



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RONALD SUBER,

Defendant Below-
Appellant,

v.

STATE OF DELAWARE,

Plaintiff Below-
Appellee.

No. 392, 2023

**ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE**

STATE'S ANSWERING BRIEF

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TABLE OF CONTENTS

	PAGE
Table of Citations	ii
Nature and Stage of the Proceedings	1
Summary of the Argument.....	2
Statement of Facts	4
Argument:	
I. THERE WAS NO PLAIN ERROR IN ADMISSION OF UNOBJECTED TO INDIRECT HEARSAY EVIDENCE OF A PHOTO LINEUP	15
Conclusion	28

TABLE OF CITATIONS

Cases:

<i>Brown v. State</i> , 897 A.2d 748 (Del. 2006).....	23
<i>Bullock v. State</i> , 775 A.2d 1043 (Del. 2001)	23
<i>Capano v. State</i> , 781 A.2d 556 (Del. 2001).....	26
<i>Chapman v. California</i> , 386 U.S. 18 (1967).....	21
<i>Commonwealth v. Parks</i> , 417 A.2d 1163 (Pa. Super. Ct. 1979)	23
<i>Culp v. State</i> , 766 A.2d 486 (Del. 2001).....	24
<i>Dutton v. State</i> , 452 A.2d 127 (Del. 1982)	22
<i>Goode v. State</i> , 136 A.3d 303 (Del. 2016).....	22
<i>Gregory v. State</i> , 293 A.3d 994 (Del. 2023).....	15
<i>Hastings v. State</i> , 289 A.3d 1264 (Del. 2023)	15, 16
<i>Head v. State</i> , 4 S.W. 3d 258 (Tex. Crim. App. 1999).....	19
<i>Headd v. State</i> , 251 A.3d 643 (Del. 2021).....	24
<i>Holmes v. State</i> , 2010 WL 5043910 (Del. Dec. 9, 2010)	22

<i>Lowther v. State</i> , 104 A.3d 840 (Del. 2014)	16
<i>Mitchell v. Hoke</i> , 745 F. Supp. 874 (E.D.N.Y. 1990), <i>aff'd</i> , 930 F. 2d 1 (2d Cir. 1991)	19
<i>Morales v. State</i> , 133 A.3d 527 (Del. 2016)	16
<i>Nance v. State</i> , 903 A.2d 283, 285 (Del. 2006)	22
<i>Pollard v. State</i> , 284 A.3d 41 (Del. 2022)	15
<i>Roberto v. Stephens</i> , 1993 WL 276904 (D.N.J. July 23, 1993)	20
<i>Sanabria v. State</i> , 974 A.2d 107 (Del. 2009)	22
<i>Sanchez v. State</i> , 595 S.W.3d 331 (Tex. App. 2020)	19
<i>Shelton v. State</i> , 744 A.2d 465 (Del. 2000)	26
<i>State v. Bankston</i> , 307 A.2d 65 (N.J. 1973)	20
<i>State v. Medina</i> , 231 A.3d 689 (N.J. 2020)	20
<i>Stewart v. Mazzuca</i> , 275 F. Supp. 2d 308 (E.D.N.Y. 2003)	19
<i>Sullivan v. Louisiana</i> , 508 U.S. 275 (1993)	21
<i>Sullivan v. State</i> , 636 A.2d 931 (Del. 1994)	23

<i>Thornton v. State</i> , 994 S.W 2d 845 (Tex. App. 1999).....	19
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	22, 23
<i>Wainwright v. State</i> , 504 A.2d 1096 (Del.), <i>cert. denied</i> , 479 U.S. 869 (1986).....	16, 22
<i>Wheeler v. State</i> , 36 A.3d 310 (Del. 2012).....	20
<i>Williams v. State</i> , 79 A.3d 917 (Del. 2014)	23
<i>Williams v. State</i> , 796 A.2d 1281 (Del. 2002)	22
<i>Williams v. Taylor</i> , 529 U.S. 362 (2000).....	16
Other Authorities:	
D.R.E. 801 (c)	18
D.R.E. 802.....	18
D.R.E. 803.....	24
Del. Super. Ct. Crim. R. 52(a)	23
Del. Super. Ct. Crim. R. 52(b)	23

Del. Supr. Ct. R. 8.....	15
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NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Ronald Suber's March 12, 2025 Opening Brief. This is the State's Answering Brief in opposition to Suber's direct appeal of his Kent County Superior Court jury convictions.

SUMMARY OF THE ARGUMENT

- I. DENIED. The Delaware State Police lost contact with the second shooting victim, Brian May, after he left the hospital on September 2, 2021. (A-380-81, 1036-37). May could not be located to appear as a witness at Ronald Suber's March 2023 Superior Court jury trial. (A-381-82).

