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Case Number 357,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN BERRY, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee.	)	No. 357, 2024 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE ID No. 2307003037

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

OPENING BRIEF

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NATURE OF THE PROCEEDINGS

On July 10, 2023, a grand jury approved an indictment charging Kevin Berry in connection with the May 9, 2023 homicide of Thaddeus Blackman.[1] The indictment charged Mr. Berry with:

1. Murder First Degree
2. Possession of a Firearm During Commission of a Felony (PFDCF)
3. Possession of a Firearm by a Person Prohibited (PFBPP)

At arraignment on August 22, 2023, the undersigned attorney entered his appearance.

Pretrial matters

On February 20, 2024, the trial judge granted an unopposed motion to sever the PFBPP charge.[2]

The Superior Court held a final case review on March 4, 2024.[3] The State offered a plea to Manslaughter and PFDCF and agreed to recommend the minimum mandatory sentence of seven years.[4] The plea would also dispose of Mr. Berry's pending violation of probation by reimposing the same probationary terms.[5] After a thorough colloquy,[6] Mr. Berry rejected the plea offer.[7]

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[1] A9-10.
[2] A11.
[3] A12-22.
[4] A14.
[5] *Id.*
[6] A16-20.
[7] A20.

On March 4, 2024, defense counsel informed the trial judge by letter that Mr. Berry had decided on a bench trial. The parties requested a colloquy.[8] The Court convened the parties on March 19, 2024 for a colloquy and pretrial conference.[9] After a fulsome colloquy,[10] Mr. Berry waived his right to a jury trial and signed a waiver. Then the prosecutor asked the judge to pose additional questions to Mr. Berry, in keeping with this Court's jurisprudence regarding jury trial waivers.[11] The judge asked the additional questions of Mr. Berry.[12] The judge accepted the waiver.

Given the waiver, the defense withdrew the motion to sever the PFBPP charge and it was rejoined to the indictment.[13]

Trial

Mr. Berry's case proceeded to a three-day trial beginning April 1, 2024. The State could not find one of its witnesses, Isiah Bennett, and a material witness warrant issued.[14] Near the end of the trial, the defense moved for a mistrial, because the State discussed Bennett, his proposed testimony, and relevant evidence

[8] A23.
[9] A24-44.
[10] A29-34.
[11] A34-35.
[12] A35-39.
[13] A43.
[14] A233.

in its opening statement.[15] The trial judge denied the mistrial application.[16] After one further brief witness, the State rested.[17]

After a colloquy, Mr. Berry elected not to testify.[18] The defense rested.[19]

On April 4, 2024, the trial judge found Mr. Berry guilty of all counts.[20]

Sentencing and appeal

On August 16, 2024, the Court sentenced Mr. Berry to life imprisonment for the murder charge, five years for PFDCF, and five years for PFBPP.[21]

Through counsel, Mr. Berry filed a timely notice of appeal. This is Mr. Berry's Opening Brief.

[15] A357-359.
[16] A362-363.
[17] A366.
[18] A369-371.
[19] A371.
[20] A413.
[21] A422-423; Exhibit A.

SUMMARY OF ARGUMENT

I. THE TRIAL JUDGE ERRED IN ADMITTING DARNELLA SPADY'S § 3507 STATEMENT; SHE WAS NOT A TURNCOAT WITNESS, BUT RATHER WAS UNDER THE INFLUENCE OF HEROIN AND REMEMBERED NOTHING OF THE INCIDENT OR HER STATEMENT.

This case vividly illustrates the concerns expressed by the Dissenting Justices of this Court in *McCrary v. State*.[22]

As the trial judge, acting as factfinder, noted, this trial came down to one witness: Darnella Spady. The prosecutor attempted to lay the required foundation for admission of Spady's § 3507 statement, which implicated Mr. Berry. Spady was a heroin addict and was under the influence of heroin during the incident and when making her statement. Her only answers were that she was high on heroin and did not remember. But, the prosecutor argued, that did not matter:

> Well, according to the Supreme Court's opinion in *McCray* [sic], her answers don't necessarily matter. I just need to ask the proper questions and make her available for cross-examination. But I expect she's going to qualify as what the court referred to as "a turncoat witness."[23]

Relying solely on *McCrary*, the trial judge admitted the § 3507 statement. Defense counsel had no meaningful ability to cross-examine Spady. After confirming that Spady did not remember anything, counsel ended the cross-

[22] 293 A.3d 442 (Del. 2023).
[23] A172-173.

examination. There was no way to ask substantive questions about what Spady said she saw and the various inconsistencies in her statement to the police.

This Court should reconsider its holdings in *McCrary*. In order to ensure confrontation rights are preserved, the witness must testify about both the events perceived and the statement, and whether or not the statement was true. Otherwise, there is no way to conduct a cross-examination – as this case demonstrates.

Even if this Court declines to reconsider *McCrary*, this Court should still reverse Mr. Berry's conviction, because the prosecutor failed to ask any questions about Spady's witnessing of the homicide.

STATEMENT OF FACTS

This case pertains to the broad daylight shooting of Thaddeus Blackman as he was coming out of the Lucky Stop convenience store on Gordon Street near 23rd Street on May 9, 2023. He was shot by a masked gunman wearing all black. Trial witnesses testified as follows:

Detective Joseph Wicks

Detective Wicks, the CIO, testified several times during the trial. He testified that the police were alerted to the shooting by a 911 call.[24] The ShotSpotter system also picked up three gunshots at 12:40 PM on May 9, 2023.[25]

Corporal Nakiesha Wisher

WILCOM dispatched Corporal Wisher for shots fired in the 2200 block of North Market Street.[26] She arrived to find Mr. Blackman on the ground with gunshot wounds.[27] She located and collected shell casings.[28]

Corporal James Houck

Corporal Houck works for the WPD Forensic Services Unit. Through Houck, the State introduced several crime scene photographs.[29] He also recorded a

[24] A70.
[25] A72.
[26] A76.
[27] A77.
[28] A79.
[29] A83-87.

