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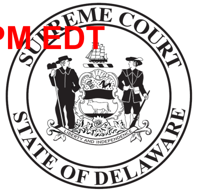

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DASHAN FREEMAN,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 12, 2024
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Andrew J. Vella (No. 3549)
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Dated: March 20, 2025

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NATURE AND STAGE OF THE PROCEEDINGS

On August 24, 2020, a New Castle County grand jury indicted Dashan Freeman ("Freeman") for Murder First Degree, Murder First Degree (felony murder); Burglary Fist Degree, Assault First Degree, four counts of Possession of a Firearm During the Commission of a Felony ("PFDCF"), and one count of Possession of a Firearm By a Person Prohibited ("PFBPP"). A1; A20-23.

On April 4, 2023, Freeman filed a pretrial Motion to Exclude Defendant's DOC Communications, claiming violations of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 6 of the Delaware Constitution, which the Superior Court denied. A6; Exhibit A to Op. Brf. On April 7, 2023, after a jury had been selected, Freeman file a Motion to Dismiss, alleging a discovery violation which, according to Freeman, amounted to prosecutorial misconduct.[1] A9. The Superior Court likewise denied that motion. A11. Exhibit B to Op. Brf. After a five-day trial, a jury convicted Freeman of Murder First Degree (2 counts); Burglary First Degree, and three counts of PFDCF.[2] A13. The jury separately found Freeman guilty of PFBPP in a "B" case. A18.

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[1] The jury was selected on April 6, 2023. A7. Trial commenced on April 11, 2023. A13.

[2] The jury did not reach a verdict on Assault First Degree or the remaining PFDCF charge. A13. The PFBPP charge was severed into a "B" case prior to trial. A1; A16-19.

Freeman filed a motion for a new trial on April 25, 2023, which the court denied on September 27, 2023. A13-14; Exhibit C to Op. Brf. On December 15, 2023, the Superior Court sentenced Freeman to an aggregate two life terms plus an additional 19 years followed by decreasing levels of supervision. A14; Exhibit D to Op. Brf.

Freeman filed a timely notice of appeal and an opening brief. This is the State's answering brief.

SUMMARY OF THE ARGUMENT

I. Appellant's argument is denied. The Superior Court did not err when it denied Freeman's motion to dismiss. The State did not commit a discovery violation when it turned over tablet messages and recordings of two phone calls days prior to the presentation evidence in Freeman's case. The State's production of the evidence did not amount to prosecutorial misconduct warranting dismissal of the case or exclusion of the tablet messages and prison phone calls. Freeman failed to demonstrate how he was prejudiced by the State's production of the evidence prior to the presentation of evidence in the case.

II. Appellant's argument is denied. The Superior Court did not abuse its discretion when it denied Freeman's motion to suppress prison communications that were obtained via Attorney General subpoena. The Attorney General subpoenas were reasonable and advanced an important government interest previously recognized by the Court.

III. Appellant's argument is denied. The Superior Court did not abuse its discretion or otherwise err when it denied Freeman's Motion for a New Trial based on alleged prosecutorial misconduct. The court correctly found that the State did not commit misconduct when it elicited testimony from Bethea regarding her communication with Freeman and later commented about her testimony in closing. Freeman's prosecutorial misconduct claim fails and he cannot establish plain error.

STATEMENT OF FACTS

Deona Bethea ("Bethea") and Freeman were in a years-long romantic relationship until May 31, 2020. B77-78. At that time, Bethea broke up with Freeman and blocked him from communicating with her via phone, text, and on social media. B78. Since her breakup with Freeman, Bethea had been seeing Vincent Flowers ("Flowers"). B79-80. On June 24, 2020, Freeman's birthday, Bethea unblocked Freeman to send him a birthday wish and to let him know that she had purchased birthday gifts for him. B76. The pair intermittently communicated during the day and into the evening. Court Exhibit 1.[3] However, that same day, Bethea had been separately communicating with Flowers and invited him to visit at her home on 13th Street in Wilmington later in the evening. B85-86.

Freeman had been communicating with Bethea, asking whether he could come over to pick up the birthday gifts she purchased for him. Court's Exhibit 1. Bethea was concerned and did not want Freeman to show up while Flowers was there. Court Exhibit 1. It was not until later in the evening, when Bethea felt assured it was too late for Freeman to get his gifts, that she told Flowers he could come to her house. Court's Exhibit 1. Flowers arrived Bethea's house around 11:00 pm and parked in front of her house. B86; Court Exhibit 1. Bethea asked Flowers to move

[3] Court Exhibit 1, admitted into evidence pursuant to 11 *Del. C.* § 3507, is a recorded statement Bethea made to Detective Justin Kane while she was at the hospital on June 25, 2020. B113.

his car because it was "too obvious." Court Exhibit 1. At approximately 1:00 am, Bethea and Flowers were in a bedroom on the second floor of her home. Court Exhibit 1; B120-21. Bethea got up and was going into the hallway when she was startled by Freeman. Court Exhibit 1. B120-21. As Bethea ran back toward the bedroom, Freeman shot her. Court Exhibit 1. According to Bethea, Flowers, who remained in the bedroom, pleaded with Freeman, "Don't do it, bro. I'm sorry, I'm sorry. Don't do it. I'm sorry." Court Exhibit 1. Flowers walked toward Freeman[4] and Freeman shot him. Court's Exhibit 1. Flowers fell to the ground, but got up and said, "I'm dying. I'm dying. I can't die like this. Call the ambulance." Court Exhibit 1. Bethea called 911. B66; Court Exhibit 1.

Bethea told the 911 operator that she had been shot. State's Trial Exhibit 67. Bethea also told the 911 operator that her friend had been shot. State's Trial Exhibit 67. When the 911 operator asked who shot her, Bethea responded, "My boyfriend." State's Trial Exhibit 67. Later in the call, Bethea identified her boyfriend as Dashan Freeman. State's Trial Exhibit 67.

Responding police officers discovered Flowers kneeling behind the front door of Bethea's residence. B14; B41; B54. He was suffering from an apparent gunshot

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[4] During her interview with Detective Kane, Bethea identified Freeman as "K.I." and "Dashan." "K.I." is Freeman's nickname. Court Exhibit 1; B119.

wound to the chest. B14. When asked who shot him, Flowers said "It was him, but I don't know him." B15. Flowers later died as a result of being shot. B159.

