which Inga reported to police. (B358-62, 370-78). After the incident, Inga banned N.M. from the house. (B376). Inga also indicated that she still believed the girls' statements. (B378).

The State also played L.M. and M.M.'s 2017 CAC interviews in which L.M. disclosed that N.M. had touched her vagina and butt, and M.M. made no disclosure. (B290-91, 322-24, 341-43).

At the evidentiary hearing and in subsequent briefing below, Massey again contradictorily argued that, if he had failed to make a showing that the complainants' prior allegations of molestation were false, the alleged prior incidents involving A.M. and N.M. were still relevant and admissible to show how L.M. and M.M. gained sexual knowledge at such a young age. (B310-11, 387-92, 406-07). However, Massey subsequently abandoned his argument about the prior alleged incidents involving N.M. and A.M. being admissible to prove "sexualization" of the children, recognizing it was at odds with his "falsity" argument:

> THE COURT: There's one argument that the information about these incidents should have been explored and you should have been allowed to explore to determine whether there was any – I'm going to use the word – falsity in what was alleged and that that might be cross-examination. But there is a kind of second or different argument that I thought you were making that somehow the information about these incidents showed some sort of – this is my term – sexualization of these two young girls, and you felt that that was somehow relevant in this case.
>
> And they seem to be two different types of arguments. Can you tell me, [defense counsel], am I right? Are you making two arguments, or am I misreading what you're saying?

[DEFENSE COUNSEL]: Your Honor, I don't think you're misreading it. I think the primary – I think the primary argument and the purpose for putting the motion in place to begin with was to challenge the credibility.

THE COURT: And this is, again, what I call the falsity argument.

[DEFENSE COUNSEL]: Yes, the credibility issue.

THE COURT: Right.

[DEFENSE COUNSEL]: The second argument brings with it additional evidentiary concerns.

THE COURT: Go ahead. Explain to me what you mean.

[DEFENSE COUNSEL]: Well, it would – it's difficult to actually say: Okay. This person was sexually abused. Confirmed. Therefore, we have an expert, and the expert says: Okay. Because of that, my opinion is – this is the way that child internalizes that, and this is the impact it has, and this is the affect on future actions.

THE COURT: And you're trying to say that because – again, assuming for purposes of argument that a child was sexually abused that should somehow bear on their credibility from a subsequent?

[DEFENSE COUNSEL]: No. No, it's two separate issues.

THE COURT: Okay.

[DEFENSE COUNSEL]: That issue brings with it other additional concerns with getting it in front of a jury or whether it's admissible in any fashion whatsoever.

THE COURT: Okay.

[DEFENSE COUNSEL]: So I think the bigger issue is the falsity issue.

THE COURT: Okay.

[DEFENSE COUNSEL]: That's why I think strategically for trial purposes I'm not sure that we can ride both horses there. That trial counsel has to say this is what I'm alleging. This is the evidence I'm alleging to get in front of the jury, and this is the purpose for it.

THE COURT: All right.

[DEFENSE COUNSEL]: Thinking about it further, I'm not sure that both prongs would be strategically advantageous to the client.

THE COURT: Well, are you arguing both prongs now as some reason for relief, or are you abandoning this general sexualization argument?

[DEFENSE COUNSEL]: May I have a moment, Your Honor?

THE COURT: Yeah. Sure.

[Defense counsel], these mikes are very sensitive. Turn them off so we don't pick up any discussions you have with your client.

THE BAILIFF: I will turn on the white noise, Your Honor.

THE COURT: Okay.

[Defense counsel], whenever you are ready.

[DEFENSE COUNSEL]: I don't believe the evidence is present in the hearing that I can continue with what you've termed sexualization.

THE COURT: Okay.

[DEFENSE COUNSEL]: If that answers the Court's question.

THE COURT: It does.

(B418-22).

As the Superior Court noted in its opinion on remand, Massey affirmatively abandoned his argument that the prior alleged incidents involving N.M. and A.M. are admissible to prove how L.M. and M.M. gained sexual knowledge.[21] Accordingly, his claim is not reviewable on appeal.

Even if not waived, Massey's argument is without merit because of the remoteness and dissimilarity between the allegations involving A.M. and N.M. and the allegations involving Massey.

