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Case Number 422,2024

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALVIN USHERY,	§	
	§	
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	No. 422, 2024
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On November 21, 2022, a Superior Court grand jury indicted Calvin Ushery ("Ushery") for Robbery First Degree, Assault First Degree (Over 62 Years), two counts of Possession of a Deadly Weapon During the Commission of a Felony ("PDWDCF"), two counts of Possession of a Deadly Weapon By a Person Prohibited ("PDWBPP"), and Criminal Mischief.[1] (A1 at D.I. 4; A12-16). The next day, Ushery filed a motion to dismiss, which the Superior Court denied as moot because of the indictment. (A1 at D.I. 3).

A five-day jury trial was held from September 11 to 15, 2023, but a hung jury resulted in a mistrial. (A4 at D.I. 22). On September 15, 2023, the State dismissed one of the PDWDC charges. (A1).

On December 1, 2023, Ushery filed a motion to dismiss, which the State answered on December 27, 2023. (A5 at D.I. 32, 34). The Superior Court denied the motion to dismiss on January 2, 2024. (A5 at D.I. 35).

[1] "D.I. ____" refers to docket item numbers on the Superior Court Criminal Docket in *State v. Calvin Ushery*, I.D. No. 2209011148A.

Following a second jury trial held between April 29, 2024 and May 2, 2024, in the jury found Ushery guilty of Robbery First Degree, Assault First Degree (Over 62 Years), and PDWDCF. (A9-10, D.I. 60, 62, 64; Ex. A to Opening Br.; A327).[2]

On July 15, 2024, the State filed a motion to declare Ushery a habitual offender under 11 *Del. C.* § 4214(c). (A10 at D.I. 68; Ex. A to Opening Br.). On September 3, 2024, the Superior Court granted the motion. (A10 at D.I. 71). The court sentenced Ushery on the same day for Assault First Degree, to life in prison, suspended after twenty-five years followed by decreasing levels of supervision; for Robbery First Degree, to twenty-five years at Level V, suspended after ten years followed by decreasing levels of supervision; and for PDWDCF, to twenty-five years at Level V, suspended after five years for two years at Level II. (Ex. A to Opening Br.).

On September 25, 2024, Ushery filed a timely notice of appeal of his convictions and sentence. On March 7, 2025, Ushery filed his opening brief. This is the State's answering brief.

[2] The State entered a *nolo prosequi* on the Criminal Mischief charge on May 1, 2024 (A9-10 at D.I. 64; A293), and a *nolo prosequi* on the two counts of PDWBPP on May 2, 2024. (B-1).

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. The Superior Court properly instructed the jury members on the first day of the trial not to discuss the case prematurely and not to conduct any research, consistent with the instruction in the Superior Court's Juror Handbook. While best practice is to repeat the instruction of "no discussion/no research" daily, this Court has held that failure to do so is not reversible error. The Superior Court also correctly ruled that if the jury had been exposed to outside media, that fact alone did not automatically create bias against Ushery. The Superior Court also correctly concluded that Juror 15 did not have to be removed based on his note to the court. Juror 15 said that he had difficulty hearing witnesses who did not use the microphone. Subsequent witnesses apparently spoke into the microphone because counsel did not ask the judge to remind witnesses to do so, and the Court later confirmed that Juror 15's hearing problems were resolved. Additionally. the court did not abuse its discretion when it determined that Juror 15's note did not show he had accessed extrajudicial materials or discussed the case with other persons. And, the court's discussion with Juror 15 about the evidence did not encourage the other jurors to believe that they were permitted to research extrajudicial materials as long as they believed they could be impartial.

STATEMENT OF FACTS

On September 15, 2022, at approximately 9:20 a.m., the owner of Solid Gold Jewelers, Changyoon Suh ("Suh"), arrived at his store and began to open it. (A30, 33, 36, 38). At the time, Suh was 67 years old. (A37, 56).

An assailant arrived at the jewelry store at 9:45 a.m. (A40, 57). He was wearing sunglasses, a hat, and a mask that covered his nose and mouth. (A277-78). The assailant asked to see what Suh had available, and Suh put out a display of jewelry for him. (A58). Then the assailant displayed a gun and attacked Suh. (A58). During the attack, which was captured on video, the assailant used a gun and a hammer to assault Suh. (A31, 38, 57-58, 271). The assailant then went from one counter to the next, smashing cases and displays and taking jewelry, and wiping each surface that he touched with a rag that he carried in his pocket. (A31, 155-56). The assailant fled the crime scene at 10:13 a.m. (A40).

Suh, who was severely injured, managed to call 911. (A33, 59, 61). Suh was hospitalized for a week due to his serious head injury and severe concussion. (A59, 63, 264). While Suh survived the attack, he had to undergo extensive rehabilitation to relearn basic functions. (A281.

Substantial evidence tied Ushery to the assault and robbery, including:

- Surveillance video showing that the assailant had the same distinctive gait and mannerisms as Ushery (A265-66, A 274) and had a similar beard and piercings. (A266-67);
- Surveillance video showing that the assailant escaped on a bicycle, (A168-69), and a matching bicycle was later found at Ushery's residence. (A263-64, 268);
- Witness testimony identifying the jewelry collected from Ushery's person and also found at his residence as some of the jewelry taken from Solid Gold Jewelers. (A264-65, 281-85).
- Location data showing that Ushery's cell phone was in the vicinity of the robbery on the morning of September 15, 2022, when the assault and robbery occurred. (A249-50, 262).

During jury selection, the court instructed the jurors and asked, *inter alia*, the following questions:

> Each of you is a prospective juror in the case. During the jury selection process, except in response to questions, you may not discuss the case with anyone, including other possible jurors. Nor may you read or listen to any accounts or discussions of the case that may be reported in the news media, social media, on the internet, in the newspaper, or on radio or television. Do you know anything about this case through personal knowledge, discussion with anyone, the news media, or any other source?
>
> . . . .

> Have you seen, read, or heard anything recently in the media, through television, documentary, movies, social media, the Internet, or any other source, that would affect your ability to render a fair and impartial verdict in this case?

(A19-20, 23).

As discussed in detail below, after the jury was selected and at the end of the first day of the trial (April 29, 2024), the Superior Court gave a further "no discussion/no research" instruction. (A40).

