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Case Number 200,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MELVIN L. MORSE,	)	
	)	
Defendant Below,	)	
Appellant,	)	Case No. 200, 2014
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

STATE OF DELAWARE'S SECOND CORRECTED ANSWERING BRIEF

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DATE: April 29, 2015

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes

Other Authorities

Rules

NATURE AND STAGE OF THE PROCEEDINGS

On September 26, 2012, Appellant Melvin Morse ("Morse") and his wife, Pauline Morse ("Pauline") were charged by information with one count of assault in the third degree, four counts of reckless endangering first degree and five counts of endangering the welfare of a child under 11 *Del. C.* § 1102(a)(1)(a). A-1; B8-10. Pauline pleaded guilty to three counts of endangering the welfare of a child on May 20, 2013. A-94; B149.

Prior to trial, the State filed a motion *in limine* seeking to allow the admission of uncharged conduct during the State's case-in-chief. A-5. The Superior Court held a hearing on the State's motion on October 14, 2013. A-6. The court granted the motion during an office conference on January 23, 2014. A-28-29; B50-65.

Following a three week trial, a Sussex County jury convicted Morse of one count each of reckless endangering first degree, reckless endangering second degree (as the lesser included of reckless endangering first degree) and assault third degree, and three counts of endangering the welfare of a child. B212-13. The jury acquitted Morse of one count of first degree reckless endangering and one count of endangering the welfare of a child.[1] B213-14.

[1] The State entered a *nolle prosequi* as to one count of reckless endangering first degree and one count of endangering the welfare of a child before the end of the trial. B175-79.

Prior to sentencing, Morse moved for release pending appeal and for a stay of execution of his sentence. A-11. The Superior Court denied both motions (*id.*) and sentenced Morse on April 11, 2014 to a total of ten years Level V incarceration, suspended after three years for one year of Level III probation (Ex. A to Op. Br.). On April 22, 2014, Morse filed a notice of appeal in this Court along with a motion for issuance of a certificate of reasonable doubt. This Court denied Morse's motion. Thereafter, Morse filed a timely opening brief. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The Superior Court did not abuse its discretion in admitting evidence of other bad acts. The acts were relevant to show Morse's intent and motive in waterboarding A.M.[2] and many of them had other independent, logical relevance. The probative value of the other bad acts substantially outweighed any prejudice therefrom. Moreover, if the court erred in admitting the other acts, such error was harmless. The evidence that Morse waterboarded his daughter was overwhelming.

II. Appellant's second claim is DENIED. The Superior Court did not abuse its discretion in permitted the jury to view the videotaped CAC statements of the victim and her sister during deliberation. The jury requested to view the videos and the court properly weighed the benefits of admitting the statements against the prejudice of unfair emphasis on their statements. Moreover, the court permitted the jury to view the videos only once. In addition, the jury's second viewing of the videos without contemporaneous cross-examination did not violate Morse's Sixth Amendment right to confront witnesses.

III. Appellant's third claim is DENIED. The State did not elicit perjured testimony from A.M. A.M.'s contradictory testimony did not amount to perjury, i.e., intentionally making a false statement. Furthermore, the State did not violate

[2] The victim's name has been replaced with the initials "A.M." throughout this Answering Brief.

Brady v. Maryland[3] by failing to provide Morse with the names of friends A.M. had told about the abuse she suffered at his hands. A.M. did not provide the State with that information.

[3] 373 U.S. 83, 87 (1963).

STATEMENT OF FACTS

On the morning of July 13, 2012, sometime between 7:30 and 8:00 a.m., Elizabeth Riedel of Harbeson was surprised by a knock on her front door. B66. On her doorstep stood a disheveled eleven-year-old girl who looked kind of familiar to her. B66-67. The girl told Reidel her first name and that she knew her (Reidel's) daughter from riding the bus to school with her. B68. A.M. told Reidel about an incident with her father that had occurred the night before. B69. Reidel noticed that A.M. had marks on her back. B71. She called the police. B70-71.

Soon thereafter, Corporal Brian Haupt responded to Reidel's residence. B72-73. A.M., who by this time had been identified as A.M., appeared to him to be wet and dirty and to have a distinct bad odor. B74. He noticed she had bruising on one ankle and scratches on her back. *Id.* Cpl. Haupt took A.M. to Beebe Hospital and notified the Division of Family Services ("DFS"). *Id.*

A.M. told the authorities that the night before, her parents, Melvin[4] and Pauline Morse, had taken her and her sister, M.M.,[5] to pick up dinner at Grotto's Pizza. B98-99, 116-17; Ex. B (A.M.'s CAC Video Statement, Ct. Ex. 6). A.M.

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[4] Although Morse held himself out for years to Anna and others as Anna's father, he was not her biological father. *See* Trial Tr. Vol. I at 232-34.

[5] The victim's sister's name has been replaced with the initials "M.M." throughout this Answering Brief.

put her hands on the glass of the ice cream counter and Morse sent her to wait in the car. Ex. B. When they got home, he told her to stay in the car. B77.