At trial, chief investigating officer Mark G. Ryde of the Delaware State Police (A-363-65) testified that May was shown a photo lineup on August 21, 2021, when May was hospitalized for a gunshot wound to his left foot. (A-372-74). The prosecutrix asked Ryde at trial if as a result of his interview with May and the photo lineup if the police officer got an arrest warrant. (A-374). When next asked, "Who was the arrest warrant for?", Ryde responded: "Ronald Suber, Junior." (A-374). There was no defense objection to this trial exchange. (A-374).

By not objecting to Ryde's testimony about obtaining an arrest warrant for Suber following the missing witness' view of a photo lineup, Suber's belated appellate claim that Ryde's arrest warrant testimony (A-374) was indirect hearsay is waived and may now only be reviewed on appeal for plain error.

Allowing Ryde's arrest warrant testimony did not affect the outcome of

the eight-day trial. Thus, any error in admission of unobjected to indirect hearsay evidence of a photo lineup was also harmless. Suber has not carried his burden of persuasion in demonstrating plain error entitling him to a reversal of all his jury convictions.

STATEMENT OF FACTS

Tori Balfour met Ronald Suber in December 2020. (A-571, 635). In June 2021, Balfour, Suber, Brian May and Anna Hurst began stealing motor vehicle catalytic converters. (A-572). May and Hurst did drugs (A-681), and Suber decided when to steal catalytic converters that Suber kept in a storage unit until a purchaser was found. (A-679). May and Hurst would cut the catalytic converters off of vehicles. (A-571-72). Suber paid for May and Hurst to stay at the Super Lodge motel. (A-656). Balfour was present at the storage unit when Suber sold a stolen converter to a purchaser. (A-680).

On the night of August 17, 2021 (A-576), the quartet attempted to steal the catalytic converter on a white pickup truck on North West Street in Dover. (A-573, 959-60). Brian May was cutting off the converter when the pickup truck owner came outside and called the police. (A-573). That evening Suber was driving and Balfour was sitting in the front passenger seat. (A-682). When the Dover Police arrived the four suspects fled in a Chevy Avalanche vehicle (A-960), but the police followed. (A-574-75).

Dover Police Officer Anthony Slaughter (A-958-59) saw the fleeing vehicle on Walker Road in Dover. (A-961). During the police pursuit, Suber told May and Hurst to get out of the vehicle and run. (A-575). Officer Slaughter observed the two

suspects (a white male and female) fleeing on foot. (A-962). As the police chased May and Hurst on August 17, Suber and Balfour drove away. (A-575).

Anna Hurst, the 5'2" female (A-742), was captured by the police and handcuffed. (A-962-63). Brian May, the fleeing white male (A-926), evaded apprehension and escaped from the police. (A-963). Hurst confessed to the police that she and the others (A-666-67) conspired to steal the pickup truck owner's catalytic converter that evening. (A-963). The Dover Police got a warrant for Hurst's arrest (A-580, 963), and Hurst was given a copy of the warrant outlining her statement to the police. (A-964).

Nicole Jackson lives at 53 Heritage Drive in Dover. (A-764). Suber is the father of her son. (A-764). While leaving for work one morning in August 2021, Jackson found paperwork about the Dover attempted catalytic converter theft in her mailbox. (A-765, 782). Although Suber's name was not in the paperwork, Tori Balfour was mentioned. (A-771, 784). Jackson contacted Suber about the paperwork left in her mailbox. (A-782). According to Balfour, Suber was not happy when informed of Hurst's statement to the police. (A-585).

In August 2021, Balfour owned a white 2016 Jeep Cherokee motor vehicle. (A-588). After the August 17 Dover Police chase (A-576), Suber wanted to get a car with tinted windows so he could not be seen. (A-590). Balfour then traded cars

with her cousin Michael Pettyjohn (A-688), who owned a 2013 Chevy Impala with very dark tinted windows. (A-588-90, 689). Balfour picked up Pettyjohn's car in Lewes (A-589), and, according to Pettyjohn, had his car for a week or two. (A-689).

May called Balfour about his catalytic converters arrest (A-655), and told her that Hurst had been released. (A-655-56). May also texted Balfour because Suber was not answering him. (A-656). Both May and Hurst were texting Balfour wanting to meet after their arrests. (A-591). Suber then made a decision to meet with May and Hurst late on August 20, 2021. (A-591-92).

