



IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE DUNNELL,)	
)	
Defendant-Below,)	
Appellant,)	
)	
v.)	No. 564, 2017
)	
STATE OF DELAWARE)	
)	
Plaintiff-Below,)	
Appellee.)	

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

APPELLANT'S OPENING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

On May 23, 2016, Dwayne Dunnell (“Dwayne”) was indicted on Drug Dealing in heroin, Aggravated Possession of heroin, Conspiracy Second Degree, other drug-related offenses and various weapons offenses.¹ Certain of the weapons offenses were severed while one was *nolle prosequi*.

On December 30, 2016, Dwayne filed a Motion *in Limine* to Preclude Text Message Evidence pursuant to *D.R.E.* 403 and 901. That motion was denied.² He went to jury trial on February 28, 2017. At the conclusion of the State’s case, Dwayne moved, unsuccessfully, for a judgment of acquittal on the lead (heroin-related) charges.³ At the conclusion of trial, the jury convicted him of those charges. Dwayne renewed his motion for judgment of acquittal.⁴ The motion was again denied.⁵

Dwayne was sentenced to 7 years in prison followed by probation.⁶ This is his Opening Brief in support of his timely-filed appeal.

¹ A2, 18.

² A24. *See* Feb. 22, 2017 Decision Denying Motion *in Limine*, Ex.A

³ A70-72. *See* Oral Decision Denying Motion for Judgment of Acquittal, Ex.B.

⁴ A110.

⁵ *See* September 8, 2017 Written Decision Denying Motion for Judgment of Acquittal, Ex.C.

⁶ *See* December 1, 2017 Sentence Order, Ex.D.

SUMMARY OF THE ARGUMENT

1. No rational trier of fact could find Dwayne guilty beyond reasonable doubt of Drug Dealing in heroin, Aggravated Possession of heroin or Conspiracy Second Degree as the State failed to establish he had any knowledge of or participated in any operation in dealing the heroin locked in Kyle's buried safe.

2. The trial court erred in admitting, without proper authentication, what the State claimed were text messages sent by Dwayne on phones purportedly belonging to him.

3. The trial court abused its discretion when it allowed the State to introduce the purportedly drug-related text messages as their probative value was substantially outweighed by the danger of unfair prejudice.

4. The trial court committed plain error when it failed to instruct the jury that the sole purpose for which it could use the text messages was to determine whether Dwayne had knowledge of and participated in dealing the heroin locked in Kyle's buried safe.

5. The errors at trial cumulatively prejudiced Dwayne and deprived him of a fair trial. Thus, even if each individual error does not require reversal, the cumulative effect of the errors requires reversal.

STATEMENT OF FACTS

On April 12, 2016, just after 6:00 a.m., police searched the townhouse at 24 Gull Turn in Newark, Delaware.⁷ When they entered the home, Dwayne Dunnell, (Dwayne), was at the top of the stairs and showed his hands to police.⁸ He was taken into custody without event.⁹ A search incident to his arrest revealed no drugs, paraphernalia, weapons, ammunition or other contraband. The second floor room in which he stayed from time to time was also searched and no drugs, paraphernalia, weapons, ammunition, or other contraband were found.¹⁰ However, police did seize an Apple iPhone 6 and a Samsung cellphone from that room.¹¹

Police also took Kyle Dunnell, (Kyle), into custody.¹² He also had no contraband on him. However, a search of his bedroom revealed a clear plastic bag with 15 OxyContin pills.¹³ The officers also seized a LG cell phone and an Alcatel One Touch cell phone from Kyle's bedroom.¹⁴ A

⁷ A45-46.

⁸ A46, 55.

⁹ A47.

¹⁰ A60.

¹¹ A47-48.

¹² A46-47.

¹³ A56, 60.

