EFiled: Mar 03 2025 03:36PM EST
Filing ID 75753445
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

STATE'S ANSWERING BRIEF

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Dated: March 3, 2025

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NATURE OF PROCEEDINGS

On July 10, 2023, a Superior Court grand jury indicted Kevin Berry on charges of first-degree murder, possession of a firearm during the commission of a felony, and possession of a firearm by a person prohibited.[1] Berry waived his right to a jury, and his case proceeded to a bench trial in April 2024.[2] During its case-in-chief, the State sought to admit a witness's prior out-of-court statement under 11 *Del. C.* § 3507, and Berry objected.[3] The Superior Court overruled the objection and admitted the statement.[4] At the conclusion of the trial, the judge found Berry guilty on all counts.[5] On August 16, 2024, the court sentenced him to life plus 10 years in prison.[6]

Berry filed a timely notice of appeal and, on January 27, 2025, his opening brief. This is the State's answering brief.

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[1] A1, at Docket Item ("D.I.") 2; A9–10.
[2] A6, at D.I. 28.
[3] A201–04.
[4] A204.
[5] A6, at D.I. 28.
[6] Opening Br. Ex. A, at 1–2.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. This Court should not overturn its recent decision in *McCrary v. State*,[7] which clarified the foundational requirements for the admission of a witness's prior out-of-court statement under 11 *Del. C.* § 3507. This Court adheres to the doctrine of *stare decisis*, and Berry does not establish urgent reasons and a clear manifestation of error to justify his request. He cites no new legal or constitutional development since *McCrary* that erodes the underpinnings of its holding. Berry presents only his own case as an example of its misapplication. Yet, his case involved the precise problem that *McCrary* sought to address: a witness who attempts to avoid giving helpful substantive testimony by claiming not to remember. The State's direct examination opened the witness to cross-examination on both the events she perceived and her prior statement. Therefore, the statute's foundational requirements and Berry's confrontation rights were both satisfied, and the Superior Court did not abuse its discretion by admitting the statement.

[7] *McCrary v. State*, 290 A.3d 442 (Del. 2023).

STATEMENT OF FACTS

The Shooting

At approximately 12:40 p.m. on May 9, 2023, James Demaio was delivering mail on East 23rd Street, just south of Market Street, in Wilmington, Delaware, when he heard three gunshots.[8] The gunshots were close, but not directly near him, so he kept walking along his route.[9] A couple seconds after the gunshots, Demaio saw a man come out of the alleyway between 2 East 23rd Street and the store facing Market Street.[10] The man was taller than 5'8" with a thin build.[11] He was wearing black pants, a black shirt, a black mask over his face, and a hat.[12] The man's right hand was in his pocket while his left hand swung freely.[13] He walked rapidly to 31 East 23rd Street, up the porch, and inside.[14] Demaio had seen the same man about five minutes earlier, pacing back and forth in front of the same residence.[15]

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[8] A235; A238–40.
[9] A240–41.
[10] A241–43.
[11] A247.
[12] A241–42.
[13] A243.
[14] A243–44; A246; A248–49.
[15] A250–51.

ShotSpotter alerted the police to the gunshots.[16] When they arrived at the intersection of Market and Gordon Streets, they found Thaddeus "YG" Blackman on the ground, with blood around the area of his head.[17] Emergency medical technicians attempted CPR but could not revive him.[18] The police discovered three nine-millimeter Luger shell casings underneath the ambulance.[19]

Blackman had suffered three gunshots wounds: (i) to the right side of his head, above the ear; (ii) to his buttocks; and (iii) to the top of his right wrist.[20] The medical examiner opined that the gunshot wounds to the head and buttocks caused his death and that it was a homicide.[21]

A forensic firearms examiner determined that the cartridge casings recovered from the scene were discharged from the same firearm.[22] Three .38-caliber projectiles were also recovered.[23] The

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[16] A71–73.
[17] A69–70; A76–77.
[18] A77.
[19] A79; A85–87.
[20] A159–64.
[21] A170.
[22] A114.
[23] A113; A121; A160; A163–64. The .38-caliber class includes nine-millimeter bullets. A113.

examiner determined that they, too, were discharged from a single firearm.[24]

The police collected surveillance footage from various locations near the scene of the murder.[25] Collectively, the videos showed the following:

At approximately 12:35 p.m., a woman later identified as Darnella Spady was walking northeast on Market Street, pushing a stroller, and approaching the Lucky Stop Mini Market on the corner of Market and Gordon Streets.[26] She entered the Lucky Stop Mini Market and later left the store at 12:39 p.m.[27] On her way out, Spady passed Blackman, who held the door for her.[28] Blackman then went inside the store and searched for an item in the refrigerators.[29]

