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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY MATTA, Defendant Below, Appellant v. STATE OF DELAWARE Plaintiff Below, Appellee.	))))))))))))	No. 514, 2024

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF PROCEEDINGS

On April 20, 2023, the Appellant Gary Matta was arrested for offenses alleged in the original indictment to have occurred between May 1 and September 1 of 1989, 1990, 1991, 1992, and 1993. A1: D.I. 1; A7-10. During a pretrial office conference held over Zoom on March 22, 2024, the Trial Judge granted the State's motion to amend the indictment. A5: D.I. 32. The amended indictment moved some of the dates back one year to reflect offenses alleged during the same months but in the years 1988, 1989, 1990, 1991, and 1992. By the time the case went to the jury, it charged Matta with Unlawful Sexual Intercourse First Degree (Count 1), Unlawful Sexual Contact Second Degree (Count 2), Unlawful Sexual Intercourse First Degree (Count 3), Unlawful Sexual Intercourse First Degree (Count 4), Unlawful Sexual Intercourse First Degree (Count 5), and Unlawful Sexual Intercourse First Degree (Count 6).[1] A11-14; A496-499.[2]

After a three-day trial held on March 25, 26, and 27, 2024, the jury returned guilty as charged verdicts to all six counts. A5: D.I. 36; A519-521. During the trial, Matta's objections to: (1) the admission of testimony of unfairly prejudicial

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[1] Count 3 of the original and amended indictment, Indecent Exposure Second Degree, was dismissed before deliberations began when the State agreed with the Defense that the statute of limitations had passed. A402.

[2] Either an error in the transcript of instructions or an instance of the Trial Judge misspeaking describes Count 4, a charge of Unlawful Sexual Intercourse First Degree, as being in the fourth degree. The mistake appears to have been of no consequence. A12; A498.

uncharged misconduct that Matta had been expelled from the Boy Scouts (A150-151); and (2) the out-of-court statements of two non-testifying declarants that accused Matta of a sexual relationship with the alleged victim were overruled by the Trial Court (A171-175).

On November 13, 2024, the Trial Court imposed on Matta an aggregate sentence of 85 years of unsuspended imprisonment at level 5 supervision followed by a year of probation. Exhibit A.

Matta filed a timely notice of appeal (A6: D.I. 41), and this is Matta's opening brief on direct appeal to the Supreme Court of Delaware.

SUMMARY OF ARGUMENT

1. The Trial Court erred in admitting testimony that Defendant, a scout master, had been kicked out of the Boy Scouts for an unspecified reason because it constituted evidence of unfairly prejudicial uncharged misconduct irrelevant to proving the charges against him. The testimony had no independent probative value to prove an element of the State's case-in-chief and did not anticipate a disputed issue. Because Defendant was a scout master charged with molesting a boy scout, the testimony unfairly prejudiced him. Any reasonable juror would necessarily speculate that the cause of Defendant's ouster from scouting was for conduct similar to that with which he was charged. The testimony, therefore, constituted impermissible character evidence showing Defendant's propensity to commit the crimes alleged in the indictment. The Trial Court further erred when: it prematurely permitted the evidence to be entered in the State's case-in-chief; it failed to recognize the testimony's unfair prejudice against the Defendant substantially outweighed its minimal probative value; it failed to determine whether the misconduct was proven by clear, convincing, and conclusive evidence; and it failed to provide instructions to guide its consideration by the jury. In the context of this late reported case with minimal corroborating evidence, the error was not harmless and prejudiced Defendant, depriving him of a fair trial.

2. The Trial Court erred by admitting into evidence out-of-court statements made to the alleged victim by his grandmother and uncle, neither of whom testified at trial, that they knew or believed that he and the Defendant were having sexual relations. The Court abused its discretion when it overruled the Defendant's objection, ruling the statements were being introduced to show why the alleged victim failed to disclose the sexual abuse to his family and not for the truth of the matter the statements asserted. This ruling was error because the statements were highly and unfairly prejudicial, and the Trial Court failed to conduct a balancing test weighing their unfair prejudice to the Defendant against their probative value to the State. The Court further erred by failing grant Defendant's motion to strike the statements and, once admitted and not stricken, by failing to provide a limiting instruction describing for the jury their proper use. Because the assertions of contained in the statements accused the Defendant of both charged and uncharged crimes, their erroneous admission into evidence, when reviewed with the rest of the trial evidence, deprived Defendant of a fair trial.

STATEMENT OF FACTS

The State's case at trial consisted of the testimony of the complaining witness, D.M. (A138), two civilian witnesses, D.M.'s cousin J.P.(A268) and D.W. (A294),[3] and police Detective Greg Micolucci (A319).

The indictment as amended accused Matta of having sexual intercourse with D.M., a child under the age of 16, during the summer months of 1988, 1989, 1990, 1991, and 1992, when Matta was a scoutmaster and D.M. was a boy scout. A11-14.

When the allegations were eventually reported 30 years after the events alleged, the police did not find (or look for) any digital evidence of the crimes. No physical or medical evidence was presented to support the State's case. Other than the chief investigator, no-one testified to D.M. disclosing sexual abuse.[4]

The State's Opening Statement

The State's opening statement leaned heavily on D.M.'s chaotic homelife as both the reason he joined the Boy Scouts of American (the "Boy Scouts" or "scouting") and how Matta, a scoutmaster during at least some of the charged time period, could exploit D.M.'s vulnerability to commit the crimes charged. A69. The

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[3] D.M. and J.P. were under 18 years of age at the time. Testimony is unclear whether D.W. was 17 or 18 during the events to which he testified. Pursuant to Supreme Court Rule 10.2(9)(b), all three, including D.W., are accorded pseudonyms out of an abundance of caution.

[4] Although D.M. said he had "told several people over the years," none were called to testify and only one was named. A183.

Prosecutor described the State's "biggest piece of evidence" as the "direct" testimony of D.M., indicating at the outset of the trial that there would be no forensics or DNA. A71-72.

