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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On February 12, 2024, a grand jury indicted Paulron Clark ("Clark") for Rape First-Degree, two counts of Sexual Abuse of a Child by a Person in a Position of Trust, Authority, or Supervision in the First-Degree, three counts of Unlawful Sexual Contact First-Degree, Continuous Sexual Abuse of a Child, Dangerous Crime Against a Child, Sexual Extortion,[1] Sexual Solicitation of a Child,[2] and Sexual Offender Unlawful Sexual Conduct Against a Child. A2 at D.I. 3; A15-20.[3] The charges stem from Clark's conduct of sexually assaulting the minor daughter (S.M.)[4] of his girlfriend (Leandra Moore).

On May 9 and 10, 2024, Clark filed a motion to suppress and/or exclude video evidence that officers had recovered through two search warrants that authorized the searches of Clark's cell phone, a motion to sever the charges, and a motion *in limine* related to GPS data (which is not at issue in this appeal). A2 at D.I. 8; A3 at D.I. 10, 11; A21-37. Thereafter, Clark filed a supplemental motion to suppress. A3 at D.I.

[1] On September 4, 2024, the State entered a *nolle prosequi* for the Sexual Extortion charge. (A237-38, A313).

[2] The State amended the count for Sexual Solicitation on September 4, 2023. (A238-39, A247, A313).

[3] "D.I.___" refers to the Superior Court docket item numbers in *State v. Paulron Clark*, ID No. 2300012390A.

[4] Pursuant to Rule 10.2(9)(b), the State refers to the minor by her initials.

12; A38-45. On June 3, 2025, the State filed a response to the motion to sever and a response to the motion *in limine*. A3 at D.I. 13, 14; A46-77.

On June 18, 2024, following a stipulation by the parties, the Superior Court granted the motion to sever the charges of Sex Offender Unlawful Sexual Conduct.[5] A3 at D.I. 15; A145, n.1. On the same day, the court granted in part and denied in part the motion *in limine.* A3-4 at D.I. 16.

On July 24, 202244, the Superior Court held a hearing on the suppression motion and reserved its decision pending further briefing from the parties. A4 at D.I. 22. Following that briefing, on August 29, 2024, the Superior Court denied the motion to suppress, finding that the second warrant was valid, did not rely on stale information, was supported by probable cause, and did not contain any information gained from the first warrant execution. A5 at D.I. 29; A144-57.

Also on August 29, 2024, Clark filed a second motion *in limine* seeking to exclude sexually explicit videos that officers had extracted from his cell phone based on their relevance and the potential unfair prejudice to him under D.R.E. 401 and 403. A158-65. To avoid unfair prejudice, Clark offered to stipulate to the existence

[5] The Sexual Offender Unlawful Sexual Conduct Against a Child charge proceeded under Superior Court docket item numbers in *State v. Paluron Clark*, ID No. 2300012390B.

of the videos and to detail the sexual content on his cell phone during the relevant time periods. A199-201.

On August 30, 2024, Clark filed a third motion *in limine* seeking to admit screenshots of certain of S.M's online conversations to support his arguments regarding her sexual knowledge under 11 *Del. C.* § 3508. A6 at D.I. 30; A166-80.

A four-day jury trial began on September 3, 2024. A5 at D.I. 28; A6 at D.I. 32. Before opening statements, the trial judge resolved the second motion *in limine* by ruling that the sexually explicit videos were both relevant and significantly probative to the charge of Sexual Solicitation of a Child. A205-08. The court ruled that the State could play one of the videos to the jury and directed the parties to draft a stipulation regarding the number of videos and the time frame and dates during which the videos were recorded. A207-09, A246. In addition, the court ruled on the third motion *in limine* by excluding from evidence the screenshots of the complaining witness' text messages with men on the internet. A239-45. However, the court also ruled that Clark could question the victim about whether she understood the words that she was using in the text messages and whether a prior report by S.M. of sexual abuse (not involving Clark) was false. A244-45, A248-49, A253-54.

On the second day of trial, the State agreed not to pursue the Sexual Extortion charge. Following the exchanges at pp. 15-20 herein, Clark moved for a mistrial, which the Superior Court denied. A396-426.

On September 10, 2024, the jury found Clark guilty of all charges. A6 at D.I. 35, 36; A779-82. On October 22, 2024, the Superior Court found Clark guilty of Sexual Offender Unlawful Sexual Conduct Against a Child. A13 at D.I. 10; A803-04.

On February 21, 2025, the Superior Court sentenced Clark to an aggregate 107 years of incarceration followed by decreasing levels of supervision. A8 at D.I. 49; Ex. F of Opening Br.

On March 3, 2025, Clark appealed his convictions and on May 23, 2025, filed an opening brief. This is the State's answering brief.

SUMMARY OF ARGUMENT

I. DENIED. The Superior Court did not abuse its discretion or otherwise err when it denied Clark's motion for a mistrial. The prosecutor did not engage in prosecutorial misconduct by hugging the complaining witness during a break and outside the presence of the jury. The Superior Court properly questioned S.M. and did not exert any improper influence over S.M. or create an unfair risk that S.M. would infer judicial disapproval of her answers. And the victim services specialist did not willfully disregard the Superior Court's instructions because she did not discuss with S.M. her testimony--rather, she provided comfort to the witness pursuant to her job.

II. DENIED. The Superior Court did not abuse its discretion or otherwise err when it allowed the prosecutor to show the jury a video of Leandra Moore ("Moore") fellating Clark. Officers found six sexually explicit videos on Clark's cell phone that matched the description of what S.M. had disclosed to the CAC. These videos were both relevant and the best evidence of the Sexual Solicitation charge. Moreover, the jurors were asked *voir dire* questions to reduce any potential risk of unfair prejudice to Clark by seeing the video. If the *Deshields* analysis applies here, its factors weigh in favor of admission of the sex video into evidence. Clark's allegations that the prosecutor used the video to weaponize the jury's disgust are baseless.

III. DENIED. The Superior Court correctly concluded that Warrant One was not a general warrant. In any event, the court correctly determined the independent source doctrine applied to allow the admission of the sex video into evidence. Following this Court's decision in *Terreros*, the prosecutor concluded that Warrant One could be challenged as overbroad. Thus, officers obtained Warrant Two, which was based on the same information used to obtain Warrant One, but was directly targeted at the videos that S.M. had described. And Warrant Two did not seek arguably overbroad materials, such as text messages.

IV. DENIED. The Superior Court did not abuse its discretion or otherwise err by excluding evidence of S.M.'s text messages on Instagram with another person and by limiting cross examination of S.M. regarding the messages. The text messages were not considered sexual conduct under Section 3508. The messages themselves are not admissible under D.R.E. 403 as prior conduct of a witness used to attack the witness' credibility. Moreover, the texts were not relevant to prove that S.M. fabricated her allegations against Clark. And evidence about a claimed prior false report by S.M. of sexual abuse by a classmate was properly excluded because the court concluded that S.M.'s allegations of the prior incident were not false.

V. DENIED. The prosecutor did not engage in prosecutorial misconduct or improper vouching in her rebuttal by stating in relation to the minor witness having broken down on that stand that "I hugged her then and I would do so again." Because

Clark made no contemporaneous objection, this claim can be reviewed only for plain error, which is not present here.

