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Case Number 564,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE DUNNELL,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 564, 2017
	)	
v.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware
	)	
Plaintiff-Below,	)	
Appellee.	)	

STATE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: July 6, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

Dwayne Dunnell ("Dunnell") was arrested on April 13, 2016. (A1). On May 23, 2016, a New Castle County grand jury indicted Dunnell for Drug Dealing, Aggravated Possession of Heroin, Conspiracy Second Degree, Possession of a Firearm During the Commission of a Felony ("PFDCF"), Possession of a Deadly Weapon by a Person Prohibited ("PDWBPP"), Possession of Firearm Ammunition by a Person Prohibited, Possession of a Firearm by a Person Prohibited, Possession of Drug Paraphernalia, and Receiving a Stolen Firearm.[1] (A18-23). On November 23, 2016, Dunnell filed a Motion to Suppress (D.I. 41; A7), which the Superior Court denied on December 16, 2016. (D.I. 46; A8). Trial commenced on February 28, 2017, and on March 6, 2017, the Superior Court jury found Dunnell guilty of Drug Dealing, Aggravated Possession of Heroin, and Conspiracy Second Degree.[2]

On March 13, 2017, Dunnell filed a Motion for Judgment of Acquittal (D.I. 69; A11), and on May 31, 2017 Dunnell filed an Opening Memorandum of Law in Support of the Motion for Judgment of Acquittal. (D.I. 79; A13). The State filed a

[1] On February 28, 2017, the State entered a nolle prosequi on the Receiving a Stolen Firearm charge (A40), and, on the same date, the parties entered a stipulation that the PFBPP (Count VI) and PFABPP (Count VIII) charges would be severed. (B-18, 49) On March 6, 2017, a second trial was held, and the jury acquitted Dunnell of PFBPP (Count VI) and PFABPP (Count VIII). (*See State v. Dunnell*, Crim. A. No. 1604008485B; B-1-2).

[2] The jury acquitted Dunnell of PFDCF (Count IV), Possession of a Firearm by a Person Prohibited (Count X), and Possession of Drug Paraphernalia (Count XII). (D.I. 65; A11, 108).

response to the Motion on July 3, 2017, and on July 27, 2017, Dunnell filed a reply memorandum. (D.I. 84, 87; A14). On September 8, 2017, the Superior Court denied Dunnell's motion. (D.I. 93; A15; Op. Br., Ex.b-37 C).

On December 1, 2017, the Superior Court declared Dunnell a habitual criminal pursuant to 11 *Del. C.* § 4214(a). (D.I. 97; A15). The Superior Court sentenced Dunnell to an aggregate sentence of 10 years Level V, suspended after serving 7 years (pursuant to 11 *Del. C.* § 4214(a)), followed by probation.[3] (D.I. 98; Op. Br., Ex. D). Dunnell filed a timely notice of appeal, followed by an opening brief and appendix. This is the State's answering brief.

[3] The Superior Court merged the Drug Dealing and Aggravated Possession charges at sentencing.

SUMMARY OF THE ARGUMENTS

I. DENIED. THE SUPERIOR COURT PROPERLY DENIED DUNNELL'S MOTION FOR JUDGMENT OF ACQUITTAL. A RATIONAL TRIER OF FACT, VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, COULD FIND DUNNELL GUILTY, BEYOND A REASONABLE DOUBT, OF ALL THE ELEMENTS OF DRUG DEALING, AGGRAVATED POSSESSION OF HEROIN, AND CONSPIRACY SECOND DEGREE.

II. DENIED. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING DUNNELL'S MOTION IN LIMINE TO EXCLUDE TEXT MESSAGES. THE TEXT MESSAGES WERE PROPERLY AUTHENTICATED PURSUANT TO DELAWARE RULE OF EVIDENCE 901, AND THERE WAS SUFFICIENT CIRCUMSTANTIAL EVIDENCE PRESENTED FOR THE JURY TO CONCLUDE DUNNELL OWNED THE CELL PHONES AND SENT THE TEXT MESSAGES IN QUESTION.

III. DENIED. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DUNNELL'S TEXT MESSAGES PURSUANT TO DELAWARE RULE OF EVIDENCE 403. THE PROBATIVE VALUE OF THE EVIDENCE WAS NOT OUTWEIGHED BY THE DANGER OF UNFAIR PREJUDICE.

IV. DENIED. DUNNELL'S CLAIM OF FAILING TO REQUEST A LIMITING JURY INSTRUCTION, RAISED FOR THE FIRST TIME ON APPEAL, DOES NOT MERIT REVIEW.

V. DENIED. DUNNELL CANNOT ESTABLISH CUMULATIVE ERROR.

STATEMENT OF FACTS

On April 13, 2016, the New Castle County Police Department ("NCCPD") executed a search warrant at 24 Gull Turn, Newark, Delaware. (A45). Shortly after 6:00 a.m., the police knocked on the front door of the residence and ultimately forcibly entered the townhouse with a battering ram. (A45-46). Upon entering the home, the police discovered Dunnell and his cousin, Kyle Dunnell, ("Kyle") had barricaded all doors to the residence by placing chairs underneath the door handles to prevent them from opening.[4] (A46; B-24).