The Defendant's Opening Statement

The Defense's opening began by focusing on the case's origin not being from a "call to police or law enforcement but with a call to civil lawyers for money" when D.M. "entered himself in a class action suit against the Boy Scouts of America." A75. Despite encouragement from a friend named Carla, an adult D.M. did not call the police. When she did so, D.M. was angry with her. A75; A194. Throughout Matta's opening (A74-94), not once was D.M.'s failure to tell family members of the sexual abuse mentioned, either at the time of its alleged occurrence or in the intervening decades into of D.M.'s adulthood. Instead, Matta discussed other evidence he expected that would reflect negatively on D.M.'s credibility, such as: D.M.'s need for money (A75); the years after the alleged sexual abuse that D.M. worked and lived with Matta until after an argument when D.M. was told to leave Matta's home (A76-78); D.M.'s waning and waxing cooperation with the police investigation once it was reported (A85); and the allegedly unthorough investigation of the police as demonstrated by the chief investigator's failure to seek a search

warrant to look through Matta's abundant computer equipment and storage (A87-94).[5]

Testimony of D.M.

The State began its case-in-chief with D.M., who testified to joining the Boy Scouts when he was 11 years old and ending his time scouting some years later when he was 12, 13, or 14. A147-148; A209-210. When D.M. was a scout, Matta was his scoutmaster. He testified that Matta had touched him and performed oral sex on him on "hundreds" of times each year on the many occasions when D.M. was staying over where Matta lived at his grandmother's house. Sometimes, these stays would last the weekend; others, a week or even two weeks. A155, 168-169.

D.M. tells the jury Matta was "kicked out" of the Boy Scouts

> Q. […] So do you remember how long you went to the Scouts total?
>
> A. I think it was a couple years. Two, three years I think I went to the Scouts before he was kicked out. Or at least that's what I heard, he was kicked out.
>
> I don't know the specifics of that, so I want to be clear about that. Just I heard that he was kicked out. I knew he was out of the Scouts. But it was about two/three years before that happened.
>
> Q. Okay.
>
> MR. ANTOINE: Objection.
>
> THE COURT: Sidebar.
>
> (The following sidebar discussion commences:)
>
> MR. ANTOINE: Motion to strike that testimony (*A151) as prejudicial. I don't think -- from my reading of the discovery, him being

[5] Both Matta and D.M. worked with and on computers throughout their lives. A89; A100; A139; A222

> kicked out of Scouts was political. It had nothing to do with molesting minors. It is more prejudicial than probative.
>
> MR. WYNN: The State's next question was going to be about the continuing of the relationship outside of the Scouts. That had nothing to do with that. That was a timeline thing.
>
> That's when [D.M.] knows he left the Boy Scouts. We instructed him not to talk about the circumstances of that, which is why he said, this is what I know, I don't know what happened other than that.
>
> THE COURT: Yeah. The testimony wasn't for the truth of the matter asserted. He was kicked out for a certain reason. The witness did say he doesn't know why he was kicked out. So I'm going to overrule the objection.
>
> (The sidebar discussion concludes.) A150-151.

The Trial Court did not balance the probative value of this evidence against its prejudicial impact on Matta and provided no instructions to assist the jury in its consideration.

D.M. testified that the sexual acts happened in the basement where Matta lived. The first time it happened he and another older boy, J.P., were staying over. D.M. stayed in Matta's bedroom, J.P. on the couch in the living room of the basement. A163-166. After that, sexual things happened to D.M. every weekend when he stayed over. A168-169. J.P was there when these things happened. The sleeping arrangements always remained the same. D.M. stayed in Matta's bedroom, J.P. on the couch. The Prosecutor asked D.M. whether he told J.P. what was happening to him. D.M. said, "No, I did not. I didn't tell anybody at that time." A166. D.M. continued, saying his homelife at his grandmother's house was very chaotic and included D.M.'s father getting drunk every night. A166. And other than

the sexual abuse, things were good at Matta's house, where he was never yelled at and could learn things about computers and van repair. A167. D.M. testified that his family life at home was "toxic." A171.

The Out-of-Court Statements of D.M.'s Grandmother and Uncle

The Prosecutor explicitly asked D.M. to tell him what D.M.'s family knew about the alleged sexual abuse:

> Q. Between that 11- and 15-year-old range, were you ever given the impression that people in your family knew something was going on with Gary?
>
> A. Yeah.
>
> Q. Can you tell me about that.
>
> A. I remember my uncle -- this is -- I remember my uncle one day looking at me and just saying, you know --
>
> MR. ANTOINE: Objection. Hearsay.
>
> THE COURT: Sustained. *A172.
>
> Q. Hold on.
>
> A. Hmm?
>
> MR. WYNN: Your Honor, if we can approach?
>
> (The following sidebar discussion commences:)
>
> MR. WYNN: Your Honor, I know he objected to that one and it was sustained. There's another question. There are two questions, two things he was going to talk about that are things people in his family said to him. It would be the hearsay objection if they were offered for the truth of the matter asserted. They are not. They are being admitted for the purpose of showing his mindset and why [D.M.] felt like he didn't have anyone else he could go to and everyone in the family knew what was happening to him and tolerating it. Nothing to do with whether those statements are true. It merely goes to his state of mind.
>
> MR. ANTOINE: I think he can testify about how he felt. I think it's hearsay what his uncle said.
>
> THE COURT: Tell me what -- give me a (*A173) proffer.
>
> MR. WYNN: So the uncle was going to say, he's your daddy, isn't he? And he didn't know what that meant, but now, of course, he realizes it. And then there's a comment by his grandmother, other

grandmother, says Daddy or Gary, makes some comment about him liking to do stuff with him, insinuating that they were having sex. It might be the uncle that insinuates the sex and the grandmother that calls, that guy is your daddy, just go hang out with your daddy. These were the two comments to him. And he feels like everyone in my family knows what is going on and no one cares.

MR. ANTOINE: That would go to the truth of the matter asserted.

THE COURT: I'm going to overrule the objection. That does not go to the truth of the matter because it's not being offered that Mr. Matta was [D.M.]'s daddy or not. It's going to his mindset at the time of what (*A174) people were saying to him and why he was continuing to go over there. So it's to the witness's mindset, so I'm going to overrule the objection.

BY MR. WYNN:

Q. So, [D.M.], if you can turn back to the questions I was asking you, what did your uncle say to you that made you think he might have known something was going on?

A. One day we were sitting in the living room at my grandmother's house, and he just started making lewd remarks to me about, like, feelings in my -- his words feelings in my ass and that I liked it and that he was like, oh, you probably like --

MR. ANTOINE: Objection. This goes to the truth of the matter asserted, Your Honor.