STATEMENT OF FACTS

Clark started dating Moore when her daughter S.M. was nine years old.[6] Sometime after that, while S.M. was still nine years old, Clark began repeatedly sexually assaulting and raping her.[7] S.M. told Moore about Clark's abuse, but Moore downplayed the allegations as "wrestling" and told S.M. that she did not believe her claims.[8]

When S.M. turned eleven years old and began sixth grade, her behavior deteriorated, and her grades slipped somewhat.[9] S.M. started flirtatiously corresponding with adults online and purportedly had an online boyfriend named Aden who was allegedly in his 20s.[10] Moore was concerned and took away S.M.'s electronic devices.[11] Eventually, S.M. told Moore that she was using her school-issued Chromebook to communicate with Aden online.[12]

On January 19, 2023, Moore notified S.M.'s school about S.M.'s use of the Chromebook.[13] S.M.'s teacher (Ms. Banta) and the then-Principal of the school met

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[6] A469.

[7] Court Ex. 2 at 10:45-14:15; 54:15 (B-1); State Ex. 2; A35, A68, A356-7, A375-76.

[8] Court Ex. 2 at 51:15; 1:12:50 (B-1).

[9] A271-72, A279-80.

[10] A440-41, A489-90.

[11] A490-91.

[12] A442-43, A491.

[13] A284-85; A474.

with S.M. that day.[14] Ms. Banta asked S.M. if everything was okay at home.[15] S.M. did not answer verbally, but she eventually wrote a note disclosing Clark's sexual abuse of her.[16] The school reported the contents of the note to Moore and the police.[17]

On February 20, 2023, S.M. was interviewed at the Child Advocacy Center ("CAC").[18] S.M. said that Clark had fondled her chest and at other times had touched her "down there," which was the term she used to refer to her vagina.[19] S.M. also said that on one or two occasions, Clark had pulled down her pants and underpants and had touched her "down there" with his mouth.[20] In addition, S.M. stated that Clark had forced her to touch him "down there," which was the term she used for Clark's penis.[21]

When the CAC interviewer asked S.M. if she had seen Clark touch anyone else, S.M. reported that Clark had shown her a video on his phone of Moore touching

[14] A273-74; A356.

[15] A356.

[16] A276; A356-57; State's Ex. 2.

[17] A277; A477.

[18] A383; Court Ex. 2 (B-1).

[19] Court Ex. 2 at 10:45-13:00 (B-1).

[20] Court Ex. 2 at 24:55; 28:00 (B-1).

[21] Court Ex. 2 at 41:00 (B-1).

him "down there" with her hands and her mouth (*i.e.*, performing fellatio on him).[22] S.M. said Clark had shown her the video when he first started touching her, which was when she was nine years old and living at "the prior house."[23]

S.M. told the interviewer that Clark had tried to bribe her—if she would let him touch her chest, he would buy her Nintendo games or intervene with Moore to allow S.M. to keep her electronic devices.[24] S.M. reported that Clark never told her not to tell anyone about the sexual contact; however, she said that she had watched *Criminal Minds* and believed that if she did not tell anyone, Clark would not come after the family with a gun or knife.[25]

There was no physical evidence of Clark's sexual abuse of S.M. because most of it occurred approximately two months before S.M. reported it.[26] But officers subpoenaed Clark's cell phone and found six sexually explicit videos matching S.M.'s description.[27]

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[22] Court Ex. 2 at 49:00 (B-1).

[23] Court Ex. 2 at 1:10:15 (B-1).

[24] Court Ex. 2 at 35:15 (B-1).

[25] Court Ex. 2 at 48:00 (B-1).

[26] A298-99, A305.

[27] A296-97, A376.

After S.M. told Moore that Clark had sexually abused her, Moore had at least one more child with Clark and married him.[28] Moore testified that she still loves Clark (A483-84) and is in frequent communication with him.[29] She had been in contact with defense counsel throughout this case[30] and took S.M. to meet with the defense team before S.M. ever met with the DOJ.[31]

[28] A353, 482.

[29] A482.

[30] A484.

[31] A481-82.

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR WHEN IT DENIED CLARK'S MOTION FOR A MISTRIAL.

Question Presented

Whether the Superior Court abused its discretion or otherwise erred when it denied Clark's motion for a mistrial based on his allegations that a fair determination of S.M.'s credibility had become impossible and that S.M. had been improperly influenced by (i) the prosecutor hugging her, (ii) the Superior Court questioning S.M. outside the presence of the jury, and (iii) the victim services specialist, Carley Davis, asking S.M. whether anything in the courtroom could be changed to help alleviate the pressure that S.M. said she felt. A359-60; A400-05.

Standard and Scope of Review

"[T]his Court reviews a trial court's denial of a motion for a mistrial under an abuse of discretion standard."[32] A trial judge should grant a mistrial only when there is a "manifest necessity," "when there are no meaningful and practical alternatives to that remedy," or "the ends of public justice would otherwise be defeated."[33]

[32] *Trala v. State*, 244 A.3d 989, 997 (Del. 2020); *Ray v. State*, 2017 WL 3166391, at *4 (Del. July 25, 2017) (quoting *MacDonald v. State*, 816 A.2d 750, 753 (Del. 2003)).

[33] *Trala*, 244 A.3d at 997; *Ray*, 2017 WL 3166391, at *4 (citing *Steckel v. State*, 711 A.2d 5, 11 (Del. 1998)) (quoting *Fanning v. Superior Court*, 320 A.2d 343, 345 (Del.

"Prejudicial error will normally be cured by the trial judge's instructions to the jury."[34] The trial judge is in the best position to assess whether a mistrial should be granted.[35] "Absent an abuse of the trial judge's exercise of discretion in making that determination, this Court will not disturb that decision."[36]

Merits of Argument

Clark incorrectly argues that the Superior Court denied his motion for a mistrial because none of the conduct about which he complains was improper or "improperly influenced" S.M.'s testimony. This Court reviews a claim of alleged prosecutorial misconduct raised at trial for harmless error.[37] First, the Court will "engage in a *de novo* review to determine whether the prosecutor's actions rise to the level of misconduct."[38] If no misconduct occurred, the analysis ends; but if the Court determines the prosecutor engaged in misconduct, the Court conducts a

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1974)); *Dawson v. State*, 637 A.2d 57, 62 (Del. 1994) (quoting *Bailey v. State*, 521 A.2d 1069, 1077 (Del. 1987)).

[34] *Trala*, 244 A.3d at 997; *Dawson*, 637 A.2d at 62 (quoting *Bailey*, 521 A.2d at 1077).

[35] *Trala*, 244 A.3d at 997; *Ray*, 2017 WL 3166391, at *4; *Bowe v. State*, 514 A.2d 408, 410 (Del. 1986).

[36] *Trala*, 244 A.3d 989, 997 (Del. 2020); *Bowe*, 514 A.2d at 410.

[37] *Saavedra v. State*, 225 A.3d 364, 372 (Del. 2020); *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

[38] *Saavedra*, 225 A.3d at 372; *Baker*, 906 A.2d at 149-50.

harmless error analysis.[39] "[N]ot every instance of prosecutorial misconduct requires reversal. Only improper comments or conduct that prejudicially affect the defendant's substantial rights warrant a reversal of his conviction."[40] "To determine whether prosecutorial misconduct prejudicially affects a defendant's substantial rights, we apply the three factors of the *Hughes* test, which are: (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."[41]

A. The Prosecutor Did Not Engage in Prosecutorial Misconduct by Hugging S.M. During a Recess.

The prosecutor did not engage in prosecutorial misconduct by hugging S.M. outside of the presence of the jury after S.M. had broken down on the stand and then stating that she cared for S.M. "a lot."[42]

Here, the prosecutor began questioning S.M. on direct examination, and after S.M. recanted, broke down on the stand, and could not continue answering questions, the following exchange occurred:

---

[39] *Saavedra*, 225 A.3d at 372; *Baker*, 906 A.2d at 149-50.