Meanwhile, at 12:39:09, the suspect wearing all black with his hood up entered the view of a surveillance camera on East 23rd Street with his right hand to his ear.[30] The suspect crossed the street from

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[24] A114.
[25] A124; A129–30; A136–39.
[26] *See* A127 (playing State's Ex. 23).
[27] *See* A127 (playing State's Ex. 23).
[28] *See* A127 (playing State's Ex. 23).
[29] *See* A127 (playing State's Ex. 23).
[30] *See* A133 (playing State's Ex. 25).

his right to left as he walked northwest on East 23rd Street, away from 31 East 23rd Street.[31] At 12:39:16, he took his hand from his ear, held it in front of him with his palm facing upward, and looked down at it—actions consistent with ending a call on a smart phone.[32] The suspect turned left into an alley behind the store facing Market Street that connected East 23rd Street to Gordon Street.[33] The suspect is then seen walking northwest on Gordon Street, toward the Lucky Stop, at 12:40:05.[34]

At 12:40:11 p.m., Blackman left the Lucky Stop without buying anything.[35] He turned right, around the store and onto Gordon Street, out of view of the camera.[36] At approximately 12:40:22 p.m., the gunshots are heard.[37] At the same time, Spady is seen walking southeast on Gordon Street.[38] Seconds after Spady passed by the view camera, the suspect ran past in the same direction, southeast on Gordon Street, back along the same route he had taken to the Lucky

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[31] *See* A133 (playing State's Ex. 25).
[32] *See* A133 (playing State's Ex. 25).
[33] *See* A133 (playing State's Ex. 25).
[34] *See* A127 (playing State's Ex. 23).
[35] *See* A127 (playing State's Ex. 23).
[36] *See* A127 (playing State's Ex. 23).
[37] *See* A127 (playing State's Ex. 23).
[38] *See* A127 (playing State's Ex. 23).

Stop.[39] At 12:40:34, the suspect came back out of the alley onto East 23rd Street; passed Demaio, who was delivering mail at an adjacent building; and continued southeast toward 31 East 23rd Street.[40]

The police later developed Berry as a suspect and obtained call-detail records for his cell phone from T-Mobile.[41] The records showed that at an outgoing call was placed from his phone at 12:38:55 p.m. and lasted 21 seconds, until 12:39:16 p.m.—the same time that the suspect was seen hanging ending a call in the surveillance footage.[42] Additionally, between 12:32:53 and 12:43:48 p.m., Berry's cell phone interacted eight times with three cell towers whose coverage areas all overlapped with the crime scene and 31 East 23rd Street.[43]

Spady's Statement

On June 15, 2023, Detective Joseph Wicks interviewed Spady at the Wilmington Police Station.[44] She recounted that she ran into Blackman, who she knew as "YG," at the Lucky Stop Mini Market on

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[39] *See* A127 (playing State's Ex. 23).
[40] *See* A133 (playing State's Ex. 25).
[41] A272–73.
[42] A276–83.
[43] A327–30 (discussing State's Ex. 52).
[44] *See* A204 (playing Court Ex. 1).

the day of his murder.[45] She had not seen him in a while.[46] Spady then continued onto Gordon Street, where she saw Berry, who she knew as "Gunner," come out of the alley.[47] Berry was wearing all black.[48] She asked "Gunner," by name, why he was wearing a face mask and said it was too hot.[49] Berry responded, "Shut up! Why are you calling my name?"[50] Spady said, "Sorry, I didn't know."[51] Moments later, while Spady was looking through her purse, she heard Berry ask, "You know who I am?" Blackman responded, "Yeah, I know who you is." Then Berry shot Blackman in the head with a black firearm.[52] Spady started crying and walking away.[53]

Later, while Spady was down in the street crying, Berry called her over.[54] She told him that she was not going to say anything.[55]

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[45] *See* A204 (playing Court Ex. 1).
[46] *See* A204 (playing Court Ex. 1).
[47] *See* A204 (playing Court Ex. 1).
[48] *See* A204 (playing Court Ex. 1).
[49] *See* A204 (playing Court Ex. 1).
[50] *See* A204 (playing Court Ex. 1).
[51] *See* A204 (playing Court Ex. 1).
[52] *See* A204 (playing Court Ex. 1).
[53] *See* A204 (playing Court Ex. 1).
[54] *See* A204 (playing Court Ex. 1).
[55] *See* A204 (playing Court Ex. 1).