The police found Dunnell and Kyle on the second floor of the residence and took both of them into custody. (A46-47). The police first searched Dunnell's bedroom, in which they found a court document pertaining to Dunnell, his State of Delaware non-license identification card, two cell phones and $371 in various denominations.[5] The cell phones were an Apple Iphone and a Samsung phone. (A48).

The police located two additional cell phones, an Alcatel One Touch phone, and an LG phone, in Kyle's bedroom.[6] (A48-49). In a third unoccupied bedroom,

[4] According to Dunnell, all the doors of the residence were barricaded for "security" reasons. (B-20).

[5] Although Dunnell told the police he lived at 24 Gull Turn, Dunnell's identification card listed his residence as 14 Sentry Lane, Newark, Delaware, which was his mother's home. (A47).

[6] A bag of 15 ½ Oxycontin pills was also located in Kyle's bedroom. (B-22-23).

the police found a canvas laundry bag which contained a digital scale, used "to measure the amount of drugs that [drug dealers] are placing in the bags." (A49).

On the downstairs kitchen table, the police found a brown shoe polish style box containing a plastic bag, which contained another bag that held multiple pink glassine baggies – "typically used to store illegal narcotics." (A49). A blue nap sack style bag containing twenty-three live Remmington Shotgun shells was recovered from a closet directly across from the laundry room. (A50). In the laundry room, the police found: (a) a purple bag containing five shotgun shells; (b) a purple bag containing a locked safe; and (c) Dunnell's pay stub.[7] The police forcibly opened the safe.[8] (A51). Inside the safe was a second digital scale, a Glock nine-millimeter handgun loaded with 9 live rounds of ammunition, an extended magazine for the Glock containing 32 rounds of live ammunition, and 3,488 bags of heroin. (A51-53). The individual heroin baggies contained one of two distinctive stamps – "Hot Head" and "King Kong."[9] (A52-53).

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[7] There was "an abundance of clothing on the ground" in the laundry room, and the purple bag containing the safe was under "a mountain of clothes piled on top of that safe." (A50).

[8] After the safe had been forced open, the police located a key to the safe. NCCPD officer Thomas Bruhn got clothes for Kyle to wear to the police station. (A62). Kyle asked to wear a specific pair of jeans, and Officer Bruhn found the safe key in the coin pocket of the jeans. (A62). Officer Bruhn initially thought it was a car key, and left it in Kyle's bedroom. (A62).

[9] The stamps indicate a specific "brand" of heroin – drug dealers brand their product for sale. (A52-53).

The police searched a black Jeep Grand Cherokee and a silver Lexus in the driveway of the home. (A53). The Lexus was registered to Dunnell, and Dunnell told the police in a post-*Miranda* interview that the Lexus keys found during the search of the residence were his.[10] (A54). Dunnell told the police that all property in the Lexus belonged to him. (B-20, 26). The police seized a black Alcatel One Touch flip phone from the center console of the Lexus. (A53).

The police submitted all five recovered cell phones for data extraction. (B-20). The black Alcatel One Touch flip phone recovered from the Lexus was not compatible with the extraction software, so NCCPD Detective Eugene Gialliombardo manually reviewed the text messages and photographed those he believed relevant to the investigation. (B-20-21). Of note was an outgoing message which said "King Kong." (A54).

Detective Vincent Jordan ("Jordan") of the Wilmington Police Department ("WPD") reviewed the facts and circumstances of the Dunnell investigation and testified as an expert in illegal drug investigations. Detective Jordan's ultimate conclusion was that Dunnell possessed the 3,488 bags of heroin with the intent to deliver same.[11] (B-40). Detective Jordan based his conclusion on the following

[10] A key attached to the Lexus key fob opened the front door lock of 24 Gull Turn. (B-25).

[11] Jordan did not participate in the Dunnell investigation and had no previous knowledge of the case. (B-36).

facts: the heroin found in the safe had a street value of $5,000 to $6,000 -- not a quantity a drug user would possess or could afford (B-36) -- users generally possess a few bags of heroin up to a "stick" of heroin, but not 26 sticks of heroin, as recovered at Dunnell's residence (B-36); a drug dealer will barricade their home to slow down the police in entering a residence, and to protect the drug dealer from being robbed (B-36); the presence of a firearm with drugs is evidence of a drug dealer protecting their product from being robbed by a rival dealer (B-36); the existence of multiple cell phones is indicative of drug dealing because drug dealers will use one cell phone as their personal phone, and carry "burner" or "flip" phones to transact business (B-36); and drug dealers do not carry all of their product to a drug deal – they only take enough supply to fill the current order, and keep the remainder in a safe location. (B-48).