Much later, sometime after dark and after the rest of the family had eaten dinner, he came back out to get her. B78, 100, 117. Morse pulled her out of the car by the ankle and dragged her across the gravel driveway, up the concrete steps into the house and into her bedroom. B78, 117. There, he spanked her repeatedly and told her that the next day "she was going to be punished like she's never been punished before." B76, 115; Ex. A (Morse's Video Statement, State's Ex. 4). Scared about what the further punishment might entail, when A.M. woke up the next morning, she packed her backpack and another small bag with odds and ends and sentimental things, wrote two notes to her parents and left. B104-08, 118. A.M. walked her rusted bike to her friend's house, which was about a mile away, and knocked on the door. B66, 89-90; Ex. B.

At Beebe Hospital, a registered nurse documented that, among other things, A.M. had a number of abrasions on her back, a few on her right arm and the back of her left leg, and a linear bruise on her right ankle. B66, 80-81. The same day A.M. ran away from home, Cpl. Haupt interviewed Morse at Troop 7. B75. He acknowledged that he had pulled A.M. out of the car by her ankle, but claimed that he had tried to carry her into the house and that she had kicked and thrashed and had fallen. Ex. A. Morse denied spanking or hitting A.M., telling Cpl. Haupt

several times that Pauline was responsible for disciplining A.M., not he. *Id.* "We don't spank her," he said, adding later during the interview: "I don't hit or abuse her;" "I haven't spanked her in years;" "I'm not violent or mean or hit her anyway;" "I've never even done this kind of thing to [A.M.]" *Id.*

Morse admitted that he had told A.M. she was going to be punished the next day like she had never been punished before, but claimed he then told her she was going to have to clean her room. *Id.* Specifically, he stated:

> Then she was saying, "Well you guys are just always punishing me." So I was like, "A.M., you've never been punished." And it's true. And then I said to her, "Tomorrow you're going to be punished like you've never been punished." But I then quickly said, . . . "You're going to have to clean your room. You're going to stay in your room and you're going to clean your room. . . ."

Id. In a July 17, 2012 interview, Morse told a DFS Family Crisis Therapist that he was gentle with A.M.. B87-88. In another interview, on August 2, 2012, Morse told another DFS Family Crisis Therapist that he had lifted A.M. out of the car on July 12th and she had bicycle-walked into the house. He claimed he did not put any marks on her and that she was laughing. B91.

As a result of A.M.'s allegation, Morse was arrested and charged with third degree assault and endangering the welfare of a child. B1-2. DFS obtained emergency custody of A.M. and M.M. and placed them in foster care. B86, 96, 115. A.M. and M.M. were interviewed at the Children's Advocacy Center ("CAC") on August 6, 2012. A-98; B119-20. Investigators learned during those

and other interviews with M.M., A.M. and Pauline, that life for A.M. at home was not as rosy as Morse had depicted it.

In fact, it was Morse who was primarily responsible for A.M.'s discipline, not Pauline. *See* Exs. B and C (M.M.'s CAC Video Statement); B42. A.M. was disciplined a lot. *Id.* In addition to spanking her, Morse would have A.M. stand for long periods of time, either with her arms out or leaning with the front or back of her head against the wall; he would have her sit on a chair in the hallway for hours until late at night; he would send her to her room for hours, and would not let her leave to use the restroom; he restricted A.M.'s movement in the house, placing bells on her door, the laundry room door, and the refrigerator; he would lecture her for long periods of time; on some occasions he would not let her eat with the family, then on other occasions he force fed her. *See* B32-33, 35-41, 43-49.

Morse would also punish A.M. by "waterboarding" her. *See* Exs. B and C. It was Morse who labeled it waterboarding. *Id.*; B34. According to A.M., he would pick her up, put her head under the sink and run the faucet over her face and up her nose so she could not breathe. A-35, 38; Ex. B. A.M. said Morse waterboarded her a number of times. On one occasion, A.M. was made to eat too much and she threw up on the cat litter box. Ex. B. When she started crying, Morse took her into the upstairs bathroom, held her down face-up in the bathtub and ran water over her face. *Id.* A.M. could not breathe. *Id.*

On another occasion, Pauline and M.M. walked into the kitchen when they heard A.M. screaming to find Morse holding A.M. across the counter with her head under the faucet. *Id.*; A-85-86; Ex. C. A.M. described a third incident in which Morse put her head under the faucet in the bathroom sink. Ex. B. On that occasion she could breathe because the water from the faucet only reached her forehead. *Id.* A.M. also told of instances when Morse would put his hand over her mouth and nose and she could not breathe. *Id.*

As a result of the new allegations, Morse and Pauline were charged with four counts of reckless endangering first degree, arising from the three instances of waterboarding and one specific instance of Morse suffocating A.M. with his hand. B8-10. They were also charged with four counts of endangering the welfare of a child, stemming from the same four instances of abuse. *Id.*

Morse testified at trial. He admitted to dragging A.M. out of the car by the ankle on the night of July 12, 2012, adding, "I picked her up and carried her into the house, and she screamed and kicked, and she flopped on the ground, and I tried to pick her back up and got her into the house." B162-63. Morse further acknowledged that when A.M. fell, he dragged her across the gravel, leaving marks on her back. B164-65.