Berry responded, "I know you not going to say anything," and took her phone and identification card from her purse.[56]

Spady had known Berry for two years.[57] Berry was her heroin dealer, and she bought from him "a lot," including at "his house" on East 23rd Street.[58] When shown pictures of the street, Spady identified the house as 31 East 23rd Street.[59] Spady also identified Berry as "Gunner" from a photographic lineup.[60]

The State called Spady to testify in its case-in-chief.[61] Beforehand, the prosecutor reported that she was uncooperative and did not want to testify.[62] When Spady took the stand, she attempted to invoke the Fifth Amendment privilege to avoid testifying.[63] After consulting with an attorney, she abandoned her attempt to invoke the privilege, but she repeatedly responded to questions by claiming she could not remember because she was high and drunk at the time of the

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[56] *See* A204 (playing Court Ex. 1).
[57] *See* A204 (playing Court Ex. 1).
[58] *See* A204 (playing Court Ex. 1).
[59] *See* A204 (playing Court Ex. 1); A206 (discussing State's Ex. 41).
[60] A207–10 (discussing State's Exs. 42–44).
[61] A177.
[62] A171–72.
[63] A178.

events perceived and her statement to the police.[64] The State sought the admission of her prior statement under 11 *Del. C.* § 3507, which the Superior Court granted over Berry's objection.[65]

[64] A175–89.
[65] A201–04.

ARGUMENT

I. *McCrary* should not be overturned, and the Superior Court did not abuse its discretion by admitting Spady's § 3507 statement.

Questions Presented

Whether this Court should overturn *McCrary* just two years after it was decided, despite no urgent reason and clear manifestation of error, and whether the State laid a proper foundation for the admission of Spady's prior statement under 11 *Del. C.* § 3507.

Scope of Review

This Court reviews a trial court's ruling on the admissibility of a statement under 11 *Del. C.* § 3507 for abuse of discretion.[66] A trial court abuses its discretion when it exceeds the bounds of reason under the circumstances or when it ignores recognized rules of law or practice in a way that produces injustice.[67] This Court reviews the trial court's factual findings deferentially and will not reverse a

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[66] *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006); *see also McCrary*, 290 A.3d at 454.
[67] *McNair v. State*, 990 A.2d 398, 401 (Del. 2010); *see also McCrary*, 290 A.3d at 454

decision to admit 11 *Del. C.* § 3507 evidence unless it was clearly erroneous.[68] It reviews related legal and constitutional questions *de novo*.[69]

Merits of Argument

Berry's trial was about identification.[70] One witness, Spady, provided the definitive link establishing that Berry was Blackman's killer.[71] Spady did not want to testify, however, and she attempted to avoid doing so.[72] When she did ultimately submit to direct and cross-examination, she mostly claimed not to remember the shooting or her prior statement to the police.[73] The State therefore sought to admit her prior statement under 11 *Del. C.* § 3507.[74] Section 3507(a) provides that "[i]n a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-

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[68] *Collins v. State*, 2016 WL 2585782, at *3 (Del. May 2, 2016); *Flonnory*, 893 A.2d at 515.
[69] *Collins v. State*, 2016 WL 2585782, at *3; *Flonnory*, 893 A.2d at 515.
[70] Opening Br. 38; A388–89.
[71] *See* A373 ("[T]his case largely does rest on the testimony or 3507 statement of Darnella Spady . . . .").
[72] *See, e.g.*, A178 (Spady attempting to "plead the Fifth").
[73] A183–88; A216–227.
[74] A201–04.

examination may be used as affirmative evidence with substantive independent testimonial value." Citing this Court's 2023 decision in *McCrary*, the Superior Court found that sufficient foundation had been laid and admitted the statement over Berry's objection.[75]

Berry argues that the Superior Court erroneously admitted the § 3507 statement under *McCrary*, but he makes that argument in the alternative.[76] His principal ask of this Court is to overturn *McCrary* altogether, just two years after it was decided, then find error and reverse.[77]

This Court should decline Berry's entreaty to re-litigate *McCrary*. His argument relies heavily on the same case law that this Court consolidated in *McCrary* and the legislative history that pre-dated it.[78] He does not cite new constitutional or legal developments in the last two years that might have eroded the underpinnings of the *McCrary* holding. The only recent development is his own case, which he presents as the *McCrary* dissent's fears come to life.[79]

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[75] A204.
[76] Opening Br. 45–46.
[77] Opening Br. 38–45.
[78] *See* Opening Br. 25–37.
[79] Opening Br. 41.