Jordan concluded the text messages on Dunnell's seized cellphones evidenced intent to deliver heroin. (B-40). Jordan believed the text "King Kong" found on the black Alcatel flip phone seized from Dunnell's Lexus was an "advertisement" where a drug dealer notifies customers of the specific brand of heroin for sale.[12] (B-37). Texts from the Samsung phone recovered from Dunnell's bedroom evidenced

[12] In Jordan's experience working with confidential informants and arresting drug dealers, "drug dealers will send out texts to individuals or groups referring to the stamp that they have." (B-37). Some heroin users "will request certain types of stamps. The heroin they purchased from someone gives them what they believe is a very good high. Then they ask for the same stamp all the time." (B-37).

buyers requesting and begging Dunnell for heroin.[13] (B-37-38; State's Ex. 34). The texts evidenced drug dealers referring buyers to one another, a common practice in the drug trade. (B-37). Dunnell's Apple Iphone evidenced drug dealing conversations and involving "Dreads" in drug transactions. (B-38-39; State's Ex. 35). Kyle's nickname was "Dreads." (B-25). Kyle's phones contained text messages indicating active participation in drug transactions. (B-45).

On October 12, 2016, Kyle pled guilty to Drug Dealing (Tier 3 quantity), PFDCF and Conspiracy Second Degree. (B-29; Def. Ex. 14). The Superior Court ordered a presentence investigation. (B-32). In his plea Kyle admitted to conspiring with Dunnell to commit the crimes of Drug Dealing and/or Aggravated Possession of Heroin. (B-30). On March 2, 2017, Kyle testified for the defense, and he did not exonerate Dunnell. (B-30, 32).

[13] Incoming messages were addressed to "Buck." (B-37). Dunnell has several known nicknames: "Buck," "Buck Gambler" and "Big Homey." (B-25).

ARGUMENT

I. THE SUPERIOR COURT PROPERLY DENIED DUNNELL'S MOTION FOR JUDGMENT OF ACQUITTAL.

QUESTION PRESENTED

Whether the Superior Court erred in concluding that the jury, viewing the evidence in the light most favorable to the State, could find Dunnell guilty of Drug Dealing, Aggravated Possession of Heroin and Conspiracy Second Degree.

STANDARD AND SCOPE OF REVIEW

The scope of review from the denial of the motion for judgment of acquittal is *de novo*.[14] The standard of review is "whether *any* rational trier of fact, viewing the evidence in the light most favorable to the State, could find [the defendant] guilty beyond a reasonable doubt of all the elements of the crime."[15]

MERIT OF THE ARGUMENT

Dunnell claims the State could not prove that Dunnell "knew the location of the heroin locked in Kyle's buried safe." (Op. Br. at 8). Dunnell further argues the State "failed to establish [his] ability to exercise dominion and control over that heroin." (Op. Br. at 9). Dunnell's arguments are unavailing.

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[14] *Brown v. State*, 967 A.2d 1250, 1252 (Del. 2009) (citing *Priest v. State*, 879 A.2d 575, 577 (Del. 2005); *McNulty v. State,* 655 A.2d 1214, 1216 n. 8 (Del. 1995)).
[15] *Id.*

Dunnell made a Motion for Judgment of Acquittal at the close of the State's evidence, claiming that although the State presented "some evidence of some type of drug activity potentially involving Mr. Dunnell, Mr. Dwayne Dunnell, and there's some reference to Dread, and Dread has been associated as a nickname with Mr. Kyle Dunnell, it does not necessarily indicate that there was any type of knowledge on my client's part of what was contained in a concealed and locked safe." (A70). Dunnell argued Kyle Dunnell "took affirmative steps to have [the heroin] away from Dwayne Dunnell," possessing the heroin in an "opaque container that was locked." (A70). Dunnell claimed the evidence was insufficient to suggest "there was knowledge of that the safe even being there." (A71).

The Superior Court denied the motion for judgment of acquittal, concluding there was "sufficient evidence in which all this case could be submitted to the jury." (A72). In reviewing the evidence, the court concluded:

> In my view, this case, the evidence presented is that there were drugs and a gun found in defendant's home. So was ammunition, drug paraphernalia in that safe. It was in a common area of the home equally accessible to both occupants in the home. [The safe] was hidden under a stack of clothing that has not been tied to any one person in the home. Although the defense points out that the evidence could have been hidden from Dwayne, its equally possible that Dwayne was hiding the evidence from other people. So, again, this is not a process of weighing the evidence. Just that there is some evidence on which the court can conclude Dwayne was aware of the safe.
>
> In addition, there are text messages that are circumstantial evidence that the defendant was engaged in drug dealing near the time the search warrant was executed and the drugs were discovered. Within approximately the month leading up to the search warrant being

> executed, there are a number of text messages going back and forth that the expert witness testified are indicative of drug dealing, including in particular one specific text message that references the exact type of drug found in the safe. There are also text messages from which a jury could conclude the defendant was engaged in drug dealing specifically with Kyle Dunnell, who has pleaded guilty to conspiring with the defendant to engage in drug dealing. (A72-73).

