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Case Number 538,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID BUCKHAM,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 538, 2016
	)	
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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DATE: April 26, 2017

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NATURE AND STAGE OF THE PROCEEDINGS

On October 30, 2015, David Buckham ("Buckham") was arrested, and later charged by Indictment, with Attempted Murder in the First Degree, Possession of a Firearm During the Commission of a Felony ("PFDCF"), Possession of a Firearm by a Person Prohibited ("PFBPP"), Possession of Ammunition by a Person Prohibited ("PABPP"), Aggravated Menacing, and Conspiracy in the Second Degree. Super. Ct. Docket Item 1. (A1, 28-30). On February 24, 2016, the Superior Court severed the two person prohibited charges. (DI 13; A3-4).

On March 4 and 9, 2016, respectively, Buckham filed motions to suppress and in limine. (DI 15-16; A4). After a hearing, the Superior Court denied the suppression motion. (DI 22; A5).

The Superior Court held a jury trial on June 14-16, 2016. (DI 29; A6). The jury found Beckham guilty of Assault in the First Degree, as a lesser-included offense of Attempted Murder, PFDCF, and the remaining counts as charged. *Id.* After the conclusion of the trial, the Superior Court held a bench trial for the two severed counts, and found Beckham guilty of both. (A11).

On June 24, 2016, Beckham filed motions for judgment of acquittal and for a new trial in each case. (A7). After considering the motions and the State's responses, on October 20, 2016, the Superior Court granted the motion for judgment of acquittal on the Aggravated Menacing conviction, and denied the

motion for a new trial. (DI 42; A8, 234-37). On October 21, 2016, the Superior Court sentenced Beckham to a total of 26 years at Level V, to be suspended after 16 years for 12 months of Level III probation. (A16-7).

Buckham appealed, and filed his Opening Brief. This is the State's Answering Brief.

SUMMARY OF ARGUMENT

I. and II. DENIED. Buckham's claims regarding Waters' testimony have no merit. The Superior Court did not abuse its discretion in allowing Waters to speak to his attorney in a situation where he was clearly contradicting his prior out-of-court statement and risked waiving his privilege against self-incrimination. On cross-examination, Waters' returned to the outright denial that prompted the court's concern, and defense counsel was able to show Waters' bias by exposing Waters as someone who would say whatever was necessary to serve his own needs, whether or not the statement was true. Buckham has failed to establish how Waters' consultation with Waters' attorney prejudice him.

III. and IV. DENIED. The Superior Court did not err in denying Buckham's motion to suppress evidence seized from his cell phone. The warrant provided numerous facts to establish a nexus between the cell phone and Buckham's crimes. Buckham's argument, raised for the first time on appeal, that the warrant was an overbroad, general warrant, fails because Buckham has not established plain error. The warrant application did specify the portions of the cell phone to be searched and the information to be seized and the crimes for which the evidence was sought.

V. DENIED. Buckham admitted at trial that the officer's use of his nickname

was inadvertent. The reference occurred only once, during testimony that the court described as ineffective. When the State asked for a curative instruction, Buckham's counsel made the strategic decision not to pursue one. Buckham has not established that the court's failure to give a curative instruction that he declined was plain error, and he has not established that the use of his nickname caused any undue prejudice, particularly where the jury acquitted him of Attempted Murder in favor of the lesser assault offense.

STATEMENT OF FACTS

On August 3, 2015, at almost 2 a.m., Gerald Walker was sitting on the steps of a house at 7th and West Streets, in Wilmington, smoking and talking to a friend. (A92-3, 103, 105, 109). Imean Waters pulled up in front of them, driving his girlfriend's car and asked Walker, "What you doing?" (A105, 132-4). Walker told Waters he was "chilling." (A105). Waters asked Walker if he was all right, and Walker responded that he was. (A105). At that point, Waters said, "Shoot." (A105). Walker tried to run, and David Buckham, who was in the passenger seat of Waters' vehicle, started shooting out the passenger-side window. (A105-6, 112). Buckham fired three-to-five shots at Walker. (A99, 103, 106, 131). Walker went inside the door to the house and laid on the floor. (A106). Waters sped away. (A106).

Walker was in disbelief. (A106). Walker had known Waters and Beckham since 2012, when Walker moved to Delaware, and they were people he hung around with every day. (A106). When police arrived, they found Walker lying in the fetal position in the vestibule of the home. (A93, 102). Other officers arrived to secure the scene and assist. (A70).

Officer Nolan of the Wilmington Police Department accompanied Walker in the ambulance to the hospital. (A93-4). In the ambulance, Walker did not reveal any information about the shooter, and no shell casings were located at the scene.

(A93, 101). Police located one witness, a female who worked with the Connections program on that street, who stated she heard three or four shots. (A99). Just after the shooting, Walker told police that he could not identify the vehicle's occupants due to the heavy tint on its windows. (A103).

Walker suffered a gunshot wound to the right chest/abdomen, and a graze wound to his right arm. (A106-7, 137-9). His lung collapsed, one of his ribs was fractured, he lost part of his liver, and he spent six days recovering in the hospital. (A106-7, 137-9). Upon his release from the hospital, he was incarcerated for a parole violation until about September 6, 2015. (A122).