To the contrary, Spady was precisely the type of witness that the *McCrary* majority intended to address: one who claims not to remember events in order to avoid giving helpful testimony. Berry's case does not justify wholly overturning recent precedent, and the Superior Court did not abuse its discretion by admitting Spady's § 3507 statement.

A. There is no urgent reason and clear manifestation of error that justifies overturning *McCrary*.

In *McCrary*, this Court had occasion to review its § 3507 jurisprudence and clarify the statute's foundational requirements.[80] This Court began with *Keys v. State*,[81] the first of its cases to interpret the statute.[82] For a witness's prior out-of-court statement to be admissible under § 3507, *Keys* required the proponent to produce the witness in court for direct examination.[83] No precise form of direct examination was required, "except that it should touch both on the events perceived and the out-of-court statement itself."[84] After

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[80] *McCrary v. State*, 290 A.3d at 454–60.
[81] *Keys v. State*, 337 A.2d 18 (Del. 1975).
[82] *McCrary*, 290 A.3d at 455.
[83] *Id.* at 455–56 (discussing *Keys*).
[84] *Id.*

reviewing the *Keys* progeny, this Court held that a § 3507 foundation does not require the witness to testify substantively about the events perceived or the prior statement, and it does not require the proponent to ask specifically whether the statement was truthful.[85] Berry now asks this Court to overturn that holding.

When asked to overturn its precedent, this Court considers the doctrine of *stare decisis*,[86] a Latin term meaning "to stand by things decided."[87] Under the doctrine, settled law is overruled "only for urgent reasons and upon clear manifestation of error."[88] "[P]recedent should not be lightly cast aside" because "the development of and adherence to precedent is an essential feature of common law systems."[89] There are also institutional considerations. "Precedent should not be overturned by narrow majorities and very recent precedent should not lightly be overturned when the only change is the composition of the court, because society must be able to presume

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[85] *Id.* at 458–60.
[86] *Holifield v. XRI Inv. Hldgs. LLC*, 304 A.3d 896, 927 (Del. 2023).
[87] *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1278 n.141 (Del. 2021).
[88] *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 124 (Del. 2006) (internal quotation marks omitted).
[89] *Brookfield Asset Mgmt.*, 261 A.3d at 1278.

that bedrock principles are founded in the law rather than in the proclivities of individuals."[90] Accordingly, "[m]ere disagreement with the reasoning and outcome of a prior case, even *strong* disagreement, cannot be adequate justification for departing from precedent or *stare decisis* would have no meaning."[91]

Berry does not establish an urgent reason and clear manifestation of error from the *McCrary* holding. The foundation of his argument is re-litigating the legislative history of § 3507 and the case law construing it.[92] With that, Berry presents purely legal questions that this Court already resolved.[93] He first offers extracts from the General Assembly's debate over the bill,[94] but this Court already considered legislative intent in *McCrary*.[95] He then recounts the development of the case law interpreting § 3507, from *Keys v.*

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[90] *Id.* at 1279–80 (internal quotation marks omitted).
[91] *Id.* at 1280 (emphasis in original).
[92] Opening Br. 25–34.
[93] *See McCrary*, 290 A.3d at 455–60.
[94] Opening Br. 25–28.
[95] *McCrary*, 290 A.3d at 457 ("[T]he draftsmen of the Statute expressly contemplated that the in-court testimony might be inconsistent with the prior out-of-court statement.").

State[96] through *Johnson v. State*,[97] *Ray v. State*,[98] *Blake v. State*,[99] and *Woodlin v. State*.[100] But *McCrary* addressed each of one these cases to explain its holding.[101]

Notably, Berry's portrayal of the § 3507 cases is at odds with this Court's characterization of them. Berry depicts these cases as a consistent development of § 3507 jurisprudence—ultimately requiring substantive testimony on the events perceived, the prior statement, and its truthfulness—that *McCrary* abruptly "upend[ed]."[102] This Court concluded otherwise, finding that its § 3507 jurisprudence lacked sufficient clarity:

> Our review of our jurisprudence under *Keys* and its progeny . . . shows that our cases have not fully clarified what the "touching on" requirements demand. Some of our decisions indicate that the "touching on" requirements are satisfied by the prosecutor calling the witness to the stand and asking questions on direct examination about those topics, regardless of whether the witness can provide substantive testimony about them, so that the defendant can confront and cross examine the witness on those topics without appearing to sponsor the witness. Other decisions imply that the "touching on" requirements mandate at least

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[96] *Keys v. State*, 337 A.2d 18 (Del. 1975).
[97] *Johnson v. State*, 338 A.2d 124 (Del. 1975).
[98] *Ray v. State*, 587 A.2d 439 (Del. 1991).
[99] *Blake v. State*, 3 A.3d 1077 (Del. 2010).
[100] *Woodlin v. State*, 3 A.3d 1084 (Del. 2010). Opening Br. 28–34.
[101] *McCrary*, 290 A.3d at 455–60.
[102] *See* Opening Br. 34–35.