¹⁴ A48-49, 61.

search of a spare bedroom revealed a laundry bag containing a digital scale.¹⁵

The first floor of the home was also searched.¹⁶ On the kitchen table, police found a brown “shoe polish style” box with a bag containing another bag with multiple pink baggies inside of that.¹⁷ Then, in the closet under the steps across the hall from the laundry room, they found a blue knapsack that contained several shotgun shells.¹⁸ Five additional shotgun shells were found in a shaving kit in the laundry room.¹⁹ However, no shotgun was actually found in the home.²⁰

In the laundry room, police encountered a “mountain of clothing.” Buried underneath the mountain was a purple plastic bag that concealed a locked Sentry safe.²¹ The officers forced it open²² and found: 3,488 bags of heroin, some stamped “King Kong” and some stamped “Hot Head;” a Glock 9 mm handgun loaded with 9 rounds of ammunition; an extended magazine loaded with 32 rounds of 9mm ammunition; and a black digital scale.²³

¹⁵ A49.

¹⁶ A49.

¹⁷ A49.

¹⁸ A49.

¹⁹ A49-50.

²⁰ A50.

²¹ A50-51.

²² A51.

²³ A51-52, 75.

Also in the house, police found a pay check for \$2001.34 from Brill Home Improvement addressed to Dwayne at the address of 14 Sentry Lane.²⁴ The check covered a 2-week pay period.²⁵

Police decided to take Dwayne and Kyle to New Castle County Police Headquarters. Since Kyle had been awakened by the search, he was not dressed appropriately to leave the house. Police asked him what clothes he wanted to wear. In response, Kyle asked for his black jeans which were on the top shelf of the closet in his bedroom on the second floor.²⁶ Police found the jeans exactly where Kyle had described. When police brought the jeans to Kyle, he acknowledged they were the ones he requested. Prior to allowing Kyle to put on the jeans, an officer searched the pockets for weapons or contraband.²⁷ Although no contraband was found, a single key to a Sentry safe was discovered.²⁸ The police confirmed that it fit and opened the safe that had been buried in the laundry room.²⁹

Next, police searched Dwayne's Jeep Grand Cherokee and silver Lexus that were parked outside of the home.³⁰ No drugs, paraphernalia,

²⁴ A47, 50-51, 84-86.

²⁵ A58.

²⁶ A62.

²⁷ A62.

²⁸ A53, 62.

²⁹ A53, 62-63.

³⁰ A53.

weapons, ammunition or contraband were found in either vehicle. However, an Alcatel One Touch flip cell phone was found in the Lexus.³¹

Later, Dwayne told police that he went back and forth between Sentry Lane and Gull Turn. In fact, he said that the Gull Turn house was a “party house” and that a lot of people often stayed there.³² Despite subsequent forensic efforts, the State never obtained any fingerprint or DNA evidence linking Dwayne to either Kyle’s locked safe that was buried in the laundry room or to the contents of that safe.³³

Extractions were performed on the 4 cell phones seized from the house.³⁴ Police could confirm only that the Apple iPhone 6 belonged to Dwayne.³⁵ There was no confirmation as to who owned the Samsung or either of the phones found in Kyle’s bedroom. Police were unable to obtain an extraction report for the Alcatel One touch flip cell phone seized from the silver Lexus. However, a manual review of text messages on that phone was conducted.³⁶ There was no confirmation as to who owned that phone. Dwayne admitted only that he owned the iPhone.³⁷

³¹ A53.

³² A84-86.

³³ A59, 64, 69.

³⁴ A67-68.

³⁵ A77, 87, 89.

³⁶ A54, 66, 68.

³⁷ A85-86.

At trial, the State introduced cell phone text messages including a single text message of the words “King Kong” sent on March 12, 2016 from the Alcatel phone found in the Lexus.³⁸ The State was unable to provide evidence as to who sent that text.³⁹

The State also introduced vague text messages without context obtained from the Samsung. Although not self-explanatory, police claimed the messages referenced drug deals. Yet, none of the messages mentioned what type of drugs may have been involved, the location of any possible drug deals, the source of any possible drugs at issue and who actually sent and received the messages.⁴⁰

³⁸ A54.

³⁹ A90.

⁴⁰ A78, 87-88.

I. NO RATIONAL TRIER OF FACT COULD FIND DWAYNE GUILTY BEYOND REASONABLE DOUBT OF DRUG DEALING, AGGRAVATED POSSESSION OR CONSPIRACY SECOND WITH RESPECT TO THE HEROIN LOCKED IN KYLE’S BURIED SAFE.