Delaware's Rape-Shield statute, 11 *Del. C.* § 3508, is designed to protect rape and sexual assault victims from attacks on their credibility.[22] Under the statute, "[e]vidence of the prior sexual conduct of an alleged sexual assault victim is admissible only when the statutory procedure is followed and the court determines that the evidence proposed to be offered by the defendant

[21] *See Massey*, 2024 WL 3443572, at *6.

[22] *Scott v. State*, 642 A.2d 767, 771 (Del. 1994); 11 *Del. C.* § 3508.

regarding the sexual conduct of the alleged victim is relevant" in attacking the credibility of the complaining witness.[23]

Here, Massey sought to admit evidence of the acts alleged to have been committed by N.M. and A.M. to show a source for the complainants' sexual knowledge other than Massey, while recognizing that such argument contradicted his argument that such evidence was relevant to attack the complainants' credibility. Although Massey abandoned his argument on remand, the Superior Court nevertheless found that the proposed evidence regarding N.M. was not relevant.[24] The court agreed with the State that the "acts alleged to have been committed by [N.M.] and A.M. are sufficiently different in kind from those of which [Massey] was convicted, and as such would otherwise be irrelevant or inadmissible at trial."[25] The Superior Court's ruling was correct.

The plain language of 11 *Del. C.* § 3508 limits the admission of prior sexual history to only that necessary to attack a victim's credibility. Here, Massey's argument that the evidence is relevant to show the source of the

[23] *Wright v. State*, 513 A.2d 1310, 1314 (Del. 1986); 11 *Del. C.* § 3508.
[24] *Massey*, 2023 WL 2384784, at *2; *Massey*, 2024 WL 3443572, at *8.
[25] *Id.*

complainant's sexual knowledge, which presumes that the allegations were true, is inconsistent with Massey's "primary" argument that the prior allegations were false. Because Massey's stated purpose is not to attack the complainants' credibility, he cannot establish relevancy under the statute.

Furthermore, even if evidence of a young victim's sexual history is relevant under the statute to show a source for the victim's sexual knowledge, Delaware courts have held that prior sexual activity is inadmissible where, as in this case, the prior acts are generally different in kind from those alleged in the criminal complaint against the defendant and remote.[26]

Here, the prior allegations involving A.M. and N.M. are not sufficiently similar to the alleged sexual acts that Massey committed to provide a relevant basis for their admission to show how L.M. and M.M. gained prior sexual knowledge at such a young age. The allegations against A.M. included allegations by L.M. and N.M. that A.M.'s penis touched the inside of L.M.'s vagina, A.M. touched L.M.'s buttocks, and A.M. kissed L.M. in 2015. (B1-

[26] *See State v. Mason*, 1994 WL 1877137 (Del. Super. Ct. Aug. 16, 1994) (holding evidence of prior sexual assault upon minor victim inadmissible where prior act remote and dissimilar), *aff'd on other grounds*, 658 A.2d 994 (Del. May 16, 1995); *State v. Adkins*, 2012 WL 5458053 (Del. Super. Ct. Mar. 28, 2012) (finding alleged prior sexual contact irrelevant where prior act dissimilar), *rev'd on other grounds*, 2013 WL 2636009 (Del. June 11, 2013).

12). The allegations against N.M. included allegations by L.M. and M.M. that N.M. touched their vaginas with his hand and N.M. made M.M. put his penis in her mouth in 2017. (A-26-29).

Although Massey's touching of L.M. and M.M.'s vaginas with his hands resembles the prior alleged acts by N.M., the nature of the remote allegations against N.M. and A.M. bear no resemblance to L.M.'s and M.M.'s testimony and statements that described Massey exposing his penis to them and rubbing his penis on L.M.'s leg, ejaculating on L.M.'s hand, masturbating in front of them, licking their vaginas with his tongue, soliciting L.M. to touch his penis and perform fellatio, and sticking his finger in their anuses.[27] As such, this alleged past sexual behavior could not have been the source of the girls' knowledge and thus, was of "no probative value to the jury's assessment of whether the child[ren] might have fabricated or imagined the specific allegations against the defendant."[28]

[27] Although the allegations against N.M. included that he forced M.M. to put his penis in her mouth, Massey was alleged to have solicited L.M., not M.M., to perform fellatio on him.