On September 16, 2015, Walker and his fiancée were sitting on the step to her home, and the same vehicle drove past them. (A94, 107). This time, Waters was in the passenger seat, and Beckham was driving. (A95, 107). They said to Walker, "We on your top," and Waters waived a gun at Walker. (A95, 107). Walker called the police. (A97).

When Walker talked to police, he told them that he did, in fact, know who shot him on August 3.[1] He identified Beckham as the shooter and Waters as the driver of the vehicle.[2] (A107-8).

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[1] At trial, Walker testified that, although he knew who shot him at the time it happened on August 3, he did not tell police at that time because the men were friends and he could not believe what had happened. (A108).

[2] Police charged Waters with Aggravated Menacing. (A97). Waters pled guilty to

Police arrested Waters later that morning, about a block away. (A97). They did not locate Buckham until a U.S. Marshalls Task Force located him near Bellmawr, New Jersey on October 26, 2015. (A34).

Conspiracy (to commit Aggravated Menacing, for the September 16th incident), and signed a cooperation agreement to truthfully testify about the events of August 3; however, at Buckham's trial, testified on cross-examination that his statement to police was inaccurate. (A163-73).

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING THE CO-DEFENDANT WITNESS TO CONSULT WITH HIS OWN ATTORNEY, AND DID NOT ABUSE ITS DISCRETION IN REFUSING TO BREACH THE WITNESS'S ATTORNEY-CLIENT PRIVILEGE.

Questions Presented

Whether the Superior Court abused its discretion when it allowed a co-defendant witness, who faced potential prosecution, to consult with his attorney when the witness's testimony clearly contradicted his statements to police. Whether Buckham suffered any prejudice thereby.

Scope and Standard of Review

This Court reviews a trial judge's determination to allow a witness to consult with counsel for abuse of discretion.[3] This Court reviews limitations on the scope of cross-examination for abuse of discretion.[4]

Argument[5]

Buckham argues that the Superior Court abused its discretion in allowing Waters to consult his own attorney during the State's direct examination.

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[3] *Chambers v. State*, 930 A.2d 904, 909 (Del. 2007) ("We conclude that the Superior Court property exercised its discretion in allowing [the chief investigating officer] to speak with [the State's witness]."); *Webb v. State*, 663 A.2d 452, 459 (Del. 1995) ("Standing alone, the Superior Court's initial admonition to Webb that he was 'not to discuss [his] testimony with anyone' because he was '[s]till subject to [his] oath[] and the cross examination will start tomorrow' would have been proper as within the trial court's discretion.").

[4] *See Weber v. State*, 457 A.2d 674, 680-1 (Del. 1983).

[5] This Argument addresses Arguments I and II in the Opening brief.

Buckham's argument fails, *inter alia*, because he has not and cannot demonstrate any prejudice that resulted from this consultation.

The State called Waters as a witness. The State had admitted Waters' cooperation papers as exhibits, and had examined him about their content. (A151-2). Waters then testified that, with respect to August 3, 2015, "The only thing I remember was me and Buckham riding around. I didn't see no gun, or nothing." (A152). After asking a few background questions about how long Waters had known Buckham, the prosecutor again pursued the issue:

> PROSECUTOR: . . . So, bringing you back to when you stated that you and Mr. Buckham were driving around on August 3rd, 2015.
>
> WATERS: Yes.
>
> PROSECUTOR: And I asked you did you see BG that day.[6]
>
> WATERS: Yes. I hadn't seen him.
>
> PROSECUTOR: So, is it your testimony today that you did not see the man you would know as BG on August 3rd, 2015?
>
> WATERS: No, I did not.
>
> PROSECUTOR: And Mr. Waters, on August 3rd, 2015, did you hear gunshots that day?
>
> WATERS: No.
>
> PROSECUTOR: Your Honor, I'm sorry. If we may approach.
>
> (sidebar)
>
> PROSECUTOR: Your Honor, we may want to get Mr. Meyer involved.
>
> Clearly Mr. Waters is facing significant issues, not only by violating the cooperation agreement, but also by potentially perjuring himself by making statements that he has declared are not truthful.
>
> . . . .
>
> DEFENSE COUNSEL: At this point, he is not refusing to

[6] "BG" is the victim, Walker. (A175, 275).

testify. . . . He is just not testifying consistent by what his prior statement was. I don't think he needs to be advised about perjury. He has already been sentenced.

PROSECUTOR: But, Your Honor, the cooperation agreement . . . does indicate that the defendant's statement was truthful at the time, so there are implications that the defendant could be facing. It's not like he's not at risk for anything at this point. And again, that's why I wanted to clarify. This isn't an individual who is saying he is not sure; he is stating in the negative these things did not occur. . . .

If I am missing something, but I feel, Your Honor, because of the cooperation agreement, especially in light of his providing other statements, he may want to speak to his counsel at this point.

. . . .