Morse denied, however, having deliberately run water over A.M.'s face as a form of punishment. B156-60, 166-72. Instead, he claimed that A.M. had a fear of

washing her hair and he had rinsed the soap out of her hair in the bathroom and kitchen sinks on a few occasions. *Id.* Sometimes the soap would get in A.M.'s eyes and she would scream and yell and kick. B160, 172.

ARGUMENT

I. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION IN ADMITTING OTHER DISCIPLINARY ACTS RELEVANT TO SHOW MORSE'S INTENT AND MOTIVE IN RUNNING WATER OVER A.M.'S HEAD.

Question Presented

Did the trial judge act within his discretion when he admitted evidence of other acts Morse used as a means of discipline in order to show whether Morse's motive and intent was abusive or appropriate?

Standard and Scope of Review

When evidence is admitted for some other purpose than to prove the defendant's propensity to commit a crime pursuant to D.R.E. 404(b), the trial court's admission of that evidence is reviewed for an abuse of discretion.[6]

Merits of the Argument

Prior to trial, the State filed a motion *in limine* seeking to include in its case-in-chief evidence of other acts of discipline inflicted by Morse on A.M.. B13-23. The State asserted the acts were relevant to show Morse's state of mind, motive, plan, opportunity and absence of mistake or accident when he waterboarded A.M. and held his hand over her mouth and nose. B18. In addition, the other acts were inextricably intertwined with the charged conduct. *Id.* The court held a hearing on the motion, and, ultimately, granted it. *See* A-6; B51-65. During the State's case

[6] *Campbell v. State*, 974 A.2d 156, 160 (Del. 2009).

at trial, Pauline's, A.M.'s and M.M.'s testimony and redacted CAC statements provided the jury with a complete picture of the punishment A.M. suffered at the hands of her father. *See, e.g.*, A-45-67, 80-84; Exs. B and C. Such evidence included not allowing her to eat dinner with the family or at all (A-47); rubbing marker too vigorously off of her face (A-45; B130-34); force feeding her (A-47-48); confining her to her room and restricting her movement within the house (A-48-49, 81, 84; B142); having her stand or sit in time out for long periods of time, while posing her either with her arms out, leaning with the front or back of her head against the wall, or in some other position (A50-54, 60-61, 83-84); doing lots of chores (B110); long lectures (B111, 112-14; 143); having her stand in time out with a sign taped to her that said, "shame;" spanking or slapping A.M., usually with his hand or fist, but spanking her once with a broom and once with a wooden spoon (A-70-72; Ex. B; B126-30, 138)

Morse argues on appeal that the trial court abused its discretion in admitting the other acts of discipline, asserting "the nature and breadth of the other bad acts infected unfair prejudice into the proceedings," thereby allowing the jury to decide the facts of the case on an improper basis. Op. Br. at 8. He further asserts that

prejudice from the totality of the acts admitted resulted in cumulative error.[7] *Id.* at 15.

Delaware Rule of Evidence 404(b) permits evidence of "other crimes, wrongs or acts" to be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." In *Getz v. State*,[8] this Court set forth five guidelines to consider when admitting evidence subject to D.R.E. 404(b):

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

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[7] The cases to which Morse cites to support his argument of cumulative error relate to claims of ineffective assistance of counsel and, thus are not relevant to this claim.

[8] 538 A.2d 726 (Del. 1988).

> (6) Because such evidence is admitted for a limited purpose, the jury should be instructed concerning the purpose for its admission as required by D.R.E. 105.[9]

This Court adopted an inclusive approach in *Getz*, explaining that "the proponent is allowed to offer evidence of uncharged misconduct for any material purpose other than to show a mere propensity or disposition on the part of the defendant to commit the charged crime."[10] To be admissible, evidence of other bad acts must be "independently relevant to an element of the State's *prima facie* case (for example, knowledge or intent)" and the State must "reasonably anticipate[] that the defendant will dispute that element in its case."[11]

A. The Court Admitted the Other Acts of Discipline for a Proper Purpose.

Here, the Superior Court appropriately found that the other bad acts were relevant to Morse's motive and intent. To prove the charge of reckless endangering first degree, the State had to prove that Morse recklessly engaged in conduct that created a substantial risk of death to A.M..[12] To prove endangering the welfare of a child, prosecutors had to provide evidence that Morse was a parent who had assumed responsibility for A.M.'s care or supervision and, as such, he had

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[9] *Id.* at 734 (citation and footnote omitted).

[10] *Id.* at 730.

[11] *Taylor v. State*, 777 A.2d 759, 764 (Del. 2001).

[12] 11 *Del. C.* § 604.

intentionally, knowingly or recklessly acted in a manner likely to be injurious to A.M.'s physical or moral welfare.[13]

Morse's intent and motive when he poured water over A.M.'s head and held his hand over her mouth and nose were a central issue in the case. The State had good reason to anticipate that Morse would dispute his intent. He had told the press that the allegations were exaggerated and that he had merely washed A.M.'s hair under the faucet on a couple of occasions. *See* B4-7, 11-12, 14. Indeed, Morse acknowledged in his response to the State's motion *in limine* that he had held A.M.'s head under the water, but had not placed her in danger in doing so. B26.

