



IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAULRON CLARK,)	
)	
Defendant—Below,)	
Appellant)	
)	
v.)	No. 98, 2025
)	
)	
)	
STATE OF DELAWARE)	
)	
Plaintiff—Below,)	
Appellee.)	

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 November 29, 2023, Paulron Clark was arrested and charged with various felony offenses stemming from allegations of sexual assault made by the daughter, S.M.,¹ of his long-term partner. A1. Mr. Clark was indicted on February 12, 2024. A2. On June 17, 2024, one count of Unlawful Sexual Conduct Against a Child was severed into a “Part B” case that would proceed to trial after all other charges, “Part A”. A3.

On May 9, 2024, trial counsel filed a Motion to Suppress video evidence recovered through a pair of warrants that authorized searches of Mr. Clark’s cell phone. A2. On July 24, 2024, after a plea rejection colloquy in which Clark rejected the State’s offer of a probationary recommendation, a suppression hearing was held. A4. Extensive written submissions on the motion to suppress were filed by the parties. A21—96; A135—43. The trial court issued a memorandum opinion which denied the Motion to Suppress on August 29, 2025. A144—57.

On August 29, 2024, Clark filed a Motion in Limine to exclude sexually explicit videos extracted from Clark’s cell phone, arguing against their admissibility on grounds of relevancy and unfair prejudice under D.R.E. 401 and 403. A158—65. Clark offered to stipulate to the videos’ existence and detail the explicit sexual

¹ An assigned pseudonym.

content on Clark’s phone during the relevant time periods as a curative means of avoiding unfair prejudice. A198—99.

On August 30, 2024, trial counsel filed a Motion in Limine seeking to admit screenshots of the complaining witness’s online conversations pursuant to 11 *Del. C.* §3508, after the prosecutor indicated that she planned to object to the admission of the evidence. A166—79. Told that one objection would be failure to comply with 11 *Del. C.* §3508, trial counsel sought a determination of the admissibility to avoid potentially waiving the chance to present exculpatory evidence.

Clark’s jury trial on the “Part A” case began on September 3, 2024. Before opening arguments, the trial court ruled upon the Motions in Limine, ordering the parties to craft a stipulation on the existence of the videos, but still permitting the State to play one. A207—09. The trial court also ruled that 11 *Del. C.* §3508 prohibited Clark from presenting or cross-examining the complaining witness about any screenshots of her conversations except one, which the court subsequently barred the following morning. A239—45; A249—54; A316—21; A328—48.

On the second day of trial, the complaining witness recanted, then materially changed her testimony after a recess in which she was hugged by the prosecutor and questioned by the trial court. A366—71. Trial counsel motioned for a mistrial, which was denied. A396—426.

In closing arguments on September 6, 2024, Clark argued that the witness’s recantation of her recantation was the result of inappropriate influence by the prosecutor. The prosecutor objected twice. During two contentious sidebars that followed, the trial court sustained the objection and ordered trial counsel to abandon further argument on the subject. A691—94; A696—98. Having just stymied defense arguments about her conduct with an objection, the prosecutor’s rebuttal reaffirmed her decision to hug the witness and vouched for its own case by twice arguing that “[t]he State would never” present elements of its case “for a show.” A706—07.

The case was submitted to the jury on the same day. During deliberations, the jury sought and received permission to review a portion of the 11 *Del. C.* §3507 statement, over Clark’s objection. A763—67; A770. After returning to deliberate, they found Clark guilty of all charges. A780—82. On October 22, 2024, “Part B” was heard as a bench trial in which the parties stipulated that the “facts, defenses, rulings, and arguments from Part A” were “preserved and incorporated by reference in Part B of the same case.” A791—96. The trial court found Clark guilty of the single count. A803.

On October 22, 2024, the trial court sentenced Clark to 137 years of level five incarceration, suspended after 107 consecutive years of incarceration, followed by declining levels of supervision.

This is Clark’s Opening Brief to his timely filed notice of appeal.

SUMMARY OF ARGUMENT

1. The prosecutor inappropriately influenced the complaining witness during a critical phase of her testimony with an uninvited embrace and proclamation that she cares about her, moments after the witness had emotionally recanted her accusations. Though the jury had just left the room because the prosecutor requested a recess that was granted, the rash act made it impossible to separate consideration of the witness's credibility from the prosecutor's actions and professed personal feelings about the witness. The trial court compounded the problem, before the witness ever had an opportunity compose herself, by asking the witness a series of questions that would have suggested to the witness that the trial court believed the witness had testified untruthfully. Finally, the witness spent the hourlong recess in company and conversation with agents of the prosecution, who discussed at least one subject relevant to her testimony with her, before she resumed testimony and contradicted her recantation. The overbearing pressure and influence of multiple authority figures' interactions with the witness, a juvenile, poisoned the fairness of the trial at a crucial moment and could not have been remedied by cross-examination. Mistrial was the only appropriate remedy and denial of the defense motion for mistrial was error.

2. Permitting the State to present the jury with an explicit video of Clark in sexual union with his partner was an abuse of the trial court's discretion. The substance of the video was cumulative and thus its probative value was negligible because the relevant facts about the video were already stipulated, and it was never determined whether the witness had seen the video that was played. The video was offered to evoke disgust and unfairly prejudice Clark in the eyes of the jury.
3. The trial court erroneously applied the independent source doctrine to deny the defense motion to suppress the contents of the Clark's cellphone, which contained the sexually explicit video with his partner. The trial court erred in deciding that the first warrant was overbroad, which the State conceded, and not a general warrant. The only meaningful limitation on the first warrant's scope was a sixteen-month temporal limitation on the data collected, allowing police review of all data from that period on a phone that was not even the device allegedly used to show the video. Although the State subsequently obtained a second warrant which partially addressed the problematic scope of the first, the trial court erred in finding the second warrant was an independent avenue by which the evidence was obtained, as the State failed to present any testimony to support such a tenuous claim.