WPD Officers Jackson Rosembert and Lisa Flores discovered Bethea in a bedroom upstairs. B41. She was alert and appeared to have been shot in the upper torso, and there was an injury to her hand. B148. Once Bethea was stable, Officer Flores asked her about what happened, and Bethea kept repeating the same thing: "her boyfriend had shot her and the other victim and that today was his birthday, and that she got cheating on him, and that he walked in and just started shooting." B149; B42. Bethea identified her boyfriend as Dashan Freeman and provided the officers his date of birth. B149; B150. Bethea, however, would not provide the officers her pedigree information at that time. B44.

WPD Sergeant Brittanni Barnes accompanied Bethea to the hospital in an ambulance. B54. On the trip to the hospital, Bethea told Sgt. Barnes that her boyfriend, Dashan Freeman, shot her. She also told Sgt. Barnes that it was his birthday. B55. WPD Detective Justin Kane interviewed Bethea at the hospital. B114; Court Exhibit 1. Bethea told Det. Kane that her boyfriend, Dashan Freeman, shot her and then shot Flowers. When Det. Kane showed Bethea a photographic lineup at the hospital, she identified Freeman. Court Exhibit 1; B68-69; B72; B117.

Months after the shooting, in September, Det. Thomas Kashner of the Newport Police Department was conducting an unrelated investigation at a residence

in Bear, Delaware, when he encountered Freeman. B183-84. Freeman initially told Det. Kashner his name was "Tristan Jones." B184. A computer check on "Tristan Jones" did not return any results. B185-86. While inside the residence, Det. Kashner came across mail addressed to Dashan Freeman. B186. A subsequent computer check revealed that Freeman was wanted, and Det. Kashner immediately arrested him. B186-87.

While Freeman was incarcerated awaiting trial and under a no-contact order, prison communication logs show that he had been communicating with Bethea using his PIN number as well as the PIN numbers of three other inmates. B167; B170. State's Trial Exhibits 86, 87. The pair communicated through phone calls, tablet messages, and video visits. Bethea established an email account and associated it with the name "Gab Jackson" to communicate with Freeman via tablet/text messages and video visits. B89; B164-68; B168-76; State's Trial Exhibits 85-87; 90-91. In January 2022, Freeman told Bethea that the pair had to "win this war," and the longer Bethea procrastinated, the "worse it looks." State's Trial Exhibit 91. He also "gave [Bethea] the 'blueprint,'" and told her she had to "handle business." State's Trial Exhibit 90. On February 2, 2022, Bethea executed an affidavit in which she swore that she "did not get a good opportunity to view the suspect['s] face due to the suspect wearing a mask." State's Trial Exhibit 88. In the affidavit, Bethea also stated she "honestly made a mistake in identifying Dashan Freeman due to . . . being

under the influence as well as police officers pressuring [her] to make an identification . . . ." State's Trial Exhibit 88.

Bethea testified at Freeman's trial. B60-142. She was an admittedly reluctant witness, who had previously advised prosecutors that she was living in Pennsylvania and would not testify at Freeman's trial. B60-62. Bethea was taken into custody on a material witness warrant prior to Freeman's trial and remained in custody for 17 days, at which time she provided prosecutors with a Delaware address where she was living and was released on an unsecured bail. B63. Prior to testifying, Bethea executed an immunity agreement in which the State agreed it would not prosecute Bethea for her actions in preparing the February 2, 2022 affidavit in exchange for her truthful testimony at Freeman's trial. Defense Trial Exhibit 1; B128-29. At trial, Bethea testified that she and Flowers had been shot in her home on June 25, 2020. B64. She acknowledged that she had previously identified Freeman as the shooter. B72-73. However, Bethea maintained that she could not identify the shooter because it was dark, and he was wearing a mask. B132-33. Bethea testified that she came to the realization that Freeman was not the shooter about one month after the shooting, when she "got . . . a clear conscience." B91. According to Bethea, the affidavit came about because it was something that was "on [her] mind as something [she] wanted to do [and she] brought it to [Freeman's] attention." B90.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED FREEMAN'S MOTION TO DISMISS GROUNDED IN A PURPORTED DISCOVERY VIOLATION.

Question Presented

Whether the Superior Court abused its discretion when it permitted the State to introduce into evidence recorded prison phone calls and tablet messages between Freeman and Bethea, which the State provided prior to trial.

Standard and Scope of Review

A trial judge's interpretation of discovery rules is reviewed *de novo*, and the judge's application of these rules is reviewed for an abuse of discretion.[5] This Court first reviews an allegation of a prosecution discovery violation to determine whether a violation occurred.[6] If the Court determines that a discovery violation occurred, a three-factor test is applied which considers: "(1) the centrality of the error to the case; (2) the closeness of the case; and (3) the steps taken to mitigate the results of the error."[7]

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[5] *Valentin v. State*, 74 A.3d 645, 649 (Del. 2013) (citing *Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006)).
[6] *Id.*
[7] *Valentin,* 74 A.3d at 649 (quoting *Oliver v. State*, 60 A.3d 1093, 1096–97 (Del. 2013) (internal quotes omitted) (other citations omitted)).

Merits of the Argument

In Freeman's case, the State provided the defense with additional discovery, which included tablet messages between Freeman and Bethea from the month of January 2022, on April 3, 2023. The State, on April 6, 2023, also provided recordings of two prison phone calls between Freeman and Bethea, which occurred on January 4, 2022 and January 18, 2022. The State had subpoenaed and received the tablet messages in February 2022, after receiving Bethea's affidavit recanting her prior identification of Freeman as the shooter.[8]

In response to a subpoena, Bethea met with prosecutors on March 13, 2023.[9] During that meeting, Bethea indicated she was not going to testify in Freeman's case and that she wanted nothing more to do with the case.[10] Based on Bethea's apparent unwillingness to testify and the prosecutors' awareness of ongoing communication between Freeman and Bethea, the State issued subpoenas targeting phone communications from prison inmates to Bethea's phone number.[11] On March 23, 2023, prosecutors received phone call records in response to the subpoenas. The January 2022 phone calls were made by Freeman, who attempted to conceal the calls by using another inmate's PIN.[12] The State was thus unaware of their existence until

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[8] A159.
[9] A159.
[10] A159.
[11] A159-60.
[12] A160.

prosecutors were alerted by DOC, in March 2023.[13] Immediately after the phone calls were reviewed, the State, on April 3, 2023, advised defense counsel of the existence of the recordings and the State's intent to introduce them at trial.[14]