At the beginning of day two, outside of the presence of the jury, the court informed the parties about a note sent by Juror 15. (A45).[3] The note included three questions. (A45). The first question asked if the court could make sure that the witnesses spoke into the microphone. (A45). Juror 15 said in the note that he had his hearing aid turned up as high as possible, but he had difficulty hearing one witness who did not speak into the microphone. (A45). The second question asked whether it would be possible to see a side-by-side comparison of the eyeglasses found at the scene of the crime and Ushery's eyeglasses as they were on the day when Ushery was arrested. (A45-46). Juror 15 stated in the note that if the eyeglasses were dissimilar, "it might be possible to find out when and where the defendant's eyeglasses were purchased to verify whether the timing was before or after the crime event." (A46). Question three was more of a statement: "When the

[3] The actual note is in the record at A328.

victim was saying with a black sundress, I think he may have been referring to a black face mask or a black mask. Don't know the victim's ethnicity, but maybe he characters a sundress and dress may be similar to a mask or face mask." (A46). After reading the note, the court asked the parties for comments. (A46). Both the State and trial counsel wanted Juror 15 to be removed because the juror was already commenting on the evidence. (A46-47). The court denied the parties' request. (A46-47) The following discussion then occurred:

> THE COURT: Jurors are allowed to ask questions. Many, many juries, they're given notebooks and invited to ask questions. I'm not going to strike him just because he has questions. So give me something else. Do you want me to give an instruction to him or somebody else?
>
> [DEFENSE ATTORNEY]: I think it's a valid point that witnesses should be speaking in the microphone. But other than that, just making sure that they're not talking about anything, they're not looking anything up.
>
> THE COURT: There's nothing in here that suggests he's talking to other jurors or looking anything up. If that were true, that would be a problem.
>
> [DEFENSE ATTORNEY]: I understand. I'm just concerned how much he might have done beyond this --
>
> THE COURT: You're worried he's going to become one of the twelve to drive everybody crazy.
>
> [DEFENSE ATTORNEY]: And then one of my other concerns, regardless of the note, is just a lot of people may not have recognized some of the names, but the video that shows the robbery was on social media and in the news quite a bit. So if Your Honor could just address any concerns with that, just because they may not have known to say yes to one of those questions based on the names. But they may have

seen something in the media and the video itself that might have reminded them of anything they read online or anywhere else.

[PROSECUTOR]: Your Honor, I would object to that. I think the Court's instructions both in terms of asking them if they know anything about the case and instructing them not do any research has sufficiently covered that. I don't think there should be anything additional to that point.

THE COURT: Side-by-side comparison with the glasses.

[PROSECUTOR]: If –

THE COURT: I don't think that Question 2 or 3 are—this is this juror just basically just kind of shooting out the juror's questions about the evidence that he's seen. At the end of the day, the evidence is going to be what it's going to be. The jurors are perhaps gun jumping if speculation is not well taken. But I don't see any reason to instruct on these.

[PROSECUTOR]: To the extent Your Honor wishes to address the questions with this particular juror, I think something to the effect of to keep an open mind throughout the pendency of the case and to listen and hear all of the evidence and he'll be instructed on the law at the conclusion of the case is really the extent that these questions can be answered.

[DEFENSE ATTORNEY]: I also just have concerns about jurors really giving a heads up on what they want the State to prove and things like that and essentially asking them, hey, can we do this to help me along the way.

THE COURT: Yeah. And I think in states and jurisdictions where juror questions are more—are used more often, one of the reasons states are reluctant to allow jurors to fire out questions is that frequently the questions are not germane, they're not relevant, or they reflect the jurors' biases or whatever more than they do the evidence. We just happen to have an active juror here who is offering his own view of how he thinks the case ought to be tried, but it's really not his business.

> I will wait until the recess. Your question about the video, I don't know whether it was on the—it was not covered yesterday, was it?
>
> [PROSECUTOR]: I didn't look, Your Honor. I don't know.
>
> THE COURT: I guess there's some concern—let me think about it. I think if a juror did see the video on the news media, it's just video they saw on the news media. It doesn't necessarily reflect they formed some opinion or would carry that opinion forward to the prejudice of either party. But you're right that it was covered the last time around. And it's at least possible that they know more now than they did yesterday morning to the question. So let me think about that and I'll try to find some way --
>
> [DEFENSE ATTORNEY]: My concern isn't having seen the video, but there were a lot of comments and some people have remarked on Mr. Ushery as having a record, things like that.
>
> THE COURT: In the media?
>
> [DEFENSE ATTORNEY]: Yes.
>
> THE COURT: Okay. I never saw any of that, but I trust you. Anything else?
>
> [PROSECUTOR]: With respect to scheduling . . . .

(A47-50).

When the testimony resumed, there was apparently no problem about witnesses failing to talk into the microphone because the judge did not remind any of the witnesses to speak into the microphone, and neither party requested that the judge give such a reminder.

After the lunch break and before the jury entered the courtroom, the bailiff responded to a question from the court about a technology issue, presumably dealing with Juror 15:

> THE COURT: Do you know if those things are working on in [sic] the other seats?
>
> THE BAILIFF: The way they explained it to me, Your Honor, was it's on and there's a button for frequency that they'll be able to know by hitting the button. So I was going to explain it to the juror.

(A181). After the jury entered the courtroom, the court addressed Juror 15:

> THE COURT: Juror No. 15, we're trying to help out your hearing. Do those things work?
>
> JUROR NO. 15: Don't seem working.
>
> THE COURT: This is the corrosive effect of new technology. It only works when it decides to work.
>
> (Pause.)
>
> THE COURT: Better? Worse? No effect at all? They're actually earmuffs. Some day [sic] we'll get that fixed. Maybe it's the air-conditioning, maybe that's the problem.

(A186).

The next day, the following discussion took place before the jurors entered the courtroom:

> THE COURT: . . . . And I'll circle back—I'm not sure, I think Mr. Keating raised the issue about publicity. You made several references in cross-examination to prior testimony, prior hearings, or whatever. I'm not sure if there's any mystery that this is a second trial. I don't

know that I'd want to say that, but you're just concerned that pretrial publicity may have infected their objectivity?