THE COURT: Well, here's the problem: At the moment—and this is my belief—is that he gave a statement with counsel's assistance. At the moment, he has said that he has never even—didn't even see the victim on the day of the event. So that is a pretty significant inconsistency; that if he continues, I am not quite sure what the consequences will be potentially from the State proceeding against him on murder charges also, or something. I don't know. *But I think it is not improper to give him an opportunity to have counsel speak with him, just to make sure that they are all on the same page. If he, after speaking to counsel, continues to say, "I didn't see him. I don't know anything about him," we will it fall where it may. . . .*

(A153-4) (emphasis added). The sidebar concluded, and the jury left the courtroom. The Superior Court then stated to Waters' counsel:

> . . . I am going to give you an opportunity to speak to the witness. The concern is that this Court has is there appear to be some testimony being given that, perhaps, is inconsistent with a statement that he previously gave. I am not telling him what he is to do or how he should testify, but before we went too far down that road I thought it would be appropriate for you at least to have an opportunity to talk to him.

(A154). Defense counsel then asked for the opportunity to cross Waters' on the substance of the conversation with his attorney. The Court agreed, in part:

> Well, if you are asking whether or not during the break that he speak with counsel, I think I would let you ask that question. Obviously, exploring with him what counsel may have told him would be a violation of the attorney/client privilege and I wouldn't allow you to pursue that.

(A154). After Waters' conferred with his attorney, he proceeded to answer the prosecutor's questions by stating, "I don't remember," asserting he was under the influence when he talked to police, and that his statement was not voluntary. (A155). After establishing grounds for playing Waters' prior statement under section 3507, the prosecutor then offered testimony from the officer who took the statement, and played the video recording of Waters' statement.[7] (A163-4; 264-90). In the statement, Waters told police that Buckham shot Walker. (A272-5, 285). When defense counsel questioned Waters, Waters denied everything (including being with Buckham on the day of the shooting), said he lied when he gave the statement, that he just wanted to be released, admitted his prior conviction for robbery (a crime of dishonesty), and admitted that he "can be dishonest, on occasion, when [he] wants to.". (A165-74). Defense counsel never asked Waters about the conversation with his attorney. *See id.*

In *Chambers v. State*, this Court found no abuse of discretion where the trial judge permitted an eyewitness presented by the State to speak to the chief

[7] The transcript included in the Appendix to the Opening Brief does not indicate which portions of the statement were redacted from the video played at trial. (A262-90).

investigating officer during his direct testimony.[8] This case is no more egregious than *Chambers*, where, here, the State had no direct knowledge of what the witness discussed with his attorney, and no involvement in it.

If the Court finds that the Superior Court abused its discretion in allowing Waters to talk to his attorney, the error was harmless. Waters' testimony was equivocal at best. His section 3507 statement implicated Buckham, but on the stand, he denied everything. Defense counsel successfully cross-examined him on his prior conviction for a crime of dishonesty, on the benefit he obtained from the cooperation agreement, and from his desire to lie when it benefitted him. As the Superior Court found, this case depended on the testimony of the victim, not Waters. (A236-7). As such, Buckham has not established prejudice and any error was harmless.

In *Webb v. State*, this Court noted that potential perjury, in particular, can be difficult to address:

> There can be no hard and fast rule governing every contingency. Coaching during a recess to shape the testimony of a defendant-witness when cross-examination is resumed is clearly improper and defense counsel should know that ethical violations are involved. There may be circumstances where it is not clear to defense counsel how to handle a problem which arises surprisingly during cross. Perjury is one example. . . . In such a case defense counsel has an ethical obligation which may require a forthright application to the

[8] *Chambers*, 930 A.2d at 909.

court for a special ruling permitting limited consultation.[9]

This situation described in *Webb* is akin to the prosecutor's dilemma in this case—she was aware that Waters faced potential prosecution for his involvement in both incidents, that he signed a cooperation agreement and agreed to testify truthfully, that his attorney was present, that he had started to contradict his proffer and potentially faced prosecution for perjury. Further, although Waters' plea and cooperation agreement resolved his liability with respect to the September 16, 2016 threat, Waters could have faced consequences for his failure to cooperate in the form of prosecution for the events of August 3. Knowing all of this, the prosecutor approached the judge and suggested that Waters be able to consult his attorney. Where a defense attorney's duty is to counsel his client to not commit perjury, the prosecutor seeking to allow that consultation appears to fall well within one of the special circumstances "permitting limited consultation" that this Court imagined in *Webb*. The prosecutor was in a "Catch-22"—it supports the conviction to have Waters testify consistent with his proffer; however, a prosecutor cannot allow false testimony of his or her own witness.[10] In this case, rather than

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[9] *Webb v. State*, 663 A.2d at 460, n.9 (quoting *See Shockley v. State*, 565 A.2d 1373, 1378 (Del. 1989) ("Under the Model Rules, adopted in Delaware in 1985, a lawyer's first duty when he learns his client is going to commit perjury is to seek to persuade the client not to do so. If the client has already presented the testimony, the attorney must rectify any damage.")).

[10] *United States v. Sanfilippo*, 564 F.2d 176, 177 (5th Cir. 1977) ("The cases hold

allowing the Waters' section 3507 statement to expose the discrepancies in his testimony, the prosecutor suggested he be able to consult his lawyer. While allowing the prior inconsistent statement to speak for itself may have been the best outcome for Buckham's case, Waters had his own constitutional rights, which is why his attorney was present. It was a difficult situation and the record shows that the prosecutor and the Superior Court attempted to serve all the parties. Buckham has failed to show that the Superior Court abused its discretion or that his constitutional rights were violated.