Freeman filed a motion to dismiss the case, claiming the State had committed a discovery violation that amounted to prosecutorial misconduct. He alternatively argued that the evidence should be excluded. Rejecting Freeman's allegation of a discovery violation, the court found:

> [T]he April 7, 2023 disclosure of the January 2022 DOC Records does not constitute a discovery violation. This case involved a fluid situation, where one of the victims, Bethea, indicated that she would not cooperate with the State and would not participate at trial. As part of the State's investigation as to Bethea's position, along with its investigation regarding potential witness tampering, the State issued the March 2023 Subpoenas. Because it appeared that Defendant was using a different inmate's PIN to communicate with Bethea, identifying communications between Defendant and Bethea presented an investigatory challenge to the State. The State disclosed the at-issue communications on April 3, 2023 to Defendant – the same day Inv. Santiago issued his report. The State also disclosed its intent to submit all or part of the thirty-three pages of text messages on this date.
>
> The DOC communications disclosed consist of two phone calls, approximately two minutes in length, and thirty-three pages of text messages.[19] Considering the short duration of the calls and limited volume of text exchanges, the court does not find that their potential use at trial will prejudice Defendant's substantial rights. Therefore, the Court finds that no discovery violation occurred, and the State is permitted to use the April 7, 2023 discovery at trial.[15]

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[13] A160.
[14] A160; A177.
[15] *State v. Freeman*, 2023 WL 2879321, at *3 (Del. Super. Ct. April 10, 2023).

The court likewise rejected Freeman's claim of prosecutorial misconduct:

> The Court, in reviewing the case law regarding alleged prosecutorial misconduct, was unable to locate a case where a defendant made a motion for prosecutorial misconduct *prior* to trial. *See*, *e.g.*, *State v. Schaefer-Patton*, 2023 2062521, at *2 (Del. Super. Feb. 17, 2023) ("In reviewing a claim of prosecutorial misconduct, the Court's standard of review depends on whether a timely objection *was raised at trial.*") (emphasis added). This is not surprising, especially in the context of pre-trial discovery. In that context, for an alleged discovery violation, a defendant typically moves to exclude evidence based on the alleged violation, as was done here. This is not to say that a motion for prosecutorial misconduct can never be brought pre-trial, but the Court finds that the State has not committed prosecutorial misconduct based on the facts of this case. This is especially so in this case, considering that the Court determines that no discovery violation has occurred.[16]

The Superior Court did not abuse its discretion or otherwise err when it denied Freeman's motion to dismiss or alternatively exclude the prison phone call and tablet communication evidence.

On appeal, Freeman contends the State committed a discovery violation when it provided additional discovery on April 3, 2023, and April 7, 2023, after the jury had been selected in his case, but prior to the presentation of evidence, which began on April 11, 2023. He argues that the Superior Court abused its discretion when it declined to find a discovery violation. Freeman also contends the court erred when it considered his prosecutorial misconduct argument. Freeman's claims are unavailing.

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[16] *Id*. at n.12.

There Was No Discovery Violation

Superior Court Criminal Rule 16 ("Rule 16") provides, in part:

> Upon request of the defendant the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.[17]

"Rule 16 is interpreted broadly, and the State has a continuing duty to disclose information subject to a discovery request."[18] Timely production of Rule 16 discovery materials weighs against a finding of a discovery violation.[19] The Superior Court correctly determined the State did not commit a discovery violation in Freeman's case.

The State provided Freeman with a voluminous discovery packet on March 17, 2023.[20] The State separately provided the phone call recordings and tablet messages prior to the presentation of evidence. Freeman nonetheless contends the State, "held back the actual prison communications it intended to use until April 3rd

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[17] Super. Ct. Crim. R. 16(a)(1)(C).
[18] *Secrest v. State*, 679 A.2d 58, 64 (Del. 1996) (citing *Ray v. State*, 587 A.2d 439, 441 (Del. 1991)).
[19] *Hopkins*, 893 A.2d at 928.
[20] A148-50.

and April 7th."[21] As the Superior Court noted, the evidence in the April 3 and April 7 disclosures was hardly voluminous, consisting of 33 pages of text messages and an aggregate four minutes of recorded phone calls. The State did not hold back the tablet messages or the prison calls.

Freeman claims that the State failed to fulfill its continuing responsibility to disclose evidence under Rule 16 because the State's April 3, 2023 disclosure violated Rule 16(d)(3)(B), which requires the State to have responded to Freeman's October 21, 2020 discovery request within twenty days. Freeman ignores the fact that the tablet messages were created after the discovery deadline had passed. In any event, while the State had possessed the tablet messages for over one year, they were not subject to disclosure under Rule 16 until the State intended to introduce them in its case-in-chief. The State provided the tablet messages once prosecutors determined that they would be introduced in the State's case-in-chief. This was not a case of deliberate delay by the State. As the Superior Court correctly determined, this was a "fluid" situation in which the tablet communications became part of the investigation into whether Freeman was tampering with Bethea, which was prompted by her statements, made during the March 13, 2023 meeting with prosecutors. The messages demonstrated Freeman remained in contact with Bethea and their relationship was sometimes tumultuous. That fact, standing alone, was not

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[21] Op. Brf. at 19.

material to the preparation of the defense. To be sure, Bethea was a critical witness, however the tablet messages, of which Freeman was arguably aware to the extent that he participated in the conversations, showed that Freeman communicated with Bethea in violation of a court order to refrain from having contact with her. There is no mention in the tablet messages of the court proceedings against Freeman, Bethea's affidavit, her attendance at court proceedings, or her proposed testimony. The State's meeting with Bethea on March 13, 2023, provided a different context when considering the tablet messages. With the possible specter of Freeman's influence on Bethea's decision to testify and the content of her testimony, the tablet messages became markedly more relevant to the State's case. This is especially true in light of the January 2022 phone calls, which the State contended demonstrated Freeman's attempt to influence Bethea's actions in executing the February 2022 affidavit (the "blueprint") and her overall assistance with his case ("win this war"). Thus, the State provided the tablet messages as required by Rule 16 once prosecutors determined the State would present them in its case-in-chief.