[DEFENSE ATTORNEY]: Yes, your Honor, just if there could be some sort - -

THE COURT: It seems to me that—so the issue isn't really whether or not they saw a headline or read a story, the issue is whether or not their, whatever they saw or read is going to impact their ability to be fair and impartial?

[DEFENSE ATTORNEY]: Right. And I think viewing the video might bring memories back more than just reading names into - -

THE COURT: Well, I think what I'll do is say, look, now that that's out, you might have seen press coverage. If you did and if it affects you, I want to hear about it. If you did and it doesn't affect you, I don't care, it's not relevant.

MR. KEATING: Thank you.

THE COURT: Thank you. Bring them in. . . .

(A242).

After the jurors entered the courtroom, the court gave the following instruction:

THE COURT: Second thing is, after seeing the video from the inside of the store, that may have jelled some memories among some of you of having seen that video before or being aware of some publicity about this incident when it happened, or whenever. That does not concern me terribly, we try to get into that during the voir dire that if you know anything about the case, you know, tell us about it. Maybe you did see something, I'm not concerned whether you did or not. I am concerned, though, whether seeing it now changes your answers to your ability to be fair and impartial and objective and weigh the evidence that you hear in this case. So you don't have to say anything now, but if you're concerned about some pretrial or extrajudicial information may have

> come in and affected your ability to be fair and impartial, let the bailiff know and we'll talk about it during a recess.
>
> Finally, to my friend Juror No. 15, I hope we've taken care of the—well, maybe not—I hope we've taken care of the hearing questions.
>
> JUROR: (Makes thumbs-up gesture.)
>
> THE COURT: Good? You had some other questions that, frankly, are outside the scope of what we can talk about. And no dig on you, I appreciate an inquisitive mind, but we're stuck with the evidence that we hear in court. Okay?

(A243).

On the last day of the trial, after both parties had submitted all of the evidence, the court began to read the jury instructions. Part of those instructions included the following:

> In connection with your judgment of the facts, it is your duty to determine the facts only from the evidence presented in the case. Of course, one of the reasons you're here is because of your wisdom and common sense, but it would be unfair for the jury to base its verdict on facts that were not presented or fairly inferred from the evidence. This is why the Court has admonished you not to do independent research on any aspect of the case: as jurors in the case, you assume a unique role as 12 people speaking with one voice. That one voice must be the voice of 12 people who have all seen and heard the same evidence.

(A322).

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR BY NOT REPEATING MORE THAN ONCE THE ADMONITION THAT JURORS SHOULD NOT CONDUCT ANY INTERNET RESEARCH OR DISCUSS THE CASE BEFORE ALL OF THE EVIDENCE HAD BEEN SUBMITTED, NOR DID THE COURT ABUSE ITS DISCRETION OR OTHERWISE ERR BY NOT CONDUCTING ADDITIONAL *VOIR DIRE* FOR JUROR 15.

Question Presented

Whether the Superior Court abused its discretion or otherwise erred when it admonished the jurors only once not to conduct any research on the case and not to discuss the case before all of the evidence had been submitted.

Whether the Superior Court abused its discretion or otherwise erred when it determined that no additional *voir dire* was needed for a juror who submitted to the court written questions about some of the evidence.

Standard and Scope of Review

When a defendant fails to raise an objection to jury instructions at trial, this Court reviews for plain error..[4] Because the defense did not request that the court give a daily admonishment regarding extrajudicial materials and premature discussions about the case, and the trial court did not *sua sponte* give the instruction,

[4] *Wright v. State*, 2019 WL 2417520, at *4 (Del. Jun. 6, 2019) (TABLE) (citing the standard of review for an unrequested alibi instruction is plain error); *Smith v. State*, 2018 WL 2427594, at *3 (Del. May 29, 2018); Supr. Ct. R. 8.

the absence of the instruction is waived on appeal, and the issue may only be reviewed for plain error.[5] Under the plain error standard of review, Ushery has the burden of showing that the alleged errors were so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.[6] Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; 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.[7]

This Court will review for abuse of discretion a trial judge's decision not to remove a juror for cause, and such decisions are ordinarily entitled to deference.[8] "The deference given to such determinations on appeal is based upon the judge's ability to assess the veracity and credibility of the potential juror."[9] "The question thus presented is one of mixed law and fact. . . . The finding of the trial court upon

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[5] *Williams v. State*, 796 A.2d 1281, 1284 (Del. 2002); Supr. Ct. R. 8.

[6] *Wright*, 2019 WL 2417520, at *4*; Smith*, 2018 WL 2427594, at *3; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986); *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982).

[7] *Wainwright*, 504 A.2d at 1100; *Bromwell v. State*, 427 A.2d 884, 893 n. 12 (Del. 1981).

[8] *Schwan v. State*, 65 A.3d 582, 590 (Del. 2013); *Knox v. State*, 29 A.3d 217, 220 (Del. 2011) ("Customarily this Court reviews a trial judge's determination that a juror can fairly and objectively render a verdict for abuse of discretion.").

[9] *Schwan*, 65 A.3d at 589; *Parson v. State*, 275 A.2d 777, 781-82 (Del. 1971).

that issue ought not to be set aside by a reviewing court, unless the error is manifest."[10] If the Superior Court fails to sufficiently inquire into juror bias, this Court must independently evaluate the fairness and impartiality of the juror, and the "examination is more analogous to *de novo* review."[11] This Court reviews questions of law and claims of constitutional violations *de novo*.[12]

Merits of Argument

Ushery argues that, for several reasons, the Superior Court violated his state and federal rights to due process and trial by jury by failing to ensure that his case was decided by an impartial jury based on the evidence presented. Opening Br. 7-8. First, he now contends that the Superior Court failed to instruct the jury to avoid exposure to extrajudicial information or discussions about the case, so "there is no basis to presume that they did so." Opening Br. 7. He argues that by specifically confining restrictions on discussions and outside research to "during the selection process," the court implied that the jurors could do so after the jury selection process ended. Opening Br. 13.

Ushery also asserts for the first time that, in response to a note from Juror 15, the court's ruling and instructions authorized the jury to look at extrajudicial

[10] *Schwan*; 65 A.3d at 589; *Reynolds v. United States*, 98 U.S. 145, 156 (1878).

[11] *Schwan*, 65 A.3d at 590; *Knox*, 29 A.3d at 220-21.