THE COURT: Overruled.

THE WITNESS: That he liked the buzzing in my ass or something like that. He just made some very lewd remarks to me that, to me, I remember thinking just that he knew things weren't quite right with the situation. And I got very upset, very emotional about it. *A175. Also, I remember one particular incident with my grandmother. It was at a birthday party. And my grandmother, in front of everybody, just started talking about how Gary was, in her words, my daddy and just kept saying it like that over and over again, he's your daddy. And, you know, and I would say back to her, no, my dad is my dad, and she was like, no, I didn't say he was your dad. Gary's your daddy. And she would say things like that. So, as I grew up, I just realized that they all thought something was wrong with the situation, but they were taking it out on me. A171-175.

In overruling Matta's objection, the Trial Court provided no instruction to guide the jury's consideration of the out-of-court statements of the non-testifying declarants.

During cross-examination, D.M. again referred to Matta having been "removed" from the Boy Scouts. A209. In response, Matta's Trial Counsel attempted, unsuccessfully and over the State's objection, to establish that Matta was not kicked out of the Boy Scouts for "some unsavory reason" but rather for "political reasons." D.M. denied knowing that to be so. A208-212.

Testimony of J.P.

D.M.'s cousin J.P. testified next. A268. He was a few years older than D.M. Both he and D.M. lived at their grandmother's house. J.P. testified that D.M.'s father drank too much and would be either happy drunk or angry and holler a lot. D.M.'s father never lived there but would "crash" from time to time. J.P. described D.M.'s relationship with his father as someone he had to deal with, but D.M.'s relationship with his mother as "kind and respectful." A273. As for J.P., he described D.M. as "more like a little brother than a cousin." A275.

Like D.M., J.P. met Matta through Boy Scouts when he was 12 or 13. A275-276. He would sleep over in the basement at Matta's house and was there many times when D.M. was staying over. A278. D.M. would sleep in Matta's room in the bed. A284-288. In all that time, he never saw anything happen between D.M.

and Matta. A290. D.M. came to live with Matta and continued to live and work with Matta into adulthood.[6] A287-288. That whole time, D.M. never said anything to J.P. about Matta molesting him. A292.

During the direct testimony of J.P., the State once again elicited testimony referring to Matta's mysterious removal from the Boy Scouts:

> A. Well, I mean, I spent quite a few years at Boy Scouts, did, like, Camp Rodney, that type of stuff, just events through Boy Scouts. It was strictly Boy Scouts at first.
>
> Q. Okay. And then, so you say "at first," so I want to reference that.
>
> A. Okay.
>
> Q. What happened after the "at first" part?
>
> A. After I was at Boy Scouts I want to say probably maybe three, four years, something happened at the Boy Scouts where Gary was asked to leave. I'm not quite sure what the story is, so I can't really answer that. But once he did, you know, we still kind of hung out because he was also known for -- we would go and do some camping, rafting, tubing. We did some camping together, that kind of stuff. A276-277.

Testimony of D.W.

D.W. was the last civilian witness in the State's case-in-chief. A294. He too met Matta during his brief time in scouting when he was 12 or 13. A295. He met D.M. around 1990 when he started going over Matta's house as a senior in high school and was 17 or 18 years old. A296. He described D.M. as an early teenager. A298. He also met J.P. who was a teenager. He testified that Matta was around 30

[6] D.W. testified that D.M. continued his friendship with Matta into his 30's when he moved out of Matta's home. A310.

at the time. A297. Like J.P., he never saw Matta make any sexual advances toward D.M. A304. Years later, after an argument between Matta and D.M., D.M. came to live in an apartment D.W. rented to him for a few years. A305-306.

Testimony of Detective Micolucci

Detective Greg Micolucci testified (A320) that his investigation of Matta began when he received a letter from the Boy Scouts of America in February of 2020. A322. He reached out to a Carla Reeves who had made a report to the Boy Scouts in 2017. As a result, he contacted D.M., speaking to him many times. A323. Based on those statements, he obtained a search warrant to photograph and videotape Matta's home. A324. The crime under investigation listed on the warrant was rape or sexual assault. A327. When executing the warrant, he did not look in cabinets or examine Matta's cellphone (A328-329), and provided his opinion that, if he had, any evidence obtained would been suppressed as "fruit of the poisonous tree." A330. In 2021, he closed the investigative file in consultation with the Attorney General's office after he had gone back to D.M. for additional information, and D.M. did not provide it to him. A331-333. By June of 2022, however, D.M. had changed his mind and called Micolucci, telling him he was prepared to move forward. A334.

Much of Detective Micolucci's cross-examination was spent challenging his decision not to seek a warrant for digital information on computers and disks that were present at Matta's home. A351-376. During redirect examination, the

Prosecutor elicited further testimony that Matta had been kicked out of the Boy Scouts:

> Q. Did Mr. [D.M.] or anyone else tell you that you would find something on an iPhone?
>
> A. An iPhone? No.
>
> Q. Okay. And earlier you were asked a question about an Apple IIe computer and there was context you were going to give.
>
> A. Yes.
>
> Q. Could you give us that context.
>
> A. Thank you. So the context of that in my police report is that [D.M.] had asked me if I had figured out why Mr. Matta had been kicked out of the Boy Scouts. I had not. And he indicated to me that records from the (*A379) Boy Scouts, that Mr. Matta would have kept them on floppy disks. And he also referenced an Apple -- some type of Mac/Apple-type desktop and then another -- well, I don't want to say desktop -- some type of computer and then some type of other similar computer that he, like, described as a clone of the first one. But just so that it's clear, that was in the context of Boy Scouts records being stored. [D.M.] did not indicate to me that there would be potentially any evidence related to this case. A378-379.