[28] *State v. Warren*, 711 A.2d 851, 856 (Me. 1998); *State v. Dunlap*, 640 N.W.2d 112, 119-20 (Wis. 2002); *State v. Sloan*, 912 S.W.2d 592, 598 (Mo. Ct. App. 1995).

In addition to being irrelevant, the probative value of evidence of alleged earlier abuse by N.M. and A.M., which took place two to four years before Massey was alleged to have abused the complainants, is too remote in time to have any bearing on L.M.'s and M.M.'s ability to recount recent events involving Massey, and is substantially outweighed by the risk that the admission of such evidence would simply serve to confuse the jury.[29]

[29] *See* D.R.E. 403; *Massey*, 2024 WL 3443572, at *8.

III. BECAUSE THIS CASE WAS REMANDED TO ALLOW ANY MISSING RECORD TO BE COMPLETED BASED ON THE STATE'S ALLEGED WITHHOLDING OF *BRADY* MATERIAL CONCERNING A PRIOR ALLEGATION OF SEXUAL ABUSE AGAINST COMPLAINANTS' COUSIN A.M. IN 2015, AND THE COURT DETERMINED, FOLLOWING AN *IN-CAMERA* HEARING PURSUANT TO 11 *DEL. C.* § 3508, THAT ANY EVIDENCE RELATING TO A.M. WOULD HAVE BEEN INADMISSIBLE AT TRIAL, MASSEY HAS FAILED TO ESTABLISH A REASONABLE PROBABILITY OF A DIFFERENT OUTCOME HAD THE EVIDENCE BEEN DISCLOSED TO THE DEFENSE PRIOR TO TRIAL.

QUESTION PRESENTED

Whether Massey has established that the alleged suppression of evidence concerning a prior allegation of sexual abuse against the complainants' cousin A.M. created a reasonable probability of a different outcome had the evidence been disclosed to the defense prior to trial where the case was remanded to allow any missing record to be completed based on the State's alleged withholding of *Brady* material, and the Superior Court determined, following an *in-camera* hearing pursuant to 11 *Del. C.* § 3508, that any evidence relating to A.M. would have been inadmissible at trial.

STANDARD OF REVIEW

This Court reviews *Brady* violation claims *de novo*.[30]

[30] *Starling v. State*, 130 A.3d 316, 325 (Del. 2015).

Evidentiary issues that are affirmatively waived by a party are not reviewable on appeal.[31]

MERITS

Massey argues that the State committed a *Brady* violation by failing to turn over evidence reflecting prior abuse of L.M. by her cousin, A.M., prior to trial, which could have cast doubt on her credibility given the lack of corroborating evidence to buttress the allegations against him. (Opening Br. 33-39).

Massey raised a similar argument below on remand, claiming that he should be granted a new trial based on this *Brady* violation. (B387-92, 406-07). The Superior Court, however, rejected Massey's *Brady* claim and ultimately found Massey failed to establish any prejudice given that the court found that the evidence would not be admissible at trial.[32] The court also found there was "significant corroborating evidence of L.M.'s allegations against [Massey] and subsequent testimony at trial that [Massey's] semen was found on a pink blanket used by [Massey] in the family living room [that] L.M. testified that [Massey] would ejaculate on."[33] The court further found that Massey was not prejudiced under *Brady* because he was well aware of the allegation involving his daughter, L.M., and his

[31] *Stevenson*, 149 A.3d at 509.

[32] *Massey*, 2024 WL 3443572, at *3-4.

[33] *Id.*

nephew, A.M., as he and the rest of his family was involved in its reporting and he was the one who told the PSI investigator about the allegation.[34] Finally, the court found that, "even if [Massey] was not aware of the police report regarding the incident involving A.M., he is not prejudiced because he has now, following the evidentiary hearing, had the chance to cross-examine L.M. about her disclosure at the CAC [and] … also had the opportunity to cross-examine Inga about the disclosure and subsequent actions taken by Inga and by [Massey] following the allegations brought forth by [N.M.]" Because Massey failed to present any evidence as to falsity, either by L.M. or by Inga, regarding the allegations against [A.M.],"[35] the court found that "any evidence relating to A.M. would be inadmissible in trial under § 3508 and the Delaware Rules of Evidence."[36] The Superior Court's ruling was correct.