[12] *Zebroski v. State*, 12 A.3d 1115, 1119 (Del. 2010).

materials and told them that if they do so, "they need only inform the court if they personally believe their ability to be fair and impartial was impacted." Opening Br. 11. Ushery contends that this instruction permitted the jury to access such information (Opening Br. 14-15) and discouraged jurors from reporting exposure to extrajudicial information. Opening Br. 16. He urges this Court to presume juror misconduct here. Opening Br. 12. Ushery also contends that this Court should presume both that jurors will obtain extrajudicial information when the Superior Court fails to admonish jurors not to access such information (Opening Br. 17) and that the jury here was exposed to extrajudicial information. Opening Br. 17-23. Ushery asserts that Juror 15's note and his hearing problems required the court to conduct at least an inquiry and that the court's failure to do so was an abuse of discretion. Opening Br. 24-27. Ushery seems to argue there is doubt about whether Juror 15 heard the court's instruction about prior knowledge, bias, and partiality. Opening Br. 25. He also seems to argue that Juror 15 was not capable of serving on the jury based on his hearing problems. Opening Br. 26. Ushery also argues that based on the substance of Juror 15's note, the court should have made an inquiry into possible extrajudicial influence. Opening Br. 26. Finally, Ushery contends that the court's response to the juror's note not only allowed a reasonable juror to believe that they could research the questions in the note as long as they believed that they

could be impartial, but also encouraged the other jurors to ask Juror 15 about his investigative theories about the case. Opening Br. 29. Ushery's arguments fail.

Because Ushery has failed to adequately brief a state constitutional claim, it is waived.[13] And, Ushery's remaining claims are unavailing. Ushery never objected to the trial court's instructions to the jury or requested that the trial court give a daily admonishment regarding extrajudicial materials and premature discussions about the case. Thus, his claims regarding the jury instructions must be reviewed for plain error.[14] Here, the record and relevant authority establish that the Superior Court committed no error, let alone plain error.

Under the Sixth Amendment of the United States Constitution and Article I, § 7 of the Delaware Constitution, all defendants have a fundamental right to trial by an impartial jury.[15] An essential element of these constitutional rights is for the jury panel to be comprised of impartial or indifferent jurors.[16] That right is violated "if

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[13] *See Wallace v. State*, 956 A.2d 630, 637 (Del. 2008) (quoting *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005)). *See also Thomas v. State*, 305 A.3d 683, 696–97 (Del. 2023) ("[T]he proper presentation of an alleged violation of the Delaware Constitution should include a discussion and analysis of one or more of the following criteria: textual language, legislative history, pre-existing state law, structural differences, matters of particular state interest or local concern, state traditions, and public attitudes or other applicable criteria.").

[14] *See McCoy v. State*, 112 A.3d 239, 268 (Del. 2015).

[15] *Knox*, 29 A.3d at 223–24.

[16] *McCoy*, 112 A.3d at 257; *Banther v. State*, 823 A.2d 467, 481 (Del. 2003); *Turner v. State of La.*, 379 U.S. 466, 471 (1965); *In re Oliver*, 333 U.S. 257 (1948).

only one juror is improperly influenced."[17] "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . 'A fair trial in a fair tribunal is a basic requirement of due process.'"[18] Here, the court's instructions and admonitions adequately advised the jury not to access outside materials and not to discuss the case before the presentation of all of the evidence. And, Juror 15's questions did not indicate that he had accessed extrajudicial information or that he had discussed the case prematurely with anyone.

Furthermore, the court did not abuse its discretion when it determined that Juror 15 did not have to be removed and found that no evidence showed he had been improperly influenced by extrajudicial information. Finally, the court did not abuse its discretion when it determined that Juror 15 could serve despite having initial problems hearing witnesses who were not speaking into the microphone.

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[17] *McCoy*, 112 A.3d at 257; *Schwan*, 65 A.3d at 587 (quoting *Hall v. State*, 12 A.3d 1123, 1127 (Del. 2010)); *Diaz v. State*, 743 A.2d 1166, 1180 (Del. 1999).

[18] *Flonnory v. State*, 778 A.2d 1044, 1057 (Del. 2001) ("A defendant in a criminal case is denied his right to a fair trial by an impartial jury if only one juror is improperly influenced."); *Hughes v. State*, 490 A.2d 1034, 1047 (Del. 1985); *Lovett v. State*, 516 A.2d 455, 475 (Del. 1986); *Styler v. State*, 417 A.2d 948, 951–52 (Del. 1980); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 551 (1976); *In re Murchison*, 349 U.S. 133, 136 (1955).

A. The Superior Court Provided Adequate Jury Instructions And Admonishments Regarding Extrajudicial Materials And Premature Discussions Regarding The Case.

The premise behind Ushery's argument that the Superior Court failed to properly instruct the jury not to discuss the case or to do any research is his belief that the court gave such an instruction only during jury selection. Opening Br. at 7, 13. Indeed, Ushery argues that "[i]n this case, the trial court specifically confined the restrictions on discussions and outside research to "during the selection process;" (A19; A23) thereby implying that, *after* the selection process, they were permitted to do so." Opening Br. at 13 (emphasis in original). But that factual premise is incorrect. In fact, at the end of the first day of trial, the court instructed the jury as follows:

> THE COURT: All right. Folks, the only admonition I leave you with is do not discuss the case with your loved ones, don't do any Internet research, don't do any of the Google, any of that stuff, don't talk to each other about the case until all the evidence has been heard. You're certainly free to tell your loved ones that you're on jury duty, but don't tell them what the case is about. This case may be covered in the press, so I would ask you not to read the, particularly the local press which may have news stories. . . .

(A40). Thus, the central factual assertion underlying Ushery's claim is erroneous. The court *did* instruct the jury, outside of jury selection and during the trial, to avoid exposure to extrajudicial information and discussions about the case. *Compare* Opening Br. 7, 13.