4. The trial court incorrectly applied 11 *Del. C.* §3508 to bar presentation of evidence that was relevant and did not include sexual conduct of the complaining witness. As a result, Clark's right to cross-examine the witness with the benefit of extrinsic evidence that could help the jury assess her testimony was impermissibly restricted.
5. The prosecutor committed misconduct in her rebuttal by vouching for her case in an egregious manner, repetitively emphasizing the vouching. The vouching was so plain on its face such that the trial court committed plain error by failing to *sua sponte* step in.

STATEMENT OF FACTS

Karen Banta

Karen Banta was previously S.M.'s teacher and more recently became principal of her school. Banta interacts with S.M. every day at school and characterized their relationship as close. A268—70. Banta noted negative behavioral changes in S.M. starting in her sixth-grade year. A279. Banta initially thought the behavioral changes to be puberty-related after questioning S.M. as to whether she was okay, which S.M. affirmed. A279—80.

On January 19, 2023, Banta (then a teacher) joined S.M. and the principal at the time, Jane Manley, in a meeting to discuss online safety concerns about S.M.'s communications with strangers online. A273—75. The conversation began to focus upon rumors that S.M. had a twenty-year-old boyfriend who she was chatting with on Instagram. A-275. S.M. became increasingly uncomfortable when asked about her adult boyfriend, fidgeting, growing quiet, and avoiding eye contact. A276.

The conversation quickly shifted when S.M. wrote a note in the middle of the meeting, alleging that “[m]y mom’s boyfriend has been sexually harassing me.” A-276—77. The note was shown to the jury as the State’s Exhibit 2. A277. S.M. was responsive after the conversation refocused on the newly raised allegation and shifted away from the twenty-year-old boyfriend. A277. Following the allegation, Manley contacted law enforcement. A277.

Banta acknowledged that the meeting with S.M. occurred because Leandra Moore had flagged the issue of S.M.'s online safety to the principal earlier that morning, prompting Banta to corroborate the matter with several students who confirmed that S.M. was in fact communicating with the boyfriend online. A285.

Officer Sarah Bozeman (1 of 2)

Bozeman was assigned to investigate S.M.'s allegations against Clark, which were referred to Wilmington Police Department by the Division of Family Services. A293. Bozeman arranged for S.M. to be interviewed at the Children's Advocacy Center ("CAC"). A293—94. Bozeman seized Clark's phone and testified that the search of the phone revealed videos showing S.M.'s mother performing fellatio upon a black male, which was what S.M. had described in her interview. A296—97. Bozeman acknowledged that due to the late reporting of the allegation, roughly two months since the last incident, no physical evidence such as DNA or fingernail scrapings had been collected. A298—99; A305. Bozeman made no efforts to investigate S.M.'s rumored online boyfriend. A304.

S.M. (1 of 2)

S.M. identified Clark as her mother's boyfriend who had previously cohabitated with them. A354—55. She confirmed that she had written the note alleging sexual harassment that was shown in State's Exhibit 2. A357. She testified that her accusation of sexual harassment meant "touching me in ways I didn't

necessarily like.” A357. S.M. then testified that she had not told the truth to her teachers or to the forensic interviewer when she made the allegations against Clark. A358. When the prosecutor then asked her more directly whether it was true that Clark had touched her in ways she didn’t like, she again responded that he had not. A358—59. Shortly thereafter, the State requested a recess and the request was granted, at which point the prosecutor hugged S.M. on the witness stand, outside the presence of the jury. A359—60.

Immediately following the recess, S.M. directly contradicted her earlier recantation, answering in the affirmative when asked if she had told the truth to teachers and to the forensic interviewer. A375—76. She answered yes when asked if she had told the truth in her allegation that Clark had touched her inappropriately and provided the same affirmative response to questions asking whether he had touched her with his hands, touched her with his mouth, and shown her a video of her mother and him. A376; A378. S.M. denied that her testimony had been coached by anyone. A377. S.M. said that she had recanted her allegations against Clark in a meeting with defense counsel because she did not want her siblings to grow up without their father or to cause Clark to be imprisoned for the rest of his life. A378. S.M. testified that she felt “a lot” of pressure while testifying but denied that any of the pressure came from her mother. A379.

Kimberly Carpenter

Carpenter conducted the forensic interview of S.M. at the CAC on February 20, 2023. A383. Footage of the interview was shown pursuant to 11 *Del. C.* §3508.² A386—87. On cross-examination, Carpenter testified that pursuant to forensic interview techniques, she asks interviewees to provide relevant anatomical terminology and consistently uses their terminology in order to avoid inadvertently teaching the interviewee new terminology. A391—93.

S.M. (2 of 2)

S.M. acknowledged that she believed she was in trouble when she met with Banta and the principal of her school before accusing Clark of sexual harassment in her note. A434. S.M. had been getting into trouble prior to the meeting, for communicating and flirting with strangers online via social media. A440—41. She specifically identified an individual known as Aden as one subject of the flirtatious correspondence. A441. S.M. agreed her correspondence was wrong and that it upset her mother, who had confiscated a series of electronic devices from her after discovering the conversations. A441—43.

While her mother was confiscating every device that S.M. could use to correspond online, the mother became aware that S.M. was circumventing her efforts at home by using the Chromebook laptop at school to contact strangers online. A443—44. When her mother prompted the principal and Banta to meet with S.M.