crime scene video that was played at trial.[30] He collected and preserved three 9mm casings.[31]

Corporal Hugh Stephey

Corporal Stephey is a ballistics investigator for WPD. He explained the low probability of obtaining useable fingerprints or DNA from spent shell casings.[32] Nevertheless, he attempted to do so and placed the DNA swabbings into evidence for potential analysis.[33]

James Storey

Mr. Storey works for the Delaware State Police Forensic Firearms Unit on a contract basis.[34] As a firearm and toolmark examiner, he analyzed three casings, the lead core of a discharged bullet, and other ballistic evidence.[35] Storey opined that the three 9mm casings were all fired from the same firearm.[36]

Detective Joseph Wicks

Detective Wicks continued his investigation by collecting security camera footage from around the crime scene. He put together a compilation of clips for

[30] A88.
[31] A89.
[32] A94-95.
[33] A98.
[34] A99.
[35] A109-110.
[36] A114.

trial that, by combining various cameras, depicted events around the Lucky Stop store and environs.[37]

The interior camera showed Isiah Barnett (who did not appear for trial) and Darnella Spady enter the store.[38] Finally, Thaddeus Blackman entered and left, just before the shooting.[39]

Wicks put together another compilation video that depicted the approach of the gunman.[40] The video showed Isiah Barnett, Thaddeus Blackman, and mailman Jim DeMaio at various points on 23rd Street.[41] Through that and other videos, the State showed an individual wearing all black walk up 23rd Street, cut through an alley, then head towards Market Street on Gordon Street, where the shooting occurred. After the shooting, the individual retraced his steps, passed the mailman, and continued down 23rd Street.[42]

As the gunman walked up Gordon, Darnella Spady pushed a stroller containing her belongings down Gordon, passing the gunman.[43] Wicks testified that the point at which Spady passed the gunman prior to the shooting was at least

[37] A125; State's Exhibit 23.
[38] A127-128.
[39] A129.
[40] A133; State's Exhibit 25.
[41] A135.
[42] A143.
[43] A144.

50 feet from where the victim's body was found.[44] Based on the timing of the shooting, Darnella Spady was shown on video walking by at least 50 feet away from where the victim's body lay.[45]

Gary Collins, M.D.

Medical Examiner Dr. Collins described his findings from the autopsy. He opined that the cause of death was gunshots to the head and buttocks and that the manner of death was homicide.[46]

Issues arise with Darnella Spady.

The prosecutor informed the judge that the recalcitrant Darnella Spady now had an attorney, who purportedly advised her not to testify.[47] The prosecutor was not aware of any pending matters that would preclude her from testifying.[48] The judge stated that the issue would be addressed before her testimony.[49]

After Dr. Collins testified, the prosecutor clarified that Spady was serving a custodial sentence at Baylor Women's Correctional Institute.[50] The prosecutor explained that Spady had never been cooperative or interested in testifying.[51]

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[44] A145.
[45] A148.
[46] A170.
[47] A151-152.
[48] A152-153.
[49] A153.
[50] A171.
[51] A172.

The judge asked the logical question, "let's assume that she doesn't want to testify and she's going to say so again. What happens next?"[52] The prosecutor responded that he would lay a 3507 foundation for her statement. The judge asked the next logical question: "well, assuming she does not want to talk to you about that either, then what?" The prosecutor responded,

> Well, according to the Supreme Court's opinion in *McCray* [sic], her answers don't necessarily matter. I just need to ask the proper questions and make her available for cross-examination. But I expect she's going to qualify as what the court referred to as "a turncoat witness."[53]

The judge and defense counsel then discussed *McCrary* and its holdings. The judge recalled that there was a tender years exception in the case also. Defense counsel stated, "I think, in this case, there's a decent chance she actually doesn't remember but – in other words, not being a turncoat, just not remembering – but I guess we'll see where the testimony goes."[54]

Darnella Spady answers some questions in a closed courtroom.

Noting the large gallery present, the trial judge elected to seal the courtroom "for the limited purpose of determining what we're going to do here."[55] Dale Bowers, Esquire, appeared in the courtroom. He explained that he did not represent

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[52] *Id.*
[53] A172-173.
[54] A174.
[55] A175.

Spady currently, but due to his representation of her in prior cases, his name may have been in the system.[56] When Spady was sworn, both counsel expressed concern about the courtroom being sealed. The judge kept it closed, stating, "let's just answer what the terrain is here."[57]

Spady immediately pled "the Fifth."[58] The judge explained that she did not have privilege because she was not charged with anything. Spady replied, "but I don't want to witness anything."[59] Spady began some basic pedigree testimony, but the Court interrupted to permit her time to speak with Mr. Bowers.[60] The record is silent on what happened next, but after the recess, Spady began her testimony.[61]

Darnella Spady testifies briefly; her 3507 statement is played.

Spady testified that she did not recall the offenses and dates of her prior convictions. She stated that she was drunk and/or high for all of them.[62] When the prosecutor zeroed in on her recent arrest that led to her statement to Detective Wicks, she responded, "I don't know. I was under the influence of drugs."[63]

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[56] A176.
[57] A178.
[58] *Id.*
[59] *Id.*
[60] A179.
[61] A181.
[62] A182-183.
[63] A184.