The Superior Court also did not violate a "directive" of this Court that states it should, at the commencement of each new trial day, inquire of the jury collectively whether any member has been exposed to extrajudicial information. Opening Br. at 13. Rather, this Court has set forth certain guidelines for the Superior Court as it exercises its discretion in conducting a trial. In *Smith v. State*, this Court stated as follows:

> It is well-settled that the conduct of the trial is largely within the discretion of the Trial Judge, and, within the context of what occurred in this case, we suggest a few guidelines in the exercise of that discretion: In our view, for the integrity of the trial and in the interests of justice, the Trial Judge should, at the end of each day, caution the trial jury collectively about avoiding accounts of the proceeding which may appear in the news media, including newspapers, radio and television. At the commencement of each new trial day, the Court should inquire of the jury, collectively, as to whether any member has in any way been exposed to such accounts.…[19]

Importantly, in setting forth these "guidelines," the Court expressly stated: "Guidelines, as here stated, are not to be considered mandates such as would support assertion of reversible error Per se."[20] And, the *Smith* Court held that, when jurors are given instructions, including those in the Juror Handbook (B1-12), "the Court, counsel and the litigants are entitled to assume that jurors will follow these instructions, including those pertaining to newspapers. . . ."[21]

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[19] *Smith v. State*, 317 A.2d 20, 23 (Del. 1974) (footnotes omitted).

[20] *Id.* at 23, n.2A.

[21] 317 A.2d at 23; *accord*, *Phillips v. State*, 154 A.3d 1146, 1157 (Del. 2017).

This Court can take judicial notice that the Superior Court gives jurors a handbook with an admonition against reading, seeing, or hearing any report about the case in the news.[22] (*See* B10). In fact, this Court has previously held that because the "Handbook for Petit Jurors" contains a direction against reading about the case in the newspapers, "it is more reasonable to infer that the jurors complied with the mandate of the Handbook rather than disobeyed it."[23] Here, in addition to the Handbook for Jurors, jurors were expressly instructed at the close of the first day of trial not to discuss the case with any other person or to do any research into the facts of the case. (A40).

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[22] The Handbook for Jurors instructs that:

> Jurors should not hear any comment about the case by anyone not on the jury, including their family or friends, and should not read, hear, or see any report about the case in the news. The jury's verdict may not be influenced by any such comment or report. . . . Jurors should report to the presiding judge any improper conduct by any juror or any attempt by anyone else to talk or otherwise communicate with a juror about a case in which the juror is sitting. It is improper for a juror to receive any information about a case other than the evidence presented in court. . . . Jurors should cease all conversation about the case when a recess is declared in jury deliberations for lunch or overnight, and may not resume until all jurors have returned to the jury room. All discussion must take place in the jury room with all jurors present.

B10.

[23] *White v. State*, 404 A.2d 137, 140 (Del. 1979) (finding that court's determination that no member of the jury panel had read news article found in newspaper in jury room was supported by the evidence).

Delaware law requires a presumption that juries follow the court's instructions.[24] Ushery fails to distinguish this controlling case law. He instead concedes that "jurors are presumed to follow instructions" (Opening Br. 17), but argues--based on his erroneous factual premise--that "when they are not instructed to avoid extrajudicial information and discussions of the case, the realities of human nature support a presumption that they do both." Opening Br. 17. Ushery also argues at length, based on secondary sources, that when jurors are not instructed to avoid extrajudicial research, it is fair to assume that, in the current environment of interconnectedness, many jurors will engage in such research. Opening Br. at 21-23. Because the court *did* instruct the jury not to pursue extrajudicial information and not to discuss the case with anyone, by its own terms, Ushery's arguments fail. For the foregoing reasons, Ushery's contention that the trial court committed reversible error in its instructions to the jury about discussions and research is without merit, and there is no basis for Ushery's proposed presumption that jurors engaged in such discussions or conducted such research.

This Court should not abandon the rule that juries are presumed to follow directions. If it did, such ruling would lead to impractical results. For example, this Court would have to change its Policy for the Public's Use of Portable Electronic

[24] *Phillips*, 154 A.3d at 1157.

Devices in Courthouses and Courtrooms[25] to forbid jurors from accessing their cell phones, computers, laptops, notebooks, smart watches, the news, and any other forms of media for the duration of the trial. But that alone would be insufficient. The Court would also have to monitor the jury at all times to ensure they did not discuss the case before the end of the presentation of evidence. This would require an order of sequester to prevent any media exposure or discussions about the case with people other than other jurors at the appropriate time.[26] This change in precedence and procedures would be overburdensome[27] and would declare to the average juror that courts do not trust them to be fair and impartial. This Court should continue its long-standing presumption that jurors will follow directions.[28]

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[25] *See* B-5-14.

[26] The common law required that juries be sequestered from the rest of society until they reached a verdict. *Dietz v. Bouldin*., 579 U.S. 40, 52 (2016); Tellier, Separation or Dispersal of Jury in Civil Case After Submission, 77 A.L.R.2d 1086 (1961). This generally meant no returning home at night, no lunch breaks, no dispersing at all until they reached a verdict. *Id*., § 2.

[27] *See Drake v. Clark*, 14 F.3d 351, 358 (7th Cir. 1994) ("Sequestration is an extreme measure, one of the most burdensome tools of the many available to assure a fair trial").

[28] The United States Supreme Court has a corollary holding that jurors are presumed to follow their oath. *Pena-Rodriguez v. Colorado*, 580 U.S. 206, 209 (2017); *cf. Penry v. Johnson*, 532 U.S. 782, 799 (2001); *Richardson v. Marsh*, 481 U.S. 200, 206 (1987).

B. The Superior Court Did Not Commit Error in Responding to Juror 15's Note.

The Superior Court's response to Juror 15's note regarding the already-presented evidence was not improper and did not somehow encourage jurors to believe that they were permitted to research extrajudicial materials as long as they believed they could be impartial. Contrary to Ushery's arguments (Opening Br. 24), Juror 15's questions were not "*extremely* peculiar" and did not suggest any wrongdoing by Juror 15. Juror 15's first question asked about a comparison between the eyeglasses left at the scene of the crime and Ushery's eyeglasses after the crime, as well as when the latter were obtained. Those were very logical questions that anyone trying to assess Ushery's guilt might want to know about. If the prescriptions did not match, or if Ushery's glasses at the time of his arrest were ones that he had worn for some time, those facts would suggest that Ushery was not the perpetrator (and contrary facts might suggest that he was). Juror 15's other substantive question was a surmise about the victim's reference to a black sundress.[29] This question suggests that Juror 15 may have had some familiarity with one or more Asian languages. But, as the court properly held, nothing about these questions suggested

[29] "When the victim was saying "black sundress", I think he may have been referring to "black facemask" or "black mask", etc. Don't know the victim's ethnicity, but the Asian characters for "sundress"/"dress" may be similar to "mask"/"facemask." (A328).

that Jury 15 had conducted extrajudicial research or had communicated improperly about the case. (A47).