To establish a *Brady* violation, a defendant must show (1) evidence exists that is favorable to the accused, because it is either exculpatory or impeaching; (2) that

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[34] *Id.*

[35] In its analysis of whether the State committed a *Brady* violation by failing to turn over evidence reflecting prior abuse of L.M. by her cousin, A.M., which had been reported at the time by N.M., it appears that the Superior Court mistakenly referred to N.M. instead of A.M. twice. Specifically, it appears that the Superior Court mistakenly referred to N.M. instead of A.M. when it stated in its *Brady* analysis that "the allegations made by L.M. and M.M. *against his son, [N.M.]*" and "[t]here has been no evidence presented by Defendant as to falsity, either by L.M. or by Inga, *regarding the allegations against [N.M.]*." *See id.* at *4.

[36] *Id.*

evidence is suppressed by the State; and (3) its suppression prejudices the defendant.[37] "[T]here is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict."[38] Reasonable probability of a different result is shown when the absence of the undisclosed evidence "undermines confidence in the outcome of the trial."[39] Here, even assuming the allegations against A.M. were *Brady* material, at the most, Massey has a claim of delayed disclosure.

"When a defendant is confronted with delayed disclosure of *Brady* material, reversal will be granted only if the defendant was denied the opportunity to use the material effectively."[40] Here, Massey cannot demonstrate a *Brady* violation because the untimely disclosure did not deprive him of the opportunity to effectively use the allegations against A.M. at the 3508 hearing held by the Superior Court on remand and to cross-examine L.M. and Inga about the allegations. Because Massey presented no evidence as to falsity at the hearing regarding the allegations against A.M., the court properly found that any evidence relating to A.M. would be

[37] *State v. Wright*, 67 A.3d 319, 324 (Del. 2013).

[38] *Strickler v. Greene*, 527 U.S. 263, 281 (1999); *United States v. Bagley*, 473 U.S. 667, 682 (1985).

[39] *Jackson v. State*, 770 A.2d 506, 516 (Del. 2001).

[40] *Rose v. State*, 542 A.2d 1196, 1199 (Del. 1988); *White v. State*, 816 A.2d 776, 778 (Del. 2003).

inadmissible at trial under section 3508 and the Delaware Rules of Evidence 608 and 403. Therefore, Massey cannot show that there is a reasonable probability that the result would have been different had the State disclosed the evidence reflecting allegations of prior abuse of L.M. by A.M. in a timely manner.

Massey also contends that "the disclosure of the abuse [of L.M. by A.M. in 2015] could have opened the door for him to utilize an expert as to how a two-year-old child [L.M.] copes with sexual abuse, how it influences her future behavior and if it could result in subsequent false allegations." (Opening Br. 38-39). Massey raised this argument below after the case was remanded for an evidentiary hearing. (B387-92, 406-07, 418-22). However, because Massey later abandoned his argument about the prior alleged incident being admissible to prove "sexualization" of the complaining witnesses (*see, supra*), he has affirmatively waived this argument. Accordingly, his claim is not reviewable on appeal.

Even if not waived, Massey's argument is without merit. Any potential testimony by an expert would be inadmissible because such opinion would directly and indirectly attack L.M.'s credibility, which would usurp the jury's function.[41]

[41] *See State v. Herbert*, 2022 WL 3211004, at *4, *7-8 (Del. Super. Ct. Aug. 8, 2022), *aff'd*, 2023 WL 7313383 (Del. Nov. 7, 2023); *Floray v. State*, 720 A.2d 1132, 1136 (Del. 1998); *Wittrock v. State*, 1993 WL 307616, at *2 (Del. July 27, 1993); *Wheat v. State*, 527 A.2d 269 (Del. 1987).

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING 8-YEAR-OLD M.M. TO HOLD A SMALL STUFFED ANIMAL AS A SPECIAL ACCOMODATION DURING HER TRIAL TESTIMONY.

QUESTION PRESENTED

Whether the trial judge abused his discretion by permitting 8-year-old complaining witness M.M. to hold a small stuffed animal during her testimony in a sexual abuse trial.