> some level of substantive testimony from the witness about the events perceived and the out-of-court statement itself.[103]

Some cases seemed to require even more.[104] *Blake*, for example, described § 3507 as having a two-part foundation where the witness must testify about both the events and whether they are true.[105]

This Court observed that its decisions may have "migrated" from the minimum foundational requirements of the statute and the Confrontation Clause.[106] That observation was correct. For example, *Blake* adopted the requirement that the witness testify about the truthfulness of the prior statement from *Ray*,[107] which purported to derive the requirement from *Keys*,[108] but *Keys* stated no such requirement.[109] Neither did *Johnson*, which was decided one month after *Keys*.[110]

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[103] *Keys*, 290 A.3d at 458–59.
[104] *Id.* at 459.
[105] *Id.*
[106] *Id.* at 460.
[107] *Blake*, 3 A.3d at 1082 (citing *Ray*, 587 A.2d at 443).
[108] *Ray*, 587 A.2d at 443 (citing *Keys*, 337 A.2d at 20 n.1).
[109] *Keys*, 337 A.2d at 21–24.
[110] *Johnson*, 338 A.2d at 126–29.

Cases that required greater foundation were attempting to ensure that § 3507 conformed with the Confrontation Clause.[111] But the Confrontation Clause does not require a witness to provide substantive testimony on a topic in order to be subject to cross-examination on it or for the factfinder to assess the testimony's truthfulness.[112] Indeed, neither the text of § 3507 nor the Confrontation Clause required more foundation than *Keys* originally intended.[113] Conversely, requiring more would thwart one of the statute's objectives—dealing with a turncoat witness who avoids providing substantive testimony by claiming not to recall the prior statement or the underlying events.[114] This Court therefore endorsed the original statement of the § 3507 foundational requirements as stated in *Keys* and *Johnson*: a prosecutor establishes the foundation for admissibility by calling the witness to the stand and asking questions about the events perceived and the prior statement, regardless of the substantive answers, because that is enough to open

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[111] *McCrary*, 290 A.3d at 459–60.
[112] *Id.* at 459.
[113] *Id.* at 459–60.
[114] *Id.*

the witness to cross-examination on those topics.[115] Specifically asking whether the statement was true is also not required because the factfinder can evaluate the truthfulness of the statement without the question.[116]

The *McCrary* dissent would have endorsed the foundational requirements as stated in *Ray*, even if it made employing the statute more difficult in some cases, to ensure that the truth of the prior out-of-court statements could be meaningfully tested.[117] The dissent feared that relaxing the foundational burden may have undesirable consequences in future cases.[118]

Berry presents no new statutory, Confrontation Clause, or other legal developments since *McCrary* that would call its holding into question. He offers only his own case, which he contends is a manifestation of the problems foreseen by the *McCrary* dissent.[119]

Berry's position relies on the notion that Spady was not a "turncoat witness" who only claimed a lapse of memory, but instead a

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[115] *Id.* at 459–60.
[116] *Id.* at 460.
[117] *Id.* at 463–68 (Traynor, J., concurring in part and dissenting in part).
[118] *Id.* at 468.
[119] Opening Br. 41.

witness who "genuinely ha[d] no memory of the event or statement."[120] He states that Spady "was high on heroin all day every day," suffered a "total lack of recall," and "credibly testified" that she could not remember the events because of her heroin abuse.[121] He points to Spady's mannerisms during the interview as direct evidence of her addiction.[122] He argues that it was "entirely plausible that Spady remembered neither the incident nor giving the statement."[123]

Plausibility falls short of a preponderance of the evidence, however. The events before and during trial lead to a better conclusion: that Spady intentionally claimed a lack of memory to avoid giving substantive testimony. As the prosecutor noted during closing arguments, her actions were "consistent with someone who had been told, don't say anything, and was attempting to not testify."[124]

Spady had witnessed Berry murder Blackman.[125] Shortly thereafter, Berry intimidated Spady to discourage her from reporting

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[120] Opening Br. 42.
[121] Opening Br. 42.
[122] Opening Br. 42–43.
[123] Opening Br. 42.
[124] A375.
[125] *See* A204 (playing Court Ex. 1); *see also* A375–79.