Spady agreed that a screenshot of the June 15, 2023 interview showed her. [64] She denied that she went to the police station voluntarily because Wicks picked her up and put her in the back of a police car.[65]

Spady continued to testify that she did not remember talking to Wicks about YG's killing.[66] When shown the video of her in the Lucky Stop, she agreed it was her in the video. She agreed it was her pushing a stroller down Gordon Street – and that was the day YG was killed.[67] But she still did not remember speaking to Detective Wicks about the incident.[68]

The prosecutor next called Detective Wicks "to continue to lay the foundation for the 3507 statement."[69]

Wicks testified that he reviewed security camera video and observed the Black female. He approached her on the street and she identified herself as Darnella Spady. She also identified herself in a screenshot from the Lucky Stop video.[70] Wicks invited her to the police station, but she did not appear.[71] Wicks went to the area a few days later looking for Spady; this time she got in the police

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[64] A187.
[65] A185.
[66] A186. Spady knew Mr. Blackman as YG. A194.
[67] A188.
[68] *Id.*
[69] *Id.*
[70] A190.
[71] A191.

car.[72] But Wicks was aware that Spady had a "hard warrant" from the State Police for shoplifting.[73]

According to Wicks, Spady then voluntarily answered questions about the murder of YG.[74]

On *voir dire* examination by defense counsel, Wicks admitted that Spady was processed on her arrest warrant once he got done questioning her.[75] When asked if he considered postponing the interview because Spady was clearly under the influence of narcotics, Wicks professed to have no knowledge of such things: "I wouldn't know any different if she was."[76] But he did admit that Spady nodded off a few times during the interview, and also was rocking back and forth on the couch.[77] Wicks claimed that despite his years of experience as a police officer, he was unaware of the symptoms of heroin withdrawal.[78] Wicks testified that he did not consider Spady to be under the influence. Wicks stated he did not consider Spady to be high because of "the clear statements that I was gathering from her."[79]

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[72] A192.
[73] A193-194.
[74] A194.
[75] A195.
[76] A196
[77] A197.
[78] A198.
[79] A199.

When asked how he could be sure if Spady's answers were truthful or accurate, Wicks responded, "I don't understand."[80]

Defense counsel argued that the 3507 foundation had not been laid. The State did not establish that the statement was voluntary, or that Spady's testimony touched on the event itself, or that Spady's testimony touched on the statement.[81] Counsel acknowledged that the McCrary case holds that it does not matter what the witness says because the statute was designed to deal with the turncoat witness. Counsel argued that Spady's situation was different: she is a person who is high all the time and has no recollection of events.[82]

The prosecutor, quoting liberally from *McCrary*, argued that it makes no difference that the witness claims not to recall the underlying events. This Court has held, the prosecutor argued, that once the questions are asked by the prosecutor, then it is up to the fact-finder to evaluate the truthfulness of "the turncoat's testimony."[83]

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[80] *Id.*
[81] A201.
[82] *Id.*
[83] A202-203.

The trial judge admitted the statement: "but under *McCrary*, I agree with the State that the Supreme Court had laid it out that this testimony meets the threshold. So it's admissible."[84] The statement, Court Exhibit 1, was then played.[85]

Detective Wicks then identified a photo of 31 East 23rd Street, a residence from which Spady identified as a place where she bought drugs from "Gunner."[86] Once Spady mentioned Gunner, Wicks contacted the Real time Crime Center, a WPD intelligence unit, for information on people who go by Gunner. That unit provided a set of photographs[87] Wicks showed her a series of photographs in an attempt to identify Gunner, but she did not identify anyone.[88] Then, Wicks showed Spady a photo array of people known to frequent East 23rd Street, with some random photographs mixed in.[89] Spady identified a photo of Kevin Berry, the person she only knew as Gunner, from that array.[90]

Spady claimed that Gunner lived at 31 East 23rd Street. On cross-examination, Wicks agreed that the building was not habitable and was condemned

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[84] A204.
[85] *Id.*
[86] A206. Gunner is the name by which Spady identified the shooter.
[87] A208.
[88] A207.
[89] A208.
[90] A208-209.

after they searched it. But he claimed that just because it was uninhabitable did not mean that no one lived there.[91]

Wicks agreed that he asked the Real Time Crime Center to find photos of Wilmington people who go by the name Gunner. They provided ten photos. Spady did not identify the shooter in any of the Gunner photos.[92] The Real Time Crime Center also provided the 23rd Street photo array; that same unit did not include Mr. Berry among those known as Gunner.[93]

Darnella Spady retook the stand. She testified she was truthful in her statement to Detective Wicks.[94] But on cross-examination, she immediately testified that she did not remember anything because she was high on drugs at all times.[95] When given a chance to provide a corrected answer, she reiterated that she had no memory of the interview.[96]

Spady testified that her heroin use made her mind hazy and made it easy to forget things.[97] Therefore, she had no memory of the day that YG got shot, nor did

[91] A211.
[92] A213.
[93] A214-215.
[94] A216.
[95] A218.
[96] A220.
[97] A217-218.

she have any memory of the interview with Wicks.[98] She testified that she was awake for 5-7 straight days just prior to that interview and was incoherent.[99]

Spady testified that during the time frame of the homicide, she was high all day, every day. She did as much heroin as she could get. Part of her drug use was to get high, but part was also to avoid getting dope sick.[100] Having just watched the video playback of her statement, she testified that she was "high, very high."[101] She testified, "you seen me in the picture nodding out."[102] She also testified that her constant rocking back and forth was due to her being high.[103]

Defense counsel called a brief sidebar to note that he could not meaningfully cross-examine Darnella Spady due to her complete lack of recall.[104] The Court perceived that counsel's assertion was that cross-examination was impeded by her lack of memory. The Court agreed that an appeals court would decide that in the future.[105]

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[98] A219.
[99] *Id.*
[100] A221-222.
[101] A223.
[102] *Id.*
[103] A224.
[104] *Id.*
[105] A225-226.

Problems finding Isiah Barnett

One witness mentioned at length in the State's opening and throughout Detective Wicks' testimony was Isiah Barnett. But he could not be found. The prosecutor advised the judge that a material witness warrant had been issued the night prior.[106] The State asked for the remainder of the day to attempt to find Barnett. The Court suggested that the State proceed with the remainder of the evidence.[107]

James Demaio

Mr. Demaio was a mail carrier who worked in the North Market Street area.[108] On May 9, 2023, he was covering another carrier's route on East 23rd Street.[109] While delivering mail near 17 East 23rd Street, he heard gunshots.[110] Surmising the shots were not in his immediate area, he continued delivering the mail.[111] Right after the shooting, Demaio saw someone come out of an alleyway between a store and 2 East 23rd Street. He was "shocked," because he did not know there was an alleyway there.[112]

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[106] A233.
[107] A234.
[108] A235.
[109] A237.
[110] A238.
[111] A241.
[112] A242.