Unlike the tablet messages, the State was unaware of the existence of the recorded prison calls, and prosecutors did not possess the recordings until they were produced by DOC on March 27, 2023, pursuant to a subpoena. On April 3, 2023, the State advised Freeman of the existence of the recordings and its intent to use them in the State's case-in-chief. Once the recordings were reviewed by the State's

investigator and prosecutors, and partially transcribed by the State's investigator, they were provided to Freeman on April 7, 2023. Any delay in disclosing the recordings is the direct result of Freeman's attempt to conceal the recordings by using another inmate's PIN to make the phone calls to Bethea. While the State has a "duty to find out about evidence which it has within its control,"[22] deliberate concealment of such evidence by a defendant severely hampers the State's efforts to discharge its obligations. Under Freeman's theory, the Superior Court should have rewarded him with exclusion of the evidence for concealing a needle in a proverbial haystack. In sum, the Superior Court did not abuse its discretion when it determined that the State had not committed a discovery violation.

Freeman also argues that the State's refusal to extend the deadline for him to accept the State's plea offer is evidence of the State's "willful and prejudicial" discovery violations.[23] The State extended a plea offer to Freeman on March 17, 2023.[24] That offer expired on March 27, 2023.[25] At his final case review, on March 27, 2023, Freeman requested a one week extension of the plea deadline from the State.[26] The State declined to extend the deadline and Freeman ultimately rejected

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[22] *Skinner v. State*, 575 A.2d 1108, 1126 (Del. 1990).
[23] Op. Brf. at 21.
[24] A34.
[25] A34.
[26] A36.

the State's plea offer after a full colloquy.[27] Freeman contorts this fact into a claim that the State engaged in "a knowing denial of providing discovery."[28]

Freeman rejected the State's offer on the day that it expired. The State was not obligated to extend the offer beyond the final case review date.[29] That there was additional discovery provided after Freeman's rejection of the plea is of no moment. The State provided the tablet messages and prison phone calls once it determined those items of evidence were going to be introduced in the State's case-in-chief. That determination was made after a review of the evidence, which occurred after Freeman had rejected the plea. There is no record support for the idea that the State knowingly held back the tablet messages or recordings until after the plea offer expired and the State declined Freeman's request to extend the offer for one week. Indeed, the State disclosed the existence of the at-issue communications on April 3, 2023, the same day the State's investigator issued his report. Likewise, there is no record support for the idea that having the opportunity to review the tablet messages and prison phone calls would have changed Freeman's decision. There is nothing in the record to suggest that Freeman, after having the opportunity to review the evidence, attempted to reengage the State in plea negotiations. There is no plain

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[27] A36; A36-41.
[28] Op. Brf. at 21.
[29] *Wilson v. State*, 2010 WL 572114, at *3 (Del. Feb. 18, 2010).

error here and the Superior Court did not abuse its discretion when it determined that the State had not committed a discovery violation.

Prosecutorial Misconduct

Freeman also argues that the State's purported discovery violations amounted to prosecutorial misconduct and the Superior Court failed to conduct the appropriate inquiry in its rejection of that claim. This argument lacks merit.

When reviewing a purported discovery violation, the Court applies "the three-pronged test of prosecutorial misconduct set out in the case of *Hughes v. State* . . . . That test requires this Court to analyze (1) the centrality of the error to the case, (2) the closeness of the case, and (3) the steps taken by the court to mitigate the results of the error.[30] A conviction will only be set aside if the alleged violation prejudiced the defendant.[31] However, the Court must first reach the threshold question of whether a discovery violation occurred.[32] For the reasons discussed above, the Superior Court correctly determined that the State did not commit a discovery violation, therefore obviating the need to perform the three-part *Hughes* analysis.[33]

Even if this Court were to determine that the State committed a discovery violation, reversal of Freeman's convictions is not required under *Hughes* because

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[30] *Skinner*, 575 A.2d at 1126 (citing *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981)).
[31] *Johnson v. State*, 550 A.2d 903, 913 (Del. 1988).
[32] *Wharton v. State*, 246 A.3d 110, 117 (Del. 2021); *Hopkins*, 893 A.2d at 927.
[33] *Wharton*, 246 A.3d at 117.

his substantial rights were not prejudicially affected. The tablet messages and prison phone calls were not central to the case. Bethea's statements to police at the scene and in the hospital were the critical evidence in the case against Freeman. The tablet communications demonstrated that Bethea continued to have a relationship with Freeman and that he communicated with her – this was not a controverted fact. The two prison phone calls were offered in support of the State's theory that Freeman had influenced Bethea to recant her identification. That Bethea had recanted her identification was a fact before the jury. In short, the evidence was not central to the case. This was a fairly close case, but certainly not as close as Freeman contends. The State presented only one eyewitness to the shooting, Bethea, who immediately identified Freeman to the 911 operator, several officers at the scene and to Det. Kane at the hospital and identifying Freeman from a photographic lineup. Bethea recanted her identification of Freeman in an affidavit more than 18 months after the shooting and maintained that she had misidentified Freeman when she testified at trial. While there were no forensics tying Freeman to the shooting, the State presented ample motive evidence in addition to evidence of Freeman's flight and attempt to evade detection by giving police a false name when he was arrested months after the shooting. There were no steps taken to mitigate the alleged error because the court did not find a discovery violation. However, had the court determined that the State's production of the tablet messages and prison phone calls violated discovery

rules, the court had a wide array of remedies available to correct the error.[34] To be sure, the court could have excluded the evidence. The court, however, would have been well within its discretion to fashion a remedy such as providing Freeman with an overnight recess or brief continuance to further review the evidence. But Freeman did not request any alternative remedy. Under the facts of this case, Freeman has failed to establish a discovery violation in the first instance. His claim likewise does not survive the *Hughes* analysis. There was no prosecutorial misconduct here.

In any event, Freeman cannot demonstrate prejudice. In his motion to dismiss the case or alternatively exclude the text exchanges, Freeman claimed the State's "delayed disclosure of [the tablet messages and phone calls] wholly prevented defense counsel from 'searching, reviewing, and reasonably considering their implications."[35] The Superior Court rejected Freeman's argument finding, "[t]he DOC communications disclosed consist of two phone calls, approximately two minutes in length, and thirty-three pages of text messages. Considering the short duration of the calls and limited volume of text exchanges, the court does not find

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[34] *Oliver,* 60 A.3d at 1096-97. Indeed, there is a wide range of remedies available to the court to address discovery issues that includes: (1) ordering prompt compliance with the discovery rule; (2) granting a continuance; (3) prohibiting the party from introducing into evidence material not disclosed; or (4) issuing such other order the Court deems just under the circumstances. *Brown v. State*, 897 A.2d 748, 752 (Del. 2006) (citations omitted).