² Designated as Court's Exhibit 2.

about the use of the Chromebook, S.M. was anxious and worried that she would be expelled for misusing her school-issued Chromebook to chat with men online. A443—44.

S.M. testified that her mother had transported her to more than five different meetings with the prosecutor's office, one meeting with defense counsel's office, and the CAC interview. A444—47. During the pretrial appointments with the prosecutor's office, on at least five occasions, she told the State that she had lied in her allegations, and they repeatedly told her that they knew she had lied. A446—47. S.M. acknowledged that she had furiously written letters, introduced as Defense Exhibits 1 and 2, declaring hatred and no love for her mother, her half-brother, and Clark, though they were not intended to be read. A452—56. S.M. wrote that she would prefer to be with her father. A456.

Under cross-examination regarding the events that transpired during the post-recantation recess, S.M. affirmed that the prosecutor had hugged her and loudly stated that she cared about S.M. A457. S.M. spent the recess in the company of the police emotional support dog, the police officer who works with the dog, and Carley Davis, a member of the prosecution team. A457—58. She acknowledged that although she had been told to not talk about her testimony, she did talk about her testimony with the police officer, and specifically acknowledged that she remembered telling the officer that her testimony was influenced by her mother.

A458. Asked about her earlier testimony that her mother had not influenced her testimony, S.M. reiterated that her mother had not influenced her testimony. A459. S.M. also acknowledged that she said, while meeting at defense counsel's office, that she lied in her allegations against Clark and had never been touched in an inappropriate way. A459. S.M. testified that her mother was upset because of personal information that S.M. was providing to the strangers she was meeting online. A463.

Leandra Moore

Leandra Moore is S.M.'s mother and Clark's girlfriend. A468—69. She began dating Clark in 2020 but had known him for the previous fifteen years. A469. Clark had cohabitated with her family at their last address and spent time with her at the home that preceded it. A470—71. She brought S.M.'s inappropriate online activity to the attention of her school on January 19, 2023, because she discovered that S.M. was using her school laptop to circumvent her prohibition on inappropriate online activity. A474. She acknowledged difficulty attending several meetings at the prosecutor's office and her subsequent marriage to Clark, who has multiple children with her. A480—83. Clark record videos of her performing fellatio upon him while they were dating. A484. Moore had only recently passcode locked her phone. A498.

Moore and S.M.'s teachers had noted S.M. displaying argumentative and secretive behaviors. A488—89. Moore testified that she disciplined and tried to

protect S.M. by limiting her access to electronic devices because S.M. had been providing personal information about herself in chats with adult men, and had a twenty-year-old boyfriend named Aden whom she interacted with online when she was only eleven. A488-92. Moore testified that S.M.'s father, who lived in Texas, did not discipline her and would provide her greater opportunity to meet with Aden in person. A492—93.

During one meeting at the prosecutor's office, Moore testified that S.M. was excited because Carly Davis filled out Victim's Compensation Fund paperwork to provide tuition funding for private school, and S.M. hoped to attend a particular school. A496—97. Moore testified that the Victim's Compensation Fund had recently paid \$3,000 for S.M.'s current school tuition that year. A503—05.

Carley Davis (1 of 2)

Davis was a victim services specialist at the Department of Justice. A524. Per Davis, Moore brought S.M. to attend five meetings at her office, starting in April of 2024 after missing two prior appointments. A529—30. Davis approached S.M. during the recess in S.M.'s testimony, when S.M. was emotional and crying, and spoke with her in a comforting manner, while asking her questions in an attempt to discover the source of the pressure she felt during testimony. A540—41. Davis confirmed that she had coordinated tuition assistance for S.M. A552.

Officer Sarah Bozeman (2 of 2)

Bozeman testified that GPS data had confirmed Clark's presence at Moore's home over the course of 375 visits. A559—60. She testified that videos of Moore fellating a heavy-set black male were recovered on Clark's phone. A560—61. She testified that the video of the fellatio was significant because its existence corroborated S.M.'s allegation, during her CAC interview, that he had showed her a video of her mother fellating him. A561. At this point, the State played its Exhibit 4 for the jury so that they, too, could see Moore fellating Clark. A561.

Robert Moser

Moser identified himself as chief investigator for the defense's law firm. A576. He read a memorandum from a defense investigator onto the record, which recounted S.M.'s recantation of her allegations against Clark during a meeting at defense counsel's office on February 13, 2024. A576—78. Moore was not present in the room during the interview with the investigator. A579.

Carley Davis (2 of 2)

Davis testified that during her mid-testimony recess conversation with S.M., S.M. had told her that her mother made her promise to say that the allegations did not happen. A585—87. Davis was aware that S.M. was not supposed to discuss her testimony with anyone during the recess but claimed that she was not discussing S.M.'s testimony with her because "I think it relates, but it's not her speaking about

what she said when she was in this room. She was talking about the pressure she was facing external of being in this space.” A587—88.

I. THE TRIAL COURT VIOLATED MR. CLARK’S CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY DENYING HIS MOTION FOR A MISTRIAL WHEN THE PROSECUTOR SOUGHT AND OBTAINED A RECESS AFTER THE COMPLAINING WITNESS RECANTED HER ALLEGATION, DURING WHICH THE PROSECUTOR EMBRACED THE WITNESS, THE TRIAL COURT QUESTIONED THE WITNESS ABOUT HER TRUTHFULNESS, AND THE WITNESS SPENT AN HOUR WITH AGENTS OF THE STATE BEFORE RESUMING HER TESTIMONY AND CONTRADICTING HER RECANTATION.