Buckham's summation of *Perry v. Leeke* is incomplete in ways material to the facts here. In *Perry*, the Supreme Court did state that a defendant has no *right* to consult his attorney while he is testifying, and that "the reason for the rule is one that applies to all witnesses."[11] The Court, however, explained that the decision to allow the consultation still rests at the discretion of the judge:

> Accordingly, it is entirely appropriate for a trial judge to decide, after listening to the direct examination of any witness, whether the defendant or a nondefendant, that cross-examination is more likely to elicit truthful responses if it goes forward without allowing the

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that the duty to correct the false testimony of a Government witness is on the prosecutor."); *Del. Lawyers Rules of Prof. Cond.* 3.3(a)(3) ("A lawyer shall not knowingly offer evidenced that the lawyer knows to be false."); *Del. Lawyers Rules of Prof. Cond.* 3.4(b) ("A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.").

[11] *Perry v. Leeke*, 488 U.S. 272, 281 (1989).

> witness an opportunity to consult with third parties, including his or her lawyer.[12]

Further, the decision focuses on a witness who consults with his attorney between direct examination and cross.[13] Here, the consultation occurred during direct examination. *Perry* does not assist Buckham's claim.

Buckham's reliance on Superior Court Civil Rule 30, related to depositions, also is misplaced. First, Civil Rule 30 specifically provides for consultation with the deposed party regarding "whether to assert a privilege against testifying or on how to comply with a court order." The record suggests that Waters' discussion with his attorney related to his privilege against self-incrimination. Second, applying Civil Rule 30 in this context is not necessary, because Criminal Rule 15 specifically allows depositions in "exceptional circumstances."[14] Criminal Rule 15 further specifies that "the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself."[15] Given this specification, reference to the civil rule is unnecessary and/or inappropriate.

A more helpful analogy, if needed, would be to a Grand Jury proceeding. In federal Grand Jury proceedings, courts have found that witnesses are entitled to

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[12] *Id.* at 282.

[13] *Id.* at 282-5.

[14] Super. Ct. Crim. R. 15(a).

[15] Super. Ct. Crim. R. 15(d)(2).

confer with counsel. In *In re Grand Jury Proceedings*, the district court explained:

> [T]he scope—and even the existence—of an immunized witness's right to consult with her attorney during her testimony before the grand jury is not well defined. Such a right has been said to arise from the Fifth Amendment privilege against self-incrimination. . . . However . . . .[i]t is . . . arguable that an immunized witness has no right at all under the constitution to consult with an attorney during testimony before the grand jury.[16]

Here, although there was no immunity, Waters did have the constitutional right to avoid self-incrimination, and thus, a right to consult with his attorney, if necessary.

Finally, Buckham's argument that he should have been permitted to cross-examine Waters on the substance of his conversation with his attorney also fails. In *Weber v. State*, this Court explained:

> A certain threshold level of cross-examination is constitutionally required, and the discretion of the trial judge may not be interposed to defeat it. 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. More specifically, we look to the cross-examination permitted to ascertain (1) if the jury was exposed to facts sufficient for it to draw inferences as to the reliability of the witness and (2) if defense counsel had an adequate record from which to argue why the witness might have been biased.[17]

The first *Weber* factor was satisfied because the jury had ample facts on which to assess Waters' credibility—his direct testimony, in which he started to deny

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[16] 2006 WL 1764387, *1 (E.D. N.Y. June 26, 2006).

[17] *Weber v. State*, 457 A.2d 674, 682 (Del. 1983) (citations omitted).

everything and then could not remember, his cooperation agreement, his statement to police admitted under section 3507, and his cross-examination testimony, during which he again denied any involvement. The second *Weber* factor also is satisfied, because defense counsel had sufficient information from which to argue that Waters' was biased (the cooperation agreement), and defense counsel used that and Water's other testimony to drive home the idea that Waters lied when it benefitted him, and that his cooperation agreement was the lie, not his testimony on the stand. Given the contradicting stories told by Waters, Buckham has not and cannot show that the inability to cross Waters about his discussion with his attorney prejudiced Buckham in any way.

Buckham's argument fails for additional reasons. First, it can be argued that Buckham waived this issue when, after seeking the court's permission, he did not then ask Waters any questions in reference to what happened during the recess in his testimony. Second, Buckham cites no case to establish that it is appropriate to violate Waters' right to counsel and his attorney-client privilege for the purpose of cross-examination. Further, Buckham's counsel could have crossed Waters on the fact that his testimony changed from "I wasn't there" to "I don't remember" after the recess, highlighting that fact for the jury without revealing the substance of the conversation. But counsel asked no such questions.

Buckham's claims regarding Waters' testimony have no merit. The Superior

Court did not abuse its discretion in allowing Waters to speak to his attorney in a situation where he was clearly contradicting his prior out-of-court statement and risked waiving his privilege against self-incrimination. On cross-examination, Waters' returned to the outright denial that prompted the court's concern, and defense counsel was able to show Waters' bias by exposing Waters as someone who would say whatever was necessary to serve his own needs, regardless of the truth. Buckham has failed to establish how Waters' consultation with Waters' attorney prejudiced him.