During the State's rebuttal argument, the State argued that Matta being kicked out of the Boy Scouts was not sufficient probable cause to obtain a warrant to search through Matta's computer and other digital equipment:

> MR. WYNN: So let's talk first about the investigation. Again, is this a time we need to apply common sense. The statement that Detective Micolucci told you that he heard from [D.M.] was, did you check the Apple 2E (*A486) because that would have all of his stuff in it, because he keeps everything in there. That was in reference to why Mr. Matta got kicked out of the Boy Scouts. Mr. Matta getting kicked out of the Boy Scouts is not a charged offense here. Getting kicked out of the Boy Scouts does not create probable cause to go roaming around in your old computer. Simply that the case involves offenses or pedophilia, or however you want to characterize it, doesn't mean you don't have constitutional rights. Everyone has constitutional rights. In

> order to get into something, as Detective Micolucci testified, to get into a phone, to get into a house, to look in a drawer, you have to get a warrant. You have to have probable cause like you saw on this board. Probable cause to believe that a criminal offense was committed. If he didn't have that, you couldn't do it. A485-486.

Later in its rebuttal, the State discussed the statements made to D.M. by his grandmother and uncle:

> Further, why wouldn't he have told his family? Well, he talked about how he got cruel sexual jokes from his aunt -- from an uncle and a grandmother. His grandmother insisted that Gary was his daddy. And he said, no. My dad is my dad. She says no. He's your daddy. He felt shame. He didn't know what this was. *A490.
>
> And his uncle, who made some detailed joke, which he had a hard time even fully articulating, but involving some sort of anal sex. His family went on a Disney cruise without him. His father went and got remarried. Never invited him back to his house. A489-490.

The Trial Court's final instructions to the jury contained no guidance how it should consider either the evidence of Matta's being removed from the Boy Scouts or the out-of-court statements of the D.M.'s grandmother and uncle. A491-517.

I. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF UNCHARGED MISCONDUCT WITHOUT APPLYING ANY OF THE STANDARDS OF ANALYSIS REQUIRED BY *GETZ V. STATE*.

Question Presented

Whether testimony during the State's case-in-chief that the Defendant, a scoutmaster, was kicked out of the Boy Scouts was uncharged misconduct evidence with little probative value when compared to its unfair prejudice in the Defendant's trial for sexually abusing an underage boy scout, and its erroneous admission deprived the Defendant of a fair trial. A150-151. Exhibit B.

Scope of Review

The Supreme Court of Delaware reviews a trial court's rulings on the admission of evidence for abuse of discretion to determine whether it "has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice so as to produce injustice."[7]

Merits of Argument

During direct examination of the State's first witness of its case-in-chief, D.M. testified that Gary Matta had been kicked out of the Boy Scouts. A150-151. This evidence was admitted over Matta's objection even though he was not charged with

[7] *Baumann v. State*, 891 A.2d 146, 147-148 (Del. 2005) (comma omitted).

doing whatever misconduct caused him to be kicked out of the Boy Scouts.[8] Matta was charged with the sexual assault of D.M., from 1988 to 1992 when he for at least some of that time was D.M.'s scoutmaster. A11-14. There is no evidence that Matta's removal from scouting had anything to do with D.M.

D.R.E. 404(b) formalized the general rule forbidding the introduction of character evidence solely to prove that the defendant acted in conformity therewith on the occasion in question. It prohibits a party from offering evidence to support a general inference of bad character or a propensity to commit certain crimes or wrongs.[9] The Rule provides:

> (1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. (2) *Permitted Uses; [. . .]* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.[10]

In a criminal case where the accused is charged with one offense, evidence of other uncharged crimes or misconduct may only be admitted for either the named permitted uses listed in the rule or for its logical relation to "material facts of

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[8] The reason Matta was expelled from the Boy Scouts was never established at trial. The Chief Investigating Officer tried but was unable to find out why the Boy Scouts kicked Matta out. A378-379.

[9] *Getz v. State*, 538 A.2d 726, 730 (Del. 1988).

[10] D.R.E. 404(b).

consequence in the case."[11] And a fact is not of consequence unless (and until) the time arrives when it is placed in issue by the accused.[12]

The Court has established longstanding requirements governing the admission of uncharged misconduct under D.R.E. 404(b):

> (1) The evidence of other crimes must be material to an issue or ultimate fact in dispute in the case. If the State elects to present such evidence in its case-in-chief it must demonstrate the existence, or reasonable anticipation, of such a material issue.
>
> (2) The evidence of other crimes must be introduced for a purpose sanctioned by Rule 404(b) or any other purpose not inconsistent with the basic prohibition against evidence of bad character or criminal disposition.
>
> (3) The other crimes must be proved by evidence which is plain, clear and conclusive.
>
> (4) The other crimes must not be too remote in time from the charged offense.
>
> (5) The Court must balance the probative value of such evidence against its unfairly prejudicial effect, as required by D.R.E. 403.
>
> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.8."[13]

In this case, however, the Trial Court committed reversible error by allowing unfairly prejudicial evidence of uncharged misconduct with minimal probative value into evidence and by failing to perform any of these mandated analyses and functions.

A. Proof of when Matta and D.M. left the Boy Scouts was not an ultimate material fact or issue in dispute.

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[11] *Getz*, at 731.
[12] *Id*. at 732.
[13] *Id.* at 734 (internal citation omitted).

Evidence of uncharged misconduct is ripe for the introduction in the State's case-in-chief only if the misconduct is "logically relevant not just to an issue or ultimate fact in dispute in the case, but to an issue or ultimate fact to be proved in the State's case-in-chief."[14] This Court has provided guidance and instruction not only to identify *if* prejudicial uncharged misconduct evidence should come before a jury, but also carefully circumscribed *when*.[15] The Court explained:

> "This language identifies a distinction between bad act evidence that is offered to prove an element of the State's prima facie case and bad act evidence that is offered to rebut an issue, dispute of fact or element of a defense, that might reasonably be raised in the defendant's case. Under this formulation of the *Getz* rule, the State may offer evidence of the defendant's bad acts only if: (1) the evidence is independently relevant to an element of the State's prima facie case (for example, knowledge or intent) and (2) the State reasonably anticipates that the defendant will dispute that element of its case."[16]

Despite Matta's objection, neither the State nor the Trial Court articulated the independent relevance of Matta being kicked out of the Boy Scouts to advance proof of any element of the indictment. The State did not give a reason it anticipated this evidence assisted in the proof of a material factual issue. The best the Prosecutor offered was D.M. was trying do "a timeline thing" and explain that when Matta left

[14] *Taylor v. State*, 777 A.2d 759, 764 (Del. 2001).
[15] *Id.*
[16] *Id*. (internal quotations omitted).

scouting "[t]hat's when [D.M.] knows he left the Boy Scouts." A151. This basis of admission, however, did not implicate an issue or ultimate fact in dispute in the case.