Question Presented

Could any remedy short of mistrial have cured the egregiously prejudicial impact of the State’s key witness, a minor, contradicting her earlier exculpatory testimony after being improperly influenced at a critical juncture by repeated prosecutorial misconduct and repeated questions about her honesty raised by the trial court? A359; A365—73; A396—400; A405—06; A411—15; A422; A793—94.

Scope of Review

The trial court’s decision to grant or deny a request for a mistrial is reviewed for abuse of discretion or the denial of a substantial right of the complaining party.³

Merits of Argument

³ *Taylor v. State*, 690 A.2d 933, 935 (Del. 1997) (citing *Johnson v. State*, 311 A.2d 873, 874 (Del. 1973)).

This was a credibility case in which the the complaining witness recanted her allegations in front of the jury. Then – following a recess in which the prosecutor, a member of the prosecution team, and the trial court, interacted with the witness in ways which were reasonably likely to influence the witnesses’ testimony – she recanted her testimony. As described below, this improper influence required a mistrial because the only other option considered (and ultimately accepted) by the trial court was cross examination in which the Clark was left between a rock and a hard place: he could either (1) not cross examine the witness regarding the conduct during the recess, in which case the jury would be left to believe that the recantation of her recantation was uninfluenced by others, or (2) inform the jury of the influence, which would prejudicially lead them to believe that the trial court, the prosecutor, and an additional member of the prosecution team, personally believed in the veracity of the allegations, and the untruthfulness of the initial recantation.

- a. The prosecutor committed misconduct when she approached the witness over defense objection during the recess, without the witness’s consent or the trial court’s permission, and embraced her, which created an unassailable obstacle that prevented the witness’s credibility from being fairly assessed in the absence of the prosecutor’s influence.***
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Prosecutors are responsible for ensuring, even while presenting their case, that a defendant receives a fair trial.⁴ “Members of the jury are likely to assume that

⁴ *Whittle v. State*, 77 A.3d 239, 244 (Del. 2013).

prosecutors will satisfy their heightened obligations of impartiality,”⁵ and thus their words and actions may carry undue weight in the eyes of the jury.⁶ Jurors may “give special weight to the prosecutor's arguments, not only because of the prestige associated with the prosecutor's office, but also because of the fact-finding facilities presumably available to the office.”⁷ “The prosecutor has the responsibility to ‘ensure that guilt is decided only on the basis of sufficient evidence,’ without the undue influence of ‘improper suggestions, insinuations, and assertions of personal knowledge.’”⁸

When prosecutors create the impression that they endorse a witness, particularly one whose credibility is a central issue of the case, they commit prosecutorial misconduct which deprives the defendant of a fair trial decided upon the evidence.⁹

If a prosecutor can shelter a witness’s testimony within the State’s “aura of credibility,”¹⁰ surely that process occurs when the prosecutor abandons impartiality and rushes to embrace a witness while loudly declaring affinity for them. A359;

⁵ *Baker v. State*, 906 A.2d 139, 152 (Del. 2006).

⁶ *Id* (citing *Elmer v. State*, 724 A.2d 625, 632 (Md. 1999)).

⁷ *Whittle* at 244 (quoting Am. Bar. Ass'n, *Standards for Criminal Justice* 3–5.8 (1993)).

⁸ *Rasin v. State*, 187 A.3d 1209 at *2 (Del. 2018) (TABLE) (quoting *Kirkley v. State*, 41 A.3d 372, 377 (Del. 2012)).

⁹ *Heald v. State*, 251 A.3d 643, 652-56 (Del. 2021); *Whittle* at 244, 248-49.

¹⁰ *Whittle* at 249.

A457. Given that the witness returned from the recess and delivered testimony that was diametrically opposite of the testimony that preceded it, changing from exculpatory testimony to incriminatory testimony, it was inevitable that Clark would need to cross-examine the witness about the change in her testimony and the events that surrounded it. A358—59; A375—76. The trial court guaranteed as much by ruling that Clark’s remedy for any prejudice caused by the events of the recess was to cross-examine the witness about the recess. A418; A422; A425. The trial court’s reliance on cross examination as a remedy – which necessitated informing the jury of the misconduct which occurred outside of their presence -- undercut the trial court’s rationale for denying a mistrial – that the jury was unaware of the events which had occurred. A425.

b. The trial court’s repeated questioning of the witness in the emotionally charged moments after the recess and the prosecutor’s embrace exacerbated the impact of the prosecutorial misconduct and created the appearance of additional pressure upon the witness in a manner that could not effectively be presented or argued to the jury as they assessed the change in her testimony.

Moments after the prosecutor hugged the crying witness, the trial court began to question the witness *sua sponte* about the truthfulness of the testimony that she had just provided. A360—63. The trial court stated that “And that is all that you need to think about, is telling the truth, okay? And if what you just indicated is the truth, that’s fine. And if it’s not, the Court needs you to tell the truth about this today.” A360. The trial court later noted in her ruling on the motion for a mistrial that the

witness's lack of composure raised initial concerns about whether the witness could testify at all, characterizing those concerns as the immediate focus of the inquiry. A420. Yet the record reflects that the sequence of questions immediately and overwhelmingly focused upon the truthfulness of the witness's testimony, not her composure. A360—62. The decision to question the minor witness who was still having "significant difficulty composing herself" about the truthfulness of her testimony created an unfair risk of the witness inferring that the trial court disapproved of her answers and altering her subsequent testimony. A419. Any reasonable person would recognize that the trial court's questions reflected its doubts as to the truthfulness of the sworn testimony. Clark raised this concern in seeking the mistrial. A397—98.