The four conspirators met at the Royal Farms Bay Road store near the Dover Safeway grocery. (A-592, 884-85). Surveillance video revealed Pettyjohn's dark Chevy Impala with a prominent dent in the passenger-side rear door (A-884) arriving at Royal Farms at 12:02 A.M. on August 21, 2021. (A-884-93). The store video showed Hurst and May entering the Impala around midnight on August 21. (A-890-93).

Before the Royal Farms midnight meeting, Balfour, who was driving her cousin's Impala, stopped on Little Creek Road. (A-592-93). Suber got out of the car, removed something from his pants, and put the object near a telephone pole. (A-593). Balfour could not see what Suber left by the pole, and she assumed it was

drugs. (A-593). Balfour then drove to the Royal Farms store while Suber rode in the front passenger seat of the Impala. (A-594-95).

After picking up Hurst and May at Royal Farms (A-884-85), Suber directed Balfour to drive everyone back to Little Creek Road. (A-595-96). Hurst and May were riding as back seat passengers (A-607) in Pettyjohn's Impala. (A-595). Pettyjohn's Impala had child safety locks on the rear doors, and Balfour engaged that locking mechanism after she picked up her cousin's car. (A-644-45). Balfour again stopped at the telephone pole, and Suber exited the vehicle to retrieve whatever he previously deposited. (A-596). It was dark and Suber directed Balfour where to drive on the rural back roads. (A-597).

When Balfour turned off Little Creek Road the tone of the conversation between Suber and the back seat passengers May and Hurst (A-607) changed. (A-597-98). Suber told the back seat pair "That things were said, pretty much told, and he didn't sound happy about it. And Anna didn't say anything, but Brian was hesitant." (A-598). According to Balfour, Brian and Anna had told things to the police. (A-598).

The quartet continued driving until Suber asked Balfour to pull over near a big cornfield. (A-608). Balfour testified: "...Brian and Anna said that they had to pee, anyway, so they were going to get out and use the bathroom." (A-608). Suber

“opened the passenger door for Anna and Brian to get out.” (A-608-09). Hurst exited the car, but May “hopped back into the car and was yelling, ‘Wo, wo, what’s going on?’” (A-609). After May finally exited the vehicle, Balfour noticed that Suber “had a big blue glove on.” (A-609).

The blue glove was on Suber’s right hand, and he was also holding a gun that Balfour had previously seen at Suber’s storage unit. (A-610). Looking in the rearview mirror (A-611), Balfour saw that Suber was pointing the gun at Hurst and May. (A-610-11). Balfour testified: “I heard pleading, Anna started to cry, and Brian had his hands in the air and he started to crouch down.” (A-611). Next, Balfour heard a gunshot and saw that Hurst was no longer standing, and May ran around the car and then into the cornfield. (A-612).

The Impala headlights were on (A-612), and Balfour observed Suber in front of the vehicle shooting at May. (A-612-13). Suber shot twice at May, and Hurst was on the ground in the grass. (A-613-14). Balfour remained in the driver’s seat and stared straight ahead. (A-614). Suber came to the driver’s side of the vehicle, opened the driver’s door, and told Balfour to find “a sharp object.” (A-614-15). When Balfour could not locate anything, Suber opened the car trunk and began searching. (A-615).

After another vehicle passed by, Balfour got out of the car to close the trunk and noticed Suber in the cornfield. (A-616). Suber returned to the car wearing the blue glove and told Balfour to drive to his cousin's house at the end of Little Creek Road. (A-616-17). During the resumed car trip, Balfour stated: "I heard him say that he killed Anna." (A-617-18). In a second phone call referring to May, Suber told someone, "If you see the white boy, take him out." (A-618).

Balfour drove to the cousin's house where Suber went inside and changed his clothes. (A-618). From there Balfour and Suber drove North on Route 1 to Philadelphia. (A-618). During this trip Suber began "throwing the clothes he had previously had on out the window." (A-618-19). Suber also threw the blue glove out the car window. (A-619). Highway surveillance video, State's Exhibit #94 (A-894), showed Pettyjohn's Chevy Impala heading North at the Route 1 Dover Toll Plaza at 1:51 A.M. on August 21, 2021. (A-897). Other later surveillance video revealed that the same vehicle was still traveling North on August 21 at 2:25 A.M. at Biddle's Toll Plaza South of the Roth Bridge. (A-897).

Later that evening Balfour and Suber arrived in Philadelphia where they stayed for several days at the home of another cousin of Suber, Taji Turner. (A-524-27, 619). Balfour saw Suber place a handgun on top of a living room China cabinet in the Turner Philadelphia home. (A-620). Taji Turner who lives at 515 Fern Street

in Darby, Pennsylvania (A-524) testified that Suber and a female arrived at his home late at night in August 2021 and stayed with him. (A-525-26). At that time Turner saw Suber with a gold handgun. (A-526-27). Balfour returned to Delaware on Tuesday or Wednesday to swap cars with Pettyjohn and clean a doctor's office. (A-620-21). Suber remained in Pennsylvania, and Balfour returned to Philadelphia following her car swap. (A-621). The Delaware State Police used cell phone tracking to locate Balfour and Suber in Pennsylvania. (A-376-78, 1016).