When Morse placed A.M.'s head under the water faucet, however, he was not benignly washing her hair. He intended to discipline and to hurt her. A.M. was the only true eyewitness (other than Morse) to the malicious extent of the act. *See* B144; Ex. C. The other acts of discipline were relevant to show that Morse's intent and motive in running water over A.M.'s head was not to wash her hair, but to punish her in a manner that caused a substantial risk of death.

Morse's discipline of A.M. was often excessive and cruel. Indeed, after listening to the evidence presented during the hearing on the State's motion to introduce the other acts evidence, the Superior Court found:

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[13] 11 *Del. C.* § 1102(a)(1)(a).

> The pretrial evidence indicates that defendant was the controlling person in the household. It indicates that defendant struck A.M. previously. It indicates that defendant put A.M.'s head under running water previously. It indicates that defendant put his hands over her nose previously. It indicates that defendant had A.M. stand and lean against walls both at home and at his place of employment as a pediatrician. It indicates that defendant force fed her and instructed her to stay in her room where she was not able to use the bathroom and she had to relief [sic] herself in the cat box.[14] It revealed that defendant would pour water over her head while she was in the tub and would throw cold water in her face in the mornings. It revealed that defendant would demean A.M. by the use of mean words like slut, whore, evil, and by taking demeaning pictures of her as referenced by the pictures introduced earlier in the case where A.M. is portrayed holding a sign that says, shame, and from oral testimony taken previously in the case where A.M. indicated that she was photographed having to give the middle finger at Morse's direction.
>
> The evidence developed earlier in the case indicates that Morse would dump food on her head and that Morse favored M.M., often lectured A.M., gave A.M. medication for a non-diagnosed condition allegedly to control behavior, and told M.M. that A.M. was a bad girl and was in need of correction. In context with the video statements, it would support the notion from Morse's perspective, A.M. was always in need of punishment.

B54-55.

As noted in a recent case in the Indiana Court of Appeals, "'[w]here a parent uses severe corporal punishment, often the only way to determine whether the punishment is a non-criminal act of discipline that was unintentionally harsh or whether it constitutes the felony of child abuse is to look at the parent's history of

[14] It was actually the toy box, in which Anna relieved herself. B48.

disciplining the child.'"[15] Morse had a history of disciplining A.M. in ways that exceeded the scope of appropriate corrective measures. He conceded he had run water over her head, but attempted to explain his action with a benign motive, washing her hair. The substance of the other acts of discipline, as well as their number and frequency, cast doubt on Morse's expressed motive and intent in committing the charged acts. Thus, the Superior Court did not abuse its discretion in admitting them.[16]

In addition, many of the uncharged bad acts had other independent, logical relevance in the case. Many of the acts of discipline were relevant to the endangering the welfare charge to prove that Morse was responsible for A.M.'s supervision.[17] The allegation of force feeding was relevant to and inextricably intertwined[18] with why Morse had waterboarded A.M. on one occasion. *See* A-56-

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[15] *Ceaser v. State*, 964 N.E.2d 911, 915 (Ind. Ct. App. 2012) (quoting *State v. Wright*, 593 N.W.2d 792, 802 (S.D. 1999).

[16] *Compare Vanderhoff v. State*, 684 A.2d 1232 (Del. 1996) (finding evidence of prior sexual incident with victim was admissible under D.R.E. 404(b) to show intent to commit new charge of unlawful sexual contact) *with Barnett v. State*, 893 A.2d 556, 559 (Del. 2006) (distinguishing *Vanderhoff* and finding evidence of other acts inadmissible when intent was not at issue because defendant did not allege that the acts were not sexual in nature, but that no sexual acts had occurred) *and Hawkins v. State*, 2006 WL 1932668 (Del. Jul. 11, 2006) (distinguishing *Vanderhoff* and concluding admission of other crimes evidence was abuse of discretion when "[t]his was not a case where [defendant] conceded his action, but attempted to explain it with a benign motive;" defendant claimed the acts did not happen).

[17] Morse had told Cpl. Haupt on July 13, 2012 that he was not responsible for Anna's discipline. *See* Ex. A.

[18] *See, e.g.*, *Pope v. State*, 632 A.2d 73, 76 (Del. 1993) (noting that "evidence is 'inextricably intertwined' with the charged offenses and, therefore, does not implicate the constraints of Rule

57; Ex. B. The allegations that Morse had put a plastic bag over A.M.'s head and that she had urinated on herself while he was covering her mouth and nose with his hand were relevant to and inextricably intertwined with the charges stemming from his suffocation of A.M. with his hand. *See* A-62, 66.

Two incidents when A.M. had attempted to report Morse's abuse to school officials were relevant to explain why she did not report the waterboarding to authorities earlier. *See* A-45-46. (The authorities would tell her parents. *Id.*; B109.) In one incident A.M. reported to school that Morse had rubbed her face too hard to get marker off, causing red marks around her eyes. B126-30. In another incident, A.M. told her school that her father had slapped her so hard, she had fallen over something. *See* Ex. B; B126. Morse also used the two incidents of reported abuse to try and impeach A.M.'s credibility. B126-34.