In response to Juror 15's questions, the court stated: "You had some other questions that, frankly, are outside the scope of what we can talk about. And no dig on you, I appreciate an inquisitive mind, but we're stuck with the evidence that we hear in court. Okay?" (A243). It might have been preferable for the court to say that the jury was "limited" or "confined" to the evidence presented in court by the parties. But, the court's reference to "stuck with the evidence" most likely would have discouraged jurors from conducting research (rather than encouraged them), since the words state that only the evidence presented in court can be considered by the jury.

Contrary to Ushery's related argument, the court's response to Juror 15's note did not encourage the other jurors to ask Juror 15 about "his investigative theories about the case." Opening Br. 29. Again, the court had previously admonished the jury not to discuss the case until all the evidence had been heard.[30] This admonishment, in conjunction with the Handbook for Jurors, sufficiently warned the

[30] "All right. Folks, the only admonition I leave you with is do not discuss the case with your loved ones, don't do any Internet research, don't do any of the Google, any of that stuff, don't talk to each other about the case until all the evidence has been heard." (A40).

jury not to discuss the case with each other until after the presentation of the evidence had concluded.[31] Nothing in the record indicates otherwise.

Additionally, the Superior Court did not abuse its discretion or otherwise err when it determined that Juror 15 did not have to be removed based on his note. "If there is reason to believe that jurors have been exposed to prejudicial information, the trial judge is obliged to investigate the effect of that exposure on the outcome of the trial."[32] But, "the court is not required to conduct an investigation where an insufficient factual basis for it exists."[33] Generally, "[t]he trial court has discretion to decide that allegations of juror misconduct are not sufficiently credible or specific to warrant investigation."[34] Additionally, a trial court "has broad discretion to determine the mode and depth of investigative hearings into allegations of juror

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[31] *See United States v. Richardson*, 817 F.2d 886, 889 (D.C. Cir. 1987) (rejecting the argument that the court's admonition not to discuss the case "either now or later this afternoon or tomorrow, whatever" applied only to the immediate separation of the jury from the courthouse; court admonished the jury after empaneling and just before lunch on the first day not to discuss the case but failed to do so again during the next two days, including after deliberations began but had not ended).

[32] *United States v. Fumo*, 655 F.3d 288, 304 (3d Cir. 2011), *as amended* (Sept. 15, 2011); *United States v. Console*, 13 F.3d 641, 669 (3d Cir. 1993) (internal quotation omitted).

[33] *Fumo*, 655 F.3d at 304.

[34] *Baird v. Owczarek*, 93 A.3d 1222, 1230 (Del. 2014); *Black v. State*, 3 A.3d 218, 221 (Del. 2010); *Lovett*, 516 A.2d at 475 ("[T]he Trial Judge occupies a unique vantage point in assessing the merit of a claim of juror misconduct and his determination will not be disturbed absent an abuse of discretion.").

misconduct and the appropriate remedy."[35] "The trial judge's determination will be disturbed only on a finding of abuse of discretion."[36]

Here, the trial court correctly ruled that nothing about Juror 15's questions suggested that Juror 15 had conducted research or discussed the case with the other jurors. As the court observed, jurors are allowed to ask questions, and some are even invited to ask questions. (A47). Even potentially suspicious circumstances do not justify an inquiry into whether a case must be retried or the jurors summoned and investigated due to alleged exposure to prejudicial information or improper outside influence.[37] "Something more than unverified conjecture must be shown."[38] Here, Juror's 15's questions did not give rise to even suspicion of misconduct. Thus, the court's decisions not to conduct further inquiry of Juror 15, or to strike Juror 15 because he had asked questions, were correct.

C. The Superior Court's Ruling Did Not Authorize the Jury to Look at Extrajudicial Materials.

The Superior Court's rulings did not authorize (or permit) the jurors to review extrajudicial materials and did not discourage jurors from reporting exposure to

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[35] *Massey v. State*, 541 A.2d 1254, 1257 (Del. 1988); *see Sheeran v. State*, 526 A.2d 896, 897 (Del. 1987).

[36] *Massey*, 541 A.2d at 1257; *Lovett*, 516 A.2d at 455.

[37] *Lovett*, 516 A.2d at 475; *United States v. Barber*, 668 F.2d 778, 787 (4th Cir.), *cert. denied*, 459 U.S. 829 (1982).

[38] *Lovett*, 516 A.2d at 475; *Barber*, 668 F.2d at 787.

extrajudicial information. The court addressed the jury in direct response to defense counsel's concern regarding a video showing the robbery that had been circulated on social media and in the news "quite a bit."[39] (A47-48). Specifically, defense counsel wanted an instruction to the jury because he believed that the jury's exposure to this video may have impacted their objectivity.[40] (A47-48, 50). The court stated that if the jurors had seen the video on the news, it did not "necessarily reflect they formed some opinion or would carry that opinion forward to the prejudice of either party." (A50). In response, Ushery explained, "[m]y concern isn't [the jurors] having seen the video, but there were a lot of comments and some people have remarked on Mr. Ushery as having a record, things like that." (A50). The judge took the matter under advisement. (A50).

The next day, outside the jury's presence, the court addressed the issue of publicity by asking Ushery whether he was concerned that pretrial publicity may have infected the jury's objectivity. (A242). The court reiterated that the issue was whether or not what the jurors had seen or read would impact their ability to be fair and impartial. (A242). The court elaborated: "Well, I think what I'll do is say, look,

[39] The State played for the jury four videos of the robbery from different camera angles. (States's Ex. 1, 3, 4, and 5).