what she witnessed.[126] He called her over while she sat on the street crying.[127] Spady told him that she would not say anything.[128] Berry responded, "I know," and took her phone and identification card.[129]

The effects of Berry's intimidation persisted. The police identified Spady from surveillance footage and asked her to come to the station to give a statement, but she did not appear.[130] When the police found her again, she gave a statement but asked the detective to not include her name "on paperwork."[131] She did not want to be identified in the reports because she was "so nervous" and did not want her family to be hurt.[132]

From the outset of the prosecution, Spady was uncooperative because "she was not interested in testifying."[133] The prosecutor previewed as much in his opening statement.[134]

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[126] *See* A204 (playing Court Ex. 1).
[127] *See* A204 (playing Court Ex. 1).
[128] *See* A204 (playing Court Ex. 1).
[129] *See* A204 (playing Court Ex. 1).
[130] A190–92.
[131] *See* A192–94; A204 (playing Court Ex. 1).
[132] *See* A204 (playing Court Ex. 1).
[133] A172.
[134] A58.

Spady attempted to avoid testifying as soon as she took the stand, interjecting: "Excuse me. Can I say something? I would like to plead the Fifth. I don't have anything to say."[135] Her stated reason was a desire to avoid giving substantive testimony, not a lack of recall: "[B]ut I don't want to witness anything."[136] When the trial judge sympathized, stating he understood that she did not want to be there, Spady agreed: "Right."[137]

After consulting with an attorney, who volunteered to counsel her because she attempted to invoke the Fifth Amendment privilege, Spady re-took the stand and repeatedly responded "I can't remember" to the prosecutor's questions, regardless of the subject. She could not remember her own 2023 conviction, or her 2022 convictions, or her 2019 conviction, or her 2018 convictions—first, because she was on drugs, and then, because she was drunk and on drugs.[138] When shown a picture of herself in the Wilmington Police Department interview room, she would not agree that it was her, claiming not to remember,

[135] A178.
[136] A178.
[137] A178–79.
[138] A182–83.

even though she was only asked to describe a picture.[139] She let her guard down momentarily, agreeing that the video was stamped with a date of June 15, 2023, and that Detective Wicks in the picture.[140] She then agreed that she was not in custody before remembering to say: "But I don't remember because I was on drugs."[141] When asked to describe the picture again, about whether it depicted her in handcuffs, she responded: "I don't know. I can't -- I don't remember anything. It's nothing I can tell you."[142] She next claimed to not remember any details about how she arrived at the police station, despite earlier saying that two officers drove her there.[143] She then stated that she could not remember whether she spoke to Detective Wicks about Blackman's murder.[144]

When shown the surveillance footage from the date of the incident, Spady agreed that she was in the video and had visited the Lucky Stop Mini Market that day.[145] She agreed that it was the day

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[139] A184 (presenting State's Ex. 39 to Spady); *see also* A193 (describing State's Ex. 39).
[140] A185.
[141] A185.
[142] A185.
[143] A185–86.
[144] A186.
[145] A187–88.

Blackman was murdered.[146] But then she again claimed again to not remember speaking to Detective Wicks about it.[147]

Spady's actions and answers are not consistent with someone who genuinely suffered from a lack of recall. She had motive to avoid testifying against Berry: he intimidated her, and she was afraid. She hesitated to speak with the police and resisted cooperating with the prosecution. She attempted to invoke the Fifth Amendment privilege explicitly because she did not want to testify and did not want to be there. She claimed to not remember in response to questions that did not ask her to recall information at all, but to describe pictures shown to her. Sometimes, she would answer questions before remembering to get back into character. Spady exemplified the turncoat witness about which *McCrary* was concerned: someone who refuses to provide substantive testimony by claiming not to recall.[148]

The fact of Spady's heroin addiction does not alter that conclusion. Even though Spady reported being in the throes of addiction at the time of Blackman's murder and her statement to the

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[146] A188.
[147] A188.
[148] *See McCrary*, 290 A.3d at 460.

police, the video evidence showed that it was no impediment. Although she exhibited some mannerisms of an addict, Spady was responsive during the interview and engaged the detective in conversation. Based on his observations and the "clear statements that [he] was gathering from her," Detective Wicks did not believe that Spady was under the influence of drugs at the time.[149]

Notably, even though he made the determination later in the proceedings, after already admitting the evidence, the trial judge implicitly found Spady's prior statement to be credible. The trial judge had commented that the State's "case largely hinge[d] . . . on one witness" and that it was "up to [him] to decide whether or not that witness is credible."[150] Then, after deliberating, the trial judge returned guilty verdicts on all counts.[151] The trial judge's implicit finding, although made after the fact, controverts Berry's argument that Spady was too high on the day of Blackman's murder to remember it later.