STANDARD OF REVIEW

This Court reviews trial management decisions for an abuse of discretion.[42]

MERITS

Before testimony began on the first day of trial, the State notified Massey that 8-year-old M.M. and 10-year-old L.M. wanted to hold a stuffed animal while testifying. (A-106a). Massey objected, and the parties addressed the issue with the judge before trial began. (A-106a). The State explained that the animals were small, and it was "something that was recommended to them by their counselor to help them feel more comfortable in trial." (A-106a). The judge overruled Massey's objection, ruling that it would allow L.M. and M.M. to hold the stuffed animals close to them and instructed the State to tell them that they were not allowed to hold the

[42] *Czech v. State*, 945 A.2d 1088, 1095 (Del. 2008).

animals up or wave them around, or otherwise make them noticeable to the jury. (A-106a).

Subsequently, 8-year-old M.M. appeared as the first witness. (B51-52). M.M., who had to use a booster seat because the jury and defense had difficulty seeing her, brought a small stuffed animal with her to the stand. (B52). M.M., who was obviously distressed to be testifying, clutched the animal in her hand while she testified, and the animal was barely visible.[43] Massey did not make any further objections during trial that would indicate M.M. was holding up the animal, waving it around, or otherwise making it noticeable to the jury. Although the court had ruled that L.M. could also hold a stuffed animal, she did not bring one to the stand when she subsequently testified.[44]

After the verdict, Massey moved for a new trial, arguing that the court failed to find a substantial need that would allow M.M. to hold a stuffed animal during her testimony. (A-45-53). The trial judge rejected Massey's claim, explaining that the State had "justified the use of the teddy bear," which was barely visible, having "told [him] that M.M. and L.M.'s counselors had recommended that the girls be able to have stuffed animals to make them feel more comfortable during trial."[45] He further

[43] *See Massey*, 2023 WL 2384784, at *3.

[44] *Id.* at *2.

[45] *Id.* at *3.

found that M.M.'s testimony during trial was limited in detail or specific recollection of events, and thus her CAC statement was introduced.[46] The judge concluded that M.M. and L.M. were always going to be sympathetic witnesses and found that the bear "added nothing to the sympathy factor the minor witness created."[47] The judge also noted that he instructed the jury to not allow sympathy in any way guide their verdict.[48]

On appeal, Massey argues that the Superior Court abused its discretion by allowing M.M. to carry the small stuffed comfort animal to the stand and hold it while testifying. (Opening Br. 40-42). Relying on *Czech v. State*[49] and *Gomez v. State*,[50] Massey contends that the State failed to show a substantial need for the special accommodation and thus the accommodation violated his right to a fair trial. (*Id.*). Massey's claims are unavailing.

The General Assembly has recognized that child victims and witnesses may be accorded "additional consideration and different treatment than that usually required for adults."[51] In *Czech*, this Court explained that special accommodations

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[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] 945 A.2d 1088.

[50] 25 A.3d 786 (Del. 2011).

[51] 11 *Del. C.* § 5131; *see Gomez*, 25 A.3d at 799; *Czech*, 945 A.2d at 1096-97.

should be made only if the requesting party has demonstrated a "substantial need" for their implementation.[52]

Here, the trial judge did not abuse his discretion by allowing M.M. to hold a small stuffed animal while she testified. Unlike in *Gomez* and *Czech*, the State demonstrated a substantial need for the accommodation.[53] The State had explained that L.M. and M.M.'s counselors had recommended that the complainants, who were then 8 and 10, be able to have stuffed animals to make them feel more comfortable during trial. (A-106a). And, the trial judge took steps to address the risk of unduly eliciting sympathy by having the prosecutor instruct them not to draw the jury's attention to the stuffed animal. (*Id.*). Further, any error in allowing the stuffed animal was harmless. As the trial judge recognized, the small bear that M.M. carried was barely visible, and M.M.'s trial testimony was limited in detail and recall, thereby requiring the admission of her section 3507 CAC statement.[54] Accordingly, Massey's claim is without merit.

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[52] *Id.* at 1094.

[53] *Id.* (finding judge's *sua sponte* allowance of support person for child witness was inappropriate without requesting party demonstrating a "substantial need"); *Gomez*, 25 A.3d at 799 ("It would have been appropriate for the trial judge … to have required the prosecutor to demonstrate a substantial need for the additional special accommodation of the teddy bear.").

[54] *See Czech*, 945 A.2d at 1094 (finding any prejudice harmless where prosecution presented substance of case through forensic interviews).