Standard of Review

This Court reviews a denial of a motion for judgment of acquittal *de novo* “to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential elements of the crimes charged beyond a reasonable doubt.”⁴¹

Question Presented

Whether any rational trier of fact, viewing the evidence in the light most favorable to the State could find Dwayne guilty beyond reasonable doubt of Drug Dealing, Aggravated Possession and Conspiracy Second with respect to the heroin locked in Kyle’s buried safe when the State failed to provide sufficient evidence, circumstantial or otherwise, establishing a link between Dwayne and those drugs.⁴²

Argument

The State acknowledged that to prove Dwayne guilty of the heroin-related offenses, it had to prove that he knew the location of the heroin

⁴¹*White v. State*, 906 A.2d 82, 85 (Del. 2006).

⁴²A70-73, 110.

locked in Kyle's buried safe.⁴³ The State claimed it proved this knowledge with the 1-month old King Kong text found on the phone in Dwayne's car simply because King Kong was the name of one of the two brands of heroin locked in Kyle's buried safe. However, no context or circumstances existed that would have allowed a reasonable trier of fact to conclude that Dwayne knew the location of the heroin locked in Kyle's buried safe on April 13, 2016. Even assuming there was such evidence, the King Kong message, along with the other vague messages, failed to establish Dwayne's ability to exercise dominion and control over that heroin.

Drug Dealing And Aggravated Possession.

In Delaware, for the State to establish constructive possession, it must present evidence that the defendant:

(1) knew the location of the drugs; (2) had the ability to exercise dominion and control over the drugs; and (3) intended to guide the destiny of the drugs[.]⁴⁴

In our case, the jury was instructed as follows:

Constructive possession means the substance was within the defendant's reasonable control; that is, in or about the defendant's person, premises, belongings, or vehicle. In other words, the defendant had constructive possession over the substance if the defendant had both power and the intention at any given time to exercise control over the substance either

⁴³ A92.

⁴⁴ *White*, 906 A.2d at 86 (quoting *Hoey v. State*, 689 A.2d 1177, 1181 (Del. 1997)).

directly or through another person. Possession is proven if you find beyond reasonable doubt that the defendant had actual or constructive possession either alone or jointly with others.⁴⁵

The State argued that the stale King Kong message established that Dwayne constructively possessed Kyle's heroin on April 13, 2016 which, in turn, established Dwayne's guilt of the heroin-related offenses.⁴⁶ While circumstantial evidence can establish knowledge for purposes of constructive possession, "[i]nferences from circumstantial evidence are not limitless[.]"⁴⁷ Here, the circumstances do not rise to establishing beyond reasonable doubt that Dwayne knew the location of Kyle's heroin.

No drugs, paraphernalia, weapons or other contraband were found on Dwayne, in his car or in the room in which he stayed from time to time at 24 Gull Turn. There was no forensic or circumstantial evidence linking Dwayne to Kyle's buried safe or the contents locked inside. The State presented no evidence that any of the clothes in the 3 foot high⁴⁸ mountain which buried the locked safe even belonged to Dwayne. And, the only key to the safe was found in Kyle's jeans that were on a top shelf in Kyle's bedroom. In fact, these were the jeans that Kyle requested to and did wear when he was

⁴⁵ A105.

⁴⁶ A41, 95.

⁴⁷ *White*, 906 A.2d at 88.

⁴⁸ A57.

arrested and taken to police headquarters. And, none of the texts introduced by the State referred to the location of Kyle's heroin.

During deliberations, the jury made an inquiry that is insightful as to its thought process:

We are trying to obtain more information regarding, 'constructive possession' also specifically regarding 'power and reasonable control.' Additionally, does Count I only deal with the drugs, (heroin in the safe) specifically?⁴⁹

Both parties and the trial court agreed that the jury was to receive no further guidance than to be redirected to the jury instructions. This inquiry as to whether Count I only deals with the heroin in the safe reveals that the jury's subsequent conviction of Dwayne was likely based not on the content of the safe but erroneously on evidence introduced via text messages of potential dealing of other drugs.