Millard Dixon, Jr. is a Kent County farmer who lives at 2005 Dyke Branch Road, Dover. (A-325). Each morning Dixon checks on his growing crops. (A-326). At approximately 9 A.M. on August 21, 2021, Dixon noticed that a couple of his corn rows were broken. (A-327). Next, Dixon observed a sandal and then Anna Hurst's dead body in his cornfield. (A-327-28). Dixon made a 911 telephone call to the State Police around 11 A.M. that morning. (A-386). The State Police interviewed Dixon at 1:55 P.M. (A-386), but he reported that he did not hear anything the previous evening. (A-331).

That same morning the State Police received a second 911 call from other neighbors about the cornfield homicide. (A-296). Dean Srygley and his wife were at home at 85 County Haven Lane, Dover the morning of August 21, 2021, when they heard Brian May knocking on their back door. (A-294-95). May appeared

confused (A-297), and said, “The bad man shot me.” (A-313). May added that he witnessed the incident where Hurst was shot by Suber, and May had fled through Dixon’s cornfield. (A-317-18). The homicide scene on Dyke Branch Road is about a half to three-quarters of a mile from the Srygley home. (A-302). Home video surveillance from the Srygley residence showed May, who had been shot in the left foot (A-368, 373), crawling on the back porch. (A-304).

A third civilian witness in the neighborhood, Jeanine Thomas, was also interviewed by the State Police concerning the nearby homicide. (A-393). The police spoke to Thomas about a body that was found in her landlord’s cornfield. (A-393). Thomas spoke to the police in the afternoon (A-393), and said she heard an argument earlier in the evening while sitting in her garage with the door open. (A-393-94).

Thomas heard a car coming fast before it came to a stop with screeching tires. (A-394-95). Although she walked halfway down her 80-foot driveway, Thomas was unable to see anything. (A-395). At Suber’s March 2023 jury trial, Thomas testified: “I heard, ‘no, no, no,’ repeated no. I heard repeatedly, ‘Get out, get out, get out.’ Then I heard a voice suggest, ‘Pull her by the hair.’” (A-395). Thomas added: “‘My girls need me. Her mom has money, would pay.’ I heard something about snitches.” (A-396). Next, Thomas heard two or three gunshots (A-395), but she did

not call 911 that evening. (A-397-98). Nonetheless, when later contacted by the State Police, Thomas did reveal what she overheard. (A-398-99).

At approximately 1:00 P.M. on August 21, 2021 (A-383-84), Mark G. Ryde, the State Police chief investigating officer (A-363-65), arrived at the rural homicide scene where a female victim was fatally shot in a cornfield near 2005 Dyke Branch Road. (A-386). There were spent shell casings at the scene (A-370-71, 414, 495), and Hurst's body was still present. (A-369). State Police Crime Scene Tech, Roy Lowe (A-411-12), located three spent shell casings and two live rounds at the shooting scene. (A-495). The spent casings and the live rounds were all .45 caliber, but no handgun was ever recovered for a further ballistics analysis. (A-496).

Brian May had a gunshot wound to his foot (A-1042), and May's left foot was bandaged (A-373), when May was interviewed at the hospital by Ryde and State Police Sergeant Stephen Yeich. (A-372-73, 861-63, 870). May's hospital police interview was recorded. (A-374, 863). At trial State's Exhibit #65 was a photograph taken at the hospital of two injuries to May's left foot. (A-530-31). A bloody tennis shoe and sock were also recovered near the Srygley back door. (A-532).

An August 23, 2021 autopsy of Ann Hurst revealed gunshot wounds and evidence of blunt trauma. (A-721-22, 724). There was a gunshot wound to the left side of Hurst's neck with the projectile passing through her left lung, fracturing a

rib, and exiting out the left side of her back. (A-726). The autopsy physician thought Hurst was shot from a distance greater than a couple of feet. (A-729).

There were also blunt force injuries to Hurst's head and left hand, including a large laceration to the right side of her head, a skull fracture, and laceration of the brain. (A-733). Hurst's autopsy report was introduced as State's Exhibit #83. (A-726). Hurst's cause of death was gunshot wounds and blunt force injuries. (A-738). Dr. Jennifer Swartz, the autopsy physician (A-719, 721-22), thought Hurst was still alive when she sustained the blunt impact injuries. (A-741-42).