The person he saw coming through the alley after the shooting was wearing all black, with a black hat and mask covering his face.[113] His right hand was in his pocket while his left arm swung free.[114] He was walking fast, but not running, down 23rd Street.[115] Demaio observed him go to the porch of 31 East 23rd Street.[116] Demaio made no identification of the person who came through the alley.

At that address, there was another person on the porch wearing green, whom Demaio had seen earlier that day.[117] The person from the alley in all black entered the house, and the person from the porch walked off.[118]

Demaio testified that he had seen the person in all black about five minutes before he came out of the alley. That person and the person in green were pacing back and forth on the street.[119]

On cross-examination, Demaio testified that, although he had delivered mail to 31 Eat 23rd Street, he had never seen anyone in that house.[120]

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[113] A242.
[114] A243.
[115] A244.
[116] A246.
[117] A254.
[118] A249-250.
[119] A251.
[120] A255.

Detective James Wicks

Detective Wicks retook the stand to testify about a number of topics. He confirmed that the condition of 31 East 23rd Street was "deplorable."[121] Nothing of evidentiary value was found there.[122] Mr. Berry actually lived at 466 Robinson Drive in Wilmington.[123] A search warrant there resulted in no evidence as well.[124] Through Wicks, the State entered a certified conviction establishing Mr. Berry as a person prohibited.[125]

Upon Mr. Berry's arrest, police searched the silver BMW that he arrived in, which was owned by his friend Derkeya Rogers.[126] The State admitted some photographs of the car.[127]

Wicks testified that he seized Mr. Berry's phone upon his arrest, and that the carrier provided call detail records.[128] Through Wicks, the State highlighted a phone call Mr. Berry made at 12:38:55 on May 9, 2023.[129] This call was relevant because the State claimed that the person in all black was making a call while

[121] A262.
[122] A283.
[123] A263.
[124] A283.
[125] A265.
[126] A268.
[127] A271.
[128] A272.
[129] A275-276.

walking up 23rd Street.[130] But on cross-examination, Wicks admitted that the video quality was not good enough to determine that the person in all black was holding or using a phone.[131]

Darnella Spady, in her statement, said that Gunner took her phone after the shooting when she was sitting on the curb crying.[132] Wicks testified that his team attempted to find the phone but never found it.[133]

Bethany Netta

Ms. Netta is a senior forensic DNA analyst at the Delaware Division of Forensic Science.[134] She tested the swabbings from the shell casings against Kevin Berry's DNA. It yielded no hits for Mr. Berry,[135] but there was a DNA profile on the swabbing. After collecting additional DNA samples, Ms. Netta found that the DNA belonged to WPD Corporal Hugh Stephey.[136]

Detective Joseph Wicks

Detective Wicks was re-called to testify that he received Mr. Berry's phone's cell tower records from T-Mobile.[137] He sent the records to the FBI for

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[130] A279.
[131] A290.
[132] A288.
[133] A289.
[134] A293.
[135] A303.
[136] A302.
[137] A308.

analysis.[138] Wicks admitted on cross-examination that he did not request T-Mobile's records for its towers in the area; he just requested Mr. Berry's cell tower records.[139]

Special Agent Garrett Swick

SA Swick is an FBI agent assigned to the CAST Unit. CAST is an acronym for Cellular Analysis Survey Team.[140] Swick analyzed the cell tower data from Mr. Berry's phone and drafted an expert report.[141] He testified about cell tower usage before and after the homicide.[142] During the timeframe of the homicide, Mr. Berry's phone was pinging off a tower that also serviced the crime scene.[143] About ten minutes after the shooting, Mr. Berry's phone was using towers to the south – near the Route 13/I-495 junction and not far from his residence.[144] By 1:00 or so, Mr. Berry's phone was back at the original location and a bit north.[145]

On cross-examination, SA Swick agreed that it is possible to perform a "tower dump," which would download every call using a tower for a particular

[138] A309.
[139] A310.
[140] A312.
[141] A317; State's Exhibit 52.
[142] A327.
[143] A329.
[144] A330.
[145] A331-332.

period of time.[146] He also agreed that the cell tower used at the time of the homicide was not re-used at any point later in the day.[147]

The State cannot find Isiah Bartlett; the Court denies a mistrial application.

After SA Swick testified, the prosecutor informed the judge that Isiah Bartlett still could not be found, despite the material witness warrant.[148] The Court granted an unopposed request to recess for the day, as Bartlett was the State's final witness.[149]

The next morning, with Barnett still missing, defense counsel moved for a mistrial.[150] Counsel argued that Barnett was mentioned liberally in opening statements and was shown in many of the security camera videos. He also gave a statement regarding the two individuals on the porch at 31 East 23rd Street.[151] Noting that the case was a bench trial, in which the judge as factfinder can parse the evidence, the Court denied the mistrial application.[152] The Court noted, "your case largely hinges now on one witness." The prosecutor agreed.[153]

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[146] A336.
[147] A342.
[148] A349-350.
[149] A350-351.
[150] A357.
[151] A357-359.
[152] A362-363.
[153] A363.

The State rested.[154] After a colloquy with the judge, Mr. Berry elected not to testify.[155] The defense then rested.[156]

The trial judge found Mr. Berry guilty of all three counts.[157]

[154] A366.
[155] A368-371.
[156] A371.
[157] A413.

ARGUMENT

I. THE TRIAL JUDGE ERRED IN ADMITTING DARNELLA SPADY'S § 3507 STATEMENT; SHE WAS NOT A TURNCOAT WITNESS, BUT RATHER WAS UNDER THE INFLUENCE OF HEROIN AND REMEMBERED NOTHING OF THE INCIDENT OR HER STATEMENT.