The remedy provided to explore the potentially prejudicial influence that the witness experience during recess was cross-examination. A418; A422; A425. That remedy was inherently insufficient because its value required Clark to inform the jury of the trial court's questions probing the witness's truthfulness, when doing so would simply replace the unfair prejudice from the improper influence of the trial court's questions with the unfair prejudice from informing the jury of facts which suggested the trial court doubted the truth of the recantation, which would effectively turn the trial court's questions (asked outside of the presence of the jury) into a comment upon the evidence, a violation of Article 4, §19 of the Delaware

Constitution. Judicial commentary on the evidence is prohibited in order to “protect the province of the jury on factual issues.”¹¹

c. The prosecutor’s colleague, a victim services specialist, willfully disregarded the trial court’s instructions on sequestration to seek and discuss information with the witness that would later be presented by the prosecution in its rebuttal case as evidence of what the witness said during the recess.

Both the trial court and defense counsel noted the apparent inconsistencies in the prosecution team’s purported observance of the trial court’s direction that the witness was not to talk to anyone about her testimony. A414—15; A422. The prosecutor told the trial court that the witness spoke with the police officer handling the emotional support dog about pressure from her mother. A403.

Later, Carley Davis, the prosecution’s victim services specialist, testified that she had deliberated elicited information from the victim, during the recess, about the pressure she had discussed during her testimony. A540—41. And the State took full advantage of information Davis had elicited from S.M. mid-testimony: that her sworn recantation was supposedly the product of pressure from her mother. A585—87.

Davis’s excuse for breaching the trial court’s sequestration order was that “I think it relates, but it’s not her speaking about what she said when she was in this room. She was talking about the pressure she was facing external of being in this

¹¹ *Lunnon v. State*, 710 A.2d 197, 201 (Del. 1998).

space.” A587—88. The prosecution team either tolerated or encouraged this misconduct, and regardless, they stooped to using the fruits of Davis’s recess discussion with the witness against Clark. A585—87. “[M]id-testimony consultations may lead to ‘improper attempts to influence the testimony in light of the testimony already given.’”¹² Such improper influence was both attempted and effectuated by the State.

d. The verdict was entirely dependent upon the credibility of the witness, and a fair determination of her credibility became impossible, at which point mistrial was the only appropriate remedy.

S.M., the complaining witness, was the “linchpin” of the State’s case. Her credibility in the allegations against Clark was essential to the jury’s determination of guilt.

To determine whether prosecutorial misconduct prejudicially affects a defendant's substantial rights, it is necessary to consider (1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error.¹³

The core facts of Clark’s case demonstrate its closeness. The complaining witness had provided contradictory testimony both incriminating and exculpating

¹² *Buckham v. State*, 185 A.3d 1, 8 (Del. 2018) (quoting *Geders v. United States*, 425 U.S. 80, 87 (1976) (“Sequestering a witness over a recess called before testimony is completed serves a third purpose as well preventing improper attempts to influence the testimony in light of the testimony already given.”)).

¹³ *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

Clark. There was no physical evidence. Testimony about S.M. seeking to circumvent her mother's ban on electronic devices with access to social media demonstrated that she would have had reason to utilize the cellphones of adults in the home and thus might have seen the explicit video without Clark showing it to her. Resentment over Moore and Clark limiting her access to her online boyfriend, a twenty-something adult male, coupled with evidence that S.M.'s father did not impose such limitations on internet access, would have allowed the jury to infer a motive to fabricate allegations: so that she might even have the opportunity to meet the boyfriend if she lived with her father. A492—93. Moreover, testimony about the meeting with her principal demonstrated that S.M. was concerned about being in trouble for inappropriate conduct on the Chromebook, which provided an alternative motive to fabricate allegations: distraction and mitigation. And thirdly, the fact that her family received thousands of dollars in victims' compensation from the State could lead a jury to infer that she would be scared to recant her allegations even if she had fabricated them.

The jury could not fairly assess the credibility of the witness, and her credibility was the core issue of the case.

The Court attempted to mitigate the error by allowing additional cross-examination regarding the recess. As previously noted in Claim I-a, cross-examination was a particularly ineffective remedy because it called attention to

conduct that was only permissible in the trial courts eyes because it had occurred outside the presence of the jury. A425.

Consequently, under the *Hughes* test, Clark's right to a fair trial was prejudicially affected, requiring reversal.¹⁴

¹⁴ *Id.*

II. THE TRIAL COURT ABUSED ITS DISCRETION BY PERMITTING THE PROSECUTOR TO SHOW THE JURY AN UNFAIRLY PREJUDICIAL VIDEO OF CLARK’S EXPLICIT SEXUAL ACTIVITY WITH HIS PARTNER WHEN THE EXISTENCE OF THE VIDEO AS RELEVANT TO THE CASE WAS ALREADY STIPULATED.

Question Presented

Was it an abuse of discretion for the trial court to let the state show the jury a video of Clark receiving fellatio from his girlfriend, even though the existence and content of the video and several others like it were stipulated facts and so all it could add to the jury’s deliberations would be an unfairly prejudicial sense of disgust? A194—208.

Scope of Review

Trial court rulings which weigh the probative value of evidence against its potential for unfair prejudice under D.R.E. 403 are reviewed for abuse of discretion.¹⁵

Merits of Argument

None of the allegations involving Clark sexually contacting S.M. involve fellatio. A202. The pertinent solicitation charge against Clark was simply supported by the claim that he showed her a video that she described as “my mom touching his penis with her hands and mouth.” A201. Clark stipulated to the contents of the video

¹⁵ *Williams v. State*, 494 A.2d 1237, 1241 (Del. 1985).

and that it was on his phone, the only material question was whether he had shown it to S.M., regarding which Bozeman testified that there was no effort to confirm. A562; A574—75.