The jury's inquiry also reveals its confusion as to Dwayne's ability to guide the destiny of the heroin locked in Kyle's buried safe. Assuming, *arguendo*, the State was able to establish his knowledge of the location of the heroin locked in Kyle's buried safe, no rational jury could find beyond a reasonable doubt that Dwayne exercised dominion and control over, or intended to guide the destiny of it. In fact, the circumstances in our case cut further against such a finding than they did in *White v. State* where this

⁴⁹ A106.

Court held that “[m]ere proximity to, or awareness of drugs is not sufficient to establish constructive possession.”⁵⁰

In *White*, police searched the home of the target of a drug investigation. The defendant, who was the target’s mother, was staying in the master bedroom for several weeks. Her belongings were in trash bags strewn about the bedroom floor. When confronted by police, she gave a false name. On her person and amongst her belongings, police found drugs and paraphernalia. However, police also found cocaine and money in a shoebox in the bedroom’s walk-in closet; drugs in a shoe in that closet; cocaine residue in the top dresser drawer; a homemade crack pipe in a smaller closet; a pot with untested, unidentified white residue in the kitchen sink; and a digital scale inside a food box in the kitchen.⁵¹ Ultimately, this Court concluded that the evidence supported a conclusion that the defendant was possibly aware of the drug operation in the house and/or was using drugs but not that she was a participant in the operation.⁵²

⁵⁰ *White*, 906 A.2d at 86 (citing *Holden v. State*, 305 A.2d 320 (Del. 1973) (finding, where, in a car, heroin was buried in container of Chinese food inside a paper bag and several small scales were also found and where a large amount of cash was found on the defendant, that mere proximity was not enough to convict for possession with intent to deliver)).

⁵¹ *White*, 906 A.2d at 84-85.

⁵² *Id.*

Here, Dwayne stayed at 24 Gull Turn from time to time. It was a “party house” where lots of people often stayed. Further, a pay stub revealed that Dwayne had a legitimate job earning a decent wage.⁵³ The State’s witness testified that he was not able to tell what type of drugs were being discussed in any of the purported drug-related texts on the phones that were not even confirmed to belong to Dwayne. Nor was there any mention of the source, brand or location of the drugs purportedly being discussed.⁵⁴ There was no evidence presented at trial providing more than mere suspicion that Dwayne participated in guiding the destiny of the drugs that were actually locked in the buried safe.

Mere suspicion, however strong, is insufficient for a criminal conviction. Even circumstantial evidence must give rise to inferences of more than mere suspicion. Viewing all the evidence in a light most favorable to the State, could not lead a rational jury to conclude that Dwayne exercised dominion and control over and intended to guide the destiny of the heroin locked in Kyle’s buried safe. Therefore, Dwayne’s convictions for Drug Dealing and Aggravated Possession must be reversed.

Conspiracy Second Degree.

A person is guilty of Conspiracy in the Second Degree when:

⁵³ A58.

⁵⁴ A78.

intending to promote or facilitate the commission of a felony, the person . . . (2) Agrees to aid another person or persons in the planning or commission of the felony or an attempt or solicitation to commit the felony; and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.⁵⁵

There is no evidence that Dwayne agreed to aid or abet Kyle in an operation to deal the drugs locked in Kyle's buried safe. There are no circumstances surrounding the King Kong text that support a conclusion of any agreement between Dwayne and Kyle.⁵⁶ Additionally, the State failed to establish that any of the purported drug-related Samsung texts referred to the heroin locked in Kyle's buried safe. Thus, no rational jury could have concluded beyond a reasonable doubt that Dwayne agreed to assist Kyle in dealing drugs locked in his buried safe. Therefore, Dwayne's conviction for Conspiracy Second Degree must be reversed.

⁵⁵ 11 *Del.C.* §512.

⁵⁶ See e.g. *Broomer v. State*, 126 A.3d 1110, 1115 (Del. 2015) (finding telephone conversations between two defendants revealed agreement to engage in particular drug transaction).

II. THE TRIAL COURT ERRED IN ADMITTING, WITHOUT PROPER AUTHENTICATION, WHAT THE STATE CLAIMED WERE TEXT MESSAGES SENT OR RECEIVED BY DWAYNE ON PHONES PURPORTEDLY BELONGING TO HIM.