V. THE SUPERIOR COURT DID NOT ERR IN PRECLUDING THE DEFENSE FROM PRESENTING EVIDENCE ABOUT THE PRIOR MOLESTATION ALLEGATIONS.

Question Presented

Whether the Superior Court erred in excluding evidence about the prior molestation allegations, thus precluding Massey from presenting the defense that the complaining witnesses' knowledge came from previous sexual abuse.

Standard and Scope of Review

This Court normally reviews a trial court's evidentiary rulings for an abuse of discretion.[55] But this Court reviews *de novo* alleged constitutional violations related to a trial court's evidentiary rulings.[56] However, where the appellant did not raise the issue below, his claim is waived unless he can establish plain error.[57] However, evidentiary issues that are affirmatively waived by a party are not reviewable on appeal.[58]

Merits

Massey argues that in denying his 3508 motion and excluding prior molestation evidence, the Superior Court violated his constitutional right to present

[55] *Fuller v. State*, 860 A.2d 324, 329 (Del. 2004).

[56] *Banks v. State*, 93 A.3d 643, 646 (Del. 2014).

[57] Supr. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[58] *Stevenson*, 149 A.3d at 509.

a complete defense to the charge. (Opening Br. 43-48). Specifically, Massey contends that, "in order to have been afforded the right to a complete defense, [he] must have been afforded the opportunity to present the defense that the complaining witnesses' knowledge came from previous sexual abuse." (*Id.* 48). Because Massey abandoned his argument below about the prior alleged incidents being admissible to prove "sexualization" of the complaining witnesses (*see, supra*), he has affirmatively waived his argument that he should have been able to present evidence concerning the prior incidents to present the defense that the complaining witnesses' knowledge came from previous sexual abuse. Accordingly, his claim is not reviewable on appeal.

Even if not waived, Massey's argument is without merit. "A defendant is only constitutionally guaranteed the opportunity to present the trier-of-fact evidence is *relevant* and *material* and … *vital* to the defense."[59] While "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, neither the Confrontation Clause nor the Compulsory Process Clause grant him the right … to present irrelevant evidence at trial."[60] For the reasons discussed above, the prior sexual abuse allegations involving A.M. and N.M. were irrelevant

[59] *Lum v. State*, 1989 WL 160439, at *2 (Del. Dec. 20, 1989) (cleaned up).

[60] *Id.* (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986); *Wright*, 513 A.2d at 1314) (cleaned up); *cf.* D.R.E. 402 (irrelevant evidence inadmissible).

because the prior alleged acts were remote and different in kind from the abuse alleged in this case. (*See, supra*).

In addition, the Delaware Rape-Shield Law prohibits a defendant from offering "evidence …. to attack the credibility of the complaining witness" unless "the statutory procedure is followed and the court determines that the evidence proposed to be offered by the defendant regarding the sexual conduct of the alleged victim is relevant."[61] For the reasons discussed in Argument VI, the Superior Court did not err in denying Massey's 3508 motion and thus precluding Massey from introducing evidence of L.M. and M.M.'s prior sexual abuse allegations against N.M. (*See, infra*).

[61] *Wright*, 513 A.2d at 1314.

VI. FOLLOWING THE *IN-CAMERA* HEARING HELD ON REMAND, THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY RULING THAT L.M. AND M.M.'S PRIOR SEXUAL ABUSE ALLEGATIONS AGAINST N.M. WERE INADMISSIBLE UNDER 11 *DEL. C.* § 3508.[62]

Question Presented

Whether, following the *in-camera* hearing held on remand pursuant to 11 *Del. C.* § 3508, the Superior Court abused its discretion in ruling that L.M. and M.M.'s prior sexual abuse allegations against N.M. were irrelevant and inadmissible.

Standard and Scope of Review

This Court reviews the Superior Court's rulings on the admission of evidence for abuse of discretion when there is a proper defense trial objection.[63]

Merits

Massey argues that the Superior Court erred in ruling that L.M. and M.M.'s prior unlawful sexual abuse allegations against N.M. were inadmissible because he failed to establish that the prior allegations were false.[64] (Supp. Opening Br. 6-9). Massey contends that the court misconstrued this Court's decision in *Bryant* because "the *Bryant* court did not hold falsity, or an indicia thereof, was required before prior

[62] This argument responds to Claim I in Appellant's Supplemental Opening Brief.