Tori Balfour's mother, a Corrections Officer at Sussex Correctional Institute (A-637), supplied the State Police with information about a second cell phone Tori possessed. (A-377). Utilizing the new phone information, Officer Ryde tracked Balfour to Upper Darby, Pennsylvania. (A-378). The police were able to track the movement of Balfour and Suber on August 28, 2021 to Urban Air Adventures, a trampoline park in Newark, Delaware. (A-378-79).

Balfour testified that she and Suber returned to Delaware on August 28, to attend a birthday party for Suber's son. (A-622). A SWAT team took Balfour and Suber into custody at the Christiana Town Center (A-378-79), and the two suspects were separately transported to Troop 3 in Kent County. (A-379, 623).

Ryde conducted two recorded interviews with Balfour. (A-379). On August 28, Balfour also showed the State Police her route of travel on August 21 from the Royal Farms to the South Little Creek Road utility pole then to Suber's cousin's house. (A-864-69). Ryde lost touch with Brian May on September 2, 2021, when May left the hospital. (A-380-81). The officer attempted to locate May in homeless shelters in Sussex County and Hagerstown, Maryland (A-1036-37), but May could not be located for Suber's March 2023 trial. (A-381-82, 1037).

Suber elected not to testify in his own defense at trial. (A-1044-46, 1052-53).

ARGUMENT

I. THERE WAS NO PLAIN ERROR IN ADMISSION OF UNOBJECTED TO INDIRECT HEARSAY EVIDENCE OF A PHOTO LINEUP

QUESTION PRESENTED

Whether admission of unobjected to indirect hearsay evidence about a photo lineup shown to a missing witness affected the outcome of an eight-day jury trial.

STANDARD AND SCOPE OF REVIEW

Since there was no defense objection to the police officer testifying that he obtained an arrest warrant for the accused after a missing witness viewed a photo lineup (A-374), the claim that this was indirect hearsay evidence is waived and may now only be reviewed on appeal for plain error.¹ “[P]lain error is limited to material defects which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.”² To reverse for plain error, “the errors complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity

¹ Del. Supr. Ct. R. 8; *Gregory v. State*, 293 A.3d 994, 998 (Del. 2023); *Hastings v. State*, 289 A.3d 1264, 1267-70 (Del. 2023); *Pollard v. State*, 284 A.3d 41, 44 (Del. 2022).

² *Pollard*, 284 A.3d at 44. *See also Gregory*, 293 A.3d at 998; *Hastings*, 289 A.3d at 1270.

of the trial process.”³ “Plain error should be, by definition, blatant, and such as to require a trial judge to intervene spontaneously even in the absence of objection.”⁴ To affect substantial rights, the error must have affected the outcome of the trial.⁵

MERITS OF THE ARGUMENT

Shortly after midnight on August 21, 2021 (A-890), a dark Chevrolet Impala (A-884-85) stopped next to Millard Dixon’s cornfield on rural Dyke Branch Road in Kent County. (A-325-26, 608). There were four occupants of the Impala: two females (Anna Hurst and the driver Tori Balfour); and two males (Brian May and defendant Ronald Suber). (A-591-92, 884-85). Jeanine Thomas who lived on Dyke Branch Road heard an argument that evening and then two or three gunshots. (A-393-96, 400-02). Three spent .45 caliber shell casings (A-495-96) were found near Hurst’s dead body. (A-327-28, 368, 370-71, 414).

Dean Srygley, the initial prosecution witness on the first day of Suber’s jury trial (March 27, 2023), lived approximately a half to three quarters of a mile from Dyke Branch Road on August 21, 2021. (A-294-96, 302). That morning an injured

³ *Hastings*, 289 A.3d at 1270 (quoting *Lowther v. State*, 104 A.3d 840, 845 (Del. 2014)).

⁴ *Morales v. State*, 133 A.3d 527, 533 (Del. 2016) (Strine, C.J., concurring).

⁵ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del.), *cert. denied*, 479 U.S. 869 (1986); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000) (trial result unreliable).

Brian May crawled onto Srygley's porch (A-304), and knocked on the back door. (A-295). May had been shot in the left foot. (A-373, 531-34, 1042).

During defense cross-examination of the first trial witness, Srygley testified that May appeared "very stressed" that morning. (A-309). Suber's defense attorney then confirmed with witness Srygley that May informed him that "The bad man shot me." (A-313). Referring to the fatal shooting of Hurst by Suber, Srygley added that May "observed the incident and fled." (A-313).