Question Presented

Whether a trial court violates *D.R.E.* 901 (a) in allowing the sponsoring party to present text messages to the jury which have not been properly authenticated when that party fails to present any evidence that the phone belonged to the individual it claims or that the message is authored or received by the individual claimed by the proponent.⁵⁷

Standard and Scope of Review

This Court reviews evidentiary rulings “for abuse of discretion.”⁵⁸

Argument

Over Dwayne’s objection, the trial court allowed the State to introduce into evidence text messages that were not linked to Dwayne. The texts were from phones not confirmed to belong to Dwayne and there were no circumstances or testimony that corroborated speculation as to authorship of the texts. Thus, the State failed to properly authenticate any of the text messages.

⁵⁷ A24.

⁵⁸ *McNair v. State*, 990 A.2d 398, 401 (Del. 2010).

Here, the State offered the King Kong text message from the Acatel phone in an effort to prove that Dwayne had knowledge of the drugs locked in Kyle's buried safe. The State offered text messages from the Samsung phone in an effort to show that he was participating in an operation to deal the drugs locked in Kyle's buried safe. Thus, the messages were only relevant to the extent that the State could link them to Dwayne.⁵⁹

In Delaware, "authentication is a "condition precedent to admissibility" of evidence.⁶⁰ This standard requires the sponsoring party to present sufficient evidence "to support a finding that the matter in question is what its proponent claims."⁶¹ In *State v. Zachary*, the Superior Court articulated a standard for authentication of text messages

A person cannot be identified as the author of a text message based solely on evidence that the message was sent from a cellular phone bearing the telephone number assigned to that person because 'cellular telephones are not always exclusively used by the person to whom the phone number is assigned.' Thus, some additional evidence, 'which tends to corroborate the identity of the sender, is required.' Circumstantial evidence corroborating the author's identity may include the context or content of the messages themselves, such as where the messages 'contain[] factual information or references unique to the parties involved.'⁶²

⁵⁹ See, e.g., *Rodriguez v. State*, 273 P.3d 845, 849 (Nev. 2012) (finding State failed to provide sufficient evidence of authorship of text message).

⁶⁰ D.R.E. 901 (a).

⁶¹ *Id.*

⁶² *State v. Zachary*, 2013 WL 3833058 *2, Witham, R.J., (Del.Super. July 16, 2013) (quoting *Commonwealth v. Koch*, 39 A.3d 996 (Pa.Super. 2013) (finding proximity to phone not sufficient for authentication because

This Court subsequently articulated a similar standard in *Parker v. State* which addressed social media evidence and concluded that the proponent:

may use any form of verification available under Rule 901—including witness testimony, corroborative circumstances, distinctive characteristics, or descriptions and explanations of the technical process or system that generated the evidence in question—to authenticate a social media post. Thus, the trial judge as the gatekeeper of evidence may admit the social media post when there is evidence "sufficient to support a finding" by a reasonable juror that the proffered evidence is what its proponent claims it to be. This is a preliminary question for the trial judge to decide under Rule 104. If the Judge answers that question in the affirmative, the jury will then decide whether to accept or reject the evidence.⁶³

This standard was extended to the authentication of text messages in *Moss v. State* because “there exist similar claims that such evidence could be faked or forged,” or “questions as to the authorship of the messages if the transmitting electronic device could have been used by more than one person.”⁶⁴ The text messages in *Moss* were found to have been properly authenticated because they were surrounded by circumstances that supported the authorship claimed by the proponent.

“[g]lariously absent” from the record was “any evidence tending to substantiate that Appellant wrote the drug-related text messages” when there was no testimony as to who sent or received them and no contextual clues in them tending to reveal the identity of the sender).

⁶³ *Parker v. State*, 85 A.3d 682 (Del. 2014).

⁶⁴ *Moss v. State*, 2017 Del. LEXIS 271, *7-8 (June 28, 2017).