II. THE SEARCH WARRANT WAS VALID; THE SUPERIOR COURT DID NOT ERR IN DENYING BUCKHAM'S MOTION TO SUPPRESS.

Questions Presented

Whether the Superior Court erred in denying Buckham's motion to suppress where the search warrant specified that the cell phone was found on Buckham when he was arrested, may have contained evidence of his whereabouts after the crime and before he was located in New Jersey, which information could lead to further evidence of the crime, including the gun. Whether the Superior Court committed plain error in denying the motion to suppress where Buckham failed to argue below that the search warrant was an invalid general warrant.

Scope and Standard of Review

This Court "review[s] . . . alleged constitutional violations *de novo*. [The Court] also appl[ies] *de novo* review to the Superior Court's legal conclusions when reviewing the denial of a motion to suppress. '[The Court] review[s] the Superior Court's factual findings to determine "whether there was sufficient evidence to support the findings and whether those findings were clearly erroneous."'"[18] This Court reviews questions not preserved below for plain error.[19] "Under the plain error standard of review, the error complained of must be so

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[18] *Wheeler v. State*, 135 A.3d 282, 295 (Del. 2016) (quoting *Bradley v. State*, 51 A.3d 423, 433 (Del. 2012) (additional citations omitted)).

[19] *Chance v. State*, 685 A.2d 351, 354 (Del. 1996); Supr. Ct. R. 8; *Hardin v. State*, 844 A.2d 982, 990 (Del. 2004).

clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[20]

Argument[21]

Buckham argues that the Superior Court erred in failing to grant his suppression motion for evidence obtained from his cell phone because, he asserts, the cell phone search warrant: (1) did not sufficiently establish a nexus that evidence of the crime would be found on his cell phone; and (2) was overbroad. The evidence at issue includes Facebook posting and messages related to the August 3, 2015 shooting that investigators found on Buckham's phone. (A47). Buckham's first argument fails because the warrant application did specify how Buckham's cell phone related to the firearm charge. His second argument fails because he did not raise it below and has failed to establish plain error.

To the extent that Buckham argued below that the search warrant violated the specific provisions of the Delaware Constitution in addition to the United States Constitution, he has not adequately briefed his argument under the State Constitution.[22] As a result, the argument is deemed waived.[23]

The search warrant in this case was valid. As this Court explained in

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[20] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

[21] This Argument addresses Arguments III. and IV. in the Opening Brief.

[22] *See Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008).

[23] *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993); Supr. Ct. R. 14(b)(vi)(A)(3).

Starkey v. State:

> [A] search warrant may only be issued upon a showing of probable cause, and must describe with particularity the places to be searched or persons or things to be seized. "An affidavit in support of a search warrant must, within the four-corners of the affidavit, set forth facts adequate for a judicial officer to form a reasonable belief that an offense has been committed and the property to be seized will be found in a particular place." The determination of whether the facts in the affidavit demonstrate "probable cause requires a *logical* nexus between the items being sought and the place to be searched." A determination of probable cause requires an inquiry into the "totality of the circumstances" alleged in the warrant.[24]

The search warrant in this case met these standards

In this case, the search warrant application sought to search Buckham's cell phone for "[a]ny and all store[d] data contained within the internal memory of the cellular phone[], including but not limited to, incoming/outgoing calls, missed calls, contact history, images, photographs and SMS(text) messages." (A32). The warrant explained, *inter alia*, the August 3, 2015 shooting, that the victim identified Buckham as the shooter, that an arrest warrant had been issued for Beckham, and that the phone was found on Buckham when he was arrested. The warrant explains that police did not know where Buckham stayed before he was arrested, that criminals often communicate through cell phones, that cell phones have GPS and wireless network data that can be used to locate the defendant while

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[24] *Starkey v. State*, 2013 WL 4858988 (Del. 2013) (quoting *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006) and *Jones v. State*, 28 A.3d 1046, 1057 (Del. 2011)) (additional citations omitted).

he previously used the phone, and that criminals often communicate through cell phones, including text messages, and often talk about their criminal activity via social media applications contained on their cell phones. (A33-4).

Below, Buckham argued that the cell phone evidence should be suppressed because there was no nexus between his crime and the cell phone. (A38-44). After hearing the parties' arguments at the suppression hearing, the Superior Court found:

> I'm just convinced that, based upon the GPS assertion that's in the warrant—if all I had was I know about cell phones, and cell phones can do this, I have real concerns about it being an adequate warrant. But in Mr. Buckham's situation I have a shooting that occurred. He flees the jurisdiction. He's arrested in New Jersey. They do not know where he resided in New Jersey or if he even resided in New Jersey.
>
> They have represented in the warrant that there is this information that would, if the phone was utilized, provide them as basis to determine where he was residing in New Jersey that would potentially lead to evidence concerning the crime on a subsequent search of that location.
>
> So I think in the overall consideration of the warrant, it is sufficient to allow the warrant to be signed and for the phone to be searched. . . .

(A76-7). To the extent this ruling encompasses factual determinations, those determinations are supported by the record, and the Superior Court did not err in denying the motion.