Issues and ultimate material facts bear upon intent, motive, plan, absence of accident, consciousness of guilt, and identification. When Matta got kicked out of (or left) the Boy Scouts was not material to prove anything like the ultimate issues D.R.E 404(b) and the caselaw discussing that rule sanction.[17]

The testimony that Matta had been "kicked out" of the Boy Scouts came early in the trial during the State's direct examination of D.M., its first witness. Matta had not raised an issue or defense related to when Matta or D.M. had left the Boy Scouts in opening statement; Matta's counsel did not mention or discuss it at all.[18]

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[17] *E.g.*, *Diaz v. State*, 508 A.2d 861, 864-865 (Del. 1986) (holding trial court properly admitted evidence of accused's prior assaultive behavior to murder victim to prove intent because defendant claimed he shot her by accident); *Dutton v. State*, 452 A.2d 127, 145 (Del. 1982) (holding prior burglary admissible against murder defendant to identify him because items identified as stolen by accused were found near the remains of remains of victim); *Pope v. State*, 623 A.2d 73, 77 (Del. 1993) (holding earlier bank robbery was admissible to prove motive for a shoot-out, the identity of vehicle used in the shootout; second shoot-out admissible to prove intent and identity for assault charges and violent flight from crime showed defendant's consciousness of guilt); *Renzi v. State*, 320 A.2d 711, 712 (Del. 1974) (reversing trial court on other grounds but approving materiality of uncharged sale of drugs by accused immediately before arrest to prove intent to deliver).

[18] When Matta and/or D.M. left the Boy Scouts was never a matter in dispute at any point time during the trial. As a result, the legitimate relevance (materiality and probative value to establish a non-propensity fact of consequence for the State) of Matta's being kicked out remains unclear throughout the record of the trial. Only after Matta's cross-examination of the State's last witness, Chief Investigator Micolucci, during redirect, did the State make an *a fortiori* attempt to connect the

Evidence of Matta's expulsion was neither relevant to an ultimate issue such as knowledge, intent, or plan to commit the crimes with which he was charged, nor its admission justified based on a reasonable anticipation of Matta disputing or contradicting an ultimate issue in the case.

Nevertheless, the premature introduction of this uncharged misconduct evidence forced Matta deal with it.[19] But Matta's attempts at trial to rehabilitate the record and establish an innocent, or at least palatable, reason the Scouts had removed him from its rolls were unsuccessful and emphasized rather than defused the record fact that Matta had been kicked out of the Boy Scouts. *E.g.*, A209-211.

B. The Trial Court failed to engage in a Rule 403 analysis and did not consider the unfair prejudice Matta's expulsion from the Boy Scouts presented to the jury.

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relevance of the uncharged misconduct to the police not collecting digital evidence from Matta's computers. A378-379; A485.

[19] While caselaw does not categorically forbid the State from introducing other misconduct evidence in its case-in-chief, it does command its independent relevance be to an important fact that must be proven in the State's case-in-chief, with the best practice being to wait until an issue has been fairly raised by the accused. The cases caution that early introduction risks reversal because it forces the trial court to make a premature decision on an unripe record and presents an accused, caught on the back foot, with an unfair Hobson's choice of either pretending its admission does not matter by ignoring it or trying proactively to deflect its impact. *See Milligan v. State*, 761 A.2d 6, 8-9 (Del. 2000); *see also Taylor v. State*, 777 A.2d 759, 763-768 (Del. 2001).

Getz requires for the admission of uncharged misconduct that it must pass muster under D.R.E. 403.[20] When evidence of Matta being forced to leave Scouting came in response to the State asking how long D.M. was in the Boy Scouts, Matta objected and moved "to strike the testimony as prejudicial," claiming to the Trial Court that evidence was "more prejudicial than probative" and "had nothing to do with molesting minors." A150-151.

D.R.E 403 provides that:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

The State's explanation of the evidence's relevance was, at best, half-hearted. Op. Br. at 19-20. The hazy significance surfaced by the State was that D.M. knew that he also left scouting when Matta was kicked out.[21] Realizing the thinness of this justification, the State did not expressly oppose either Matta's objection or his motion to strike. Instead, the Prosecutor backpedaled, telling the Trial Judge he had "instructed [D.M.] not to talk about the circumstances of that." A151. Despite the

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[20] *Getz*, 538 A.2d at 734.

[21] Unclear also is why it mattered to the State' case when Matta and D.M. left scouting, since (1) no date was given when he was kicked out and (2) D.M. claimed they continued having sex until D.M. was 20. A218-219. Both the State and the Court explicitly relied upon the latter in opposing and denying Matta's Motion for Judgment of Acquittal. A457; A459-460.

Defense's objection and the State's ambiguous response, the Trial Court overruled Matta's objection, finding the:

> testimony wasn't for the truth of the matter asserted. [Matta] was kicked out for a certain reason. The witness did say he doesn't know why he was kicked out. So I'm going to overrule the objection. (The sidebar discussion concludes.)" A151.

As far as the jurors were concerned, the evidence that Matta got kicked out of the Boy Scouts was admitted without limitation.

When Matta left scouting had (if any) dubious probative value; but that he had been forced out had none. Balanced against the clear and substantial unfair prejudice it caused Matta, it should have been stricken by the Trial Court and disregarded by the jury at the Trial Court's instruction. That Court's failure to do so, as required by both Matta's legal objection and the long-established protocol of *Getz*, was an abuse of discretion. It "exceeded the bounds of reason in view of the circumstances" and "so ignored recognized rules of law or practice so as to produce injustice."[22]

C. The evidence of Matta's conduct resulting in him being forced to leave the Boy Scouts was not proven by plain, clear and conclusive evidence.

Even if the Court were to determine that the evidence of Matta's expulsion from the Boy Scouts was relevant to an ultimate issue in dispute in the case not introduced prematurely and that its unfair prejudice to the accused did not

[22] *Cf. Baumann*, 891 A.2d at 148 (and citing the abuse of discretion standard of review).

substantially outweigh its probative value to the State, the State's proof of the misconduct itself did not meet the *Renzi* standard because it was not proven by "plain, clear, and conclusive" evidence.[23]

Because evidence of uncharged crimes is so highly prejudicial, its admission must be "carefully circumscribed by requirements there be substantial evidence that the defendant committed such prior crime.[24] The evidence of Matta's wrongful conduct that resulted in him being kicked out of the Boy Scouts suffered from the vice of being an unproven and pliable wild card subject to no limitation beyond what the rest of evidence would likely conjure in an uninstructed juror's imagination.