Additionally, the Superior Court opined that possession of heroin could be actual or constructive. The heroin was in or about Dunnell's belongings, person and premises, and were within his reasonable control. (A73). The State could establish constructive possession by offering "evidence that defendant had the power or intent to exercise control either directly or through another person." (A73). In addition, possession of the drugs could be alone or with another person. (A73). The Superior Court, in viewing the evidence in the light most favorable to the State, concluded a reasonable juror could find Dunnell had possession or control of the heroin in the safe, and denied Dunnell's motion. (A73).

On May 13, 2017, Dunnell renewed the Motion for Judgment of Acquittal (A111-116), and on May 30, 2017, Dunnell filed a Memorandum of Law in Support of his Motion for Judgment of Acquittal. (A117-128). Dunnell argued the "jury improperly weighed and considered the text message evidence presented at trial and used it to convict [him] of the general drug dealing referenced in the text messages." (A125). Dunnell argued that the text messages predated his arrest on April 13, 2016, as the "text message evidence specifically involved the time periods of March 12,

2016 and April 6, 2016 to April 12, 2016."[16] (A125). Dunnell claimed the jury was confused by or improperly weighed the evidence because he was acquitted of PFDCF but found guilty of Drug Dealing and Aggravated Possession of Heroin. (A126-127).

On September 13, 2017, the Superior Court denied Dunnell's Motion for Judgment of Acquittal. (Op. Br., Ex. C). The court concluded:

> Considering the evidence in the light most favorable to the State, the evidence was sufficient on every element of the crimes of Drug Dealing, Aggravated Possession, and Conspiracy Second Degree. That evidence included the barricaded doors in the home; the safe's location in the common area of the home; the relatively large amount of cash found in Dunnell's bedroom; the recovery of five cell phones, two of which were in Dunnell's bedroom and one of which, a "burner phone," was in a car registered to Dunnell; the reference to "King Kong" in a text message and "King Kong" stamped on bags of heroin; text messages referring to Dunnell working with Kyle in response to his requests for heroin; and other text messages suggesting Dunnell engaged in the drug trade with his cousin, who on the day of the search had physical possession of the key to the safe.
> (Op. Br., Ex. C at 10).

The Superior Court properly determined that "[a] rational trier of fact could have concluded that Dunnell knew of the heroin in the safe and had the power and intent to exercise control over the drugs."[17] (Op. Br., Ex. C at 11).

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[16] The police executed the search warrant at Dunnell's residence just after 6:00 a.m. on April 13, 2016. (A45). All text messages referenced at trial were sent or received within a month of execution of the search warrant, and all but one occurred in the week prior to April 13, 2016.

[17] The Superior Court concluded the fact the jury found him not guilty of the PFDCF charges was not an inconsistent verdict – "unlike the drug charges, the State did not

Dunnell argues on appeal the State failed to demonstrate actual or constructive possession of the heroin found in the safe in his laundry room. (Op. Br. at 8-9). He claims there is no evidence that he conspired to sell heroin i.e., that there was no evidence he agreed to aid or abet Kyle in a drug dealing operation to distribute the drugs in the safe. (Op. Br. at 14). He is incorrect. The direct and circumstantial evidence, as well as all reasonable inferences that flow therefrom, demonstrate Dunnell actually or constructively possessed the heroin for sale, and he and Kyle conspired to do so.

When ruling on a motion for judgment of acquittal under Superior Court Criminal Rule 29(a), the trial judge must consider the evidence and all legitimately drawn inferences from the point of view most favorable to the State.[18] The court must determine whether any rational trier of fact viewing the evidence in the light most favorable to the State could find a defendant guilty beyond a reasonable doubt of all the elements of the crime.[19] The court does not distinguish between direct and circumstantial evidence of the defendant's guilt.[20] To sustain a conviction, the State is not required to disprove every possible innocent explanation it may be given for

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have other evidence, direct or circumstantial, that Dunnell had knowledge of the firearm in the safe or could exercise control over it." (Op. Br., Ex. C at 11).

[18] *Vouras v. State*, 452 A.2d 1165, 1169 (Del. 1982) (citing *Conyers v. State*, 396 A.2d 157 (Del. 1958)).

[19] *Flonnory v. State*, 893 A.2d 507, 537 (Del. 2006) (citing *Priest*, 879 A.2d at 577).