[40] *Baker*, 906 A.2d at 148; *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004) (citing and parenthetically quoting *United States v. Sherman*, 171 F.2d 619, 625 (2d Cir. 1948) ("No prosecution is tried with flawless perfection; if every slip is to result in reversal, we shall never succeed in enforcing the criminal law at all.")).

[41] *Saavedra*, 225 A.3d 364; *Hughes v. State*, 437 A.2d 559 (Del. 1981).

[42] A359-60.

[PROSECUTOR]: [S.M.], you just mentioned that Pauly, or Paulron, has touched you in ways that you did not like. After you talked to your teachers about that that day, did you go to the Children's Hospital and talk to a nice lady named Kim about what happened with Pauly?

[S.M.]: Yes.

[PROSECUTOR]: And when you were talking to the lady at the Children's Hospital and your teachers, were you telling the truth?

[S.M.]: No.

[PROSECUTOR]: Okay. What do you mean by that, [S.M.]?

[S.M.]: (Long pause. No response.)

[PROSECUTOR]: Let me ask you another question. You just mentioned that when you wrote the note and you said Pauly was sexually harassing you, you meant that he was touching you in ways you didn't like? Is that the truth, that he touched you in ways you did not like?

[S.M.]: No.

[PROSECUTOR]: Okay. How are you feeling right now?

[S.M.]: (No response.)

[PROSECUTOR]: Do you need a minute? Okay. We can take a break. Can we take a break? I won't talk to her.

THE COURT: Yeah. 5-minute recess, please.

THE CRIER: Jurors, please rise.
- - -

(Whereupon, the jury panel was excused.)

- - -

> [PROSECUTOR]: I'm not going to say anything. I'm just going to give her a hug.
>
> [DEFENSE COUNSEL]: Your Honor, I think that's very inappropriate.
>
> [PROSECUTOR]: I care about her, Your Honor, a lot.
>
> (Whereupon, [PROSECUTOR] hugged the witness on the witness stand.)[43]

Importantly, the prosecutor did not say anything inappropriate or influential when she approached S.M. outside the view of the jury, hugged her, and then expressed her affection for her. No case law supports the argument that the prosecutor engaged in misconduct here.

Clark fails to explain how the prosecutor hugging S.M. and relaying that she cared about S.M. would improperly influence her testimony. Rather, it was a human emotion to try to comfort a visibly distressed minor. The interaction did not touch upon the substance of S.M.'s testimony, and it was not in any way threatening or coercive. To the contrary, if anything, it would convey to that minor that she was not in trouble and that the prosecutor was not angry with her, despite her testimony that Clark had not abused her.

Even if this Court were to determine that the prosecutor's actions amounted to misconduct, her actions nevertheless did not prejudicially affect Clark's right to a

[43] A358-60.

fair trial. The State agrees that, under the first factor of *Hughes*, the facts of the case were close. But Clark cannot satisfy the second or third *Hughes* factors. Under the second factor, the alleged misconduct (the prosecutor's hug of S.M.) was clearly not central to the case because it did not even occur in the presence of the jury. The third *Hughes* factor is also not satisfied because the Superior Court took appropriate steps to mitigate any adverse effects of the alleged misconduct by allowing Clark to question S.M. more than once about whether she spoke with anyone during the break and with whom she may have spoken.[44] Thus, the *Hughes* factors do not mandate reversal of the trial court's denial of the motion for a mistrial.[45]

B. The Superior Court Did Not Abuse its Discretion or Otherwise Err by Questioning the Complaining Witness During a Break.

After S.M. broke down on the stand and was unable to answer questions, the following colloquy occurred outside the presence of the jury:

> THE COURT: Okay. [S.M.], my name is Judge Vavala. And you know why we're here today, right? Okay. You swore a few minutes ago on a Bible. Do you remember when this lady came up, and you swore that you would tell the truth?
>
> THE WITNESS: (Witness nods head.)

---

[44] A422, A424-25. Clark's claim that he was left "between a rock and a hard place" (Opening Br. at 17) is addressed at pp. 23-24, *infra*.

[45] Under *Hunter v. State*, 815 A.2d 730 (Del. 2002), even if the prosecutor's misconduct did not endanger the fairness of the trial process, this Court may still reverse where the misconduct is part of a persistent pattern of prosecutorial misconduct over different trials such that a failure to reverse would compromise the integrity of the judicial process. No such pattern of misconduct is alleged here.

THE COURT: And you promised to do that, and put your hand on the Bible. That's all that anybody in this courtroom wants you to do today, all right? 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. Do you understand that?

THE WITNESS: (Witness shakes heads.)

THE COURT: Do you think you can do that?

THE WITNESS: (Witness shakes head.)

(Witness crying.)

THE COURT: Just look at me for a minute. Do you think you can tell the truth today?

THE WITNESS: (No response.)

THE COURT: At the present time, pretend that nobody else is here, do you think you could just tell us the truth, whatever that is?

THE WITNESS: (No response.)

THE COURT: And you don't need to worry about anything in the future at all, okay? Just the truth. And the only person that we have here today that's able to do that is you, okay? If I bring the jury back, can you tell them the truth, whatever that may be? [S.A.]?

THE WITNESS: (Witness nods head.)

THE COURT: We're just asking you a question. Can you tell the truth? And if you can't, tell me why. All right. Do you think that -- do you think that you can tell the truth in this courtroom today? That's a yes or no. What do you think?

THE WITNESS: (Witness shakes head.)

THE COURT: You can't tell the truth? Okay. Why?

THE WITNESS: Too much pressure.

THE COURT: It's too much pressure?

THE WITNESS: (Witness shakes head in the affirmative.)

THE COURT: Is there anything that would make that pressure better right now for you?

THE WITNESS: (Witness shakes head no.)

THE COURT: Do you think if we take a break for an hour or so, and you have an opportunity to talk to somebody about the pressure, that you could come back in and tell the truth?

THE WITNESS: (Witness shakes head in the affirmative.)

THE COURT: Okay. All right. So how about we do this, how about we take a recess, until 11:30. And during that time, you talk to whomever you need to talk to, okay? And I don't mean about what you're going to say, because you're under oath and you shouldn't be talking to anybody about what you're about to say under oath, okay? But if you need some other support, you can try to get that during that amount of time, maybe have a little bit of water and something to eat, and then we'll reconvene this court, and I will ask you again whether or not you can tell the truth, okay?

THE WITNESS: (Witness shakes head affirmative.)
- - -
THE COURT: Very good. All right. We're in recess for an hour.
- - -
(Whereupon this Court took a one-hour recess, from 10:30 to 11:30.)[46]

[46] A360-64.

Contrary to Clark's claims, this was not an attempt to influence S.M. to testify in any particular way. Rather, the judge asked S.M. multiple times if she could tell the truth and expressly stated that if her recantation of the claims against Clark was the truth, "that is fine."[47] The judge emphasized that she wanted S.M. only to tell the truth, "whatever that may be."[48] In response, S.M. expressed that she could not tell the truth.[49] In these circumstances--a recantation by an 13-year old victim of sexual abuse who was sobbing on the stand--the judge's questions were entirely appropriate, and indeed necessary. And, the court acted properly and maintained the required neutral demeanor that judicial officers must exhibit.[50] Contrary to Clark's assertion, the judge's questions were not an attempt to influence S.M. to testify to any particular facts.

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[47] A360.

[48] A361.

[49] A361-62.