[35] A133 (quoting *State v. McGuiness*, 2022 WL 1580601, at *3 (Del. Super. Ct. May 18, 2022)).

that their potential use at trial will prejudice Defendant's substantial rights."[36] Rather than ask for additional time to consider the prison communication, Freeman chose to ask only for dismissal or exclusion of the evidence. The court may well have granted a brief recess or continuance, which would have cured Freeman's claimed prejudice. The prison communications were not voluminous, and Freeman was able to search, review, and reasonably consider the evidence. That Freeman did not request additional time to review the evidence demonstrates his substantial rights were not prejudiced by the State's disclosure of the evidence.

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[36] *Freeman,* 2023 WL 2879321, at *3.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED FREEMAN'S MOTION TO SUPPRESS THE JANUARY 2022 PRISON CALLS OBTAINED THROUGH AN ATTORNEY GENERAL SUBPOENA. THE SUBPOENA WAS REASONABLE AND ADVANCED A LEGITIMATE GOVERNMENT INTEREST.

Question Presented

Whether the Superior Court properly denied Freeman's motion to suppress recordings of his tablet communications and prison telephone calls obtained by the State through an Attorney General subpoena.

Standard and Scope of Review

This Court reviews the denial of a motion to suppress for an abuse of discretion.[37] To the extent the Superior Court's decision is based on factual findings, this Court upholds such findings unless they were not supported by sufficient evidence and were clearly erroneous.[38] Allegations of constitutional violations are reviewed *de novo*.[39]

Merits of the Argument

On February 22, 2022, after receiving Bethea's affidavit recanting her identification of Freeman, the State issued an Attorney General Subpoena to the

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[37] *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284-85 (Del. 2008) (collecting cases).
[38] *Id*. (collecting cases).
[39] *Morris v. State,* 2019 WL 2123563, at *5 (Del. May 13, 2019) (citation omitted).

Department of Correction for "all records regarding telephone visiting room conversations and iPad records . . . for Dashan Freeman . . . including . . . any and all available approved phone number lists, outgoing call log entries and conversations" from the time between January 1, 2022 and February 22, 2022.[40] In March 2023, the State issued five Attorney General subpoenas to DOC for prison communications related to Freeman's possible contact with Bethea. A March 9, 2023 subpoena requested records of phone calls for Freeman for the period covering January 1, 2023 through March, 2023.[41] The State issued the following subpoenas after interviewing Bethea on March 13, 2023. A March 15, 2023 subpoena requested any and all phone calls and inmate information for calls placed to Bethea's known phone number for the period covering March 10, 2023 to March 14, 2023.[42] A March 17, 2023 subpoena requested any and all phone calls and inmate information for calls placed to Bethea's known phone number from January 1, 2022 to March 31, 2022.[43] A March 23, 2023 subpoena requested any and all phone calls and inmate information placed to Bethea's known phone number from January 1, 2022 to March 17, 2023.[44] A March 23, 2023 subpoena requested any and all phone calls and call detail sheets placed to three phone numbers, including Bethea's known

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[40] A53.
[41] A75.
[42] A77.
[43] A78.
[44] A79.

number, under a DOC PIN assigned to Ryan Flamer covering the time period between March 10, 2023 and March 23, 2023.[45] A March 24, 2023 subpoena requested all records regarding telephone visiting room conversations and DOC tablet electronic messages or video calls for Dashan Freeman covering the time period between March 21, 2023 and March 24, 2024.[46]

Immediately prior to his trial, Freeman filed a motion to suppress the prison communications obtained by the State through the Attorney General subpoenas issued on February 22, 2022, requesting Freeman's prison communications made between January 2022 and February 2022, and March 9, 2023, requesting Freeman's prison communications for the period between January 2023 and March 2023.[47] In his motion, Freeman argued the subpoenas were unreasonable because the State failed to articulate an important or substantial governmental interest.[48] He also argued the subpoenas were overbroad.[49] The Superior Court rejected Freeman's arguments. The court first determined the February 22, 2022 Attorney General subpoena satisfied the reasonableness requirement:

> In February 2022, a notarized affidavit was delivered to the Department of Justice, signed with the name Deona Bethea. The State knew from their investigation that although Bethea identified Defendant as the perpetrator on the day of the incident, Bethea wanted no assistance from

[45] A80.
[46] A81.
[47] A45-49.
[48] A47.
[49] A47.

> Wilmington Police Department Victim Services personnel. The State also knew that Defendant and Bethea communicated with each other prior to the incident. In light of Bethea's affidavit, the State continued its investigation into the incident and Defendant's involvement, and also the reasonable possibility that Defendant had made contact with Bethea to sign the affidavit, despite a no contact order. As such, the State has met the first prong of the *Martinez* Standard in identifying both an important and substantial government interest.[50]

The court also determined the request for information in the February 2022 Attorney General subpoena was no greater than necessary for the protection of the government interest and the time frame was sufficiently limited in scope and tailored to the investigation.[51] The court likewise determined that the five March 2023 Attorney General subpoenas were reasonable:

> The Court finds that the State meets the first prong of the *Martinez* Standard because the State was continuing its ongoing investigation of the incident, along with the possibility of witness tampering by Defendant. Again, Defendant argues that the State attempts to justify the subpoena based on information learned from the subpoena, but that is not the case. The State only issued the March 2023 Subpoenas after the State met with Bethea and she indicated she was not willing to testify and "wanted nothing to do with the case." The March 2023 Subpoenas were also issued after the State discovered that Bethea may be communicating to Defendant under the name "Gab Jackson" and that between January 1, 2022 to February 17, 2023 one hundred and thirty nine (139) calls were made to Bethea's phone, utilizing the PIN numbers of three other inmates.
>
> For all these reasons, the State had reason to believe that Defendant was tampering with a witness, Bethea, although he had a no contact order.[52]

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[50] *State v. Freeman*, 2023 WL 2854771, at *8 (Del. Super. Ct. Apr. 9, 2023) (citing *Procunier v. Martinez*, 416 U.S. 396, 413 (1974)).
[51] *Id.*
[52] *Id*. at *10 (record citations omitted).

The Superior Court did not abuse its discretion or otherwise err when it made the above determinations and denied Freeman's suppression motion.