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[149] A199.
[150] A363.
[151] A413.

Spady gave a statement helpful to the prosecution but then resisted testifying for the State out of fear. She was, by definition, a turncoat witness who might have thwarted the State's efforts to use her prior statement. With the admission of her statement under § 3507, *McCrary* worked as intended.

Relatedly, Berry further claims that, because of Spady's "lack of recall," her prior statement "was not subject to cross-examination," violating his confrontation rights.[152] The record belies the claim.

The Confrontation Clause of the Sixth Amendment provides the accused the right "to be confronted with the witnesses against him." It requires that the accused have an adequate opportunity to examine adverse witnesses.[153] But it "guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[154] For example, an outright refusal to testify eliminates the opportunity,

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[152] Opening Br. 44.
[153] *El-Abbadi v. State*, 312 A.3d 169, 190 (Del. 2024).
[154] *Id.* at 193 (internal quotation marks omitted) (emphasis in original).

but a failure of memory does not.[155] The distinction is one of kind, not degree.

Spady attempted to outright refuse to answer questions by invoking the Fifth Amendment privilege, but she abandoned that attempt after consulting with an attorney. She then answered all the questions posed to her by the prosecutor and defense counsel, even if, more often than not, she claimed a failure of memory. Although defense counsel called a sidebar to claim that he could not meaningfully cross-examine Spady,[156] as Berry notes in his opening brief, defense counsel admitted during that same sidebar that he was "getting answers" to his questions.[157] The exchange at sidebar, in relevant part, proceeded:

> [DEFENSE COUNSEL]: Here's the problem I'm having, Your Honor. I can't meaningfully cross-examine this witness because she doesn't remember anything. So I can ask her what she said in her statement, you know what I mean, and --
>
> THE COURT: She just told you she was high. She just told you she was nodding out. She seemed pretty clear to me. I don't know -- I mean, I get it that you want to be

[155] *McCrary*, 290 A.3d at 458.
[156] Opening Br. 43 (citing A223).
[157] A225.

> able to claim that you couldn't cross-examine her, but I think your cross was just fine.
>
> [DEFENSE COUNSEL]: Yes, I do --
>
> THE COURT: -- I don't know what you're missing.
>
> . . . .
>
> [DEFENSE COUNSEL]: Some future smart attorney may say that Mr. Berry's confrontation rights were -- but, you know, *I called a sidebar just to kind of take a timeout. I think I'm getting answers*.
>
> THE COURT: I think you are too. And it doesn't surprise me that the argument will be made, if it's not today, it'll be ten years from now . . . .[158]

Indeed, Berry could ask questions of and get answers from Spady, just not in the way and to the extent that he wished. He claims, for example, that he was "unable" to ask Spady about her opportunity to observe Berry in the moment.[159] Yet, foregoing a question because he was not satisfied with the answer that he expected is not the same as being denied the opportunity to ask the question at all. If Spady had claimed not to remember, Berry could have used that answer, or the purported reason for her memory lapse (the heroin addiction), to

[158] A224–25 (emphasis added).
[159] Opening Br. 43.

attack the credibility of her statement, which can be an effective defense tactic.

The Confrontation Clause did not guarantee Berry particular answers to the questions he asked or wished to ask. Limited recall, even when genuine, is not an impediment to admission under § 3507.[160] Accordingly, admitting Spady's prior statement under *McCrary* did not infringe upon his confrontation rights.

B. The State laid an adequate foundation for the admission of Spady's § 3507 statement.

Berry further claims that, even under *McCrary*, the State failed to lay an adequate foundation for the admission of Spady's prior statement under § 3507.[161] Specifically, Berry contends that the State's direct examination did not touch on the events perceived.[162] He argues that the State's examination was insufficient because the prosecutor did "not ask[] anything about what [Spady] observed or perceived during the incident."[163] Even if "the answers do not matter

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[160] *Johnson*, 338 A.2d at 127.
[161] Opening Br. 45–46.
[162] Opening Br. 45.
[163] Opening Br. 45.

much," Berry argues, "the prosecutor still must ask the required questions."[164]

To admit a witness's prior out-of-court statement under § 3507, the prosecution must call the witness for the direct examination, and the direct examination must touch on both the events perceived and the prior statement.[165] No particular form of direct examination is required, and the witness's lack of recall does not defeat its admission.[166] The purpose of the touching-on requirements is to open both topics to cross-examination.[167]