Though the video was not presented as “bad acts” evidence, the commonly held treatment of sex (and most certainly the recording of sex acts) as taboo, presentation of an obscene video featuring the defendant carries similar concerns about the prospect for unfair prejudice, warrants application of the nine factors set forth in *Deshields v. State* to assist in analysis of D.R.E. 403 balancing:¹⁶ (1) the extent to which the point to be proved is disputed; (2) the adequacy of proof of the prior conduct; (3) the probative force of the evidence; (4) the proponent's need for the evidence; (5) the availability of less prejudicial proof; (6) the inflammatory or prejudicial effect of the evidence; (7) the similarity of the prior wrong to the charged offense; (8) the effectiveness of limiting instructions; and (9) the extent to which prior act evidence would prolong the proceedings.¹⁷ Factors (1), (4), (5), and (7) all suggest the probative value of the evidence was strongly diminished, if not negated, by the stipulation and emphasize the cumulative nature of the video. And, in light of the video’s graphic content and the fact that none of the allegations against Clark

¹⁶ *Deshields v. State*, 706 A.2d 502, 506-07 (Del. 1998).

¹⁷ *Id.*

involved him initiating fellatio with S.M, factors (6) and (7) weigh in favor of exclusion.

The State clearly intended to utilize the video for its unfairly prejudicial value, arguing that “honestly I’m not intending to make argument about the location of the videos as much as just the fact that these videos were allegedly shown” to S.M., and later continued to argue that “the jury should be able to see that the defendant showed a video to the child of the mother and the way that she’s frankly moving her head, moving her mouth, touching his penis, maybe the noises that she’s making,” to decide if the video would purposefully solicit a sexual act. A200; A202—203. The trial court should have accounted for these red flags within the State’s argument.

The unfair prejudice created by introduction of the video was reified by the prosecutor’s rebuttal argument at the end of the trial, when she asked, “how can the jury make a decision about that offense without seeing what the child has seen?” A707. In a case where the State knew that they would struggle to establish their complaining witness’s credibility, the prosecutor unfairly weaponized the jury’s disgust, using shock value to tip the scales of justice.

III. THE TRIAL COURT ERRONEOUSLY APPLIED THE INDEPENDENT SOURCE DOCTRINE TO A WARRANT WHICH WAS NOT INDEPENDENT FROM THE ILLEGALITY OF THE PRIOR WARRANT AND ALSO ERRONEOUSLY CONCLUDED THAT THE PRIOR WARRANT WAS NOT A GENERAL WARRANT.

Question Presented

Were the trial court's conclusions that the independent source doctrine was applicable and the initial warrant was merely overbroad both wrong as a matter of law? A21—45; A78—96; A103—33; A135—43.

Scope of Review

Though the trial court's denial of a motion to suppress is reviewed for abuse of discretion and factual findings will only be reversed if clearly erroneous, "[t]he trial court's legal conclusions, including those addressing constitutional issues, are reviewed *de novo*."¹⁸

Merits of Argument

The independent source doctrine can allow the admissibility of evidence that was illegally obtained, if the evidence was also in fact, separately obtained through an independent and lawful source.¹⁹ Stated differently, the independent source doctrine cannot depend upon counterfactual assumptions of what would have

¹⁸ *Terreros v. State*, 312 A.3d 651, 660 (Del. 2024).

¹⁹ *Murray v. United States*, 487 U.S. 533, 538-39 (1988).

happened but for the illegality;²⁰ such an analysis prevents a determination of whether the second search was actually independent because the analysis itself proceeds as if the first search had not occurred.

Yet the trial court's logic held that a second warrant that revised an initial illegal warrant was somehow independent of the first warrant despite the fact that the second warrant's affidavit directly indicated that it would be used to provide continued access to a phone that had already been illegally seized and searched, stating that "this search warrant is a reapplication of an initial search warrant signed on March 16, 2023" and "the cellphone has remained in police custody and the warrant reapplication does not exclude any evidence that was obtained from the download of the cellular device at the time." A77. In other words, by its own terms subsequent warrant's content (mostly taken directly from the first) and existence (as a *reapplication*) was by definition *dependent* on the prior warrant. Moreover, though the prosecutor insisted that the creation of the second warrant had zero reliance upon the execution of the first warrant, it presented no evidence to support this self-serving claim, nor did it even claim to have a basis for its assertion. In contrast, Clark pointed out that there was a basis to infer that the second warrant relied on the first. In particular, one specific category of data, text messages, that had

²⁰ *Garnett v. State*, 308 A.3d 625, 668-670 n. 94 (Del. 2023) (Valihura, J., dissenting).

been removed from the list of categories that police thought might contain evidence, indicating that the search authorization had been refined not just as a matter of correcting its defective scope, but in response to the results of the initial illegal search. A116—25; A140. State witnesses were the only ones capable of providing a definitive answer on this and given that it is the State’s burden to satisfy the requirements of the independent source doctrine²¹ its failure to call those witnesses is both telling and controlling.