On appeal, Freeman presents the same argument he did below. He contends, "there was no reasonable basis to subpoena the communications" and the production of the materials did not further an important government interest.[53] His argument is unavailing.

The State's subpoena of recordings of an inmate's prison phone calls implicates both First Amendment and Fourth Amendment considerations.[54] Under the First Amendment, the State may obtain an inmate's phone communications if: "(1) the contested actions furthered an important or substantial government interest unrelated to the suppression of expression; and (2) the contested actions were no greater than necessary for the protection of that interest."[55] This Court has recognized "that there is a legitimate or substantial government interest if the defendant is engaged in witness tampering."[56] "This governmental interest falls

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[53] Op. Brf. at 27.
[54] *See Shannon Johnson v. State*, 983 A.2d 904 (Del. 2009) (analyzing subpoena of out-going mail under First Amendment and Fourth Amendment) (*Johnson I*); *Tywann Johnson v. State*, 2012 WL 3893524 (Del. Sept. 7, 2012) (applying First Amendment test adopted in *Johnson I* to recorded prison phone calls) (*Johnson II*); *State v. Tywann Johnson*, 2011 WL 4908637 (Del. Super. Ct. Oct. 5, 2011) (applying First Amendment and Fourth Amendment tests analyzed in *Johnson I* to recorded prison phone calls).
[55] *Johnson I*, 983 A.2d at 917 (citing *Nasir v. Morgan*, 350 F.3d 366, 374 (3d Cir. 2003) (citing *Martinez*, 416 U.S. at 413)).
[56] *Johnson I*, 983 A.2d at 917-18; *Johnson II*, 2012 WL 3893524, at *2.

within the category of security concerns that the inmate is engaged in 'ongoing criminal activity.'"[57] Nonetheless, Freeman appears to claim the boilerplate language on the subpoenas "give[s] no clue to the reason for which they were issued," and the State's explanation for the issuance of the subpoena fails to demonstrate an important governmental interest. He is wrong.

While an inmate possesses no reasonable expectation of privacy with respect to prison phone calls,[58] the Fourth Amendment of the United States Constitution nonetheless requires that a subpoena for those calls be "reasonable."[59] There is a three-prong test to determine reasonableness.[60] First, the subpoena must specify the materials to be produced with reasonable particularity. On appeal, Freeman does not challenge the sufficiency of the particularity of the subpoena. Second, the subpoena must require the production only of materials relevant to the investigation. A subpoena for all of an inmate's communications with any person outside of prison seeks materials relevant to an investigation into witness tampering when there is "a reasonable basis for the State to suspect that [the inmate] might attempt to contact [the victim/witness]…."[61] Freeman's arguments on appeal focus on this prong.

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[57] *Johnson I*, 983 A.2d at 917 (citations omitted).
[58] *Johnson II*, 2012 WL 3893524, at *1 (Del. 2012) (citing *Rowan v. State*, 45 A.3d 149 (Del. 2012); *Johnson v. State*, 983 A.2d 904 (Del. 2009)).
[59] *Johnson I*, 983 A.2d at 921 (citing *Blue Hen Country Network*, 314 A.2d 197, 201 (Del. Super. Ct. 1973)).
[60] *Id.*
[61] *Id*.

Third, the materials must not cover an unreasonable period of time.[62] Freeman does not assert that the requested materials covered an unreasonable period of time.

Here, the State articulated the basis for issuing the Attorney General subpoenas, which were reasonable and furthered an important or substantial government interest. The fact that the Attorney General subpoenas contained boilerplate language is of no moment. As the Superior Court noted, "[t]here is no requirement that the reasonableness requirements must be located in the body of the subpoena, and Defendant has not cited any authority that would require as such."[63]

The February 2022 Attorney General Subpoena

In her February 2022, affidavit, Bethea recanted her identification of Freeman as the shooter.[64] The State knew that Bethea was in a relationship with Freeman before the shooting and that she had been texting Freeman throughout the day up until less than an hour before the shooting.[65] The texting continued after the shooting, but before Freeman's arrest.[66] The State knew from its investigation that Bethea wanted no assistance from Wilmington Police Department Victim Services personnel.[67] This was a domestic violence case and it is not unusual for a victim of

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[62] *Id*. (citing *In re Blue Hen Country Network*, 314 A.2d at 201).
[63] *Freeman*, 2023 WL 2854771, at *8, n.66 (citing *Johnson*, 983 A.2d at 921).
[64] A71.
[65] A59.
[66] A59.
[67] A59.

domestic violence to have conflicted feelings about an offender and communicate with an offender.[68] The Superior Court correctly determined, "[i]n light of Bethea's affidavit, the State continued its investigation into the incident and Defendant's involvement, and also the reasonable possibility that Defendant had made contact with Bethea to sign the affidavit, despite a no contact order."[69] Based on the foregoing, the Superior Court correctly determined that the State had a reasonable basis to issue an Attorney General subpoena that furthered a legitimate or substantial government interest in determining whether Freeman was engaged in witness tampering[70]

The March 2023 Attorney General Subpoenas

The March 2023 March Attorney General Subpoenas were likewise reasonable and furthered the same legitimate government interest. When the State reviewed the materials produced from the February 2022 Attorney General subpoena, prosecutors learned that Bethea, using the name "Gab Jackson" had been communicating with Freeman via text and video chat, despite a no-contact order that prohibited Freeman from communicating with Bethea.[71] On March 9, 2023, one month before Freeman's trial, a State investigator hand delivered a trial subpoena

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[68] A59.
[69] *Freeman*, 2023 WL 2854771, at *8.
[70] *Johnson I*, 983 A.2d at 917-18.
[71] A60.

and a subpoena for a pretrial meeting.[72] The investigator spoke with Bethea, who was reluctant to speak with him and did not seem interested in participating in the trial.[73] Coupling this information with the February 2022 materials, the State believed Freeman was having on-going communication with Bethea and issued a subpoena that day for Freeman's prison communications occurring between January 1, 2023 and March 9, 2023.[74] On March 13, 2024, Bethea appeared at the Department of Justice for trial preparation. At that time, Bethea indicated that she was not going to testify, she was not going to come to court, and she wanted nothing to do with the case.[75] Coupling this development with the information previously known to the State, prosecutors issued several Attorney General subpoenas for prison communications related to Freeman and Bethea.[76] As the Superior Court succinctly stated, "the State was continuing its ongoing investigation of the incident, along with the possibility of witness tampering by [Freeman].[77] There was a reasonable basis for issuance of the March 2023 Attorney General subpoenas and they furthered the legitimate government interest in determining whether Freeman was engaged in witness tampering.