In *Moss*, the State presented fingerprints from the phone that matched the defendant. The State presented defendant's fingerprints found "on some of the seized drug evidence, which circumstantially connected him to the drug-related texts." And, the State "presented testimony explaining the technical system" that generated an extraction report of text messages.

In our case, the King Kong message had no contextual clues tending to reveal the identity of the sender.⁶⁵ And, it was sent about a month before Kyle's buried safe was seized. There was no evidence of the last time the phone was used. Dwayne never specifically admitted ownership of the phone.⁶⁶ Nor did he admit to ownership of the Samsung. Police were unable to confirm ownership of either of the phones. There was no eyewitness testimony that Dwayne ever used either phone.⁶⁷ There was no testimony from individuals who engaged in the text conversations at issue on the Samsung. And, significantly, there were no fingerprints or any other

⁶⁵ *Commonwealth v. Mosley*, 114 A.3d 1072 (Pa.Super. 2015) (no authentication of drug-related texts based, in part, on lack of reference to defendant in messages).

⁶⁶ Police assumed the phone belonged to Dwayne because they generically asked him if everything in his car belonged to him. They did not tell him at the time what they found in the car.

⁶⁷ *Id.* (no authentication of drug-related texts based, in part, on lack of corroborating testimony).

identifying marks linking Dwayne to the phones, to Kyle's buried safe or to the drugs locked in Kyle's buried safe.⁶⁸

Locating the phone near Dwayne along with an officer's speculation that Dwayne was the author or recipient of a text is not sufficient for authentication. Therefore, the texts should not have been admitted and Dwayne's convictions must now be reversed.

⁶⁸ See *People v. Watkins*, 25 N.E.3d 1189 (Ill.App.Ct.3d Dist. 2015) (finding lack of authentication where phone found in same house as defendant and near cocaine as there was no eyewitness testimony that phone belonged to or had been used by defendant, and there were no identifying marks on phone or phone's display screen to indicate that it belonged to or had been used by defendant).

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ALLOWED THE STATE TO INTRODUCE THE PURPORTEDLY DRUG-RELATED TEXT MESSAGES AS THEIR PROBATIVE VALUE WAS SUBSTANTIALLY OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

Question Presented

Whether the trial court abused its discretion when it allowed the State to introduce the purportedly drug-related text messages as their probative value was substantially outweighed by the danger of unfair prejudice.⁶⁹

Standard and Scope of Review

This Court reviews evidentiary rulings “for abuse of discretion.”⁷⁰

Argument

The State introduced text messages for the purpose of showing that Dwayne had knowledge of and participated in the dealing of the heroin locked Kyle’s buried safe. As discussed previously, the State failed to establish a link between the texts and Dwayne. However, assuming, *arguendo*, that such a link did exist, any link between the text messages and Dwayne’s purported possession and/or participation in the dealing of the drugs locked in Kyle’s buried safe is substantially outweighed by the danger of unfair prejudice. Thus, pursuant to *D.R.E.* 403, the messages should have been excluded.

⁶⁹ A24.

⁷⁰ *McNair v. State*, 990 A.2d 398, 401 (Del. 2010).

There was no reference in any of the texts to the residence, the buried safe or to heroin locked in the buried safe. In fact, the State's witness testified that he was unable to say what drugs or even what type of drugs were the subject of the texts.⁷¹ Thus, the evidence is speculative at best and "carries the potential for permitting the jury to draw unwarranted inferences. Where those inferences reflect adversely on the defendant" without establishing a link to the crime, "admissibility" of the speculative evidence "is barred because speculation creates prejudice, even apart from the weighing process required by *D.R.E.* 403."⁷² Speculation that Dwayne was involved in dealing the drugs locked in the buried safe based on the possibility that he may have been involved in dealing other drugs subjected him "to the same risk that impermissible character or bad act evidence may pose -- equating disposition with guilt."⁷³

Even if a jury did not conclude that the text revealed knowledge with respect to the charged offenses, the text "carrie[d] the risk that the jury may associate" past possible drug usage or sales with participation in a drug operation with Kyle.⁷⁴ In fact, the jury's inquiry as to whether the drug

⁷¹ See *Farmer v. State*, 698 A.2d 946, 948-949 (Del. 1997) (citing *Whitfield v. State*, 524 A.2d 13 (Del. 1987)).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

dealing charge applied only to the “heroin in the safe” highlights the risk as it existed in this case that its subsequent conviction of Dwayne was based not on the content of the safe but on potentially dealing other drugs.⁷⁵

The trial court abused its discretion when it failed to exclude the text messages because their probative value was substantially outweighed by the danger of unfair prejudice, they should have been excluded. Thus, Dwayne’s convictions must be reversed.