B. Prejudice from the Other Acts Did Not Substantially Outweigh their Probative Value.

Notwithstanding the fact that the evidence of the other incidents of discipline were admitted for a proper purpose under D.R.E. 404(b), Morse claims the "'wall-to-wall' litany of events demonstrated a disposition of abject cruelty on the part of the defendant – a character disposition that could not be ignored," amounting to unfair prejudice, which outweighed the probative value of the evidence. Op. Br. at

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404(b) . . . if it forms an integral and natural part of the witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted.'" (citations omitted)).

14-15. Many of the disciplinary acts were undeniably prejudicial to Morse. *See* B62. To the extent, however, that some of those acts are appropriate corrective measures, it cannot be said they were "bad acts" in the legal sense, or that their admission prejudiced Morse. For example spanking, lecturing, sending a child to her room and placing a child in time out are socially acceptable forms of punishment.

Here, the Superior Court correctly applied the factors laid out in *Deshields v. State*[19] in determining that the probative value of the other acts evidence was not substantially outweighed by any prejudice therefrom under D.R.E. 403.[20] Not only were Morse's motive and intent in dispute,[21] but Morse engaged in a full-scale

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[19] 706 A.2d 502 (Del. 1998).

[20] In *Deshields*, this Court incorporated nine factors of which a court should consider when applying the Rule 403 balancing test to Rule 404(b) evidence:

> (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.

Id. at 506-07 (quotations omitted).

[21] *Cf. Pope*, 632 A.2d at 78 (finding that although the potential for prejudice from evidence that defendant had participated in an armed robbery and shoot-out with the police was undeniable, the Superior Court did not abuse its discretion in finding the prejudice did not substantially outweigh the probative value of the evidence because it was relevant to his motive, intent and identity and it was "significant to the jury's understanding of the immediate context of events surrounding the offenses for which [he] was charged").

attack on A.M.'s credibility that even began prior to trial.[22] Throughout the trial, Morse attempted to portray A.M. as a liar, who exaggerated and fabricated stories about her father and her half-sister, Ashley.[23] For example, Morse cross-examined A.M. about an incident in which she admittedly lied to authorities, telling them her sister Ashley had sexually abused her. A68-69, B122-24.

He also brought up several of the bad acts on cross examination of A.M. and Pauline – that Morse had hit A.M. with a broom and a spoon and that he had placed his thumb on a pressure point in her armpit. *See* Trial Tr. Vol. E at 49, 51-52, 96, 131-32 and Vol. Fat 150-53. With them, Morse suggested that A.M. had fabricated them, merging things that had happened to Pauline with abuses inflicted on her by Morse and transferring abuses inflicted on her by Ashley to Morse. *Id.*; B181-84. In addition, Morse contended that A.M. had fabricated the reports she gave to the school about Melvin slapping her and aggressively rubbing marker off of her face. B126-34.

Morse's argument of unfair prejudice is further undermined by the fact that 1) the court instructed the jury multiple times not to consider the other crimes evidence for an improper purpose (B92-95, 139-41, 150-52, 179-80); and 2) Morse

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[22] Morse began assaulting Anna's credibility in the media prior to trial. *See* B3-7.

[23] Ashley was Anna's half-sister by Pauline. She had been convicted of sexually abusing Anna and was removed from the home in 2007. *See* B153-54. Anna accused Ashley of sexually abusing her a second time in December 2010. The charges were eventually dropped. *See* B122-24; 173.

was acquitted of the two charges related to the hand suffocation and the jury convicted him of a lesser charge with regard to the incident of waterboarding in the kitchen sink (B174, 212-14).[24] "[A] trial court's 'prompt curative instructions presumptively cure error ... [and] "adequately direct the jury to disregard improper matters" from consideration.'"[25] Jurors are presumed to follow a court's instruction.[26] In addition, it is unlikely that the jury considered the other acts for an improper purpose given the verdict.

C. Any Error in Admitting Other Bad Acts Evidence Was Harmless.

Even when bad act evidence is improperly admitted, this Court will not reverse the decision of the trial court if the error is harmless. [27] In *Hawkins v. State*, the defendant was tried for abusing his wife and step-daughter.[28] The State introduced evidence that the defendant had abused his wife several years earlier,

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[24] *Cf. Monroe v. State*, 28 A.3d 418, 428 (Del. 2011) (finding the record supported the presumption that the jury followed the instruction to consider non-severed charges separately because the jury acquitted defendant of the attempted murder of one victim and the related charges).

[25] *Hamilton v. State*, 2013 WL 6492153, *2 (Oct. 9, 2013) (citations omitted)).

[26] *Revel v. State*, 956 A.2d 23, 27 (Del. 2008).

[27] *See Hawkins v. State*, 2006 WL 1932668, at *3 (Del. July 11, 2006) (finding that although admission of prior misconduct constituted an abuse of discretion, such error was harmless beyond a reasonable doubt as this was "not a close case"); *Johnson v. State*, 587 A.2d 444, 451 (Del. 1991) (quoting *Collins v. State*, 420 A.2d 170 (Del. 1980) (stating, in defining harmless error, "where the evidence exclusive of the improperly admitted evidence is sufficient to sustain a conviction, error in admitting the evidence is harmless").