[40] Trial counsel stated, "[B]ecause [the jurors] may not have known to say yes to one of those questions based on the names. But they may have seen something in the media and the video itself that might have reminded them of anything they read online or anywhere else." (A47-48).

now that that's out, you might have seen press coverage. If you did and if it affects you, I want to hear about it. If you did and it doesn't affect you, I don't care, it's not relevant." (A242). Ushery did not object to the court's proposed instruction, but rather thanked the court in response. (A242). Ushery cannot establish plain error. The court's statements demonstrated that it followed the correct principles of law. As the United State Supreme Court has stated, "[t]he question is whether or not, irrespective of a prior opinion, the prospective juror can follow the instructions given by the trial judge, disregarding his prior opinion and deciding the issue of guilt or innocence upon the facts presented in the trial at bar."[41]

After the jurors entered the courtroom, the court gave the following instruction:

> THE COURT: Second thing is, after seeing the video from the inside of the store, that may have jelled some memories among some of you of having seen that video before or being aware of some publicity about this incident when it happened, or whenever. That does not concern me terribly, we try to get into that during the voir dire that if you know anything about the case, you know, tell us about it. Maybe you did see something, I'm not concerned whether you did or not. I am concerned, though, whether seeing it now changes your answers to your ability to be fair and impartial and objective and weigh the evidence that you hear in this case. So you don't have to say anything now, but if you're concerned about some pretrial or extrajudicial information may have come in and affected your ability to be fair and impartial, let the bailiff know and we'll talk about it during a recess.

[41] *Parson*, 275 A.2d at 782.

(A243). The provided instruction was focused on allaying defense counsel's concern about pretrial exposure to a video of the robbery that the jurors may have seen and the jurors' ability to act fairly and impartially. The court correctly stated that the focus was on whether, after having seen the robbery video, the jurors could still be impartial.[42] The court followed the correct test regarding the jurors' objectivity.

This Court should reject Ushery's argument that the Superior Court's words about being "not concerned" that the jurors may have previously seen the robbery video somehow affirmatively permitted them to conduct research. Opening Br. 14-15. The court specifically prohibited the jury from conducting research via its admonition at the end of day one. (A40). Moreover, the Handbook for Jurors stated the same prohibition.[43] When these facts are coupled with the presumption that jurors follow instructions, Ushery's argument fails.

This Court should also reject Ushery's argument that the trial court "nullified the presumption of prejudice." Opening Br. 16. Although the court stated that it was "not concerned" about whether the jurors had seen the robbery video prior to the trial, this statement makes sense given that the court had previously conducted a

[42] *Parson*, 275 A.2d at 782; *Johnson v. State*, 976 A.2d 171 (Del. 2009); *Jacobs v. State*, 358 A.2d 725, 728 (Del. 1976); *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

[43] B-24.

voir dire of all of the jurors. Moreover, at that stage of the trial, the court's concern was about the jurors' ability to continue to be fair and impartial after the possibility of seeing any extrajudicial materials. Ushery's argument that the court's words dictate a reversal here misapprehends the court's focus and the applicable law.

And, contrary to Ushery's arguments (Opening Br. 15), mere exposure of a juror to pretrial or extrajudicial information does not create a presumption of prejudice. First, the United States Supreme Court has not held that a juror must be completely ignorant of the facts of a case to be considered impartial.[44] "Even in instances where a juror has heard of or about the case, and of the allegations of a defendant's guilt, he may sit if he is still capable of abandoning his prior impressions and rendering a fair verdict on the evidence."[45] Second, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial."[46] "'[A]

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[44] *See Irvin*, 366 U.S. at 722 ("It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.").

[45] *United States v. Claxton*, 766 F.3d 280, 298 (3d Cir. 2014) (cleaned up).

[46] *Skilling v. United States*, 561 U.S. 358, 384 (2010); *Nebraska Press Assn.*, 427 U.S. at 554; *State v. Halko*, 192 A.2d 817, 832 (Del. Super. Ct. 1963), *aff'd*, 204 A.2d 628 (Del. 1964) (rejecting assertion that the mere reading or listening to newspapers or television or radio broadcasts of accounts of the trial is prejudicial misconduct of the jury). *See also Banner v. State*, 225 S.W.2d 975, 976 (Tex. Cr. Ct. App. 1950) (holding that although the better practice during the trial was not to

searching *voir dire* of the prospective jurors is the primary tool to determine if the impact of the publicity rises to th[e] level' of actual prejudice."[47] The United States Supreme Court has also "stressed the wide discretion granted to the trial court in conducting *voir dire* in the area of pretrial publicity and in other areas of inquiry that might tend to show juror bias. Particularly with respect to pretrial publicity, we think this primary reliance on the judgment of the trial court makes good sense."[48]

Ushery cites to *Dietz v. Bouldin*[49] as support for his argument that mere exposure to pretrial or extrajudicial information creates a presumption of prejudice. Opening Br. at 15, n. 18. But Ushery's quote from *Dietz* is incomplete—and it comes from *Remmer v. United State*.[50] *Remmer* did not deal with extrajudicial information. Rather, that case dealt with an outside party who offered a bribe to a juror after the trial had started.[51] The United States Supreme Court stated in *Remmer*:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively

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allow jurors to read the newspaper accounts of the trial, such actions would lead to reversible error only when the accused is injured or prejudiced thereby).

[47] *Jin Sig Choi v. Warren*, 2015 WL 4042016, at *17 (D.N.J. Jun. 30, 2015) (quoting *Ritchie v. Rogers*, 313 F.3d 948, 962 (6th Cir. 2002)).

[48] *Mu'Min v. Virginia*, 500 U.S. 415, 427 (1991).

[49] 579 U.S. 40 (2016).

[50] 347 U.S. 227 (1954).

[51] *Id*. at 228.

> prejudicial, ***if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties***. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.[52]

Ushery relies on *Baird v. Owczarek*[53] to argue that unconfirmed allegations of Internet research by a juror raises the presumption of prejudice. However, *Baird* is distinguishable. In that case, one of the jurors alleged that another juror had conducted Internet research.[54] This Court stated that "once the trial court has been presented with evidence of internet research by a juror[,] it is incumbent on the trial judge to conduct an investigation."[55] Although evidence of Internet conduct qualifies as an "egregious circumstance" in proving a claim of improper jury influence,[56] there can be no presumption of prejudice in favor of the defendant here.[57] The court specifically admonished the jury not to conduct such research. *See* p. 18, *supra.* None of the jurors reported that Juror 15 had conducted any research.