[20] *Monroe v. State*, 28 A.3d 418, 430-31 (Del. 2011) (citing *Hardin v. State*, 844 A.2d 982, 989 (Del.2004) (quoting *Cline v. State*, 720 A.2d 891, 892 (Del. 1998))).

the evidence, even in a purely circumstantial case.[21] The jury is the sole judge of the credibility of the witnesses and is responsible for resolving conflicts in testimony.[22]

The jury convicted Dunnell of Drug Dealing, Aggravated Possession of Heroin, and Conspiracy Second Degree. The elements of Drug Dealing in Dunnell's case were: (1) on or about the 13th Day of April, 2016, (2) Dunnell did possess with intent to deliver, (3) 4 grams or more of heroin. (A18). For Aggravated Possession of Heroin are: (1) on or about the 13th day of April, 2016, (2) Dunnell did knowingly possess (3) 5 grams or more of heroin. (A18). As to Conspiracy Second Degree the State was required to prove (1) on or about the 13th day of April, 2016, (2) when intending to promote the felony or felonies of Drug Dealing or Aggravated Possession of Heroin, (3) Dunnell did agree with Kyle Dunnell that one, the other, or both of them wound engage in Drug Dealing or Aggravated Possession of Heroin (or an attempt to do so), and (4) one or both of them committed an overt act in pursuance of the conspiracy. (A19).

The Delaware Code defines "possession" as follows:

> "Possession," in addition to its ordinary meaning, includes location in or about the defendant's person, premises, belongings, vehicle, or otherwise within the defendant's reasonable control.[23]

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[21] *Hoey v. State*, 689 A.2d 1177, 1181 (Del. 1997) (citing *Williams v. State*, 539 A.2d 164, 167 (Del. 1988).
[22] *Pryor v. State*, 453 A.2d 98, 100 (Del. 1992).
[23] 16 *Del. C.* § 4701(36).

This provision is satisfied "by a showing that the defendant was in constructive possession of the illegal substance at the time of the alleged offense."[24] To establish constructive possession, "the State 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."[25] A *prima facie* case of constructive possession may be established if there is "evidence linking the accused to an ongoing criminal operation of which possession is a part."[26] The State may prove constructive possession exclusively through circumstantial evidence.[27]

The police executed a search warrant at 24 Gull Turn, Dunnell's residence. Dunnell had a key to the front door of the home on his Lexus key ring, and the Lexus in the driveway was registered to Dunnell. Dunnell and his cousin barricaded all the doors to 24 Gull Turn for one purpose – to provide security to their drug dealing operation, to slow down police entry if a search warrant were executed, and/or to prevent being robbed.[28]

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[24] *Hoey*, 689 A.2d at 1181 (citing *Holden v. State,* 305 A.2d 320, 322 (Del. 1973)).
[25] *Id.* (citing *McNulty,* 655 A.2d at 1217).
[26] *Id.*
[27] *Id.* (citing *Skinner v. State*, 575 A.2d 1108, 1121 (Del. 1990)).
[28] The police attempted to secure Dunnell's residence after executing the search warrant, but because the doors were originally locked and barricaded, the door could not be secured. (B-20). Dunnell advised securing the home was now unnecessary and it was fine to leave the house unlocked. (B-20). He advised the home was barricaded for "security," which was no longer a concern. (B-20).

The safe was found in a common area of the residence – the laundry room – a room which also contained Dunnell's pay stub. A large pile of clothes was on the floor of the laundry room, and a juror could reasonably conclude some, if not all of those clothes, belonged to Dunnell. A juror could also reasonably conclude Dunnell or his cousin, or the both of them, knew the drugs were in the safe, and hid the safe under clothes in the laundry room to avoid discovery of the heroin.

The police seized $371 and two cell phones from Dunnell's bedroom. A third, "burner phone," was located in the center console of Dunnell's Lexus. The police located two additional cell phones in Kyle's bedroom, and a digital scale in the third, unoccupied bedroom. Possessing multiple phones evidences drug dealing, and a dealer will generally use a "burner phone" to conduct transactions and communicate with drug purchasers. The text message "King Kong" sent from the burner phone found in Dunnell's Lexus was sent by Dunnell as an "advertisement" to customers -- identifying the specific product he was offering for sale. A large quantity of heroin stamped with "King Kong" was recovered from the safe.

The value and quantity of heroin seized was consistent with drug distribution, and Detective Jordan testified that Dunnell possessed the heroin seized from the safe with the intent to distribute it. Jordan's expert opinion was amply supported by the evidence. Drug dealers barricade their homes. Possessing a firearm with drugs provides an element of protection for drug dealers, not necessarily from the police,

but from rival drug dealers and other criminals. Drug dealers possess significant amounts of U.S. currency. Drug dealers do not carry all of their product to a drug deal, but only enough to fulfill their current order and keep the remainder in a safe location. Dunnell's barricaded residence, containing a locked, hidden safe in a common area is as safe a place as any to secrete 3,488 bags of heroin for distribution.

Text messages recovered on Dunnell's phones sent and received within one week of the execution of the search warrant between Dunnell, heroin buyers and his cousin Kyle, or "Dreads," revealed heroin solicitations, sales, and Dunnell's intent to deliver heroin. (State's Ex. 33, 34, 35). Kyle pled guilty to conspiring with Dunnell to possess and/or deliver the heroin found in the safe. A juror could reasonably conclude Dunnell's text communications regarding heroin distribution referred to selling a portion of the 3,488 bags of heroin. The Superior Court did not err in denying Dunnell's Motion for Judgment of Acquittal.