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[72] A60.
[73] A60.
[74] A60.
[75] A60.
[76] A61.
[77] *Freeman*, 2023 WL 2854771, at *10.

III. THE SUPERIOR COURT DID NOT PLAINLY ERR WHEN IT DENIED FREEMAN'S MOTION FOR A NEW TRIAL.

Question Presented

Whether the Superior Court plainly erred when it denied Freeman's motion for a new trial based on an allegation of prosecutorial misconduct.

Standard and Scope of Review

The grant or denial of a motion for a new trial is ordinarily reviewed for an abuse of discretion.[78] However, defense counsel's failure to raise a contemporaneous objection to allegedly improper arguments constitutes a waiver of the right to raise the claim on appeal.[79] Where defense counsel fails to raise a timely and pertinent objection to alleged improper prosecutorial argument at trial and the trial judge does not intervene *sua sponte*, this Court reviews only for plain error.[80] "[T]he first step in the plain error review of prosecutorial misconduct mirrors that in the review for harmless error: [this Court] examines the record *de novo* to determine whether prosecutorial misconduct occurred. If [this Court] determines that no misconduct occurred, [the] analysis ends. If the record demonstrates misconduct, [this Court] appl[ies] the *Wainwright* standard."[81] Under the *Wainwright* plain error

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[78] *Burroughs v. State*, 988 A.2d 445, 448–49 (Del. 2010).
[79] *Id.* (citing *Walker v. State,* 790 A.2d 1214, 1220 (Del. 2002)).
[80] *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).
[81] *Id.* *See Small v. State*, 51 A.3d 452, 459 (Del. 2012).

standard, the error complained of "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[82] Where the Court finds plain error, it will reverse with no further analysis, but where no plain error is found, the Court may still reverse.[83] Under *Hunter v. State*[84] the Court "'will consider whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.'"[85] Applying *Hunter*, the court may reverse even if the misconduct would not warrant reversal under *Wainwright.*

Merits of the Argument

When Freeman was arrested, police seized his phone and searched its contents, which showed communication between Freeman and Bethea after the shooting but prior to Freeman's arrest.[86] Freeman filed a motion to suppress the contents of the phone, which the Superior Court granted.[87] During the State's direct examination of Bethea, the following exchange occurred:

Q. After you were shot, did you stay in the hospital -- you said, five days?

A. Yeah, about five days.

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[82] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[83] *Id.* (citations omitted).
[84] 815 A.2d 730 (Del. 2002).
[85] *Id.* (quoting *Baker,* 906 A.2d at 150).
[86] *Freeman*, 2023 WL 2854771, at *4.
[87] *Id.*

Q. Did you and Dashan Freeman talk?

A. No.

Q. Did he text you?

A. No.

Q. Did you visit him?

A. No.

Q. Did he get in contact with you at any time?

A. No.

Q. Now, you're aware that Dashan was arrested for this on September 23, 2020?

A. Yes.

Q. Did Dashan Freeman contact you then?

A. Yes.

Q. How did he do that?

A. Through phone, via phone.[88]

During the State's closing, the prosecutor made the following comments:

> Which Deona Bethea is credible? Deona Bethea the victim, who called 911? "Oh, my God, I need help; oh; my God, my children; oh, my God, help me, help me." Deona Bethea, the victim who told the arriving officers what happened? Deona the victim, who told Detective Kane the details of KI shooting her and Vince?

* * * *

[88] B88-89.

> Or Officer Rosembert when he asked her who shot her, "My boyfriend. Today is his birthday, too. He caught me cheating." To Officer Flores when she asked who shot her, "I'm not going to lie. I'm not going to lie, I got caught F-ing. I got caught in the mid. I was cheating on my boyfriend and he caught me doing it, and he shot us. And today is his birthday." Corporal Barnes in the ambulance when she's been loaded, Barnes asks, "Do you know who shot you?" She says, "I think so." "Who was it" "Dashan Freeman; my boyfriend."
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> * * * *
>
> After that we get to the stage where Deona is the girlfriend now after the shooting. The defendant hasn't been arrested. He's out and about. He can't be found. Deona Bethea from the stand said she didn't hear from Freeman until he got arrested, but after he got arrested, they started talking. So for three months, Freeman is wherever Freeman is. Detective Kane told you, couldn't find him at his apartment, apartment; left his job. U.S. Marshals task force – fugitive task force is looking for him, can't find him. Wherever he is, according to Deona Bethea, he's not calling her. He's having no contact with her until he gets arrested. When he gets arrested, he needs to do something about that. What got him arrested? Deona Bethea. It was her identification of Dashan Freeman that got him arrested. What is he going to do about that? While ordered not to contact her, he finds ways to do it.[89]

Freeman did not object to Bethea's answers to the prosecutor's questions on direct examination and he did not object to the prosecutor's comments in closing.

On appeal, Freeman contends the prosecutor's failure to correct Bethea's testimony regarding her pre-arrest communications and subsequent reference to her testimony in closing argument amounted to misconduct requiring reversal. Freeman also argues that the trial judge failed to address the issue presented in the motion for

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[89] B253-58.

a new trial and instead denied the motion, "based on a finding that the prosecutor did not violate her order suppressing the text messages."[90] He is wrong.

When the Superior Court considered Freeman's motion for a new trial based on prosecutorial misconduct, the judge went beyond the required initial analysis and engaged in the plain error analysis. In its ruling, the court noted the exclusion of the text messages found on Freeman's phone and the State's adherence to the court's suppression decision, however, the court did not base its ruling on that fact. Rather, the court made the following determination:

> A new trial in this case is not required "in the interest of justice." Because there was no objection raised at trial, the Court conducts a plain error review of the statements made by the prosecution during closing argument that form the basis of the alleged misconduct. First, however, the Court engages in a *de novo* review to determine whether the prosecutor's action rise to the level of misconduct. Upon careful review of the record, this Court finds no prosecutorial misconduct. Even if the Court were to accept Defendant's claim that the statements made during closing amounted to prosecutorial misconduct (which they do not), Defendant has not shown plain error.[91]

As the court explained, "the State accurately commented on the evidence presented at trial, and did so in a way that did not violate the Court's prior ruling."[92] And, "[d]espite the Defendant's contention, the State did not misstate evidence but made legitimate inferences of the Defendant's guilt that followed from Bethea's

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[90] Op. Brf. at 32.
[91] *Freeman*, 2023 WL 6299437, at *3 (citations omitted).
[92] *Id.* at *4.

direct testimony and the substantial amount of other evidence available at trial including post-arrest text messages and prison phone calls."[93] The Court's ruling was correct.