This error also inured to the State's benefit and Matta's harm; it, too, requires reversal.

D. Assuming *arguendo* admissibility, the jury was not provided any guidance to prevent its misuse.

The Court has long required that the jury be instructed why evidence of uncharged misconduct is admitted and for what purpose it may be considered.[25] Because evidence of other uncharged misconduct is offered for a limited purpose—and not to establish a criminal defendant's propensity to commit similar acts—it

[23] *Renzi*, 320 A.2d at 712; *Getz*, 538 A.2d at 734.
[24] *Renzi*, 320 A.2d at 712.
[25] *Getz*, 538 A.2d at 734; *see* D.R.E. 105.

must be accompanied by a limiting instruction concerning the purpose of its introduction.[26]

When a defendant objects to unfairly prejudicial evidence and uncharged misconduct, as Matta did, if that evidence is admitted over the defendant's objection, as happened here below, a limiting instruction is mandatory, and the failure of a trial court *sua sponte*, to give such an instruction, must result in reversal.[27] Here, the Trial Court failed to do so.

The jury knew little to nothing of Matta beyond what the State presented to it, that he was a scoutmaster accused of molesting a scout. In the context of the State's case against Matta, proof that he had in addition been kicked out of scouting for something unrelated to this case, strongly implied the existence of further, uncharged misconduct, likely of a sexual nature, on the part of Matta that was sufficient to justify him being forced out of his position as a scoutmaster.[28] This type of evidence

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[26] *Getz*, 538 A.2d at 734.

[27] *Cf. Weber v. State*, 547 A.2d 948, 955-957 (Del. 1988); *but cf. Williams v. State*, 796 A.2d 1281, 1289-1290 (Del. 2002) ("Finally, we address the fact that the Superior Court did not sua sponte give a limiting instruction. We do not find this omission to be plain error. We have held that a trial court generally does not commit plain error if it fails to give a limiting instruction, sua sponte, when evidence of prior bad acts is admitted. *Therefore, we hold that Weber is distinguishable because it involved a timely objection.* Accordingly, the failure to give an instruction sua sponte does not rise to the level of plain error.") (italics added to emphasize distinguishing fact).

[28] In pertinent part, the form jury instruction endorsed by this Court tells the jury that although "you have heard evidence of a defendant's other similar bad act, they "may not use that evidence as proof that the defendant is a bad person and therefore

in this type of case, admitted without a limiting instruction carefully circumscribing the purpose and use of the prejudicial evidence, could not help but unfairly prejudiced Matta and deny him a fair trial.[29] The lack of such an instruction merits reversal because this "deficiency undermined the ability of the jury to intelligently perform its duty returning a verdict."[30]

E. The errors were not harmless and require reversal.

While not all errors call for reversal,[31] errors affecting substantial rights do.[32] An error may be deemed harmless only if the properly admitted evidence was sufficient on its own to sustain conviction.[33] To find an error harmless and safely disregard it, the Court on review must engage in a case-specific inquiry scrutinizing the record to evaluate both the importance of the error and the strength of the other

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probably committed the [indicted offense] he is charged with." *Getz v. State*, 538 A.2d at 734, n. 8.

[29] *See Milligan v. State*, 761 A.2d 6, 7-8 (Del. 2000) ("First, the jury should be told the specific purpose or purposes for which the evidence may be used consistent with record and the findings of the trial court supporting admissibility of the other crimes or uncharged bad acts." *Id*. at 10 (internal quotations omitted)).

[30] *Id.* at 10, quoting *Floray v. State*, 720 A.2d 1132, 1137 (Del. 1998) (internal quotations omitted).

[31] *Buckham v. State*, 185 A.3d 1, 13 (Del. 2018).

[32] *See* Super. Ct. Crim. R. 52(a) ("*Harmless error*. Any error, defect irregularity or variance which does not affect substantial rights shall be disregarded.")

[33] *Nelson v. State*, 628 A.2d 69, 77 (Del. 1993).

evidence presented at trial.[34] To affirm, this inquiry must provide the Court with "fair assurance. . . that the judgement was not substantially swayed by error."[35]

The State's case against Matta had unique problems. The allegations against Matta were reported to the police 30 years after they were alleged to have taken place. A321. Police learned of them not from D.M., the alleged victim, but from the Boy Scouts, and only after a then impoverished D.M. had joined a lawsuit and sought compensation from that organization. A184; A193; A198-199; A203. The State's corroborating evidence of the sleepovers came from two other boy scouts who repeatedly accompanied the alleged victim on the occasions when the abuse was supposed to be happening but who never saw or heard anything happen.

Given the absence of physical or digital evidence to corroborate child abuse, the complaining witness's initial ambivalence toward the investigation and prosecution of the case (A333-335), the accused being kicked out of scouting likely assumed outsized significance. The presence of these evidentiary weaknesses invited the jurors to latch onto Matta's expulsion to bolster the State's case. It naturally would cause jurors to wonder what evil Matta had done to merit this sanction.[36] The rest of the State's case made filling in the answer easy. The jury

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[34] *Buckham*, 185 A.3d at 13; *Van Arsdall v. State*, 524 A.2d, 3, 10-11 (Del. 1984).
[35] *Buckham*, quoting *Ashley v. State*, 798 A.2d 1019, 1023 n.17 (Del. 2002).
[36] Three of the four State's witnesses articulated curiosity why Matta had been kicked out of the Scouts in front of the jury (*e.g.*, D.M. at A150 and A209, J.P. at A276, and Sergeant Micolucci at A378), so why would not the jurors?

knew that D.M.'s accusations and the State's case against Matta were intertwined with scouting. They had been asked during selection to determine if they had watched a recent television exposé about sexual abuse of minors by adults involved in scouting. A29. Within this context, the State's case carried the strong implication that the wrong precipitating Matta's expulsion likely took the form of crimes like the ones with which he was charged. This inference Matta's jury should have been told they could not draw. Another (related and equally impermissible) inference the jury was free to draw was that the Boy Scouts removed Matta to protect other children from him.[37] Without any direction to the contrary, the jury was free to take up this cause as well—this time, by convicting Matta with the assurance they were following the lead of what the Boy Scouts had already done and protecting children.