On redirect examination at trial, May "described it as a possible murder scene," according to Srygley, who added: "...he witnessed the incident and fled through a cornfield, but he didn't know which cornfield and where." (A-317). While May did not identify the shooter by name to Srygley (A-313), other than as "The bad man [who] shot me." (A-313), the driver Tori Balfour (A-594), who testified on the third day of Suber's trial (March 29, 2023), stated that Suber shot Hurst (A-611-12), and then moved to the front of the Impala and fired two more shots at May who fled into the adjacent cornfield. (A-612-13).

On the second day of trial (March 28, 2023), Delaware State Police chief investigating officer Mark G. Ryde (A-363-65) stated that he interviewed May at the hospital on August 21, and showed May a photo lineup. (A-373-74, 853, 863-64). The prosecutrix asked Ryde if as a result of his interview with the second surviving

shooting victim (May) and “...the photo lineup, did you get an arrest warrant?” (A-374). Officer Ryde answered in the affirmative and confirmed the arrest warrant was for “Ronald Suber, Junior.” (A-374). There was no defense trial objection to this exchange. (A-374). The State Police lost contact with May when he left the hospital on September 2, 2021 (A-380-81), and May could not be located to appear as a trial witness in 2023. (A-381-82, 1036-37).

In this direct appeal new counsel for Suber argues that Ryde’s testimony about getting an arrest warrant for Suber after the non-appearing witness May viewed a photo lineup at the hospital is indirect hearsay that violates Suber’s rights under the Sixth Amendment Confrontation Clause.⁶ Suber is correct. Ryde’s testimony is indirect hearsay.

D.R.E. 801 (c) defines hearsay as a statement that the declarant did not make while testifying at trial that is offered to prove the truth of the matter asserted in the statement. D.R.E. 802 provides: “Hearsay is not admissible except as provided by law or by these Rules.” A statement for hearsay purposes includes “nonverbal conduct, if the person intended it as an assertion.”⁷ Thus, if Brian May merely pointed to Ronald Suber’s picture in the State Police photo lineup when asked to

⁶ Opening Brief at 35-39.

⁷ D.R.E. 801(a).

identify who shot him in the foot, that would be sufficient nonverbal conduct to constitute hearsay evidence. (A-374).

“An out-of-court ‘statement’ need not be directly quoted to run afoul of the hearsay rule [citation omitted]. The ‘backdoor’ (or indirect) hearsay doctrine aims to prevent parties from eliciting testimony that indirectly reveals the substance of out-of-court statements.”⁸ The admission of indirect hearsay is subject to the same rules and limitations as direct hearsay.⁹

A classic example of indirect hearsay is where “The act of the hearer (the detective) leads by direct inference to the precise words of the speaker (the identifying witness).”¹⁰ “Whether the disputed testimony violates the hearsay prohibition necessarily turns on how strongly the content of the out-of-court statement can be inferred from the conduct.”¹¹ “[W]here there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside

⁸ *Sanchez v. State*, 595 S.W.3d 331, 336 (Tex. App. 2020).

⁹ *Thornton v. State*, 994 S.W.2d 845, 854 (Tex. App. 1999).

¹⁰ *Mitchell v. Hoke*, 745 F. Supp. 874, 876 (E.D.N.Y. 1990), *aff’d*, 930 F.2d 1 (2d Cir. 1991) (police lineup). *See also Stewart v. Mazzuca*, 275 F. Supp. 2d 308, 313 (E.D.N.Y. 2003) (“The problem is infrequently recognized by attorneys or by trial courts.”).

¹¹ *Head v. State*, 4 S.W.3d 258, 261 (Tex. Crim. App. 1999).

the courtroom, a party may not circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly.”¹²

To determine if evidence is indirect hearsay “[W]e are not concerned with mere possible inferences. When the logical implication to be drawn from the testimony leads the jury to believe that a non-testifying witness has given the police evidence of the accused’s guilt, the testimony should be disallowed as hearsay.”¹³

In an earlier Kent County attempted murder case this Court recognized the indirect hearsay problem and observed: “Detective Ryde was asked if anyone other than Wheeler was identified by each of the three [non-appearing] witnesses..... Detective Ryde’s testimony is also a classic example of hearsay..... That indirect hearsay testimony was offered by the State to prove the truth of the matter asserted. Accordingly, we hold that the hearsay rule was violated.”¹⁴

Unlike the circumstances in Suber’s prosecution (A-374), in *Wheeler* when Detective Ryde testified that he asked each of the three non-appearing witnesses (Shani Scott, Amber Scott and May Zachery) if anyone other than the suspect Daemont Wheeler was involved in the shooting of Herbie Davis, there was “a

¹² *Head*, 4 S.W. 3d at 264.