The search warrant did establish the necessary nexus between Buckham's crimes and the cell phone. As the State noted to the Superior Court, in paragraph

11 of the warrant, the officer specifically referred to social media posts that Beckham made about his arrest, on October 1, 2015. The officer explained in paragraph 15 that "cell phone contain social media applications and chat data from social media in which criminals talk about their involvement in criminal activity." (A34). As such, a search of the phone was expected to contain the posts specifically referenced by the officer, as well as other information linking Buckham to the crimes.

In addition, as the Superior Court correctly found, the cell phone may have revealed Buckham's location prior to his arrest, and may have led to additional evidence of the crime, including the gun used in the shooting. The detective cited GPS coordinates that could potentially have been extracted from information on the phone to assist in this regard.

Finally, there was probable cause to believe that the cell phone contained communication between Buckham and Waters, who drove the vehicle when Buckham shot Walker. This is supported in the warrant by the fact that Waters contacted Buckham's girlfriend by cell phone before he talked to police, and the officer's experience that "criminals often communicate through cellular phones." (A34).

Buckham incorrectly reliance on *State v. Ada*[25] and *State v. Cannon*.[26] *Ada*

[25] 2001 WL 660227 (Del. Super. June 8, 2001).

and *Cannon* are distinguishable on their facts because they involved searches of the defendants' residences to locate drug evidence, where the illegal drug sales did not take place at the searched residences.[27] Buckham's argument that the search warrant for a phone is similar to a warrant for a car, Op. Br. at 27, n.77, also fails. Generally speaking, people use their cell phones to communicate by call and text, keeping their phones with them at all times, and use them to access social media applications that are specifically created to promote and ease communication. A search of a home or vehicle where a crime was not alleged to have occurred is completely different from the search of the defendant's cell phone found in his or her possession.

Buckham similarly misplaces his reliance on *State v. Westcott.*[28] In *Westcott*, which did involve a cell phone search, the search warrant, unlike the warrant here, failed to explain why the officer expected to find "physical evidence or confession of the shooting or the illegal distribution of heroin" in the "data and

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[26] 2007 WL 1849022 (Del. Super. June 27, 2007).

[27] *State v. Ada*, 2001 WL 660227, at *4-5 (finding the search warrant invalid where it alleged that the defendant "may be keeping the main portion of his drugs at the [searched address] while he sold out of [a different address]."); *State v. Cannon*, 2007 WL 1849022, at *5 ("The tips conveyed to police, and later contained in the affidavit, identified specific street locations, not Cannon's home, as the sites where he conducted the drug transactions.").

[28] 2017 WL 283390 (Del. Super. Jan. 23, 2017).

cellular logs" of the three seized phones.[29] In granting Westcott's motion to suppress, the Superior Court distinguished *Westcott* from this Court's decision in *Starkey*.[30] In *Starkey*, the search warrant "included a statement that '[P]ersons involved in criminal acts will utilize Mobile Electronic Devices such as cellular telephones to further facilitate their criminal acts and/or communicate with coconspirators.'"[31] The officer in *Starkey* also noted that a search of the phone could reveal its owner, a list of all calls to and from the phone, and identified "specific evidence that the police hoped to find in support of their case."[32] Like *Starkey*, the warrant here included sufficient detail to support a finding of probable cause.[33]

Finally, Buckham's argument that the warrant is an overbroad, general warrant has no merit. First, Buckham failed to raise this argument below; therefore, it is reviewed only for plain error, which Buckham has failed to

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[29] *Id.* at *1-2.

[30] 2017 WL 283390, at *2 (citing and quoting *Starkey v. State*, 2013 WL 4858988 (Del. Sept. 10, 2013)).

[31] 2017 WL 283390, at *2 (quoting 2013 WL 4858988, at *3).

[32] 2017 WL 283390, at *2 (citing 2013 WL 4858988, at *3).

[33] *Starkey v. State*, 2013 WL 4858988, at *4 ("Similar to *Fink* [*v. State*, 817 A.2d 781, 786 (Del. 2003)] the warrants here were not vague as they specifically limited the officer's search of the cell phones to certain types of data, media and files that were 'pertinent to this investigation.' This language effectively limited the scope of the warrants, and prevented a boundless search of the cell phone."). Here, the warrant limited the files to be searched to those that "represent evidence of a violation of" the crimes Buckham was alleged to have committed. (A32, 33).

establish. As *Wheeler* requires, the warrant in Buckham's case specified the evidence the police sought from the cell phone "with as much specificity as possible under the circumstances."[34] The warrant specified the crimes that are under investigation. It sought to search "[a]ny and all store[d] data contained within the internal memory of the cellular phone[], including but not limited to, incoming/outgoing calls, missed calls, contact history, images, photographs and SMS(text) messages." (A32). It sought GPS location information that may locate where Buckham was staying and, potentially, the gun used in the shooting, and it sought social media and chat data, and communications including text messages that could offer additional evidence of the crime. Buckham has failed to explain how the warrant could have been more specifically tailored, and has failed to establish plain error.

[34] *Wheeler*, 135 A.3d at 296.