A. Question Presented

Whether the Superior Court erred in admitting, over defense objection, Darnella's Spady's out-of-court statement pursuant to 11 *Del. C.* § 3507. The defense preserved this issue by way of a timely foundational objection at trial.[158]

B. Scope of Review

A trial court's ruling on the admissibility of a witness's § 3507 statement is reviewed by this Court for abuse of discretion.[159] Constitutional violations arising from evidentiary rulings are reviewed *de novo.*[160]

C. Merits of Argument

Enaction of 11* Del. C. *§ 3507 by the General Assembly

In derogation of established hearsay rules, the Delaware General Assembly enacted 11 *Del. C.* 3507, which states, in relevant part:

> (a) In a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value.

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[158] A200-202.
[159] *Wyche v. State*, 113 A.3d 162, 165 (Del. 2015).
[160] *Warren v. State*, 774 A.2d 246 (Del. 2001)(claim of violation of right to confront witnesses arising from an evidentiary ruling on 911 calls).

> (b) The rule in subsection (a) of this section shall apply regardless of whether the witness' in-court testimony is consistent with the prior statement or not. The rule shall likewise apply with or without a showing of surprise by the introducing party.[161]

The statute, originally styled 11 *Del. C.* § 3509, was enacted on June 8, 1970. Debate on the bill, HB 781, was brief.

In the House, the sponsor, Representative Stabler, announced that the bill had been requested by the Attorney General's Office. He confirmed that "it will in no way affect the rights – the constitutional rights of defendants."[162] The representative confirmed that the bill had been written by a deputy attorney general, but it had been discussed with the Attorney General.[163]

In the Senate, the debate lasted almost half an hour. The Senate Attorney was present. The attorney first explained that the purpose of the bill was to address situations where a witness to a crime who testified at trial, "I don't remember what I said, whether I said it or not, it's been eight months ago or a year ago." The attorney noted that the prior statement would be affirmative evidence against the defendant. The attorney explained that the bill would be a significant change in the Rules of Evidence.[164]

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[161] 11 *Del. C.* § 3507 (a), (b).
[162] A434.
[163] A438.
[164] A445-446.

One senator expressed concern that the witness may "on the spur of the moment" identify a perpetrator but then has more time to think about it. The senator was concerned that the witness could not then recant the statement – even after realizing the initial statement was a mistake.[165]

The attorney agreed with a comment that one feature of the bill is that the witness claims not to remember, but one "saving feature" is that the witness must be in court.[166]

One senator, who mistakenly thought that a police officer would conduct cross-examination, thought that too many "presumably guilty people" were going free on the street and this bill would help, so long as it is subject to cross-examination by the police officer.[167]

Another senator surmised that the bill was trying to protect "fresh evidence before it gets polluted by pressure."[168] The Senate Attorney agreed that would be "one thing that it would be aimed at, yes."[169] Similarly, another senator stated that the bill would "determine whether the initial on the spot observations are valid without being diluted later." The attorney agreed.[170]

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[165] A447-448.
[166] A449.
[167] A451.
[168] A452.
[169] A453.
[170] A456.

The attorney tried to explain that the prior statement would have independent testimonial value: "he may come to the stand and give one story and he – may take the other story and the other one would stand independently as having been stated at the time." Then, the attorney continued, it would be up to the trier of fact to determine which one to believe.[171]

In response to a question as to whether the bill would make hearsay admissible, the Senate Attorney explained that it would not really be hearsay because the witness who gave the prior statement must be present and subject to cross examination, "so there is safeguard for the defendant in that respect."[172]

Another senator, a former police officer, stated that even police officers' initial observations are not consistent, much less a civilian in the heat of the moment. He concluded, "I think this is a dangerous piece of legislation."[173]

This Court's interpretations of* § 3507 *over the years

The statute has undergone an interpretive odyssey since its enactment. The first significant case to discuss § 3507 was *Keys v. State*.[174] The *Keys* Court held that because prior out-of-court statements are inadmissible (absent certain exceptions), the new statute was in derogation of the common law and must be

[171] A458-459.
[172] A461.
[173] A463-465.
[174] 337 A.2d 18 (Del. 1975).

interpreted narrowly.[175] *Keys* further clarified that in order to admit the prior statement under § 3507, the declarant must appear in court and be subject to cross-examination.[176] In Keys' trial, the § 3507 witness did not appear; rather, his statements were admitted through a detective and a prosecutor.[177]

The *Keys* Court set forth additional requirements for the declarant's testimony. Although not suggesting a precise form of direct examination, this Court held that the examination should touch on both the events the witness perceived and the and the out-of-court statement itself.[178]

A month later, this Court had the opportunity to address § 3507 again in *Johnson v. State*.[179] In that case, Johnson was charged with raping and assaulting a 75-year-old woman. Johnson argued his confession was inadmissible on *corpus delecti* grounds, and that the statements of the victim were improperly admitted through § 3507. The Court found that there was substantial independent evidence of rape, with or without the contested statements.[180]

The victim gave four out-of-court statements to officers; three were on the day of the attack and the fourth was a few days later. She described the attack and

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[175] *Id.* at 21-22.
[176] *Id.* at 22-23.
[177] *Id.* at 21.
[178] *Id.* at 23.
[179] 338 A.2d 124 (Del. 1975).
[180] *Id.* at 126.

her attacker, albeit somewhat inconsistently.[181] The victim testified, satisfying the requirement laid down in *Keys*. However, her recall was limited. She remembered little of the actual attack. She remembered none of the first three statements; indeed she remembered nothing from that day, except waking up in the hospital.[182]

Johnson argued that the statements should not have been admitted due to the limited recall, which impaired his ability to confront the victim on cross-examination. This Court held that § 3507 does not require a specific quality of cross examination, nor does it impose a particular level of recall by the witness on direct examination:

> While the Statute does require that the out-of-court declarant be subject to cross examination, it does not expressly require any specific quality of cross examination or key the admission of the out-of-court statement to any particular recall in court on the part of the witness. To the contrary, the draftsmen of the Statute expressly contemplated that the in-court testimony might be inconsistent with the prior out-of-court statement. One of the problems to which the Statute is obviously directed is the turncoat witness who cannot recall events on the witness stand after having previously described them out-of-court. We conclude that there is nothing in the Statute or its intent which prohibits the admission of the statements on the basis of limited courtroom recall.[183]