[50] *Lawrence v. State*, 2007 WL 1329002 (Del. May 8, 2007); *Lagola v. Thomas*, 867 A.2d 891, 898 (Del. 2005); *Price v. Blood Bank of Delaware, Inc*., 790 A.2d 1203, 1210 (Del. 2002)). *See also State v. Robertson*, 760 A.2d 82, 104 (Conn. 2000) ("In a criminal trial, the judge is more than a mere moderator of the proceedings. It is his responsibility to have the trial conducted in a manner which approaches an atmosphere of perfect impartiality which is so much to be desired in a judicial proceeding. . ..").

C. The Victim Services Specialist Did Not Disregard the Superior Court's Instructions to S.M.

Clark is not entitled to a mistrial based on the conduct of Carley Davis, the DDOJ victim services specialist. Ms. Davis testified that part of her job as a social worker entails providing comfort to witnesses or victims who have an emotional breakdown.[51] In that situation, Ms. Davis acts as "kind of an emotional support safety net for them to return to neutral" so that the trial process can continue.[52] Ms. Davis approached S.M. during the break and told S.M. that she was okay, was safe, and was not in any trouble.[53] Because S.M. was emotional and crying, Ms. Davis tried to console her.[54] S.M. indicated that she felt a lot of pressure.[55] Ms. Davis asked S.M. if there were things within the courtroom that could be done to alleviate the pressure S.M. was experiencing, but S.M. said no.[56] Ms. Davis clarified that S.M. felt pressure coming from someone within her family, and she was grappling with her vision of her home life versus her experience and being forthcoming.[57]

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[51] A540.

[52] A540.

[53] A540.

[54] A541.

[55] A541.

[56] A541. The State notes that later, the prosecutor moved to clear the courtroom of spectators during S.M.'s testimony because S.M. told Ms. Davis that clearing the courthouse would help "with the pressure factor that she is feeling." A369.

[57] A550.

Because Ms. Davis's job entails comforting witnesses who become too emotional to continue testifying, she acted properly and within the constraints of her job.

Contrary to Clark's assertion[58], Ms. Davis did not violate the court's instruction, and there was no "sequestration order." Rather, prior to the recess, the judge instructed S.M.:

> THE COURT: Okay. All right. So how about we do this, how about we take a recess, until 11:30. And during that time, ***you talk to whomever you need to talk to, okay?*** And I don't mean about what you're going to say, because you're under oath and you shouldn't be talking to anybody about what you're about to say under oath, okay? ***But if you need some other support, you can try to get that during that amount of time*** . . . .[59]

Davis spoke to S.M. only about the pressure she was facing, and not about the testimony she was going to give.

Finally, Ms. Davis' interactions with S.M. during the recess were not an attempt to influence her testimony. While it is true that "[m]id-testimony consultations may lead to 'improper attempts to influence the testimony in light of testimony already given,'"[60] there is no evidence that Ms. Davis encouraged S.M. to

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[58] Opening Br. at 21.

[59] A363 (emphasis added). *See, e.g., Frierson v. State*, 543 N.E.2d 669 (Ind. Ct. App. 1989) (the trial court was within its discretion to allow the State to talk with a testifying victim during a break "if [the court] determined that such communications would help console the victim"; break was taken so that victim could regain her composure).

[60] Opening Br. at 22, citing *Buckham v. State*, 185 A.3d 1, 8 (Del. 2018).

testify a certain way or otherwise pressured her in any way. To the contrary, Ms. Davis told S.M. "that she was okay, that she was safe, that she wasn't in trouble." [61] This was the opposite of pressuring the witness to change her testimony. Rather, it communicated to S.M. that there would not be any negative repercussions from her recantation of her allegations against Clark.

Faced with the fact that neither the prosecutor, the judge, nor Ms. Davis sought to pressure S.M. to change her testimony, Clark argues that the trial court's rulings left him "between a rock and a hard place" in which he could either (1) not cross examine S.M. about what occurred during the recess, in which case the jury would believe that her post-recess testimony was not influenced by what occurred during the recess, or (2) cross examine her about what happened during the recess, in which case the jury would believe that the prosecutor, the judge, and the victim's assistance officer personally believed the veracity of S.M. post-recess testimony that Clark had abused her.[62] This argument fails because, as noted above, the prosecutor's hug, the judge's questions, and Ms. Davis' interaction with S.M. during the recess were not improper attempts to influence her testimony.

Clark made a tactical decision to inform the jury of what occurred outside of their presence in the hope that he could convince them that the prosecutor, the judge,

[61] A540.

[62] Opening Br. at 17.

or Ms. Davis had improperly influenced S.M.'s post-recess testimony that Clark had sexually abused her.[63] The jury, hearing all the facts, did not accept Clark's "influence" claim. Clark's tactical decision was unsuccessful and does not somehow entitle him to a reversal of his convictions.

[63] A694-96.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR WHEN IT ALLOWED THE PROSECUTOR TO SHOW THE JURY A VIDEO OF CLARK'S SEXUAL ACTIVITY WITH MOORE.

Question Presented

Whether the Superior Court abused its discretion or otherwise erred by ruling that the State could offer into evidence and show the jury a video depicting Moore fellating Clark to support its Sexual Solicitation charge. A181-86; A198-204.

Scope of Review

"The determination of whether the probative value of a particular piece of evidence is substantially outweighed by the danger of unfair prejudice is a matter which falls particularly within the discretion of the trial court," and this Court will not reverse the decision in the absence of a clear abuse of discretion.[64] "An abuse of discretion occurs when a court has ... exceeded the bounds of reason in view of the circumstances [or] . . . so ignored recognized rules of law or practice . . . to

[64] *Taylor v. State*, 76 A.3d 791, 802 (Del. 2013); *Charbonneau v. State*, 904 A.2d 295, 304 (Del. 2006); *Williams v. State*, 494 A.2d 1237, 1241 (Del. 1985). *See also* D.R.E. 401, 402, 403.

produce injustice."[65] Clark bears the burden of establishing that a "clear abuse of discretion" has occurred to be entitled to a reversal of his conviction.[66]

Merits of Argument

Clark argues that because he stipulated to the contents and existence of the sex videos on his phone, presenting the jury with a video depicting sex acts between Moore and him carries similar concerns as "bad acts" evidence with the potential for unfair prejudice. Opening Br. at 26. Therefore, for the first time on appeal, Clark urges this Court to apply the nine factors set forth in *Deshields v. State*[67] for a D.R.E. 403 balancing test. Opening Br. at 26. Clark also argues that the State intended to utilize the video for its unfairly prejudicial value and that this prejudice was "reified" by the State's rebuttal argument about how the jury could not decide about the offense without seeing the video. Opening Br. at 27. Clark's arguments are unavailing.

[65] *Gallaway v. State*, 65 A.3d 564, 569 (Del. 2013); *Culp v. State*, 766 A.2d 486, 489 (Del. 2001) (internal quotations and citations omitted).

[66] *Gallaway*, 65 A.3d at 569; *Harper v. State*, 970 A.2d 199, 201 (Del. 2009) (quoting *Kiser v. State*, 769 A.2d 736, 739 (Del. 2001)).

[67] 706 A.2d 502, 506-07 (Del. 1998).

A. The Probative Value of the Video Was Not Substantially Outweighed by the Danger of Unfair Prejudice.

The Superior Court did not abuse its discretion or otherwise err when it ruled the probative value of showing the jury one of six sexually explicit videos that officers found on Clark's cell phone was not substantially outweighed by the danger of unfair prejudice.[68] The Superior Court correctly determined the video had significant probative value regarding the charge of Sexual Solicitation of a Minor "and what has been called 'grooming' by the State,"[69] which outweighed the danger of unfair prejudice.