No Prosecutorial Misconduct

The threshold question in the prosecutorial misconduct analysis is whether the prosecutor's actions amounted to misconduct.[94] If the Court determines that no misconduct occurred, the analysis ends.[95] Here, the Superior Court found that the prosecutor's questions to Bethea and his statements in closing did not amount to misconduct. That ruling was correct. Bethea was a reluctant witness who attempted to downplay her relationship and communication with Freeman at every turn. When confronted with a question about her contact with Freeman after the shooting, but before his arrest, she said there had no contact between them. While there was evidence of text messages between them during that timeframe in Freeman's phone, that evidence had been suppressed and the State could not confront her with it, as it had with other communications that occurred prior to the shooting. During the State's closing argument, the prosecutor attempted to paint the picture of the two Donae Betheas – the victim Donae Bethea, who identified Freeman as the shooter and the girlfriend Donae Bethea, who recanted her identification of Freeman and

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[93] *Id.* at *5.
[94] *Baker,* 906 A.2d at 150.
[95] *Id.*

remained in contact with him until the trial. In doing so, the prosecutor contrasted her statements to police with her testimony at trial. In drawing the contrast, the prosecutor identified Bethea's testimony denying any contact with Freeman after the shooting, but before his arrest.[96] The prosecutor immediately thereafter identified almost all of the instances of contact between Freeman and Bethea while Freeman was incarcerated awaiting trial.[97] The prosecutor's comments were not misleading, nor did they misstate the evidence. In sum, the prosecutor's questions to Bethea and comments in closing did not amount to misconduct. Thus, the analysis ends.

No Plain Error

Even if the Court were to determine that the prosecutor engaged in misconduct, Freeman has not demonstrated plain error requiring reversal. Under the *Wainwright* plain error standard, the error complained of "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[98] "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."[99]

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[96] B257.
[97] B258-63.
[98] *Wainwright*, 504 A.2d at 1100.
[99] *Id.*

Freeman contends the prosecutor elicited testimony from Bethea that he knew was false and failed to correct it and argues that the prosecutor's statements in closing further compounded the error. Freeman's argument is unavailing.

In *Napue v. Illinois,* the United States Supreme Court held that the prosecution's failure to correct false testimony that it knew to be false denied the defendant due process of law.[100] Similarly, this Court has held that the State's knowing use of false or perjured testimony violates due process.[101] This Court recently considered a *Napue* claim in *Burrell v. State.*[102] In that case, the Court noted:

> The three-step framework that some circuits have adopted to analyze *Napue* claims requires the defendant to show that: (1) the testimony or evidence presented at trial was actually false or misleading; (2) the Government knew or should have known that it was false; and (3) the testimony was material, meaning that there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.[103]

Applying the *Napue* framework to this case does not result in a finding of plain error. Bethea's testimony regarding her contact with Freeman prior to his arrest was demonstrably incorrect. There were text messages in Freeman's seized phone that showed Bethea and Freeman were communicating after the shooting until he was arrested three months later. The prosecutor knew Bethea's testimony was incorrect,

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[100] *Napue v. Illinois*, 360 U.S. 264 (1959).
[101] *Jenkins v. State*, 305 A.2d 610, 616 (Del. 1973).
[102] *Burrell v. State*, 2024 WL 4929021, at *11 (Del. Dec. 2, 2024).
[103] *Burrell*, 2024 WL 4929021 at *11, n.132.

however, the trial judge had suppressed the contents of Freeman's phone, which prohibited the prosecutor from confronting Bethea with the messages as he had done with other communications between Freeman and Bethea. Even assuming Freeman is able to satisfy the first two prongs of *Napue*, he cannot establish materiality.

Freeman's trial strategy was to paint Bethea as a credible witness who was not influenced by Freeman. The State, on the other hand, contrasted Bethea's testimony, which exculpated Freeman, with her immediate identification of him as the shooter multiple times to multiple people. Under the State's theory, Freeman had influenced Bethea to recant her identification in the affidavit and maintain her recantation at trial. The evidence the State used in support of its theory consisted of the communications between Freeman and Bethea. To the extent it was possible, Freeman wanted to distance himself from Bethea to show he did not influence her decisions to prepare the affidavit and testify at trial. Placing the fact that Bethea had communicated with Freeman in the time between the shooting and his arrest would not advance Freeman's defense strategy. And, placing the fact that Bethea had, in fact, been communicating with Freeman during that time period after she denied do so when she testified would have reflected negatively on her credibility. In other words, it was not in the best interests of Freeman's trial strategy to paint Bethea as a credible witness over whom he had no influence by highlighting what appeared to be Bethea's attempt to conceal their communications that occurred between the

shooting and Freeman's arrest. The fact that Freeman and Bethea were communicating between the time of the shooting and the time of his arrest would not have been even minimally impactful given all the other evidence of their contact. This is especially true because the jury would not have been provided with any context surrounding the communications because the court had suppressed that evidence. The jury would not have seen the content of the communications, and it is highly unlikely that Freeman would have wanted them to.[104] There is no reasonable likelihood that Bethea's testimony regarding her contact with Freeman between the time of the shooting and his arrest could have affected the judgment of the jury. Freeman has failed to establish materiality and cannot demonstrate plain error. He likewise cannot prevail under *Hunter*. The prosecutor's statements in closing were not repetitive errors that require reversal.

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[104] Some of the communications between Freeman and Bethea that occurred between the time of the shooting and Freeman's arrest were memorialized in Detective Kane's police report. A191-93. In the messages, Bethea told Freeman he "could've killed [me]." A191. She also states: "But I'm not dealing with those fucking cops, courthouses none of it that's why I said let's get this story together now of need be 'cause I can't do it it just won't happen everybody is going to be mad at me but." A193.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

/s/Andrew J. Vella
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Dated: March 21, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DASHAN FREEMAN,	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 12,2024
	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

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STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Andrew J. Vella
Chief of Appeals
ID No. 3549

DATE: March 20, 2025