ARGUMENT

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN DENYING DUNNELL'S MOTION IN LIMINE TO EXCLUDE TEXT MESSAGES.

QUESTION PRESENTED

Whether the Superior Court abused its discretion in denying Dunnell's Motion in Limine to exclude text messages.

STANDARD AND SCOPE OF REVIEW

This Court reviews a trial judge's evidentiary rulings for an abuse of discretion.[29] "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."[30]

ARGUMENT

Dunnell claims that the Superior Court "allowed the State to introduce into evidence text messages that were not linked to Dwayne." (Op. Br. at 15). He argues the texts were not from phones "confirmed to belong to Dwayne[,] and there were no circumstances or testimony that corroborated speculation as to authorship of the

[29] *Parker v. State*, 85 A.3d 682, 684 (Del. 2014) (citing *Manna v. State*, 945 A.2d 1149, 1153 (Del. 2008), *Pope v. State*, 632 A.2d 73, 78–79 (Del. 1993)).
[30] *Id.*, (citing *Culp v. State*, 766 A.2d 486, 489 (Del. 2001) (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994))).

texts." (Op. Br. at 15). Dunnell argues the Court abused its discretion in holding the State satisfied DRE 901(a). Dunnell's claim is without merit.

On December 30, 2016, Dunnell filed a Motion in Limine to Preclude the State from admitting evidence of text messages, claiming the State could not show Dunnell was the owner of the cell phones seized, there was no evidence on the phones demonstrating a "sufficient indicia of authorship" by Dunnell as to the actual text messages, and would not be able to produce any witness "who will provide a competent foundation that Defendant Dunnell is the author or intended recipient of these text messages." (D.I. 48, A25-A29).

The State argued authentication under Delaware Rule of Evidence ("DRE") 901 was a "lenient burden," and the State would be able to prove "a rational basis from which the jury may conclude the exhibit did, in fact, belong to [Dunnell]."[31] (D.I. 54, A32-37). The text message regarding "King Kong" was recovered from an Alcatel One Touch cell phone located in Dunnell's Lexus, Dunnell told the police the car, and all the property in the car, was his, and he possessed a key to the car. Dunnell never disavowed ownership of the phone even after the police told him what was recovered and seized from the vehicle. The State argued that the relevant issue

[31] *Guy v. State*, 913 A.2d 558, 564 (Del. 2006) (quoting *Whitfield v. State*, 524 A.2d 13, 16 (Del. 1987); see also *Mills v. State*, 2016 WL 152975, at * 1 (Del. Supr. Jan. 8, 2016).

was not authentication, which lenient burden it had met, but what weight, if any, the jury should give to the admissible text message evidence.

On February 22, 2017, the Superior Court denied the Motion in Limine, concluding there existed "indicia that is sufficient to support a finding by a reasonable juror that the proffered evidence is what it claims to be." (D.I. 60; B-5). Conclusive proof of authorship is not required – only that there exists "prima facie evidence from which a jury could reasonably conclude the communications were authored by the person identified by the State." (B-5).

The Superior Court concluded the three cell phones attributed to Dunnell were sufficiently linked to Dunnell to satisfy DRE 901(a). (B-8). As to the Apple Iphone (State's Ex. 2), it was serviced by the same phone number Dunnell gave to the police as his phone number, it was found in his bedroom, and the Apple ID bore a nickname attributed to Dunnell – "Buck Gamble." (B-8). The phone also included "text messages referring to [Dunnell] by name and to which he responds – well to which the person who's sending the message responds." (B-10-11). The Samsung phone, found in Dunnell's bedroom, contained text messages referring to Dunnell by his nickname, "Buck." (B-10). The Alcatel flip phone found in the Lexus was attributed to Dunnell because in a post-*Miranda* interview, Dunnell told the police all property in the car was his. (B-9). Further, the Alcatel flip phone contained a message "King Kong," sent Saturday, March 12, and heroin stamped "King Kong" was "found in

the safe in defendant's home." (B-10). The next message on the flip phone was "Okay, can I get some help tonight cuz?" and Kyle, charged as a co-defendant, "is defendant's cousin and also was found in the home where the safe was present with the King Kong heroin." (B-10). The court concluded these messages, and Dunnell's possession and ownership of the phone, established "sufficient circumstantial evidence to the extent any more is required to authenticate the Alcatel flip phone as belonging to [Dunnell]." (B-10).

The Superior Court concluded the State sufficiently attributed each of the three phones to Dunnell, holding:

> I think under the case law as I understand it in the state and the purpose of authentication generally and the relatively low burden it is in order to authenticate evidence, that merely linking – I don't want to say "linking," but linking a phone to a particular person through both physical evidence and other evidence is enough to authenticate the messages sent from that phone as being sent by the person who owned the phone and that everything else goes to the weight of the evidence. But that in this case there are other – there is other circumstantial evidence that I've identified that gets us even further past the authentication line. (B-11).