However, the *Johnson* Court declined to impose this rule as one of general application and was careful to point out that "a case by case approach with

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[181] *Id.*
[182] *Id.* at 127.
[183] *Id.*

emphasis on each case's particular facts is appropriate in determining whether there has been a violation of the Confrontation Clause due to a lack of effective cross-examination."[184]

To that point, in Johnson's case, the Court found that the out-of-court statements were not particularly important and in some aspects could be seen as helpful to the defense. The Court held that "there is simply no reasonable doubt on the record" even if the victim's out-of-court statements were excluded.[185]

In 1991, this Court decided *Ray v. State*,[186] another sexual assault case, this time of a young girl. This Court reversed for a discovery violation but also addressed Ray's § 3507 claim.[187] At trial, the Court admitted hearsay statements from a family member and a detective about what the victim said to them. When laying the foundation, the prosecutor was able to elicit testimony that she told these individuals what happened to her but declined to say what she said to them.[188]

Noting the requirements imposed in *Keys* – that the foundation must touch on the events perceived, the statement itself, and the truthfulness of the statement – this Court found the foundation inadequate.[189] This Court held that the out-of-court

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[184] *Id.* at 128.
[185] *Id.* at 129.
[186] 587 A.2d 439 (Del. 1991), *abrogated by*, *McCrary v. State*, 293 A.3d 442 (Del. 2023).
[187] *Id.* at 442.
[188] *Id.* at 443.
[189] *Id.*

statement may only be introduced if the witness testifies about the events, the statement, and whether they are true. Moreover, to preserve the accused Sixth Amendment confrontation rights, "the victim must also be subject to cross-examination on the content of the statement as well as its truthfulness."[190]

As this Court noted "the statute becomes meaningless if there is no opportunity to test the truth of the statements offered."[191]

On July 22, 2010, this Court decided three § 3507 cases, which were consolidated because they all involved "recurring problems with regard to the admission of evidence under section 3507."[192] Two of the cases are relevant to this appeal as they discuss the foundational requirements for admissibility.

In *Woodlin v. State,*[193] another child sex offense case, the defendant stood accused of Rape First Degree, Incest, and other serious felonies. This Court reviewed the § 3507 issue for plain error as there was no objection at trial to the precise claim of error.[194]

The child victim testified that she had talked to a CAC interviewer about "my daddy" who "did something wrong to me."[195] But she would not discuss what

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[190] *Id.* at 444.
[191] *Id.*
[192] *Stevens v. State,* 3 A.3d 1070, 1071 (Del. 2010).
[193] 3 A.3d 1084 (Del. 2010).
[194] *Id.* at 1087.
[195] *Id.* at 1088.

her father did on the witness stand, "because it's nasty."[196] Appellate counsel argued that the child's testimony did not touch upon the events discussed in the interview and that she was not asked if her statements were truthful.[197]

This Court endorsed the trial judge's finding that the child implicitly affirmed the truthfulness of her interview and also touched upon the events by testifying that her father did something wrong to her and that it was nasty.[198] Affirming, this Court found that Woodlin had not demonstrated plain error.[199]

In *Blake v. State*,[200] this Court went another way regarding the truthfulness requirement. *Blake* was a murder prosecution in which the Dover Police conducted interviews with several people who were involved in the earlier fracas that led to the shooting.[201] The trial judge admitted five statements pursuant to § 3507. For three of the witnesses, the State conceded that a proper foundation had not been laid, because the prosecutor failed to ask the witnesses whether their out-of-court statements were true or not.[202] As to the others, the State contended that the truthfulness question was implicit.[203]

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[196] *Id.*
[197] *Id.* at 1089.
[198] *Id.*
[199] *Id.*
[200] 3 A.3d 1077 (Del. 2010), *abrogated by*, *McCrary v. State*, 293 A.3d 442 (Del. 2023).
[201] *Id.* at 1080.
[202] *Id.* at 1081.
[203] *Id.* at 1081-1082.

This Court held that Sixth Amendment considerations require that the witness be asked whether the prior statement is true. If the State seeks to admit out-of-court statements through § 3507, an "entirely proper foundation" must be laid.[204]

This Court, in* McCrary*, upends established* § 3507 *jurisprudence.

Recently, in *McCrary v. State*,[205] this Court considered another child sex offense case involving § 3507. The allegations about a preschool teacher involved four young girls. The Court held a bench trial. The interview of one of the children was admitted pursuant to our tender years statute, 11 *Del. C.* § 3513.[206]

The second child, L.F., identified the defendant in the courtroom, but did not know how she knew him. She did not know his name. She denied ever speaking with anyone about the defendant. She recalled speaking with the interviewer but could not remember what was discussed. She remembered discussing "bad touches," but could not recall who gave her the bad touches.[207]

Defense counsel objected to the admission of L.F.'s interview pursuant to § 3507. He argued that the direct examination L.F. did not touch upon the events

[204] *Id.* at 1082-1083.
[205] 290 A.3d 442 (Del. 2023).
[206] *Id.* at 448.
[207] *Id.* at 448-449.

perceived and the out-of-court statement. The judge overruled the objection and allowed the statement to be played.[208]

After a review of § 3507 jurisprudence, the Majority opined that these prior cases had not fully clarified the "touching on" requirement.[209] The Majority held that the approach described in *Keys* was sounder, eschewing the more substantive testimony required of the witness in later cases. The Majority held that once the prosecutor has *asked* the necessary foundational questions, the answers do not really matter. If the witnesses claim not to recall, it is up to the factfinder to assess the witness of credibility.[210] The *McCrary* Majority, speaking for this Court, found that "a particular level of testimony is not required" to lay a foundation for a § 3507 statement.[211]

Moreover, this Court held that the prosecutor is no longer required to ask the witness if the statement is true or not. This Court reasoned that a turncoat witness "by definition," will not testify that the prior statement is true, because he or she will claim not to remember it.[212]