¹³ *State v. Bankston*, 307 A.2d 65, 69 (N.J. 1973) (quoted in *Roberto v. Stephens*, 1993 WL 276904, at *7 (D.N.J. July 23, 1993)). *See also State v. Medina*, 231 A.3d 689, 699 (N.J. 2020) (“inescapable inference”).

¹⁴ *Wheeler v. State*, 36 A.3d 310, 317 (Del. 2012).

defense objection at trial that was overruled.”¹⁵ This Court held that the indirect hearsay in *Wheeler* objected to at trial by defense counsel violated the defendant’s Sixth Amendment confrontation right.¹⁶ Ultimately, because the inadmissible out-of-court statements of the three absent witnesses were found to be cumulative to other properly admitted evidence, the indirect hearsay evidence admitted against Wheeler was harmless beyond a reasonable doubt.¹⁷ Because Ryde’s brief testimony that he obtained an arrest warrant for Suber after May was shown a police lineup at the hospital (A-374) was also merely cumulative to the other properly admitted incriminating evidence, any error in admission of indirect hearsay against Suber is also harmless error beyond a reasonable doubts.

The proper focus for a harmless error inquiry under *Chapman v. California*¹⁸ “...is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was unattributable to the error.”¹⁹ Utilizing this analysis in Suber’s direct appeal, any error in the unobjected to admission of Ryde’s indirect hearsay response (A-374) is harmless.

¹⁵ *Wheeler*, 36 A.3d at 315.

¹⁶ *Id.*, at 320.

¹⁷ *Id.*, at 321.

¹⁸ 386 U.S. 18, 24 (1967).

¹⁹ *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

A Sixth Amendment Confrontation Clause violation occurs when the “out-of-court statements were not merely cumulative evidence...[but] likely a principle factor in [the] conviction.”²⁰ In *Holmes*, the error in admitting a newspaper article that did not include any information of which the jury was not otherwise fully informed without a limiting instruction was harmless error.²¹

Because Suber did not preserve his claim that Ryde’s indirect hearsay response about obtaining an arrest warrant after the surviving shooting victim May viewed a lineup during the police interview at the hospital (A-373-74), the current appellate contention of a Confrontation violation can only be reviewed for plain error.²² For the indirect hearsay error to be plain it must be “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”²³ To be plain, the error must affect substantial rights, generally meaning that it must have affected the outcome of the trial.²⁴ In demonstrating that a forfeited error resulting from the lack of any defense objection is prejudicial, the burden of

²⁰ *Holmes v. State*, 2010 WL 5043910, at *5 (Del. Dec. 9, 2010) (quoting *Sanabria v. State*, 974 A.2d 107, 120 (Del. 2009)).

²¹ *Holmes*, *supra*, at *5.

²² *Goode v. State*, 136 A.3d 303, 311 (Del. 2016) (citing *Nance v. State*, 903 A.2d 283, 285 (Del. 2006)).

²³ *Nance*, 903 A.2d at 285-86 (quoting *Williams v. State*, 796 A.2d 1281, 1284 (Del. 2002)). See also *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982).

²⁴ *United States v. Olano*, 507 U.S. 725, 732-34 (1993); *Wainwright v. State*, 504 A.2d 1096, 1100, *cert. denied*, 479 U.S. 869 (1986).

persuasion is on the defendant.²⁵ Suber has not carried his burden of establishing plain error in Ryde's limited indirect hearsay response about obtaining an arrest warrant for the defendant. (A-374).

"Harmless error and plain error are distinct but analogous doctrines."²⁶ "[T]he difference between harmless error and plain error is that for plain error, 'it is the defendant who bears the burden of persuasion with respect to prejudice.'"²⁷ In this appeal while Ryde's response that he obtained an arrest warrant for Suber after May viewed a police lineup (A-374) is harmless error even though it is indirect hearsay, there is also no plain error because Suber did not object at trial to the police officer's testimony and Suber cannot demonstrate any prejudice. The reason for this is that the other uncontradicted evidence in the case, including May's excited utterance hearsay statements to witness Dean Srygley, was sufficient to support the jury verdict.²⁸

On cross-examination of the first trial witness, Dean Srygley, the State objected when Suber's defense counsel asked Srygley what Brian May, a non-

²⁵ *Olano*, 507 U.S. at 734; *Brown v. State*, 897 A.2d 748, 753 (Del. 2006); *Sullivan v. State*, 636 A.2d 931, 942 (Del. 1994).

²⁶ *Williams v. State*, 79 A.3d 917, 922 (Del. 2014). *Compare* Del. Super. Ct. Crim. R. 52(a) and 52 (b).