(1) *The existence of the sexually explicit video on Clark's phone was crucial evidence in this case.*

Determination of relevancy under D.R.E. 401 and unfair prejudice under D.R.E. 403 are matters within the sound discretion of the trial court, and this Court will not reverse the lower court in the absence of clear abuse of discretion.[70] Evidence is relevant where it has a tendency to make the existence of any fact of consequence to the determination of Clark's guilt or innocence more probable or less

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[68] A205-09.

[69] A205-06.

[70] *Scott v. State*, 642 A.2d 767, 769-70 (Del. 1994); *Mercedes–Benz of North America, Inc. v. Norman Gershman's Things to Wear, Inc*., 596 A.2d 1358 (Del. 1991). *See also Gallaway*, 65 A.3d at 571 (citing *Williams*, 494 A.2d at 1241; *Rush v. State*, 491 A.2d 439 (Del. 1985)).

probable than it would be without the evidence.[71] Even when evidence is relevant, a court may exclude it if the danger of unfair prejudice, confusion of the issues, or misleading the jury substantially outweighs the evidence's probative value.[72] "Generally, unfair prejudice within the context of DRE 403 means an undue tendency to suggest that the jury will render an adverse decision based on emotional grounds, instead of properly weighing the evidence."[73]

Here, there were no witnesses to Clark's abuse of S.M. other than S.M. And because the abuse was not reported until several months after it happened, there was no physical evidence that could corroborate S.M.'s testimony. But S.M. testified, *before anyone knew the content of Clark's cell phone*, that Clark had used that phone to show her a video of Moore performing fellatio on him. Officers thereafter found videos on Clark's cell phone showing him receiving fellatio from Moore.[74] The videos were highly relevant because they matched the description of what S.M. had disclosed that Clark had shown to her and thus corroborated her testimony.[75] These videos were also the best evidence of the solicitation itself, so it was proper for the

[71] D.R.E. 401.

[72] D.R.E. 403; *Scott*, 642 A.2d at 769.

[73] *Gallaway*, 65 A.3d at 570.

[74] A297.

[75] A201, A296-97, A356. Also, Moore testified that she and Clark had made videos showing her performing oral sex on him. A484, A500.

jury to view the very evidence that Clark forced his victim to view as an aid in reaching their verdict.[76]

Because the videos qualified as one of the elements of the charge of Sexual Solicitation of a Minor, the video was probative to the issue of Clark's guilt. Additionally, the video showed two adults engaging in consensual sexual acts, which was less prejudicial than, for example, a video that portrayed an adult coercing another person to engage in a sexual act. Finally, both parties agreed to include in *voir dire* questions for the potential jurors the following: "It is expected that there will be evidence presented that concerns matters of a sexually graphic nature and that you will have to discuss such matters during deliberations with other jurors. Is there anything about the nature of that evidence alone that would affect your ability to render satisfactory jury service and a fair and impartial verdict?"[77] Asking the potential jurors this *voir dire* question minimized the possibility that the probative value of the video evidence would be substantially outweighed by the risk of unfair prejudice to Clark.[78]

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[76] *See, e.g.*, *Gallaway*, 65 A.3d at 569–70 ("[T]his Court must decide whether the trial judge abused his discretion in finding that the video was first, material to issues 'of consequence' at trial; and second, that it had probative value, in that it advanced the probability that the facts or issues asserted were true."); *Owens v. State*, 2008 WL 4659801, at *2 (Del. Oct. 22, 2008).

[77] *See* A185.

[78] *Ortiz v. State*, 869 A.2d 285, 291 (Del. 2005) ("The purpose of *voir dire* is to ensure the selection of qualified jurors, who have no bias or prejudice that would

(2) *The Parties' Stipulation Was Insufficient.*

Clark argues that because he stipulated to the existence of and the content of the sexually explicit videos on his cell phone, the only material issue was whether he had shown one of the sexually explicit videos to S.M. Opening Br. at 25-26. But this argument fails to account for the State's responsibility. The State had the burden to prove that Clark showed S.M. the sexual content contained in the video for the purpose of soliciting a prohibited sexual act from her.[79] Because the stipulation failed to include any agreement that the State had met this element of its case, the State's ability to play the cell phone video to the jury during the trial was important to the State's proof of its case--it could show that the video exactly matched what S.M. had described to the CAC investigator before she or they knew the contents of Clark's cell phone.[80] Because the State had the burden of proof and the evidence

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prevent them from returning an impartial verdict based on the law and the evidence that is properly admitted during trial."), *overruled on other grounds*, *Raul v. State*, 145 A.3d 430 (Del. 2016).

[79] 11 *Del. C.* § 1112A.

[80] *Owens*, 2008 WL 4659801, at *2 (holding Superior Court did not abuse its discretion by finding probative value of photos substantially outweighed danger of unfair prejudice and by allowing into evidence to prove child solicitation charge pornographic images found on defendant's computer even though defendant was willing to stipulate to the existence of the photos on his computer).

corroborated S.M.'s allegations of sexual abuse, this Court should give the State latitude in introducing this evidence.[81]

(3) *The Deshields "Bad Acts" Evidence Test.*

For the first time on appeal, Clark argues that this Court should apply the nine factors set forth in *Deshields v. State*[82] to assist in analyzing D.R.E. 403's balancing test. Opening Br. at 26. However, Clark failed to argue this point below and is therefore barred from raising this contention on appeal before this Court absent plain error, which he has not shown.[83]

This Court employs the five factors set forth in *Getz v. State*[84] before admitting prior bad acts into evidence under D.R.E. 404(b), then applies the nine factors of

[81] *Rush*, 491 A.2d at 446 ("Furthermore, it must be noted that the State has the burden of proof and must be afforded considerable latitude in the introduction of evidence.").

[82] 706 A.2d 502, 506-07 (Del. 1998).

[83] Del. Supr. Ct. R. 8.

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

Deshields[85] to perform the test of *Getz's* fifth prong,[86] which is balancing the probative value of the prior bad act against its unfair prejudice.

This case did not involve a prior bad act. I Instead, the parties disputed what evidence the State could introduce to prove Sexual Solicitation of a Minor. Thus, *Getz* and *Deshields* do not apply. But if the *Deshields* factors were applied, they weigh heavily in favor of the State and the admission into evidence of the sexually explicit video. Indeed, Clark does not even discuss *Deshields* factors 2, 3, 8, or 9. The remaining factors (1, 4, 5, 6, and 7) do not mandate exclusion of the evidence.

Although Clark claimed he did not show any of the sexually explicit videos on his cell phone to S.M. (the first factor), the State had the burden to prove Clark committed Sexual Solicitation of a Minor and did, in fact, prove its case. S.M. described in detail the sex video that Clark had showed her *before she, the police, or the prosecutor knew the contents of Clark's cell phone.* Police later located at least six sexually explicit videos on Clark's cell phone that matched S.M.'s description, which strongly corroborated her testimony., so the second factor weighs in favor of

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[85] The nine factors in *Deshields* are: (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. *Deshields*, 706 A.2d at 506–07.

[86] *Ward v. State*, 2020 WL 5785338, at *5 (Del. Sep. 28, 2020).

the State. Moreover, the probative force of the evidence was critical for the State to prove that Clark had shown a sexually explicit video to S.M. to solicit her to commit a prohibited sexual act. And the video was the only evidence corroborating S.M.'s testimony, so factors three and four also weigh in favor of the State.