Clark’s cellphone was seized on March 13 while police sought an illegal warrant. A68. It was held while police executed the search that was authorized by the illegal warrant. Police searched and seized the digital contents of the phone pursuant to the illegal warrant, constrained only by a sixteen-month temporal limitation. A75; A67. However, 415 days later, on May 1, 2024, subsequent to this Court’s opinion in *Terroros v. State*,²² it appears that the State recognized that it was in possession of the fruits of an illegal search and attempted to tidy up the rotten

²¹ *Murray*, 487 U.S. at 540 (describing government’s “onerous burden of convincing a trial court that no information gained from the illegal [search]... affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it”)

²² *Terreros v. State*, 312 A.3d 651, 668-69 (Del. 2024) (holding that the distinction between an overbroad warrant and a general warrant hinges upon the difference between an overbroad search that allows a search for to seek specific items or look in specific places, for which there is no probable cause, and a general search that allows “exploratory rummaging” and based upon wide authorization that may identify a target yet fails to actually constrain the search within categories of data).

mess that the first warrant created. A73—77. The State delved deeply into the realm of the counterfactual while seeking shelter within the independent source doctrine, and the trial court erred by following the State down that path.

The second warrant was not, in fact, independent, and the failure to exclude the evidence was an erroneous legal conclusion about Clark’s constitutional rights against unlawful search and seizure. But though the trial court indicated that the initial warrant was merely overbroad in a manner that could redact the product of the search without excluding the video evidence, that decision represented on the trial court misapprehending the definition of a general warrant as described in a near-identical scenario in *Taylor v. State*.²³ A66—67; A70. The *Taylor* case, like this one, also featured limited development of the record by the State’s to support the conduct of the search.²⁴

Terreros contains timely analysis of an increasingly complex set of privacy problems created by digital searches, which can allow law enforcement to take advantage of any failure to constrain their authority by snapping up a shocking

²³ *Taylor v. State*, 260 A.3d 602, 616 (Del. 2021) (“a warrant that allows investigators to search for ‘any and all data’ ‘pertinent to the criminal investigation’ is unlimited in scope. To find information pertinent to the investigation, investigators were authorized, in general warrant fashion, to rummage through all of the smartphones’ contents. The free-ranging search for anything ‘pertinent to the investigation’ undermines the essential protections of the Fourth Amendment—that a neutral magistrate approve in advance, based on probable cause, the places to be searched and the parameters of the search.”).

²⁴ *Id.*

quantity of digital data from a device that can contain an individual's most private details.²⁵

Recent general warrant decisions in *Terreros*,²⁶ *Taylor*,²⁷ *Buckham*,²⁸ and *Wheeler v. State*,²⁹ all serve to illustrate that trial courts' must, as a matter of law, apply the definition of general warrants to protect Delawareans' state and federal constitutional rights against illegal search and seizure of digital data.³⁰ The denial of the Clark's Motion to Suppress constituted two separate errors of law as to the independent source doctrine and prohibition of general warrants, and each requires reversal.

²⁵ *Id.* at 663 (citing *Riley v. California*, 573 U.S. 373 (2014)).

²⁶ *Id.* at 651.

²⁷ *Taylor* at 616.

²⁸ *Buckham* at 18.

²⁹ *Wheeler v. State*, 135 A.3d 282 (2016).

³⁰ *Wheeler* at 298-99 (citing Art. I, § 6 of the Delaware Constitution).

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW BY INTERPRETING 11 DEL. C. § 3508 AS BARRING THE PRESENTATION OF RELEVANT EVIDENCE AND PROHIBITING RELEVANT CROSS-EXAMINATION OF THE COMPLAINING WITNESS, AND IN DOING SO, THE TRIAL COURT VIOLATED CLARK’S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND CONFRONTATION OF THE WITNESS.

Question Presented

Whether the trial court erred as a matter of law and violated Clark’s constitutional rights to due process and confrontation by interpreting 11 Del. C. § 3508 as barring the presentation of relevant evidence and prohibiting relevant cross-examination of the complaining witness? A210-233, A248-254, A315-348.

Scope of Review

The trial court’s legal conclusions, including those addressing constitutional issues, are reviewed *de novo*.³¹

Merits of Argument

As part of pretrial discovery, defense counsel provided the State with numerous Instagram messages which evidenced that the complaining witness (1) had more familiarity with sexuality and sexual terminology than exhibited in her CAC statement, (2) was specifically aware that she could avoid being in trouble and

³¹See *Benson v. State*, 2020 WL 6554928, at *6 (Del. 2020) (“We review claims alleging an infringement of a constitutionally protected right... *de novo*.”).

other negative attention by making false allegations of sexual abuse, (3) had previously made false allegations of sexual abuse, and (4) had engaged in conduct which led to punishment and restrictions imposed by Clark, such that she had a motive to make false allegations against him. A166—79; A210. As indicated to the trial court, the State informed Clark that it would object to the introduction of any of these materials. A210.

One potential basis for objection, which was in fact borne out by the prosecutor's arguments, was that the material was barred by 11 *Del. C.* § 3508. A211. § 3508 allows introduction of evidence of a witness's sexual conduct, provided that the proponent of the evidence complies with certain procedural and substantive requirements.³² Procedurally, the proponent must file a motion in advance; and substantively, the proponent must provide an offer of proof concerning the evidence it proposes to present and the relevancy of such evidence in attacking the complaining witness's credibility.³³ Such a motion was filed in the instant case, and specifically identified the above materials provided in discovery. A166. As explained to the trial court, the motion was not a concession that the materials were

³² See 11 *Del. C.* § 3508.

³³ 11 *Del. C.* 3508(a)(1). The trial court then conducts an *in camera* hearing with the complaining witness, during which the witness is subject to cross examination, and the trial court must determine if the evidence is both *relevant and admissible*, in which case the evidence is admitted and the trial court may issue an order limiting the evidence to be introduced and the nature of the questions to be asked. See *State v. Benson*, 2019 WL 10104792, at *2 (Del. Super. 2019).

covered under 3508, but rather, a means to ensure compliance with 3508's procedural rules, should the State argue, and the trial court find, that the materials were covered by 3508. A210-211. However, trial counsel argued that the materials were not 3508 "sexual content," and even if they were, they were admissible to challenging the complaining witness's credibility. A212—225.