[63] *Baumann*, 891 A.2d at 148.

[64] Massey does not argue that the court erred in ruling that Massey failed to establish falsity regarding the prior allegations against A.M. and has thus waived any such claim.

sexual assault claims were admissible to challenge a witness' credibility." (*Id.*). According to Massey, "[w]hen the [*Bryant*] [C]ourt held that "even inconclusive allegations are admissible to challenge credibility, the [C]ourt accounted for the fact that the issue of falsity potentially could not be established." (*Id.*). Massey contends that because N.M. was not prosecuted and there is no corroborating evidence to support L.M. and M.M.'s allegations against N.M., the evidence was "inconclusive" as to falsity, and thus, "the jury is entitled to hear these allegations in weighing the credibility of the complaining witnesses, pursuant to *Bryant*." (*Id.*). Massey's claims are unavailing.

On the eve of Massey's 2023 trial, Massey filed a motion and offer of proof under 11 *Del. C.* § 3508, contradictorily alleging that prior "unsubstantiated" allegations of sexual abuse of then-four-year old L.M. and then-three-year-old M.M. by their 12-year-old half-brother N.M. are relevant to: (1) attack the credibility of M.M. and L.M., and (2) show M.M. and L.M.'s source of sexual knowledge at a tender age.[65] (A-19-34; B13). Specifically, Massey sought to introduce evidence that L.M. and M.M. made allegations, which were reported to the police, in August 2017, when they were three and four, respectively, that their then-12-year-old half-

[65] Although Massey's 3508 motion initially addressed two other allegations, Massey later abandoned those issues and has not appealed those claims. *See, supra*; B306-07). On remand, Massey also abandoned his claim that the evidence was relevant to show complainants' source of sexual knowledge. *See, supra*.

brother, N.M., had touched their vaginas with his hand, tried to put his finger in M.M.'s buttocks, and made M.M. put his penis inside her mouth. (A-18-34; A-61-87). Although there was no evidence that L.M. and M.M. had recanted their allegations or that they had lied, Massey nevertheless alleged that L.M. and M.M.'s prior allegations were "found to be unsubstantiated," which "shows that L.M. and M.M.'s credibility has been and continues to be questionable." (A-20-21). In support of his claim that the allegations were "unsubstantiated," Massey claimed that the State "refused to prosecute the case noting 'insufficient evidence' and 'numerous inconsistencies in L.M.'s statements.'" (*Id.*).

The State opposed Massey's motion, arguing that, although the State did not prosecute, there was no evidence indicating the prior sexual abuse allegations were false and thus Massey's "offer of proof", as required by section 3508, was insufficient to show false allegations. (A-35-44; B33-34, 39). The Superior Court denied Massey's request for *in-camera* hearing to question the complainants regarding the 2017 prior allegations against N.M., finding that Massey failed to establish sufficient evidence that the allegations were false. (A-86-87). After the verdict, Massey moved for a new trial, arguing the court erred in not applying *Bryant*. (A45-53). The court denied Massey's motion, finding *Bryant*

distinguishable and that Massey failed to establish an appropriate purpose for introduction of this evidence.[66]

Subsequently, this Court remanded this case to the Superior Court with instructions to, *inter alia,* hold a hearing pursuant to 11 *Del. C.* § 3508 and to reconsider Massey's 3508 motion in light of the expanded record. During the *in-camera* hearing held in February 2024, Massey had the opportunity to directly confront L.M., M.M., and Inga regarding the prior allegations against N.M. and A.M. in order to develop a full record on his falsity claim. L.M. and M.M. did not recant any of the prior allegations, and their testimony "essentially buttressed their original reports from 2015 [and] 2017, … with allowances made for the young ages of the girls and the dimming of memories over time."[67] (B315-46).

Following briefing and argument, the Superior Court denied Massey's 3508 motion based on the expanded record.[68] The court again distinguished *Bryant*, noting that *Bryant* did not address section 3508 and the allegations in *Bryant* were demonstrably false because the alleged victims recanted some statements.[69] Relying instead on *State v. Bailey*,[70] the court found that, after the *in-camera* hearing, Massey

[66] *Massey*, 2023 WL 2384784, at *1-2.