III. THE SUPERIOR COURT DID NOT ERR IN DENYING BUCKHAM'S MISTRIAL MOTION OR HIS MOTION FOR A NEW TRIAL.

Question Presented

Whether the Superior Court erred by failing to grant Buckham's motion for a mistrial or motion for a new trial where the chief investigating officer inadvertently made one reference to Buckham's nickname.

Scope and Standard of Review

This Court "review[s] a trial judge's decision to grant or deny a mistrial for abuse of discretion."[35] "This Court reviews the denial of a motion for new trial for abuse of discretion."[36] "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."[37]

Argument[38]

Buckham argues that the Superior Court abused its discretion in denying his mistrial and new trial motions, and for not providing a curative instruction where

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[35] *Smith v. State*, 963 A.2d 719, 722 (Del. 2008).

[36] *Hicks v. State*, 913 A.2d 1189, 1193 (Del. 2006) (quoting *Wolhar v. General Motors Corp.,* 1999 WL 485435 (Del. Feb. 24, 1999) (citing *Eustice v. Rupert,* 460 A.2d 507 (Del.1983)).

[37] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

[38] This Argument addresses Argument V in the Opening Brief.

the chief investigating officer inadvertently referred to Buckham by his nickname, "Gunner," on the last day of trial. Buckham's argument fails for two reasons. First, the prosecutor asked for a curative instruction, and Buckham did not agree to one, waiving that claim. Second, Buckham conceded at trial that the officer's use of the nickname was an inadvertent mistake, made only once. (A193). Buckham has failed to show that the reference unduly prejudiced him.

This issue arose after a voir dire related to evidence from Buckham's cell phone. During the voir dire, Beckham was referred to by his nickname, Gunner, multiple times. (A188-9). Immediately following the voir dire, within eighteen transcript pages of the use of the name on voir dire, the prosecutor asked the chief investigating officer, "I'm going to show you chat two, State's exhibit 12. Who is that chat between?" (A192). The officer responded, "The B is Gunner—or Montana. I'm sorry. I didn't draw a line." (A193). Defense counsel objected and the following sidebar discussion occurred:

> DEFENSE COUNSEL: Move for a mistrial. . . . He referred to him as Gunner Montana, which is something we agreed was not going to be mentioned throughout this trial. The jury has now heard his nickname. It wasn't intentional, but it slipped out. Very prejudicial.
>
> PROSECUTOR: Your Honor, the State would ask for a curative instruction and ask that the jury disregard—it's possible the jury didn't even hear it.
>
> DEFENSE COUNSEL: I don't know how they couldn't have heard it, number one. And, number two, I think Chief Justice Strine has gone on record as to jury instructions, as far as their impact a lot of times on jurors once things have been brought out. We painstakingly tried to avoid this.

> THE COURT: Well, before I get to that, I don't know why we're doing what we're doing. Maybe this has some really good stuff, but the way it's being presented, it's just being totally lost. . . . I know you think it's probably great, but I can tell you, sitting up here listening to it, it's having no effect, and it will have no effect on the outcome of the case. . . . Now, as far as the comment, we have been painstakingly trying to avoid that. Up until this point, he's always referred to the last name. I don't believe in the circumstances—in the way it was presented it will rise to the level that a mistrial should occur. But I want you to tell me why you want to continue doing this. . . . .You can continue to do what you want to do, but if he says it again, this all goes away. And so you are running the risk at the moment if you want to continue to ask the question. But if he says the name again, I'm granting [defense counsel's] request and we'll do this all over again. . . .

(A193). The officer did not use the reference again. In his motion for a new trial, Buckham argued again that the reference was highly prejudicial, but did not argue that a curative instruction should have been given. (A222-3). Contrary to defense counsel's statement at trial, counsel argued in his motion that "The use of the term "Gunner" was not an inadvertent mistake by an inexperienced witness . . . ." (A223). The Superior Court disagreed, and denied the motion, holding:

> First of all, there is nothing to suggest that this reference to "gunner" was anything more than an inadvertent mistake. It was not made with an intent to influence the jury or to act in defiance of the Court's direction. Secondly, the word "Gunner" was muttered during the course of the officer's mind-numbing and frankly, extremely ineffective and confusing, testimony as to Facebook chats alleged to be from Defendant's phone. The Court doubts that the jury even heard the alleged comment, but even if they did, the Court is convinced it would have had no effect on the outcome of this case. This trial turned on the testimony of Mr. Walker. If the jury perceived that testimony as credible, Defendant would be convicted. If they doubted Mr. Walker, a "not guilty verdict may have resulted. While

> the Court found that the chat correspondence . . . was relevant and therefore admissible, it clearly did not affect the outcome of this trial. . . .

(A237). The Superior Court did not abuse its discretion in its holdings.