The trial court erred as a matter of law by (1) interpreting 3508 as covering the materials at issue, and (2) finding that Clark's offer of proof did not satisfy 3508's prima facie requirements, (3) except as to the prior false sexual allegations against another individual. As to point (1), the trial court interpreted 3508 more broadly than its language permits because the materials at issue reflect the complaining witnesses' *familiarity with* sexual content but are not in and of themselves sexual content. A316. As to point (2), the trial court erred because Clark's offer of proof established a permissible purpose of introducing the material; in particular, it placed the complaining witness's credibility firmly at issue by evidencing a greater level of sexual knowledge than presented in her CAC statement.³⁴ A319. Moreover, it established that S.M. was engaging in particularly risky behaviors that escalated tensions with Moore and Clark, such as sending her

³⁴ See *State v. Massey*, 2024 WL 3443572, at *8 (Del. Super. 2024); citing *Benson*, 2019 WL 1014792, at *2; see also *State v. Davis*, 2007 WL 4234453 (Del. Super. 2006) ("Section 3508 expressly permits the Court to limit the scope of the evidence offered to only that which is necessary to attack the complaining witness's credibility.").

home address to the men she was messaging online. A462. Given her repeated surreptitious efforts to communicate with adult men online, a jury might also infer that she may have been subject to online manipulation intended to drive a wedge between her and her family to make her vulnerable. And finally, as to point (3), the trial court acknowledged that prior false allegations are directly relevant to the witness's credibility but excluded them because there existed "conflicting" evidence suggesting that the prior allegation was not false. A330-342. This was error because, regardless of evidence to the contrary, there is no dispute that there was evidence upon which a juror *could* reasonably infer that the complaining witness had previously made false allegations. It was up to the jury to determine whether her denial was credible or not. Additionally, the trial court's finding that the evidence of prior false allegations was also inadmissible under 403³⁵ was conclusory, as it does not explain how the highly probative value might be outweighed by unfair prejudice. A347—348.

³⁵ See D.R.E. 403 ("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.").

V. THE TRIAL COURT PLAINLY ERRED BY ALLOWING THE PROSECUTOR TO VOUCH FOR HER CASE DURING HER REBUTTAL, WHICH VIOLATED CLARK’S RIGHT TO A FAIR TRIAL.

Question Presented

Did the prosecutor’s repeated vouching for her case in rebuttal after the defense closing argument jeopardize the fairness and integrity of the trial process? This matter should be reviewed in the interests of justice³⁶ because the vouching represented a recurrence of earlier prosecutorial misconduct which had been preserved by objection and Clark attempted to remedy with a motion for a mistrial, which was denied as set forth in Claim I, incorporated herein by reference. Moreover, the vouching occurred shortly after a contentious pair of sidebar arguments, prompted by the prosecutor’s objections to Clark’s accusations that S.M.’s testimony had changed due to prosecutorial misconduct and improper influence. A691—94; A696—98. The trial court warned Clark that “I have allowed you significant latitude in determining and making those arguments. I mean a long way. It needs to stop.” A698. Clarifying the warning was a ruling, the trial court told Clark, “don’t continue to say that either the State is arguing with unprofessional conduct or violating the laws, or violating the rules of this Court. And don’t ask the jury to consider the statements of any other attorneys in this room today.” A698. The

³⁶ Pursuant to Delaware Supreme Court Rule 8.

ruling should be understood as, if not a prohibition on future defense objections because it was primarily directed at the defense closing, then at least a statement which created a chilling effect upon Clark’s readiness to raise further objections to prosecutorial misconduct. The prosecutor heard the same warning issued to defense and quickly seized the opportunity created by the chilling effect and repeatedly vouched for her case. A706—07.

Scope of Review

Improper prosecutorial vouching for the State’s case is reviewed for plain error in the absence of a defense objection,³⁷ compelling reversal only if “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”³⁸

Merits of Argument

The prosecutor’s vouching during rebuttal clearly runs afoul of the overwhelming weight of precedent on the subject, mirroring a common and highly prejudicial form of vouching in which the prosecutor bolsters their case by arguing to the jury that the prosecutorial acts of the State are undertaken carefully and thus are evidence of guilt.³⁹ In *Hardy*, during rebuttal, “the prosecutor vouched for the

³⁷ *Heald* at 648.

³⁸ *Id.* (quoting *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

³⁹ *Hardy v. State*, 962 A.2d 244, 247 (Del. 2008); *Hughes* at 573; *Kirkley* at 376-78.

State's case when he commented that falsely reported rapes do not go to trial.”⁴⁰ Such vouching was “inexcusably egregious”⁴¹ and required reversal with no further analysis under the plain error standard.⁴²

Unfortunately, the prosecutor abandoned impartiality, destroyed Clark’s chance at a fair trial, and, having wrapped the witness in the State’s “aura of credibility,”⁴³ chose to double down on her misconduct, again placing her own conduct at issue in front of the jury so that they could not fairly question the witness’s credibility: “I hugged her then and I would hug her again.” A706. A fair outcome was impossible under the circumstances.

⁴⁰ *Hardy* at 247.

⁴¹ *Id.* at 248.

⁴² *Id.* at 247-48.

⁴³ *Whittle* at 249.

CONCLUSION

For the reasons and upon the authorities cited herein, Defendant's aforesaid convictions should be vacated.

Respectfully submitted,

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