The crux of Clark's argument revolves around factor five. He contends his offer to stipulate that sexually explicit videos with Moore existed on his phone was a less prejudicial way of proving the existence of those videos. But this argument fails. An anodyne stipulation that the videos existed failed to equate with being able to show the jury a video which matched, in detail, the video that S.M. testified Clark had showed her. Because the State's case largely depended on S.M.'s credibility, finding a video that exactly matched S.M.'s description was particularly critical here. *See* Opening Br. at 17, 22. Although the Superior Court noted that the sexually explicit videos were prejudicial[87] (factor six), the videos presented the best evidence supporting an argument that Clark had solicited a minor to engage in a prohibited sex act.

Although not similar to the charged crime of Sexual Solicitation of a Minor or any of the alleged sexual contact that Clark had with S.M., the video depicted Clark and Moore engaging in a consensual sexual act (factor seven). But this factor

[87] A205-06.

should not apply here because the video was not offered into evidence as a prior "bad act." Rather, Clark showing the video to S.M. was an element of Sexual Solicitation of a Minor. Moreover, the court prophylactically minimized any prejudice to Clark through its *voir dire* question (factor eight), and there is no claim that the two-minute video unnecessarily prolonged the proceedings (factor nine). Accordingly, the *Deshields* factors as a whole, if relevant, weigh in favor of the State.

(4) *The State Did Not Utilize the Videos for Unfair Prejudice.*

Clark argues that the State "clearly intended to utilize the video for its unfairly prejudicial value"[88] and that the prosecutor "unfairly weaponized the jury's disgust." Opening Br. at 27. Clark has shown no evidence to support these arguments. And bald assertions alone are insufficient.[89]

[88] Clark points to the prosecutor's arguments during the hearing held on Clark's Motion *In Limine* regarding the video evidence. A200, A202-03.

[89] *Ploof v. State*, 75 A.3d 811, 822 (Del. 2013), *as corrected* (Aug. 15, 2013) (stating failure to cite any supporting authority for a legal argument waives that argument) (citing *Flamer v. State*, 953 A.2d 130, 134 (Del. 2008); *Rossitto v. State*, 298 A.2d 775, 778 (Del. 1972)).

III. THE TRIAL COURT CORRECTLY CONCLUDED THE INDEPENDENT SOURCE DOCTRINE APPLIED HERE, AND THE ORIGINAL WARRANT WAS NOT A GENERAL WARRANT

Question Presented

Whether the Superior Court correctly ruled that the original warrant was not a general warrant and that the independent source doctrine applied to allow into evidence the sexually explicit videos found on Clark's cell phone that matched S.M.'s description of what Clark had showed to her. A46-77 and A116-25.

Scope of Review

"This Court reviews the denial of a motion to suppress for abuse of discretion"[90] and will reverse the Superior Court's factual findings "only if they are clearly erroneous,"[91] but will review legal conclusions, "including those addressing constitutional issues," *de novo*.[92]

[90] *Terreros v. State*, 312 A.3d 651, 660 (Del. 2024); *Lopez-Vazquez v. State*, 956 A.2d 1280, 1284-85 (Del. 2008); *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006).

[91] *Terreros*, 312 A.3d at 660; *West v. State*, 143 A.3d 712, 715 (Del. 2016); *Loper v. State*, 8 A.3d 1169, 1172 (Del. 2010); *Lopez-Vazquez*, 956 A.2d at 1285.

[92] *Terreros*, 312 A.3d at 660; *Lopez-Vazquez*, 956 A.2d at 1284-85; *Hall v. State*, 788 A.2d 118, 123 (Del. 2001).

Merits of Argument[93]

The relevant facts here are not in dispute. The initial warrant ("Warrant One"), obtained on March 16, 2023, sought from Clark's phone "all visual recordings, multi-media messages, text messages, and any other information/data pertinent to this investigation within the time frame of July 20, 2020 to November 30, 2021."[94] After Warrant One was executed, this Court decided *Terreros*,[95] which established that Warrant One was likely overbroad. Therefore, in May of 2024, the State sought a new warrant ("Warrant Two") which sought only "all visual recordings and associated data that notes the date, time, and/or location of when the visual recordings were created, downloaded and/or accessed within the time frame of July 20, 2020 to November 30, 2021."[96]

Clark asserts (correctly) Warrant Two was a reapplication for the visual recordings sought from the outset (and that were obtained as a result of Warrant One). From that he argues that "by its own terms [the] subsequent warrant's content

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[93] To the extent Clark's opening brief does not argue other grounds to support his appeal that were previously raised, those grounds are deemed waived and will not be addressed by this Court. Supr. Ct. R. 14(b)(vi)(A)(3); *Harris v. State*, 840 A.2d 1242, 1243 (Del. 2004); *Somerville v. State*, 703 A.2d 629, 631 (Del. 1997) (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)).

[94] A66.

[95] *Terreros*, 312 A.3d at 660.

[96] A72.

(mostly taken directly from the first) and existence (as a *re*application *was* by definition *dependent* on the prior warrant."[97] The State does not dispute that the Second Warrant was dependent on the First Warrant. Indeed, it was a subset of the First Warrant. But that is not the relevant test under the independent source doctrine. Rather, the test is whether the State could have obtained the subsequent warrant without knowledge of the materials it improperly received pursuant to the first warrant.[98]

Here, the independent source doctrine applies to Warrant Two. S.M. told investigators about a video that Clark showed her on his phone, and the search warrants were designed to obtain that video (if it existed). Warrant One sought that video, but also sought multi-media, text messages, and "any other information/data pertinent to this investigation within the relevant time frame."[99] After *Terreros* indicated that Warrant One was likely overbroad, the State pared down the warrant to seek only the video and its associated metadata, deleting the request for multi-media, text, messages and "any other information/data pertinent to this investigation." That narrowing did not depend in any way on information

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[97] Opening Br. at 29 (emphasis in original).

[98] *Utah v. Strieff*, 579 U.S. 232, 238 (2016); *Norman v. State*, 976 A.2d 843, 859 (Del. 2009); *Murray v. United States*, 487 U.S. 533, 537 (1988); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920), *overruled on other grounds by United States v. Havens*, 446 U.S. 620 (1980).

[99] A67.

improperly obtained pursuant to Warrant One. And Clark did not assert the State had improperly obtained information relevant to this case. Thus, the Superior Court did not abuse its discretion or otherwise err when it concluded the information obtained by the officers from Warrant Two was separate and independent from the information derived from Warrant One.

Clark also contends that Warrant One was an improper "general warrant" (rather than merely overbroad). The Court need not reach this question if it determines that the independent source doctrine applies to Warrant Two. Even so, Warrant One was not a general warrant because it limited the information sought to information or data related to the Sexual Solicitation charge and dated within a specific time frame.[100]

[100] *Compare Wheeler v. State*, 135 A.3d 282, 304 (Del. 2016) (failure to limit the search to the relevant time frame does not satisfy the particularity requirement); *Buckham*, 185 A.3d at 6 (finding warrant was general because it had no limitation as to time frame or type of data); *Terreros*, 312 A.3d at 657 (finding warrant seeking "any and all" data within certain parameters and lacking and date restriction was general warrant).

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR BY APPLYING 11 *DEL. C.* §3508 TO EXCLUDE EVIDENCE OF S.M.'S INSTAGRAM MESSAGES WITH ANOTHER PERSON AND BY LIMITING CROSS-EXAMINATION OF S.M. REGARDING THOSE MESSAGES.

Question Presented

Whether the Superior Court abused its discretion or otherwise erred when it ruled that 11 *Del. C.* § 3508 prevented Clark from presenting evidence of the Instagram messages that S.M. allegedly wrote and limited Clark's cross-examination of S.M. about the language she had used in these messages. A225-27.