In sum, the evidence against Matta was far from overwhelming. But the unfair prejudice of the erroneously admitted bad character/propensity evidence with little or no connection to any issue being tried when weighed against the sparse untainted evidence is clear. As a result, the admissible evidence against Matta falls far short of providing this Court with a "fair assurance. . . that the judgement was not substantially swayed by error."[38]

The convictions, therefore, should be reversed and a new trial granted.

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[37] More fuel was thrown on this fire when the jury was told that D.M. had asked the chief investigator to find out why Matta had been forced out. A378.
[38] *Cf. Buckham*, 185 A.3d at 13.

II. THE TRIAL COURT ERRED BY ADMITTING OUT-OF-COURT STATEMENTS MADE BY COMPLAINING WITNESS'S NONTESTIFYING GRANDMOTHER AND UNCLE ASSERTING THEY KNEW DEFENDANT WAS HAVING SEX WITH HIM.

Question Presented

Whether the Trial Court's admission the statements of the alleged victim's grandmother and uncle expressing their belief that the accused was engaged in a sexual relationship with him was error because the Court failed to consider their high degree of unfair prejudice to the accused, the likelihood the assertions they made would be taken as true by the jury, and, once admitted, because the Judge failed to limit the jury's consideration of them to a permitted purpose. A171-175. Exhibit C.

Scope of Review

The Supreme Court of Delaware reviews a trial court's rulings on the admission of evidence for abuse of discretion.[39]

Merits of Argument

The two statements of D.M.'s uncle and grandmother asserting their knowledge and/or belief of D.M.'s sexual involvement with Matta were highly and unfairly prejudicial to Matta because they related directly to the elements of the charges against him and they also accused Matta of other sexual crimes with which

[39] *Baumann v. State*, 891 A.2d at 147.

he had not been charged and for which no other evidence was admitted at trial.[40] Their admission into evidence was erroneous because it occurred without (1) conducting a D.R.E 403 balancing test and (2) providing a limiting instructions to the jury.[41]

On direct examination, the State asked its first witness D.M., "Between that 11- to 15-year old range, were you ever given the impression that people in your family knew something was going on with Gary?" D.M. answered, "Yeah." The Prosecutor continued, "Can you tell me about that?" He answered, "I remember my uncle—this is—I remember my uncle one day looking at me and just saying, you know--." Defense counsel objected to the hearsay, which the Trial Court initially sustained. A171. A later discussion at sidebar resulted in the Trial Court reversing itself and overruling Matta's objection to the uncle's statement, when the Trial Court accepted the Prosecution's argument that the statement was admissible not for the truth of the matter asserted by the declarant but rather to show why D.M. never told his family members of the abuse. A172-174. The jury received no cautionary instructions from the Trial Judge concerning the proper purpose of the hearsay, and the Trial Judge did not perform a D.R.E 403 balancing test. The Prosecutor continued by eliciting from D.M. further testimony:

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[40] *See infra* Op. Br. at 32 n.45; *Sanabria v. State*, 974 A.2d 107, 112 (Del. 2009).
[41] *Sanabria*.

> One day we were sitting in the living room at my grandmother's house, and [my uncle] just started making lewd remarks to me about, like, feelings in my—his words feelings in my ass and that I like it and the he was like, oh, you probably, like— A174.

Matta made a speaking objection to the hearsay, saying the statement "goes to the truth of the matter asserted." His objection was summarily overruled without a sidebar and in front of the jury. A174. D.M. continued:

> That he liked the buzzing in my ass or something like that. He just made some very lewd remarks to me that, to me, I remember thinking just that he knew things weren't quite right with the situation. And I got very upset, very emotional about it. A174.

D.M. then went on to describe comments his grandmother had made to him, that Matta:

> was, in her words, my daddy. And, you know, and I would say back to her, no, my dad is my dad, and she was like, no, I didn't say he was your dad. Gary's your daddy. And she would say things like that. So, as I grew up. I just realized that they all thought something was wrong with the situation, but they were taking it out on me. A175.

Neither D.M.'s grandmother nor his uncle were called to testify in the trial. In its rebuttal summation, the State further exploited this evidence in a manner designed to create juror sympathy by describing the "cruel sexual jokes" made by the uncle "involving some sort of anal sex," further prejudicing Matta. A490.

A. Although the statements were admitted for another purpose, they were likely taken by the jury as proof of their assertions.

The Delaware Rules of Evidence provide that: "'Hearsay' means a statement (1) The declarant does not make while testifying at the current trial or hearing; and (2) A party offers in evidence to prove the truth of the matter asserted in the statement."[42] A "statement" is "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion."[43] A statement may be admissible in a criminal trial if offered to prove a relevant fact at trial other than the truthfulness of the assertion it contains when the statement's probative value is not substantially outweighed by the risk its admission unfair prejudice poses to the accused.[44]

This Court has observed that specific and damaging assertions of criminal conduct contained in out-of-court statements are "likely to be understood by the jury as proof of a necessary element of the crime."[45] Given the clearly intended assertions of criminal conduct contained in the statements made by D.M.'s uncle and grandmother, they should not have been admitted over Matta's objection because of their unfair prejudice.

B. Prejudicial out-of-court statements asserting criminal conduct must be subjected to the balancing test of D.R.E. 403.

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[42] D.R.E. 801(c).
[43] D.R.E. 801(a).
[44] D.R.E. 403.
[45] *See Johnson v. State*, 587 A.2d 444, 449 (Del. 1991) (quoting *Commonwealth v. Palsa*, 555 A.2d 808, 811 (Pa. 1989).

When hearsay is offered by the prosecution to prove a matter it claims relevant at trial, the admission of that evidence is "problematic" when the third-party statements either (1) refer to other bad acts or crimes of the defendant, or (2) relate to an element of the charged offense.[46] In this case, the hearsay statements of the uncle and grandmother do both. D.M. only testified to oral sex with Matta during the time period specified in the indictment.[47] But the uncle's lewd comments about defendant "buzzing [D.M.'s] ass" involve the uncharged crime of anal sex with a minor, conduct the State neither presented evidence to support, nor argued to the jury as the basis for, a finding of guilt to the Unlawful Sexual Intercourse counts of the indictment. In addition, because both the grandmother and uncle's statement imply their knowledge of the existence of a general sexual relationship between defendant and D.M.—the defendant being his "daddy" even though Matta was not D.M.'s "dad"—the hearsay relates also to elements of the crimes the State was trying to prove in the indictment.