²⁷ *Bullock v. State*, 775 A.2d 1043, 1035 n. 43 (Del. 2001) (Veasey, C.J., concurring)(quoting *Olano*, 507 U.S. at 734).

²⁸ *See Commonwealth v. Parks*, 417 A.2d 1163, 1169 (Pa. Super. Ct. 1979).

appearing witness, said on the morning of August 21, 2021. (A-309). The State's objection was that what May told Srygley "would be hearsay." (A-310). In response, Suber's attorney stated: "There's an exception, which is an excited utterance."²⁹ (A-310). The trial judge overruled the State's objection and said, "I'm satisfied that the statement meets the qualifications of an excited utterance...." (A-312).

Srygley then acknowledged that May told him, "The bad man shot me." (A-313). On redirect examination, Srygley elaborated on May's statements and added: "That he witnessed the incident and fled through a cornfield...." (A-317). In explaining what "the incident" was, Srygley testified: "He described it as a possible murder scene." (A-317). Next, Srygley told the prosecutor, "He wasn't sure of the murder scene at the time. He said she had been shot, and he had been told to stand at the back of the vehicle with his hands on the truck while the incident took place, and then he said he fled into the cornfield." (A-317-18).

After the first trial witness (Dean Srygley), Suber's jury knew that Brian May claimed he had been shot by a man, there was a possible murder scene near a vehicle where a female was also shot, and May fled through a cornfield. (A-313-18). The

²⁹ D.R.E. 803(2). *See Headd v. State*, 251 A.3d 643, 659 (Del. 2021); *Culp v. State*, 766 A.2d 486, 489-90 (Del. 2001).

second trial witness, Millard Dixon, Jr., testified that about 9 A.M. on August 21, the farmer found a dead woman in his cornfield. (A-325-28). At the end of the first day of trial, Suber's jury knew a female later identified as Anna Hurst was found dead near a Kent County cornfield and Brian May fled through the cornfield and was shot in the foot by the "bad man."

Tori Balfour, the driver of the vehicle where May and Hurst were riding as back seat passengers (A-595, 607, 890) was an eyewitness who appeared at trial and testified that Suber shot Hurst and was shooting at May who fled into the nearby cornfield. (A-608-13). Balfour stated at trial that she heard Suber tell someone he killed a white girl and in a second telephone call asked someone, "If you see the white boy, take him out." (A-618). After the cornfield shooting incident, Balfour saw Suber with a gun (A-620), as did Taji Turner. (A-526-27).

Near the crime scene where Hurst's body was discovered (A-414, 431-32), the State Police recovered three spent .45 caliber shell casings. (A-495-96). An autopsy of Hurst on August 23 (A-721-22) revealed a gunshot wound below her neck (A-725-26), as well as blunt force injuries to her head and left hand. (A-732-36). Suber elected not to testify (A-1044-46, 1052-53), and none of this forensic and eyewitness evidence was contradicted by any defense trial evidence.

Because Balfour as the driver of the Impala where Suber was riding as a front seat passenger on August 21 (A-594-95) was an accomplice to Suber's fatal shooting of Hurst (A-612) and wounding of May (A-373, 612-13), the jury received an accomplice jury instruction. (A-1129-30). Suber's jury was instructed that "the testimony of an alleged accomplice should be examined by you with more care and caution than the testimony of a witness who did not participate in the crime charged." (A-1129). Jurors are presumed to follow the court's instructions.³⁰ In the defense closing argument, Suber's trial attorney reminded the jury that "Balfour's testimony must be examined with extra caution." (A-1074), and that "Tori's testimony to you or statements to the police, they are not credible." (A-1075).

Suber's jury also knew that Balfour was arrested for conspiracy (A-624), had entered into a plea bargain agreement with the State (A-630-31), and that her sentencing was deferred until the completion of Suber's murder trial. (A-632). Even though the jury should not have heard the indirect hearsay evidence about May identifying Suber in a lineup and Ryde then getting an arrest warrant for Suber (A-372-74), the other evidence in the case was sufficient to convict Suber of all the charges. Given the totality of incriminating evidence against Suber apart from the

³⁰ See *Capano v. State*, 781 A.2d 556, 589 (Del. 2001); *Shelton v. State*, 744 A.2d 465, 483 (Del. 2000).

brief indirect hearsay of Ryde (A-374), Suber has not carried his burden of persuasion in demonstrating plain error.

CONCLUSION

The judgment of the Superior Court should be affirmed.

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Dated: April 10, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

RONALD SUBER,)	
)	
Defendant Below-)	
Appellant,)	
)	
v.)	No. 392, 2023
)	
)	
STATE OF DELAWARE,)	
)	
Plaintiff Below-)	
Appellee.)	

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DATE: April 10, 2025