[67] *Massey*, 2024 WL 3443572, at *6.

[68] *Id.* at *4-8.

[69] *Id.*

[70] 1996 WL 587721 (Del. Super. Ct. Sept. 12, 1996).

had still "failed to make any showing of falsity, only self-serving assertions that the prior allegations may have been false accusations."[71] The court noted that "[t]here have been no recantations of any prior allegations against either [N.M.], the half-brother to both alleged victims, or against A.M., their cousin."[72] The court further noted that "both girls maintained [in their 2021 CAC interview] that something had occurred with [N.M.]."[73]

The court also noted that the Rhode Island Supreme Court's holding in *State v. Oliveira*,[74] a case cited in *Bryant* for the possibility that prior allegations of sexual assault may be admissible to challenge credibility where falsity evidence is inconclusive, has since been limited to require a defendant to at least present some indicia tending to show that the prior accusation was false to avoid the risk of a determination that its probative value is outweighed by its prejudicial effect.[75] Because Massey failed to "even present[] a minimal showing that the prior allegations were, in fact, false, and there are no indicia tending to show that the allegations were false," the court ruled that the "allegations presented in the 3508 Motion and at the remand hearing are irrelevant [and inadmissible] because they are

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[71] *Massey*, 2024 WL 3443572, at *7.

[72] *Id.*

[73] *Id.*

[74] 576 A.2d 111 (R.I. 1990).

[75] *Id.*

not probative of the complaining witness' character for truthfulness."[76] The court also found that the proffered evidence would be inadmissible under D.R.E. 403.[77]

The Superior Court did not err in denying Massey's 3508 motion after the remand hearing. The court properly found that the allegations against N.M. were irrelevant under D.R.E. 401, and the probative value of the evidence was also substantially outweighed by its prejudicial effect under D.R.E. 403.

In *Bryant*, this Court concluded that the trial court abused its discretion by excluding prior allegations of sexual abuse without making further effort to determine their falsity.[78] Although there was no evidence that the complainants had recanted, this Court found that the record was incomplete, and the court should, at a minimum, have allowed the defendant to inquire of the complainants directly, out of the presence of the jury, whether any of the excluded incidents were false, noting that an admission of falsity would have rendered them admissible under D.R.E. 608(b).[79]

Here, unlike in *Bryant*, Massey has now had the opportunity to inquire of L.M. and M.M. whether the claims regarding N.M. were false. As the Superior Court

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[76] *Id.*

[77] *Id.* at *8.

[78] *Bryant*, 1999 WL 507300, at *3.

[79] *Id.*

found, there is no evidence, in the expanded record, indicating that any of the prior sexual abuse allegations are false.[80]

Although this Court in *Bryant* left open the possibility that prior allegations of sexual assault may be admitted to challenge credibility even where the evidence is inconclusive as to falsity, Bryant did not address section 3508. Furthermore, Massey provides no support for his claim that the evidence here is "inconclusive" merely because the State did not prosecute N.M. and there was no corroborating evidence. As the Superior Court noted, unlike in *Bryant*, L.M. and M.M. were very young at the time of the alleged incident, and Massey failed to present any indicia tending to show that L.M. and M.M.'s allegations regarding N.M. were false.

Furthermore, the Superior Court did not abuse its discretion in finding that the evidence would be inadmissible at trial because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice.[81] Such evidence concerning alleged sexual abuse years before the alleged abuse by Massey that was different in kind (*see, supra*), is remote, and of limited relevance. And, the prejudice of such evidence would far outweigh the minimal probative value of introducing such testimony because it would confuse and mislead the jury since the

[80] *See State v. Manning*, 973 A.2d 524, 535 (R.I. 2009) (lack of prosecution not evidence that allegations false).

[81] D.R.E. 403.

allegations against N.M. would lead inexorably to a mini-trial being subsumed within the trial of the charged offenses.[82] The trial judge, therefore, was correct in preventing Massey from introducing evidence of L.M. and M.M.'s alleged previous sexual abuse against N.M.

[82] *See Bailey*, 1996 WL 587721, at *8.

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

DEPARTMENT OF JUSTICE

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Dated: December 18, 2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RHANDY MASSEY,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 131, 2023
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

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STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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