[28] 2006 WL 1932668.

claiming it showed his motive.[29] This Court explained that because the defendant was arguing that the acts did not happen, motive was not in contention; therefore, it was an abuse of discretion to have introduced the prior bad acts.[30] However, this Court did not reverse because the error was harmless beyond a reasonable doubt given the overwhelming corroboration of the victim's testimony about the instant abuse by eyewitnesses and police officers.[31]

Here, too, the evidence that Morse waterboarded his daughter is overwhelming. As noted above, A.M. testified that Morse punished her by holding her head under water so that she could not breathe. Pauline corroborated that Morse used the treatment as punishment and that he called it waterboarding. M.M. too corroborated that Morse dumped water over A.M.'s head, and that he "clean[ed] her hair by water boarding [sic]." Ex. C.

In sum, the Superior Court did not err in admitting the 404(b) evidence, but even if it did, the overwhelming evidence in this case justifies a finding that such error was harmless beyond a reasonable doubt.

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[29] *Id.* at *1.

[30] *Id.* at *3.

[31] *Id.*

II. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION IN PERMITTING THE JURY TO WATCH TWO WITNESSES' 11 *Del. C.* § 3507 STATEMENTS DURING DELIBERATION.

Question Presented

Did the trial judge act within his discretion when he allowed the jury to rehear two Section 3507 statements during deliberations after the jury requested to rehear the statements?

Scope and Standard of Review

A trial court's decision to replay out-of-court statements to a jury during deliberations is reviewed for an abuse of discretion.[32] Alleged constitutional violations related to a court's evidentiary ruling are reviewed *de novo*.[33]

Merits of the Argument

During its case-in-chief, the State admitted the video-taped CAC statements of A.M. and M.M. under 11 *Del. C.* § 3507.[34] Exs. B and C; A-98, B120-21. The jury requested to view those videos during its deliberations. B185. It also requested to review excerpts of the transcripts of A.M.'s and Pauline's testimony about the kitchen sink. *Id.* The court allowed the jury to view the videos, but

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[32] *Taylor v. State*, 65 A.3d 593, 600-1 (Del. 2013).

[33] *Flonnory v. State*, 893 A.2d 507, 515 (Del. 2006).

[34] Section 3507 provides, "[i]n a criminal prosecution, the voluntary out-of-court prior statement of a witness who is present and subject to cross-examination may be used as affirmative evidence with substantive independent testimonial value."

limited the viewing to one time in the courtroom. *See* A-101-110; B199. The jury was not provided with the transcript excerpts they requested because they were not available. B202.

Morse claims the Superior Court abused its discretion in finding he would not be unduly prejudiced if the jury viewed the CAC statements during deliberation, arguing essentially that 1) video statements are highly prejudicial because the medium allows the jury to see witness gestures, body language and facial expressions in addition to hearing testimony; 2) other state courts require the jury to also view related cross-examination when playback of a witness's statement is permitted; and 3) the video in this case was highly prejudicial because it included other bad acts of the defendant, depicted A.M. in a setting that underscored her vulnerability and depicted questioning by a sympathetic interviewer who repeated many of A.M.'s answers. Op. Br. at 20-26. Morse also asserts the second viewing of the videotape without cross-examination violated his Sixth Amendment due process right to effective cross-examination. Op. Br. at 26-30.

The law regarding to the ability of a jury to review section 3507 statements during deliberation is well-settled. This Court held in *Flonnory v. State* that recorded statements played during trial pursuant to 11 *Del. C.* § 3507 should not be

admitted as separate trial exhibits that the jury can review during deliberations. [35] The *Flonnory* Court, however, noted two exceptions: (1) when the jury requests to rehear a section 3507 statement during its deliberation or (2) where the parties do not object to having the statements go into the jury room.[36] A trial judge has broad discretion in deciding what evidence the jury may rehear during deliberations.[37] In exercising his discretion, the judge must evaluate the benefits of replaying such evidence. "A proper analysis require[s] the trial judge to determine whether the benefits of admitting the § 3507 statements [are] outweighed by the danger of unfairly emphasizing the testimony of one witness over the testimony of others."[38]

Here, the court properly weighed "the relative prejudice to the parties against the danger of unfairly emphasizing one piece of testimonial evidence over that of all other testimonial evidence."[39] *See* B185-201. He recognized there was a concern of undue emphasis, but noted "that can be said about just about any 3507 statement that goes back where you have an alleged victim's statement." B195. As Morse pointed out, his own testimony was heard just three days prior to jury deliberations. B190. A.M. and M.M., however, had testified nine and eight days prior.

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[35] 893 A.2d at 527.

[36] *Id.* at 526-7.

[37] *Id.* at 525.

[38] *Id.* at 530-31.

[39] *Id.* at 530.

Moreover, while A.M.'s testimony was central to the State's case, her CAC statement was not the sole evidence of the charged crimes.[40] She provided live in-court testimony about the waterboarding, hand suffocation and dragging incidents. A35-44, 62-66; B100-03. In addition, Pauline testified that she had witnessed the dragging incident and walked in on one occasion when Morse was holding A.M. under the kitchen faucet. A88-90; B145-48. She also corroborated the fact that Morse used hair washing as a form of punishment for A.M. and that he called it waterboarding. B145.