Scope of Review

This Court reviews the Superior Court's evidentiary rulings for abuse of discretion.[101] "An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances or so ignored recognized rules of law or practice to produce injustice."[102] If this Court determines that the Superior Court abused its discretion, then the Court will determine "whether the error rises to the

[101] *Jenkins v. State*, 53 A.3d 302 (Del. 2012); *Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008) (citing *Pope v. State*, 632 A.2d 73, 78–79 (Del. 1993)); *Baumann v. State*, 891 A.2d 146, 148 (Del. 2005).

[102] *Jenkins*, 53 A.3d at 302; *Harper*, 970 A.2d at 201 (quoting *Culp*, 766 A.2d at 489).

level of significant prejudice to deny the defendant a fair trial."[103] The Court applies a *de novo* standard of review to the trial judge's legal conclusions.[104]

Merits of Argument

Clark argues that the Superior Court erred when it ruled against his motion *in limine* and excluded S.M.'s Instagram messages from evidence. Opening Br. at 34-36. Clark contends the Instagram messages provided by the State in pretrial discovery "evidenced" that S.M.: (1) had more familiarity with sexuality and sexual terminology than exhibited in her CAC statement; (2) was specifically aware she could avoid being in trouble by making false allegations of sexual abuse; (3) had previously made false allegations of sexual abuse; and (4) had engaged in conduct leading to punishment and restrictions imposed by Clark, so she had a motive to make false allegations against him. Opening Br. at 34. Clark also asserts (i) the Instagram messages did not qualify as materials covered by 11 *Del. C.* § 3508, (ii) his offer of proof satisfied section 3508's *prima facie* requirements, (iii) although the Superior Court acknowledged that prior false allegations are relevant to a witness' credibility, the court nevertheless incorrectly excluded the messages based on conflicting evidence regarding S.M.'s credibility; and (iv) the court's ruling that

[103] *Jenkins*, 53 A.3d at 302; *Manna*, 945 A.2d at 1153 (citing *Seward v. State*, 723 A.2d 365, 372 (Del. 1999)).

[104] *Taylor v. State*, 260 A.3d 602, 612 (Del. 2021) (citing *Lopez-Vazquez*, 956 A.2d at 1284-85).

D.R.E. 403 excluded the evidence was conclusory because it failed to explain how its "highly probative value" was outweighed by unfair prejudice. Opening Br. at 35-36. Clark's claims fail.

A. The Superior Court Correctly Ruled that the Instagram Messages Were Not Considered Sexual Conduct Under 11 *Del. C.* § 3508.

The Superior Court correctly concluded that Clark could not use the Instagram messages as evidence of S.M.'s sexual knowledge to attack her credibility because the messages did not qualify as a sexual encounter or conduct within section 3508.[105] The court reasoned that the messages appeared to be based on S.M.'s research on the Internet and a conversation with a peer that was not dated and thus did not rise to a level that qualified for an *in-camera* hearing under section 3508.[106] In addition, the Superior Court correctly ruled that the proffered evidence was not highly probative of whether S.M. fabricated the allegations against Clark[107] and was not admissible as independent evidence of S.M.'s credibility.[108] Nevertheless, the court ruled that Clark could cross-examine S.M. to determine whether she understood the words she was using in the text messages,[109] to impeach S.M. regarding any evidence

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[105] A241. Notably, Clark mistakenly argues that the court erred by concluding that section 3508 ***covered*** the Instagram texts. See Opening Br. at 35.

[106] A241-43, A248, A251, A316.

[107] A242.

[108] A252, A348.

[109] A252-53.

on direct that showed fabrication or lack of truthfulness,[110] and to determine if S.M. fabricated her allegation that a boy in her school had hit her on the butt.[111]

Section 3508 "was designed to protect victims from attacks on their credibility."[112] Section 3508 also allows "defenses based on the complainant's credibility while protecting her from unnecessary humiliation and embarrassment."[113] Thus, to admit evidence of the prior sexual conduct of an alleged rape victim in a rape prosecution to attack the victim's credibility, a defendant must follow the statutory procedure in section 3508, and a court must determine that the offered evidence is relevant.[114] If the Superior Court finds that the proffered evidence is likely to substantially affect the complainant's credibility without significantly clarifying other issues, the court may properly exercise its discretion and deny the introduction of the evidence for failing to comply with section 3508.[115]

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[110] A317-18.

[111] A243-44, A248, A318.

[112] *Scott*, 642 A.2d at 771.

[113] *Id*.; *Wright v. State*, 513 A.2d 1310, 1314 (Del. 1986).

[114] *Jenkins*, 2012 WL 3637236, at *2; *Ketchum v. State*, 1989 WL 136970, at *3 (Del. Oct. 17, 1989); *Wright*, 513 A.2d at 1314; 11 *Del. C.* § 3508(a)(1)-(4).

[115] *Scott*, 642 A.2d at 772.

In the end, defendants have no constitutional right to present irrelevant evidence at trial.[116]

Here, Clark attempted to introduce the Instagram messages to attack S.M.'s credibility. "Specific instances of the conduct of a witness, proffered for the purpose of attacking her credibility, may not be proved by extrinsic evidence."[117] Thus, regardless of whether the messages showed S.M.'s prior sexual conduct under section 3508 or whether the messages could be admissible under D.R.E. 403, the Superior Court correctly excluded them as substantive evidence.[118]

Moreover, the proffered messages were not relevant to prove that S.M. fabricated her allegations against Clark. The messages included sexual terms, but did not demonstrate that S.M. personally knew what such terms meant. For example, S.M. named sexual positions, but also stated that she was "getting these from google."[119] And knowledge of sexual terms by itself does not clarify the issue of whether S.M. had told the truth to the CAC investigator about Clark's sexual abuse of her. Hence, the court properly excluded the text messages.

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[116] *Jenkins*, 2012 WL 3637236; *Harper*, 970 A.2d at 201; *Culp*, 766 A.2d at 489; *Wright v. State*, 513 A.2d 1310, 1314 (Del. 1986).

[117] D.R.E. 608(b); *Ketchum*, 1989 WL 136970, at *3.

[118] A317.

[119] A175.

As for the allegedly false statement about the boy in school touching S.M. inappropriately, the Superior Court correctly found that Clark failed to present sufficient evidence of falsity under section 3508. S.M. testified that the incident happened.[120] S.M. sent a text message saying that a boy in school had touched her inappropriately.[121] Moore testified that S.M. told her the allegation was true and that she reported the incident to both S.M.'s school and the police.[122] Afterwards, within one week, Moore testified that S.M. told Moore that she could not believe anything that S.M. said.[123] Under section 3508, the court makes the determination of whether the proposed evidence is relevant and admissible.[124] Here, the court acted as the factfinder and concluded, based on the credibility of the witnesses, that Clark's evidence was not sufficiently reliable under section 3508.[125] The evidence supported the Superior Court's conclusion. And although the court also ruled that the statement regarding the boy hitting S.M. inappropriately did not meet the requirements of D.R.E. 403, such a ruling was superfluous.

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[120] A330.

[121] A178.

[122] A334-36, A338, A340.

[123] A334, A337-39.

[124] 11 *Del. C.* § 3508.

[125] A346-47.

V. THE PROSECUTOR'S STATEMENTS MADE DURING THE STATE'S REBUTTAL DID NOT AMOUNT TO VOUCHING OR OTHER MISCONDUCT.

Question Presented

Whether the Superior Court plainly erred by allowing the prosecutor to respond in her rebuttal to Clark's argument in closing that she had hugged S.M. and "would hug her again." A691-94.