As to McCrary's case, the Majority found that L.F.'s testimony, which did not link "the boy" on the bus to the person who gave her bad touches, was not

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[208] *Id.* at 449.
[209] *Id.* at 458.
[210] *Id.* at 460.
[211] *Id.* at 459-460.
[212] *Id.* at 460.

problematic, because the witness does not have to explain the testimony nor does the witness have to connect the dots between one part of his or her testimony and another. Nor does the witness need to "explain" any aspect of testimony, because "as we explained in *Keys*, no 'precise form of direct examination is required.'"[213]

The Majority further found that the prosecutor had made a "good faith effort" to elicit the required foundational testimony.[214] Paradoxically, the Majority found that while L.F. knew who the defendant was and even though she identified him in the courtroom, she never associated him in any way with the person who gave her bad touches.[215]

The Dissenting Justices took a different view. The Dissent noted that our jurisprudence has long held that a defendant's confrontation right requires the witness to testify about the events, the statement, and *whether or not they are true*.[216]

The Dissent also observed that the Majority's reliance on the holding in *Woodlin* – that limited courtroom recall is no obstacle to admissibility – was taken out of context. *Woodlin* itself affirmed that the *Keys* foundational requirements were still good law.[217] The witness, L.F., did not have limited recall. She had no

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[213] *Id.* at 461.
[214] *Id.*
[215] *Id.* at 462-463.
[216] *Id.* at 464 (emphasis in original).
[217] *Id.* at 465.

recall – in particular, whether she had ever interacted with McCrary or what happened at her school. This foundational attempt stood in stark contrast to the victim in *Woodlin*, who told the CAC interviewer that she was discussing "my daddy," and "he did something wrong to me" which was "nasty."[218]

The Dissent also took issue with the Majority's description of L.F. as a turncoat witness, noting that such an appellation ignores the traditional understanding of what a turncoat witness is. Indeed, a turncoat witness is defined in Black's Law Dictionary as "a witness whose testimony was expected to be favorable but who becomes (usually during trial) a hostile witness."[219] The Dissent observed that the Majority took *Johnson's* reference to a turncoat witness out of context: it is not a witness who claims to have no recall, but includes witnesses who testify inconsistently or have limited courtroom recall.[220] This distinction is important, because at least in the *Johnson* definition, the witness is testifying about the event and the statement, albeit in a limited or inconsistent manner.

Finally, the Dissent expressed concern that, as § 3507 is a statute of general application applying to all prosecutions, the relaxed foundational burden laid down in *McCrary* will have constitutional ramifications for future cases.[221]

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[218] *Id.* at 466.
[219] *Id.* at 467.
[220] *Id.* at 466.
[221] *Id.* at 468.

Mr. Berry's trial illustrates the implications of* McCrary *on the admission of § 3507 statements and the right to confront witnesses.

As the trial judge noted, "your case largely hinges now on one witness." The prosecutor agreed.[222] That one witness was Darnella Spady. The only other substantive witnesses were Jim Demaio, the mailman, and SA Swick, the cell tower witness. Demaio added nothing to the proof of identifying Mr. Berry as the individual in all black who came through the alleyway after the shooting. SA Swick testified that Mr. Berry's phone was using a tower near the crime scene at the time of the homicide, then went south near Mr. Berry's residence, then returned to Wilmington shortly afterwards. The fact that Mr. Berry's phone was in the area is not revelatory. The Real Time Crime Center identified Mr. Berry – although not as someone who goes by Gunner – as someone who frequented the 23rd Street area.

So, the Court's observation was correct. The trial came down to Spady's identification of Gunner, who she picked out of a photo array as Kevin Berry, as the perpetrator.

When asked what would come next if Spady did not want to testify, the prosecutor summed up the DOJ's understanding of *McCrary*:

[222] A363.

> Well, according to the Supreme Court's opinion in *McCray* [sic], her answers don't necessarily matter. I just need to ask the proper questions and make her available for cross-examination. But I expect she's going to qualify as what the court referred to as "a turncoat witness."[223]

The prosecutor's comments amount to a fair reading of *McCrary*. The prosecutor now only needs to ask a couple basic questions, and it makes no difference what the answers are – so long as the witness says something.

In a closed courtroom, Spady said that she wanted to plead the Fifth and did not want to be a witness.[224] After the Court gave her an opportunity to speak to an attorney,[225] she returned to the witness stand.

The prosecutor attempted to ask Spady about her prior convictions, not having to do with Mr. Berry's case, and she testified that she was drunk and high and did not remember them.[226] After that, Spady persistently testified that she was so high that she did not remember the June 15, 2023 interview.[227] She did not recall speaking to the detective.[228] As to the events of May 9, 2023, she did identify a still photo of herself with her stroller in the Lucky Stop.[229] Other than that, she was not asked about what happened on May 9, 2023.

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[223] A173.
[224] A178.
[225] A179-180.
[226] A182-183.
[227] A184-185.
[228] A186.
[229] A188.

The prosecutor then called Detective Wicks to help with laying the voluntariness requirement. He opined that Spady voluntarily answered his questions about the homicide.[230]

Despite being an experienced detective, Wicks claimed to not be able to tell that Spady was under the influence of drugs.[231] Wicks agreed that Spady was nodding off and rocking back and forth, but because he was getting "clear statements" from her, he did not consider her to be under the influence. When asked how he could be sure that Spady's answers were truthful or accurate, Wicks did not understand the question.[232]

Defense counsel argued that Spady was so chronically high that she did not remember the incident or her statement; as such, the touching on requirements had not been met.[233]

The prosecutor responded, "the *McCrary* case goes directly to this issue."[234] Quoting liberally from *McCrary*, the prosecutor argued that no substantive testimony is required from a turncoat witness in order to admit the out-of-court statement.[235] The prosecutor argued that is up to the factfinder to assess the

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[230] A194.
[231] A196-198.
[232] A198-199.
[233] A201-202.
[234] A202.
[235] *Id.*

witness's credibility, but "the *McCrary* case makes clear she qualifies as a turncoat witness."[236]

The trial judge relied solely on *McCrary* when admitting the statement: "but under *McCrary*, I agree with the State that this testimony meets the threshold. So, it's admissible."[237]

The problems foreseen by the Dissenting Justices in *McCrary* have manifested in Mr. Berry's case. All it takes is a few questions by a prosecutor, regardless of answers, plus a claim that the witness is a turncoat witness, and the statement must be admitted.