The fact that the statements contained properly admitted other bad acts evidence is inapposite to whether the jury should be permitted to review the statements in deliberation. Nor has this Court held that video statements should be considered more prejudicial than transcribed or recorded statements.[41] In addition, the fact that the CAC interviewer's questioning of A.M. and M.M. was gentle and that she repeated some of A.M.'s answers does not justify a finding that the Superior Court abused its discretion in permitting the jury to rewatch the statements once. Morse thoroughly cross-examined A.M. about her CAC

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[40] *Cf. Lewis v. State*, 21 A.3d 8, 15 (Del. 2011) (finding trial court abused its discretion in sending section 3507 recordings back to jury during deliberation when the statements contained the only incriminating evidence).

[41] *See, e.g., Taylor*, 65 A.3d at 601 (finding court did not abuse its discretion in permitting jury to view victim's CAC video statement during deliberation). *Cf. also United States v. Sacco*, 869 F.2d 499, 501 (9th Cir. 1989) (finding that although videotaped testimony is unique, there is no *per se* rule against replaying such testimony during jury deliberations).

statement during her testimony. Additionally, many of the interviewer's repetitive questions had been redacted from the interview at Morse's request. B84-85.

Any prejudice from the danger of unfair emphasis on the statements was properly mitigated by the court. The judge did not allow the jury to have unlimited access to the statements. The videos were only played once and (at Morse's request) in the courtroom in the judge's presence.[42] *See* B199. Additionally, at Morse's request, the judge reread the instructions concerning general credibility of witnesses, child witnesses, and section 3507 statements before replaying the statements. B201, 207-11. Thus, the trial judge did not abuse his discretion in replaying the 3507 statements one time during jury deliberation just three days after Morse had testified.

Notwithstanding the fact that the statements were otherwise permissibly played for the jury, Morse claims their admission during deliberation violated his Sixth Amendment right to confront witnesses. The Confrontation Clause of the Sixth Amendment, however, "guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'"[43] Thus, for example, this Court has held that a defendant's right of confrontation is not denied when the section 3507

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[42] *See Lewis*, 21 A.3d at 14 (Del. 2011) (noting that 3507 statements should not be given to a jury for unlimited replaying during their deliberations).

[43] *United States v. Owens,* 484 U.S. 554, 559 (1988) (emphasis in original) (quoting *Kentucky v. Stincer,* 482 U.S. 730, 739 (1987)), quoted in *Feleke v. State*, 620 A.2d 222, 228 (Del. 1993).

statement of a witness is admitted despite the fact that when the witness is presented for cross-examination, he or she is unable to recall or comment on his or her prior, unsworn statement.[44]

"[T]he Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination."[45] Here, Morse extensively cross-examined both A.M. and M.M. about their CAC statements during their testimony. *See* Trial Tr. Vol. E-23-122, 138-144; Vol. G-93-105. "'[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.'"[46] When Morse cross-examined A.M. on February 3rd and 4th, he was given "a full and fair opportunity to probe and expose [any] infirmities" in her testimony and CAC statement.[47] In addition, his cross-examination provided him with sufficient information to apprise the jury of

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[44] *See Tucker v. State*, 564 A.2d 1110, 1124 (Del. 1989) (finding the admission of a sexual assault victim's prior out-of-court statements under 11 *Del. C.* § 3507 did not violate the defendant's Sixth Amendment right of confrontation, notwithstanding the child's unwillingness or inability to fully respond, particularly with respect to the issue of sexual penetration); *Johnson v. State*, 338 A.2d 124, 127 (Del. 1975) ("While [section 3507] does require that the out-of-court declarant be subject to cross examination, it does not expressly require any specific quality of cross examination or key the admission of the out-of-court statement to any particular recall in court on the part of the witness.").

[45] *California v. Green*, 399 U.S. 149, 158 (1970).

[46] *Flonnory*, 893 A.2d at 522 (quoting *Crawford v. Washington*, 541 U.S. 36, 59 (U.S. 2004)).

[47] *Feleke*, 620 A.2d at 228 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 22 (1985)).

A.M.'s and M.M.'s biases and motivations.[48] The court's decision to permit the jury to view the CAC statements during deliberation did not violate Morse's Sixth Amendment right to confrontation.

[48] *See Weber v. State*, 457 A.2d 674, 682 (Del. 1983) ("When the cross-examination relates to impeachment evidence, the test for determining if the trial judge's limitation on cross-examination violated the defendant's confrontation right is whether the jury had in its possession sufficient information to appraise the biases and motivations of the witness."). *Accord Wilkerson v. State*, 953 A.2d 152, 156 (Del. 2008).

III. THE STATE DID NOT ELICIT PERJURED TESTIMONY FROM A.M. MORSE.

Question Presented

A.M. Morse made contradictory statements during trial and at the *Getz* hearing as to whether or not she told friends about Morse's abuse. Does a child's contradictory testimony constitute perjury, and if so, did the State knowingly elicit perjured testimony from A.M.?