Buckham waived any claim that the Superior Court erred by not offering a curative instruction when he declined to join in the State's request for an instruction, and also when he did not raise the issue in his post-trial motion for a new trial. In *Stevenson v. State*, this Court stated, "there is an express and effective waiver as to any appellate presentation on an issue where defense counsel responds to queries by a trial judge, by stating that there are no objections to the admission of evidence. Indeed, such affirmative statements are a stronger demonstration of a waiver 'than the mere absence of an objection.'"[39] Similar to *Stevenson*, the Superior Court asked Buckham's counsel if he wanted a curative instruction, and counsel did not accept that offer, but instead appears to have cited the idea that a further instruction may emphasize the issue. (A193). By not accepting the offer of a curative instruction, he waived the issue and, at most, it is subject to plain error review.[40]

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[39] *Stevenson v. State*, 2016 WL 5937897, at *9 (Del. Oct. 11, 2016) (citing *King v. State*, 239 A.2d 707, 708, 709 (Del. 1968)).

[40] *See Fowler v. State*, 2016 WL 5853434, *2 (Del. Sept. 29, 2016) ("Fowler failed to take the Superior Court upon what was in essence an offer to sever the trial. IT thus comes with little grace to accuse the Superior Court of plain error when Fowler effectively waived any right to severance.").

The Superior Court did not abuse its discretion in denying the mistrial and new trial motions. In *Revel v. State*, this Court explained:

> Whether a mistrial should be declared lies within the trial judge's discretion. This grant of discretion recognizes the fact that a trial judge is in the best position to assess the risk of any prejudice resulting from the trial events. When a trial judge rules on a mistrial application, that decision should be reversed on appeal only if it is based upon unreasonable or capricious grounds.
>
> "A trial judge should grant a mistrial only when there is a 'manifest necessity' or the 'ends of justice would be otherwise defeated.'" The remedy of a mistrial is "mandated only when there are 'no meaningful and practical alternatives' to that remedy." A trial judge's prompt curative instructions "are presumed to cure error and adequately direct the jury to disregard improper statements." Juries are presumed to follow the trial judge's instructions.[41]

"[T]he power to grant a mistrial should 'be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.'"[42] Finally, "prejudice must be egregious when a curative instruction is deemed insufficient to cure prejudice to the defendant."[43]

In *Revel*, this Court provided four factors, from *Pena v. State*, used to assess whether a mistrial is necessary where there is an "an allegedly prejudicial remark by a witness": "first, nature and frequency of the offending comment; second, the

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

[42] *Swanson v. State*, 956 A.2d 1242, 1244 (Del. 2008) (quoting *Bailey v. State*, 521 A.2d 1069, 1075-76 (Del. 1987) and *United States v. Perez*, 22 U.S. 579, 580 (1824)).

[43] *Ashley v. State*, 798 A.2d 1019, 1022 (Del. 2002).

likelihood of resulting prejudice; third, closeness of the case; and fourth, the adequacy of the trial judge's actions to mitigate any potential prejudice."[44] Applying the first factor, "Gunner" was, in fact, Buckham's nickname. It was only stated once, by mistake, during testimony that the Superior Court characterized as unhelpful. Second, the likelihood of resulting prejudice is low, because, as the Superior Court explained, it occurred during testimony that the court itself found to be "mind-numbing and frankly, extremely ineffective and confusing." (A236). Further, had the reference been unduly prejudicial, the jury likely would have convicted Buckham of Attempted Murder, rather than the lesser offense of Assault in the First Degree. Third, as the Superior Court found, the case turned on the victim's testimony. The victim testified that he was friends with Buckham and Waters, and was in disbelief that they shot him. (A108). Finally, the prosecutor asked for a curative instruction, but Buckham's counsel disagreed and did not pursue one. (A193). That strategic decision cannot be used to argue that the court should have done more. In sum, under the *Pena* factors, a mistrial is not warranted.

Buckham's reliance on *Gomez v. State*[45] and *Ashley v. State*[46] is misplaced because these cases are not sufficiently factually similar to support Buckham's

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[44] *Id.* at 27 (citing *Pena v. State*, 856 A.2d 548, 550-51 (Del. 2004)).

[45] 25 A.3d 786 (Del. 2011).

[46] 798 A.2d 1019 (Del. 2002).

premise. In *Gomez*, a witness referred to the defendant's conviction of a prior rape, during a rape trial.[47] In *Ashley*, a spectator yelled that the defendant was guilty because he had stabbed the spectator 14 times.[48] These examples are far more egregious than the officer's single reference to Buckham's nickname in this case.

Buckham admitted at trial that the officer's use of his nickname was inadvertent. The reference occurred only once, during testimony that the court described as ineffective. When the State asked for a curative instruction, Buckham's counsel made the strategic decision not to pursue one. Buckham has not established that the court's failure to give a curative instruction that he declined was plain error, and he has not established that the use of his nickname caused any undue prejudice, particularly where the jury acquitted him of Attempted Murder in favor of the lesser assault offense.

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[47] 25 A.3d at 790, 794-5 (finding that the witness's "testimony 'injected into the trial the assertion of a prior bad act that was patently and squarely on point with the very type of crime for which [Gomez] was on trial.' . . . creat[ing] an impermissible inference that he had committed the offense for which he was being tried.").

[48] 798 A.2d at 1022. The jury found Ashley guilty as charged and the Superior Court sentenced him to death. *Id.*

CONCLUSION

The judgment of the Superior Court should be affirmed.

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CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on April 26, 2017, I caused the attached document to be served by File and Serve to:

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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAVID BUCKHAM,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 538, 2016
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.

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Dated: April 26, 2017

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