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[52] *Remmer v. United States*, 347 U.S. 227, 229 (1954) (emphasis added); *Mattox v. United States*, 146 U.S. 140, 148-150 (1892) (superseded by rule as stated in *Wargerv. Shauers*, 574 U.S. 40 (2014)); *Wheaton v. United States*, 133 F.2d 522, 527 (8th Cir. 1943).

[53] 93 A.3d 1222 (Del. 2014).

[54] *Id.* at 1225.

[55] *Id*. at 1230.

[56] *Id*. at 1228.

[57] *Id*.; *Black*, 3 A.3d at 220; *Sykes v. State*, 953 A.2d 261 (Del. 2008).

And, Juror 15's questions dealt with a comparison of the evidence presented by the State and with some testimony that appeared to be confusing based on a language barrier.[58] Because the questions do not suggest extrajudicial research, Ushery's argument fails.

This Court should continue to rely on the discretion of the Superior Court to determine whether jurors have been prejudiced by extrajudicial information. It is of course true that "[t]he theory of our [trial] system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[59] But, "[p]rominence does not necessarily produce prejudice, and juror impartiality, we have reiterated, does not require ignorance."[60]

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[58] Suh, the robbery victim, described the assailant's clothing as a black sun dress, but in addition to being confused and disoriented from the robbery, he was having problems communicating and there was also a language barrier. (A33-34, 37).

[59] *Skilling*, 561 U.S. at 378 (citing *Patterson v. Colorado ex rel. Attorney General of Colo.*, 205 U.S. 454, 462 (1907)).

[60] *Skilling*, 561 U.S. at 381; *Irvin*, 366 U.S. at 722 (ruling that jurors are not required to be "totally ignorant of the facts and issues involved"; "scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case"); *Reynolds*, 98 U.S. at 155–156 ("[E]very case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any one can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits.").

Here, there is no evidence that any juror was aware of pretrial publicity about the crime. Out of an abundance of caution, the court asked, after the surveillance video of the trial had been played, whether the video "jelled some memories among some of you of having seen that video before or being aware of some publicity about this incident when it happened, or whenever." (A243). However, consistent with legal requirements, the court focused on whether seeing the video "changes your answers to your ability to be fair and impartial and objective and weigh the evidence that you hear in this case." (A243). No juror reported a belief that he or she could no longer be objection. More was not required.

D. The Superior Court Did Not Abuse Its Discretion Or Otherwise Err By Not Removing Juror 15.

The Superior Court correctly concluded that Juror 15 did not have to be removed as a juror due to his hearing problem. On day two, Juror 15 sent a note that asked if the court could make sure that the witnesses spoke into the microphone. (A45). Juror 15 said that he had his hearing aid turned up as high as possible, but he "had a little difficulty hearing some of what [one witness] he was saying, because the witness was looking at the jury and not speaking into the microphone. (A328). Ushery's counsel agreed that the witnesses should speak into the microphone. (A47).

Contrary to Ushery's assertions (Opening Br. 25), no evidence supports a conclusion that Juror 15 failed to hear the court's instruction about prior knowledge,

bias, and partiality. As an experienced jurist, the trial judge presumably spoke into the microphone so that the jurors could hear him. And, the Handbook for Jurors notifies jury members that they "should bring to the attention of the court any matter affecting their service. ***For example, they should promptly notify the bailiff if they cannot hear or see what is being said or shown to the jury***."[61]

Here, Juror 15 followed this instruction. He reported that he had difficulty hearing one witness who did not speak into the microphone. (A45). Subsequent witnesses presumably spoke into the microphone because neither Juror 15 nor either parties' counsel subsequently asked the judge to direct any witness to speak into the microphone, and the judge did not find it necessary to so instruct any witness on his own. Moreover, the record appears to show that the court attempted to fix the issues that Juror 15 was having by providing him with amplified headphones. (A186). Specifically, after the lunch break on day two, the court asked the bailiff about what appear to be the sound buttons in the jury box, and the bailiff advised that he would talk with "the juror":

> THE COURT: Do you know if those things are working on in [sic] the other seats?
>
> THE BAILIFF: The way they explained it to me, Your Honor, was it's on and there's a button for frequency that they'll be able to know by hitting the button. So I was going to explain it to the juror.

[61] *See* B23 (emphasis added).

(A181).

Then the court continued to assess the ability of Juror 15 to hear the case. After informing the jury that the air conditioning was not working and notifying the jury about the case schedule (A185-86), the court checked with Juror 15 about what appears to be headphones that the court or its staff had provided to him:

> THE COURT: Juror No. 15, we're trying to help out your hearing. Do those things work?
>
> JUROR NO. 15: Don't seem working.
>
> THE COURT: This is the corrosive effect of new technology. It only works when it decides to work.
>
> (Pause.)
>
> THE COURT: Better? Worse? No effect at all? They're actually earmuffs. Some day [sic] we'll get that fixed. Maybe it's the air-conditioning, maybe that's the problem.

(A186). While the headphones did not initially work, Juror 15 did not state that witnesses were not speaking into the microphone or that he could not hear any witness (or the court).

The next day, the court again asked Juror 15 if the headphone he had been provided were working::

> THE COURT: Finally, to my friend Juror No. 15, I hope we've taken care of the—well, maybe not—I hope we've taken care of the hearing questions.
>
> JUROR: (Makes thumbs-up gesture.)

THE COURT: Good? You had some other questions . . . .

(A243).

From the record, it appears that Juror 15 had difficulty hearing only some parts of one of the State's witnesses when the witness failed to speak into the microphone. The court properly inquired about the problem and arranged for Juror 15 to receive amplified headphones to alleviate any problem. Those headphones initially did not work. But, there is no evidence that any subsequent witness failed to talk into the microphone, or that Juror 15 could not hear any witnesses' testimony. Juror 15 did not raise the issue further after his initial note (which asked only that witnesses speak into the microphone). Thus, the court did not abuse its discretion by not excusing Juror 15 for a hearing problem, nor did the court abuse its discretion by failing to conduct an inquiry into whether Juror 15 was continuing to have hearing problems.

CONCLUSION

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

Respectfully submitted,

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Date: April 9, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

CALVIN USHERY,	§	
	§	No. 422, 2024
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains **9,913** words, which were counted by Microsoft Word.

Date: April 9, 2025

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