Scope and Standard of Review

Morse did not raise this issue in the trial court, therefore, it is reviewed for plain error.[49] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[50]

Merits of the Argument

In his last claim, it appears Morse is accusing the State of failing to provide *Brady*[51] material and knowingly permitting a twelve-year-old child to commit perjury. Morse's claims are devoid of merit. A.M. gave inconsistent information about who she told about different aspects of the abuse. During her CAC interview, she said:

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[49] Supr. Ct. R. 8; *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

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

[51] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

> I never talked about it to anybody else. Nobody would believe me. They were going to say, 'Well, she just wants attention or something. . . . I tried to tell my teachers. I tried to tell the principal. I tried everybody I could, I could get to. . . . Even the therapist . . . this person at school who was sort of like a therapist or something.
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> . . .
>
> You know, I told my friends about it, and they told me I should call the police, but I just felt, I was just too scared to call the police.

Ex. A. A.M. told the interviewer she could not remember which friends she told. *Id.*

Prior to trial, Morse filed a motion to compel production of *Brady* material, seeking the names of the friends to whom A.M. had disclosed the abuse. A-30-31. Prosecutors requested from A.M. the names of friends with whom she had talked about the abuse and she responded she had not talked to any friends. A-30-31. Morse's motion was denied. A-31. In her testimony, Laurel Braunstein, a social worker at the Department of Justice who was present during A.M.'s interviews with prosecutors, stated that she did not recollect that A.M. had ever told them during any of their interviews that she had told friends at school about the abuse. B155.

A.M. testified, however, that in the third grade she had told a friend that she was going to stay at school as she was afraid of Morse because he was going to waterboard her.[52] B109. She also expressed that she did not tell grownups about

[52] Anna was in seventh grade at the time of trial and was between 5th and 6th grades at the time of the incident that led to Morse's arrest. B97.

the abuse because they would just tell her dad.[53] *Id.* During cross-examination, A.M. stated that the friend she had told was Elena Vicente. A-75. She also acknowledged that the prosecutors had asked her if she had told any friends and, if so, what were their names. B137. When asked "[y]ou've always said that you've never told anybody, haven't you?" A.M. responded, "Um." *Id.*

Under Delaware law, a person is guilty of perjury if he swears falsely.[54] "A person 'swears falsely' when the person intentionally makes a false statement or affirms the truth of a false statement previously made, knowing it to be false or not believing it to be true, while giving testimony or under oath. . . ."[55] As the Third Circuit has noted: "Discrepancy is not enough to prove perjury. There are many reasons testimony may be inconsistent; perjury is only one possible reason."[56] Similarly, this Court has held: "[M]ere contradictions in a witness's testimony may not require reversal because those contradictions may not constitute knowing

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[53] In fact, Anna had told grownups about two prior incidents. B126, 130-34. Both times, her parents were told and they denied the incidents had occurred as Anna described them. In one case, Anna told her teacher that her father had slapped her so hard she had fallen over an object. B126. Morse was contacted and he denied having slapped her. *See* Trial Tr. Vol. I at 199. However, Morse admitted to Cpl. Haupt during his interview in July 2012 that he had slapped Anna on that occasion. *See id.*; A-100; Ex. A.

[54] 11 *Del. C.* §§ 1221, 1222 and 1223.

[55] 11 *Del. C.* § 1224.

[56] *Lambert v. Blackwell*, 387 F.3d 210, 249 (3d Cir. 2004).

use of false or perjured testimony. Rather, mere contradictions in trial testimony establish a credibility question for the jury."[57]

A.M. was twelve at the time she testified. Morse's abuse of her began when she was seven and continued until she was removed from the home after just turning eleven. Thus, it is no surprise that her memory of who she told might be inaccurate or have faded. The substantive details A.M. provided about the charged crimes, however, were consistent. Inconsistency in A.M.'s statements is not, in and of itself, evidence that she intentionally lied while testifying.

Moreover, Morse cross-examined A.M. thoroughly about her inconsistent statements. *See* A-75; B135-37. That fact undermines any argument that his conviction was obtained through the use of false testimony or that he was otherwise prejudiced thereby.[58] As such, Morse can prove no due process violation.[59]

Finally, there is simply nothing in the record to indicate the State knowingly presented false testimony. A.M.'s statement that she had told a friend in the third grade that she feared her father would waterboard her was elicited by the State

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[57] *Romeo v. State*, 2011 WL 1877845, at *3 (Del. May 13, 2011).

[58] *Cf. Napue v. Ill.*, 360 U.S. 264, 269 (1959) ("[I]t is established that a conviction *obtained through use of false evidence*, known to be such by representatives of the State, must fall under the Fourteenth Amendment. The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." (emphasis added)).

[59] *Cf. Johnson v. State*, 587 A.2d 444, 447 (Del. 1991) (finding no error when State witness actually committed perjury on the stand as to his prior drug dealings, where the jury was fully informed of the perjury and was able to use it as to the witnesses credibility).

during direct examination. The State, had, in good faith, at Morse's request, asked A.M. for names of friends she had told about the abuse and A.M. denied telling any friends. For the same reason, the State's failure to turn over the names did not violate *Brady*. It cannot be said the State suppressed the evidence, when it did not have it.[60]

[60] *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999), quoted in *Starling v. State*, 882 A.2d 747, 756 (Del. 2005) (noting the three components to a *Brady* violation are 1) the evidence must be favorable to the accused because it is exculpatory or impeaching; 2) the evidence was suppressed by the State (either willfully or inadvertently); and 3) there must be prejudice to the defendant as a result).

CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

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