Scope of Review

"The appropriate standard of review when a court reviews statements made by the prosecution during closing arguments without an objection from the defense is plain error."[126] "To be plain, the alleged error must affect substantial rights, generally meaning that it must have affected the outcome of [the] trial."[127] "The burden of demonstrating that the error was prejudicial is on the party claiming error."[128]

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[126] Supr. Ct. R. 8; *Green v. State*, 2016 WL 4699156, at *2 (Del. Sept. 7, 2016) ("When there is no objection to evidence, we review for plain error."); *Czech v. State*, 945 A.2d 1088, 1098 (Del. 2008); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[127] *Green*, 2016 WL 4699156, at *2; *Brown v. State*, 897 A.2d 748, 753 (Del. 2006) (citing *United States v. Olano*, 507 U.S. 725, 734 (1993)).

[128] *Green*, 2016 WL at 4699156, at *2; *Brown*, 897 A.2d at 753.

Merits of Argument

Clark argues that the prosecutor improperly vouched for S.M.'s credibility by stating during closing, "I hugged her then and I would hug her again."[129] He is wrong. The prosecutor's statement in rebuttal was made in response to an argument he raised in his closing.

At the outset, it appears that Clark is contending the prosecutor's misconduct and vouching was pervasive. Clark is required to quote in his opening brief the entire allegedly improper prosecutorial misconduct statement, specifically indicate the objectionable portions of the statement, and append to the brief all relevant portions of the transcript where the "misconduct" can be confirmed.[130] The quoted statement above is the only statement that Clark identifies. To the extent that Clark argues other instances of misconduct or error by the judge, he failed to preserve those objections below and he has waived those arguments. "This Court, in the exercise of its appellate authority, will generally decline to review contentions not raised below and not fairly presented to the trial court for decision."[131]

In any event, Clark appears to make four arguments in the last section of his opening brief. First, he argues the Superior Court erred by allowing the prosecutor

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[129] Opening Br. at 39.

[130] *Kurzmann v. State*, 903 A.2d 702, 710 (Del. 2006).

[131] *Wainwright*, 504 A.2d at 1100.

to repeatedly vouch for her case during rebuttal and the prosecutor's vouching represented a recurrence of earlier allegedly prosecutorial misconduct.[132] Next, he argues the Superior Court's ruling had a "chilling effect" on his future objections to prosecutorial misconduct when the court told Clark that he had to refrain from continuing to state that the State was engaging in unprofessional conduct or violating the laws or rules of the court.[133] Third, Clark argues the prosecutor vouched for S.M. during rebuttal by making an argument similar to saying that the prosecutorial acts of the State are undertaken carefully and thus are evidence of guilt.[134] Finally, Clark asserts that the prosecutor "abandoned impartiality, destroyed Clark's chance at a fair trial," wrapped the [complaining] witness "in the State's 'aura of credibility,' chose to 'double down' on her misconduct," by saying that she had hugged S.M. and would hug her again.[135] Clark's arguments fail here.

In closing, Clark told the jury that after S.M. denied her earlier allegations against him and after the break, the prosecutor hugged S.M.; then defense counsel asked the jury, "Is that normal? Can you hug a witness?"[136] The prosecutor objected

[132] Opening Br. at 37 (header).

[133] Opening Br. at 37-38,

[134] Opening Br. at 38-39.

[135] Opening Br. at 39.

[136] A691.

to the insinuation that she had acted unprofessionally or in opposition to the rules.[137] The court agreed and ruled that Clark had made an unsupported allegation of misconduct.[138] Then the State argued that Clark was raising an improper issue of the prosecutor's demeanor, and the court agreed.[139] At that point, the Superior Court stated:

> [Y]ou were now treading into ground where you are accusing opposing counsel of misconduct and asking them to take that into account when rendering their verdict. That is not a fact that is in front of the jury, nor is the demeanor of counsel in any way something that the jury is to take into consideration. I have allowed you significant latitude in determining and making those arguments. I mean a long way. It needs to stop. You can conclude in whatever arguments you want. Like, 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. That is what I'm ruling, you are to stop.[140]

In the State's rebuttal, the prosecutor stated:

> Nothing at this trial from the State has been done to put on a show. The State takes this extremely seriously. We're talking about a child who, yes, I hugged after she was shaking and unresponsive on the witness stand. I hugged her then and I would hug her again.[141]

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[137] A691-2.

[138] A693.

[139] A696-7.

[140] A697-8.

[141] A706.

Clark placed the issue of the interaction between the prosecutor and S.M., which occurred outside of the presence of the jury, squarely before the jury during his cross-examination of S.M.[142] and during his closing.[143] In both instances he insinuated improper conduct by the prosecutor. As noted above, this was not lost on the trial judge.

"Improper vouching by a prosecutor for the credibility of a witness implie[s] that the prosecutor has superior knowledge that the witness has testified truthfully 'beyond that logically inferred from the evidence.'"[144] That did not occur here. The prosecutor's statement in rebuttal did not suggest she had superior knowledge that S.M. was being "truthful."[145] Clark placed before the jury on cross-examination the

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[142] A456-57.

[143] A691-96.

[144] *Trump v. State*, 753 A.2d 963, 966 (Del. 2000) (quoting *Miller v. State*, 2000 WL 313484, at *4 (Del. Feb.16, 2000)).

[145] *See Trump*, 753 A.2d at 967. Even if interpreted as commentary on the veracity of S.M.'s testimony, the prosecutor's statements did not rise to the level of misconduct. *See Czech v. State*, 945 A.2d 1088 (Del. 2008) (no prosecutorial misconduct when prosecutor stated, "five year olds don't make that stuff up" and defendant did not object); *Ward v. State*, 2020 WL 5785338 (Del. Sept. 28, 2020) (no plain error when prosecutor made a single statement, "[T]his case isn't definitely invented by [A.M.]" and defendant did not object); *Cirwithian v. State*, 2021 WL 1820771 (Del. May 6, 2021) (no plain error or vouching when prosecutor argued "why would (minor complaining witness) make this up? And defendant did not object. Prosecutor did not endorse witness credibility beyond what could be inferred from the evidence and not an assertion that the witness was truthful, correct, or right).

prosecutor's hug of S.M. in an effort to suggest the prosecutor had improperly influenced S.M.'s testimony. Clark again raised the issue in closing. In rebuttal, the prosecutor directly responded to Clark's assertion that she had engaged in improper conduct that influenced S.M.'s testimony. In the end, the prosecutor's remarks in rebuttal served as a counterpoint to Clark's general argument about the motives actuating and influencing S.M.'s testimony, and more specifically to Clark's allegation of the prosecutor's purported misconduct improperly influencing S.M.'s testimony. The prosecutor's remarks in rebuttal came in the context of the possible influences on S.M.'s testimony, including whether S.M.'s mother had influenced her testimony, rather than the prosecutor's hug.[146] Clark has failed to show how the prosecutor's comments amount to vouching that influenced the jury's verdict or deprived him of a fair trial. And Clark has failed to show how the alleged error affected the outcome of his trial. Because Clark has failed to meet that burden, this claim fails.

[146] A706.

CONCLUSION

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

Respectfully submitted,

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Date: October 3, 2025

IN THE SUPREME COURT OF THE STATE OF DELAWARE

PAULRON CLARK,	§	
	§	No. 98, 2025
Defendant Below,	§	
Appellant,	§	On appeal from the Superior Court
	§	of the State of Delaware
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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Date: October 3, 2025

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