The Trial Court in this case did not conduct a balancing test or give any cognizable consideration how the evidence would be unfairly used by the jury as

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[46] *Sanabria v. State*, 974 A.2d at 112.

[47] Other than the statement of the uncle, there are just two references to anal sex during the trial. Neither one was submitted as proof of an indicted charge. First, D.M. testified the last time Matta and he had sex was when D.M. was 20 and D.M. was not sure if it was oral or anal. A219. The Prosecutor in closing referred the uncle's hearsay statement as a "cruel joke" played on D.M. that isolated him from his family and caused him not to report the sexual abuse to them. A490.

proof of the facts they were asserting: that the out-of-court declarant grandmother and uncle somehow knew Matta and D.M. were having sex. Nor did the Trial Court "scrutinize [the] out-of-court statements as to the availability of the speaker, the specificity of the information, the need of the statement in relation to other evidence, its relevancy to the question of guilt and the statement's prejudice to the defendant."[48]

This Court recognizes that hearsay statements containing specific assertions of criminal conduct tip the balance too far toward prejudicing the defendant without a sufficient showing of need for their introduction by the prosecution.[49] In this case, the Trial Court erred by failing to consider that balance.

C. The out-of-court statements were not sufficiently probative or material to be admitted.

The State offered these statements to explain D.M.'s failure to tell his grandmother and uncle about the sexual abuse he claimed was happening to him. But while they may say why he did not tell these two when he was a child living with them, their materiality is limited because they say nothing about why he never initiated a report to the police during the many years that followed. They also fail to explain why he never told other, more sympathetic, family members. For example, there was his mother with whom he had a kind and respectful relationship

[48] *Johnson*, 587 A.2d at 448 (citing cases).
[49] *See Id.* at 449.

(A216, A273), or his cousin J.P. with whom he lived and who saw him as a little brother (A275, A287-288, A292), or the other 5 family members who also lived in the household (A217), or his teachers and guidance counselors at school (A217). Whatever the reason for D.M.'s three decades of non-disclosure to the police, it was not the alleged taunts of his uncle and grandmother.

Even if the Court were now inclined to attempt to recreate a D.R.E. 403 balance based on the record of the trial, the "not for the truth of the matter" purpose ascribed by the State on the record of this case is toothless and not very weighty evidence.

While expert evidence is sometimes permitted in the State's case-in-chief to explain late reported crime,[50] the evidence here was lay testimony that contained prejudicial evidence of uncharged conduct asserted in out-of-court statements in the State's case-in-chief. The cases look skeptically at this kind of timing and generally finds such introduction premature and prejudicial.[51] In *Cobb v. State*,[52] when discussing a late reporting defense, the Court discussed the relative merits of the admission of prejudicial evidence to explain late reported sexual crimes:

> [E]ven in cases where there is a late reporting defense, the relevance of the later bad act to the phenomenon of delayed reporting is tenuous. The fact that the later bad act may have triggered the complaining witnesses' report of the 1995 incident does not explain to the jury why

[50] *Wheat v. State*, 527 A.2d 269, 274 (Del. 1987).
[51] *E.g. Milligan*, 761 A.2d at 8.
[52] 765 A.2d 1252 (Del. 2001).

> the complaining witness waited roughly one and half years to make the report.[53] (Internal Citations omitted.)

By analogy, similar skepticism is merited here where the purported non-assertion basis achieves but little resonance in explaining the 30-year gap from the alleged crime commission to police report when measured against the inherent prejudice of these statements asserting both charged and uncharged crimes against the accused.

D. It was error to admit the prejudicial out-of-court statements without a limiting instruction.

Even if the admission of an out-of-court statement alleging crimes is found necessary and its probative value is not substantially outweighed by its unfair prejudice to a defendant, a jury must be contemporaneously advised by a limiting instruction that the third-party statements and other bad acts are not being admitted for the truth of the matter.[54] An instruction is important when a statement is admitted for some purpose other than what it asserts. Without it, the jury here "was left with the impression that the content of both statements was truthful."[55]

E. These errors were not harmless and require a new trial.

An error is harmless only if the properly admitted evidence was sufficient on its own to sustain conviction.[56] Appellate review for harmless error includes a case-

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[53] *Cobb*, 765 A.2d at 1255.
[54] *Sanabria*, 974 A.2d at 116.
[55] *See Sanabria*, 974 A.2d at 116.
[56] *Nelson v. State*, 628 A.2d at 77.

specific inquiry scrutinizing the record to evaluate both the importance of the error and the strength of the other evidence presented at trial.[57] To find the error harmless, this inquiry must provide the Court with "fair assurance. . . that the judgement was not substantially swayed by error."[58]

The State's case against Matta had unique problems. The allegations against Matta were reported to the police 30 years after they were alleged to have taken place. A321. Police learned of them not from D.M., the alleged victim, but from the Boy Scouts, and only after a then impoverished D.M. had joined a lawsuit and sought compensation from that organization. A184; A193; A198-199; A203. The State's corroborating evidence of the sleepovers came from two other boy scouts who repeatedly accompanied the alleged victim on the occasions when the abuse was supposed to be happening but who never saw or heard anything happen. Given the absence of physical or digital evidence to corroborate child abuse, the complaining witness's initial ambivalence toward the investigation and prosecution of the case (A333-335), the erroneous admission of these hearsay statements of non-testifying declarants asserting both charged and uncharged crimes, and containing the declarants' beliefs or knowledge that Matta was engaged in a meretricious relationship with D.M., harmed Matta.

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[57] *Buckham*, 185 A.3d at 13.
[58] *Id.*

In this case, there can be no fair assurance that Matta's convictions were not substantially swayed by these errors.

CONCLUSION

For the reasons and upon the authorities cited herein, the convictions of the Appellant Gary Matta should be reversed and the case remanded for a new trial.

Respectfully submitted,

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