In regard to authentication, Delaware Uniform Rule of Evidence Rule 901 provides:

> (a) General provision. -- The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.[32]

[32] D.R.E. 901(a)

This Court recently considered the authentication requirement related to the admissibility of text messages,[33] recognizing that "text messages may be authenticated using any means available in D.R.E. 901."[34] A proponent can authenticate text messages by testimony from "a custodian of the cell phone company" or "testimony by a witness with knowledge, by circumstantial evidence of distinctive characteristics, or through expert testimony or comparison with authenticated examples."[35]

As the Superior Court found, there was sufficient evidence presented for the jury to conclude Dunnell owned the Alcatel cell phone and that he sent the outgoing text message "King Kong." The phone was found in the center console of Dunnell's Lexus. Dunnell told the police, during his interview, that all property in the Lexus was his. When advised the police seized the phone from the Lexus, Dunnell did not disavow ownership of the phone. The text message "King Kong" was also the stamp on the heroin found in the safe in his home. The Iphone and the Samsung phones were seized from Dunnell's bedroom. Dunnell told the police the Apple Iphone was his phone, and the phone number Dunnell provided as his came back to the Iphone. The Superior Court did not abuse its discretion in concluding the State properly authenticated the evidence.

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[33] *Moss v. State*, 2017 WL 2806269, at * 3 (Del. Supr. June 28, 2017).
[34] *Id.*
[35] *Swanson v. Davis*, 2013 WL 3155827, at *4-5 (Del. Supr. June 20, 2013).

ARGUMENT

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING DUNNELL'S TEXT MESSAGES PURSUANT TO DRE 403.

QUESTION PRESENTED

Whether the Superior Court abused its discretion in admitting Dunnell's text messages pursuant to DRE 403.

STANDARD AND SCOPE OF REVIEW

This Court reviews a trial judge's evidentiary rulings for an 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]

MERIT OF THE ARGUMENT

Dunnell claims that if the State were able to establish a link between the texts and himself, "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." (Op. Br. at 20).

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[36] *Parker v. State*, 85 A.3d 682, 684 (Del. 2014) (citing *Manna*, 945 A.2d at 1153, *Pope*, 632 A.2d at 78–79).
[37] *Id.*, (citing *f*, 766 A.2d at 489) (quoting *Lilly*, 649 A.2d at 1059).

Dunnell argues the text evidence was "speculative at best." (Op. Br. at 21). Dunnell's claim is meritless.

On December 30, 2016, Dunnell filed a Motion in Limine seeking suppression of the text messages based on claims of improper authentication, hearsay, and that the probative value of the evidence was substantially outweighed by a danger of unfair prejudice. (A24-A29). After ruling the text message evidence was admissible either because they were not hearsay or were admissible under DRE 801(d)(2)(a), (b) or (e),[38] the Superior Court concluded:

> Which leads to the 403 analysis and the defendant's contention that the evidence, particularly the King Kong message, but also other evidence that the defendant was engaged in some type of drug-dealing activity in the days leading up to the discovery of the evidence in the safe in the house where the defendant was living would be unfairly prejudicial. There's a difference, of course, between prejudice and unfair prejudice, which is all the evidence at least in theory that the State is going to offer is prejudicial comes in because its also probative, but 403 applies to evidence that is unfairly prejudicial.
>
> The issue in this case is going to be whether the defendant had knowledge – at least one of the issues in the case will be whether the defendant had knowledge of what was in the safe. And the evidence the State seeks to introduce and that the defendant wishes to exclude are text messages that the State will attempt to show were either references to the drugs that were found in the safe or back in forth which the defendant was engaging in drug dealing and sending people to see Kyle Dunnell or "Dread" in order to obtain drugs. That is significant circumstantial knowledge of the defendant's – let me rephrase. Significant circumstantial evidence of the defendant's knowledge of what was in the safe. All the text messages at issue occurred

[38] Although the Superior Court transcript refers to both DRE 801 and 802 (B-12-13), it is apparent that any references to DRE 802 were actually references to DRE 801 and its sub-parts.

> approximately in the month leading up to the discovery of the drugs, some merely a day or two before it. And although they are not conclusive proof that the defendant knew what was in the safe, they are probative of that.
>
> In contrast, the argument, at least as I understand it, is that the jury may lead to – may lead the jury to conclude that just because the defendant was engaged in some type of drug activity, he must have known what was in the safe. I don't think that is unfairly prejudicial. In fact, I think it is directly relevant and, therefore, I would – the evidence is admissible under 403 because it's the danger of unfair prejudice, to the extent any of the prejudice is unfair, does not substantially outweigh the probative value of the evidence.

(B-12-13).

Where a defendant challenges the admissibility of certain evidence, this Court limits itself to determining whether the trial court abused its discretion in admitting the challenged evidence.[39] In reviewing the trial court's evidentiary rulings, "the trial judge is in a unique position to evaluate and balance the probative and prejudicial aspects of the evidence."[40]

D.R.E. 403 provides that a trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence."[41] Dunnell's claim of unfair prejudice is not supported by the record. The State established a link

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[39] *Floudiotis v. State*, 726 A.2d 1196, 1202 (Del. 1999) (citing *Lilly*, 649 A.2d at 1059.