As the debate on this bill in 1970 established, the General Assembly was concerned with witnesses that changed their story or professed not to remember. It must be said, however, that some senators were uncomfortable with the witness not being able to make good faith revisions to their observations upon reflection. In any event, the so-called turncoat witness was never mentioned during the debates, but such a witness was described.

Allaying the concern of the senators, the Senate Attorney ensured them that the witness who made the statement must be present and subject to cross-examination, thereby providing "a safeguard" for the defendant.[238]

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[236] A203.
[237] A204.
[238] A461.

But what safeguard is there when the witness genuinely has no memory of the event or the statement? Darnella Spady was not a turncoat witness within any reasonable definition of the word. She was high on heroin the day of the incident. She was high on heroin all day every day. One only need watch her statement to the detective[239] to readily observe that she was severely under the influence of drugs. It is entirely plausible that Spady remembered neither the incident nor giving the statement. Because of our now-relaxed standard for admissibility, that was no impediment to the admission of her statement.

Predictably, due to her total lack of recall, defense counsel was unable to effectively cross-examine Spady. After *McCrary*, there was no requirement that the prosecutor ask if her statement to the detective was true, further impairing cross-examination.

Instead, defense counsel was reduced to asking Spady about heroin addiction and confirming that she did not remember the incident or her statement. She confirmed that she was always on heroin. She confirmed that heroin makes one hazy and forgetful.[240] She confirmed that she had no recollection of the shooting incident.[241] She identified a point in the video where she nodded out in the middle

[239] Court Exhibit 1.
[240] A216-218.
[241] A220.

of giving an answer.[242] In other words, Spady was not a witness who, in a turncoat fashion, claimed not to remember. She credibly testified that she was so addled by heroin that she did not remember. And there is video evidence that she was in a drugged state when giving her statement.

Defense counsel called a sidebar to note that he could not meaningfully cross-examine Spady because of her lack of memory.[243] There were avenues of cross that could have tested the veracity of Spady's observations, now that the statement was in evidence – but no ability to pursue them. Defense counsel concluded that he was getting the answers he was going to get and was ready to shut down the cross-examination.[244] The prosecutor responded, "I'll just note, Your Honor, that's precisely what *McCrary* talks about."[245]

Defense counsel was unable to ask Spady about her opportunity to observe Gunner in the moment, which lasted a few seconds at most in a stressful situation. Counsel was unable to ask how Spady was able to witness the shooting when she was shown on video at least 50 feet away mere seconds after the shots rang out. Counsel was unable to ask how sure she was of the identification of Gunner, given that he was fully masked and hooded. Counsel was unable to ask how Spady knew

[242] A223.
[243] A224-225.
[244] *Id.*
[245] A226.

Gunner *as* Gunner – a relevant question since the Real Time Crime Center did not list Mr. Berry among their roster of Gunners. Counsel was unable to ask the circumstances of the taking of her phone – where it occurred and when it occurred. Counsel was unable to ask Spady how sure she was that Gunner lived at 31 East 23rd Street.

Given Spady's lack of recall, the statement admitted into evidence was not subject to cross-examination. This violated § 3507, which requires that the witness be subject to cross-examination. The only cross-examination here was limited to asking about heroin addiction and confirming that Spady remembered nothing.

The admission of the statement also violated Mr. Berry's right to confront witnesses – a right with which prior decisions of this Court were justifiably concerned. Mr. Berry had no ability to test Spady's prior statement through the crucible of cross-examination. Mr. Berry was convicted based solely on a prior statement of a witness who could not be cross-examined about it. But under the current law, the requirement that the defendant has the right to cross-examine the witness on the *content* of the statement no longer exists.

Respectfully, this Court's holding in *McCrary* has tilted the landscape so in favor of admission of *any* prior statement that the right to effectively confront witnesses has been impermissibly eroded. This Court should reconsider its holding in *McCrary* and reinstate the familiar legal precepts of *Ray* and *Blake*.

But for this Court's holding in *McCrary*, Darnella Spady's statement would not have been admitted. The record establishes that it was offered and admitted solely pursuant to *McCrary*. Since Spady had no recall and could not testify about the events she perceived nor the statement she gave, the out-of-court statement would not have met the former threshold.

This Court should reconsider *McCrary*, and in light of that reconsideration, find error and reverse.

Even under* McCrary, *the trial judge erred in admitting Spady's statement because the required foundation was not laid.

Even given our current post-*McCrary* landscape, the State failed to lay an adequate foundation for § 3507 admissibility. The State's foundation lacked the touching-on requirement as to the event perceived. There were only two questions directed to that issue. In the first, the prosecutor showed screenshots from security camera video at the Lucky Stop. Spady identified herself in the screenshots; she was the one pushing a stroller.[246] Second, the prosecutor asked, "and that's when YG was killed, right?" and Spady responded, "I guess so."[247] Spady was not asked anything about what she observed or perceived during the incident.

Under our current law, the answers do not matter much, but the prosecutor still must ask the required questions. The prosecutor's failure to ask Spady about

[246] A187-188.
[247] A188.

the events she observed or perceived renders the foundation for the § 3507 statement insufficient as a matter of law.

As such, this Court should reverse.

CONCLUSION

Appellant Kevin Berry asks this Court to reverse his convictions and sentence. This Court should reconsider its recent jurisprudence in § 3507 cases and find that under the well-established prior precedents, Darnella Spady's statements were inadmissible. Should this Court decline to reconsider its recent holdings, this Court should still reverse, as the proper foundational requirements for the admission of Spady's statement were not met.

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