To satisfy the touching-on requirement with respect to the event perceived, the prosecutor's questions need not be directed toward establishing any particular fact.[168] In *McCrary*, questions aimed at establishing that the witness knew the defendant, how she might have known the defendant, and that a kind of wrongful conduct occurred were sufficient.[169] The prior statement itself could inform the

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[164] Opening Br. 45.
[165] *McCrary*, 290 A.3d at 456, 459.
[166] *Id.* at 456–57.
[167] *Id.* at 459.
[168] *Id.* at 460–61.
[169] *Id.* at 461.

relevance of the questions and answers and, together, allow the jury to gauge their truthfulness.[170]

Given Berry's argument, it is important to distinguish between the object of the touching-on requirement and the object's complement. *Keys* and *McCrary* require that the direct examination touch on the events (that the witness perceived), not the witness's perceptions (of the events).[171]

In the normal course of trial, this is a distinction without a difference. Counsel will ordinarily elicit evidence about events through a witness as that witness perceived them. But the "practical ebb and flow of the criminal drama" will not always allow for the normal course.[172]

Such was the case here. Spady attempted to thwart the prosecutor's examination. She talked over the prosecutor and repeatedly claimed not to remember, sometimes before the prosecutor even finished his question.[173] In a good-faith attempt to not only ask

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[170] *Id.* at 461–63.
[171] *Cf. Washington v. State*, 2013 WL 961561, at *3 (Del. Mar. 12, 2013) (distinguishing questions aimed at the events themselves from those merely asking whether the witness recalled the events).
[172] *McCrary*, 290 A.3d at 456 (*Keys*, 337 A.2d at 23).
[173] *E.g.*, A183.

questions, but to also elicit answers, the prosecutor resorted to asking descriptive questions about photographs and videos, hoping to break through the façade.[174] He showed Spady surveillance video from the date of the incident.[175] The form of his questions were directed at the video itself, but the substance he attempted to elicit was about the events depicted therein. Instead of asking whether she was on Market Street near the Lucky Stop Mini Market on May 9, 2023, he asked whether she was the person in the video that captured Market Street in front of the Lucky Stop Mini Market on May 9, 2023.[176] The tactic worked. Spady finally relented, agreeing that she was the person depicted in the video, conceding the date was May 9, 2023, and testifying that she visited the store that day.[177] The prosecutor then fast-forwarded the video, and rather than ask Spady if she then walked down Gordon Street, along the same route as the suspect, he asked whether she was the woman in the video walking down Gordon Street along the same path as the suspect.[178] The tactic worked again: Spady

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[174] *See* 184 (the prosecutor stating, "Let me see if I can help jog your memory," before showing Spady a photograph).
[175] A187 (playing State's Ex. 23).
[176] A187.
[177] A187.
[178] A188.

agreed.[179] The prosecutor then felt emboldened enough to ask a question directed to the event itself, rather than the video: "And that was when YG was killed, right?"[180] Spady responded, "I guess so."[181]

The prosecutor's questions were adequate to subject Spady to cross-examination on the events she perceived. The questions were aimed at placing—and did place—Spady at the scene of the murder, at the time of the murder, and in close proximity to the suspect. Moreover, by asking directly whether she was in these locations "when YG was killed," the relevance of the questioning was apparent even before considering the content of her statement, as this Court permitted in *McCrary*.

This Court does not require any particular form of direct examination. The prosecutor was required to ask Spady about the underlying events that she perceived, not specifically "what did you see." This Court should not discredit the prosecutor's line of questions by elevating considerations of form over substance. The prosecutor's questions touched on and subjected Spady to cross-

[179] A188.
[180] A188.
[181] A188.

examination on the underlying events she witnessed. The State therefore satisfied its burden under *McCrary*.

Even if this Court takes the extraordinary step of overturning *McCrary*, the State nevertheless established an adequate foundation under the higher standards enunciated in cases such as *Ray* and *Blake.* The prosecutor not only asked questions but elicited testimony about the events Spady perceived. The prosecutor also asked Spady whether her prior statement was truthful.[182] The record supports the conclusion that there was an adequate foundation for the admission of Spady's § 3507 statement, regardless of the applicable standard. The Superior Court therefore did not abuse its discretion by admitting the statement, even under Berry's preferred legal paradigm.

[182] A216. The prosecutor did not ask this question until after the Superior Court admitted the statement, as it is not a foundational question under current law, but it was nonetheless asked and put before the factfinder.

CONCLUSION

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

Respectfully submitted,

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Dated: March 3, 2025

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

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Dated: March 3, 2025

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