[40] *Id.*, quoting *Smith v. State*, 560 A.2d 1004, 1007 (Del. 1989).

[41] DRE 403(b).

demonstrating Dunnell's ownership of the three cell phones. The text message "King Kong" was a reference to the stamp on the heroin found in the safe, and Dunnell's advertisement of specific heroin for sale. Text messages between Dunnell and prospective purchasers on the phones revealed that buyers were asking Dunnell for heroin, specifically a "b", or bundle of heroin. In the messages Dunnell also refers buyers to his cousin, "Dreads," to obtain heroin. All of the text messages were temporally limited to within one month of the heroin seizure, and the majority are within a week of April 13, 2016, the day the heroin was seized. As the Superior Court decided, the messages were significant circumstantial evidence which demonstrate an intent to distribute heroin. The Superior Court did not abuse its discretion by concluding the probative value of the text messages was not outweighed by the danger of unfair prejudice.

ARGUMENT

IV. DUNNELL'S CLAIM OF FAILURE TO REQUEST A LIMITING INSTRUCTION, RAISED FOR THE FIRST TIME ON APPEAL, DOES NOT MERIT REVIEW.

QUESTION PRESENTED

Whether the Superior Court committed plain error in admitting evidence of Dunnell's text messages without providing the jury a limiting instruction.

STANDARD AND SCOPE OF REVIEW

This Court generally declines to review contentions not raised below and not fairly presented to the trial court for decision.[42] This Court may excuse a waiver, however, if it finds plain error requiring review in the interests of justice.[43]

MERITS OF THE ARGUMENT

For the first time on appeal, Dunnell claims the Superior Court committed plain error by failing to provide a limiting instruction regarding the text message evidence. Dunnell now argues, for the first time on appeal, that the text messages showed "prior bad acts" that were "admitted for a limited purpose," and, in the absence of a limiting instruction, the jury "was allowed to reach an erroneous guilty verdict through untethered propensity inferences." (Op. Br. at 23-24). Dunnell is

[42] Del. Supr. Ct. R. 8; *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).
[43] *Id.*

mistaken.

When deciding the Motion in Limine, the Superior Court noted that the State sought to admit text message evidence that were either references to the drugs found in the safe or communications which showed Dunnell was engaging in drug dealing and sending people to see Kyle or "Dread" to obtain drugs. These text messages did not reference prior bad acts, but were circumstantial evidence demonstrating Dunnell's knowledge of brand of the heroin in the safe found in a common area of his residence, and an ongoing illegal heroin distribution scheme. The evidence the State sought to submit assisted in establishing Dunnell's intent to deliver heroin and a conspiracy to distribute heroin with his cousin. Dunnell has not demonstrated error, and the interests of justice do not require this Court's review.

ARGUMENT

V. DUNNELL CANNOT ESTABLISH CUMULATIVE ERROR.

QUESTION PRESENTED

Whether the alleged errors at trial, when considered cumulatively, were so prejudicial as to require reversal.

STANDARD AND SCOPE OF REVIEW

This Court generally declines to review contentions not raised below and not fairly presented to the trial court for decision.[44] This Court may excuse a waiver, however, if it finds plain error requiring review in the interests of justice.[45]

MERITS OF THE ARGUMENT

Dunnell argues, for the first time on appeal, that he is entitled to reversal based on cumulative error at trial. This Court has recognized that cumulative error may be the basis for reversing a conviction, even when one error, standing alone, would not be the basis for reversal.[46] Harmless errors, even when added together, may nevertheless remain harmless.[47] Cumulative error cannot merely be the result of

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[44] Del. Supr. Ct. R. 8; *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).
[45] *Id.*
[46] *See Wright v. State*, 405 A.2d 685, 690 (Del. 1979).
[47] *See Michael v. State*, 529 A.2d 752, 765 (Del. 1987).

multiple harmless errors, but must derive from errors that caused actual prejudice.[48]

Here, none of Dunnell's claims resulted in prejudicial error. As such, he cannot prevail on his cumulative error claim.

[48] *Michaels v. State*, 970 A.2d 223, 231 (Del. 2009).

CONCLUSION

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

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Date: July 6, 2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DWAYNE DUNNELL,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 564, 2017
	)	
vi.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	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 Times New Roman 14-point typeface using MS Word.

2. This brief complies with the type-volume requirement of Rule 14(d)(i) because it contains 6,921 words, which were counted by MS Word.

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

/s/ Martin B. O'Connor
Martin B. O'Connor (No. 3528)
Deputy Attorney General

DATE: July 6, 2018

CERTIFICATE OF SERVICE

The undersigned, being a member of the Bar of the Supreme Court of Delaware, hereby certifies that on this 6th day of July, 2018, he caused one copy of the attached *State's Answering Brief* to be delivered electronically via File&Serve to:

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