⁷⁵ A106.

IV. THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO INSTRUCT THE JURY THAT THE SOLE PURPOSE FOR WHICH IT COULD USE THE TEXT MESSAGES WAS TO DETERMINE WHETHER DWAYNE HAD KNOWLEDGE OF AND PARTICIPATED IN DEALING THE HEROIN LOCKED IN KYLE’S BURIED SAFE.

Question Presented

Whether the trial court committed plain error when it failed to instruct the jury that the sole purpose for which it could use the text messages was to determine whether Dwayne had knowledge of and participated in dealing the heroin locked in Kyle’s buried safe.⁷⁶

Standard and Scope of Review

This Court will reverse errors not raised below when, as in our case, they are “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.”⁷⁷

Argument

“When evidence is admitted for a limited purpose, *D.R.E.* 105 generally provides that ‘the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.’”⁷⁸ This Court will reverse when the trial court’s failure to give a limiting instruction, *sua sponte*, as to the purpose for which the jury must consider prior bad acts, is “so clearly

⁷⁶ *Del.Sup.Ct. Rule 8.*

⁷⁷ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁷⁸ *Weber v. State*, 547 A.2d 948, 961 (Del. 1988).

prejudicial to [the defendant's] substantial rights as to jeopardize the fairness and integrity of the trial process.”⁷⁹

In our case, the text messages were central to the State's case. In fact, the State relied on them heavily in its closing. As a result, the jury was tasked with navigating through proper and improper inferences starting from a 1-month old text to conclude Dwayne was guilty of possession and/or participation in dealing the heroin locked in Kyle's buried safe on April 13, 2016. Thus, without a limiting instruction, the jury was allowed to reach an erroneous guilty verdict through untethered propensity inferences. It is for this reason that an instruction was necessary to limit the jury's consideration to the proper purpose for which the evidence had been admitted.

Here, there was no valid strategic reason for trial counsel not to request a limiting instruction. Thus, in this case, the trial court's failure to, *sua sponte*, issue a limiting instruction was “so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.” Thus, Dwayne's convictions must be reversed.

⁷⁹ *Williams v. State*, 796 A.2d 1281, 1290 (Del. 2001).

V. THE ERRORS AT TRIAL CUMULATIVELY PREJUDICED DWAYNE AND DEPRIVED HIM OF A FAIR TRIAL.

Question Presented

Whether the preceding trial errors cumulatively deprived Dwayne of a fair trial.⁸⁰

Standard and Scope of Review

“[W]here there are several errors in a trial, a reviewing court must also weigh the cumulative impact to determine whether there was plain error from an overall perspective.”⁸¹

Argument

“Cumulative error must derive from multiple errors that caused actual prejudice.”⁸² Here, the text messages were central to the State’s case. Assuming, *arguendo*, this Court determines these messages are sufficient to allow a rational trier of fact to conclude that Dwayne constructively possessed the heroin locked in Kyle’s buried safe, their admission was, obviously, extremely damaging. Further, assuming this Court finds the trial court’s abuse of discretion in each of the previously cited evidentiary errors

⁸⁰ *Del.Sup.Ct. Rule 8.*

⁸¹ *Michael v. State*, 529 A.2d 752 (Del. 1987) (citing *Wright v. State*, 405 A.2d 685 (Del. 1979)).

⁸² *Morse v. State*, 120 A.3d 1, 9 (Del. 2015) (internal quotation marks omitted)

does not individually require reversal, it must conclude that their cumulative impact amounts to plain error requiring reversal of Dwayne's convictions.

CONCLUSION

For the reasons and upon the authorities cited herein, Dunnell's convictions must be reversed.

Respectfully submitted,

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