EFiled: Jun 20 2019 08:45AM EDT
Filing ID 63380915
Case Number 564,2018

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAIQUAN BORDLEY,	)	
	)	
Defendant Below-Appellant,	)	**No. 564, 2018**
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-Appellee.	)	

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

STATE'S ANSWERING BRIEF

John Williams (#365)
Deputy Attorney General
Department of Justice
102 West Water Street
Dover, DE 19904-6750
(302) 739-4211 (ext. 3285)
JohnR.Williams@delaware.gov

DATE: June 20, 2019

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

CASES **Page**

STATUTES AND OTHER AUTHORITIES

NATURE AND STAGE OF THE PROCEEDINGS

Appellee, the State of Delaware, generally adopts the Nature and Stage of the Proceedings as contained in Appellant Daiquan Bordley's April 15, 2019 Opening Brief.

This is the State's Answering Brief in opposition to Bordley's direct appeal.

SUMMARY OF ARGUMENT

I. DENIED. Whether evaluated under the plain error or de novo standard of review, Bordley can establish no prosecutorial misconduct concerning potential defense witness Christopher Gartner–Hunter.

There was no defense objection at trial concerning witness Gartner–Hunter, so the claim has been waived unless Bordley can demonstrate plain error. Del. Supr. Ct. R. 8. Gartner-Hunter never testified so it is unknown what helpful defense evidence the witness could have provided about conduct following the fatal shooting. Bordley has failed to establish anything that would "have affected the outcome of the trial." Morales v. State, 133 A.3d 527, 532 (Del. 2016). Thus, Bordley has demonstrated no plain error.

Even conducting a de novo review utilizing the four factor tests of Hughes v. State, 437 A.2d 559, 571 (Del. 1981), and Hunter v. State, 815 A.2d 730, 738 (Del. 2002) there is no basis for relief. This was not a close case. What happened after the fatal shooting was not a central issue. No action apart from the witness colloquy was required by the trial judge. Finally, the prosecutor's conduct was not repetitive.

II. DENIED. By stating that he had "no opposition" to the telephone text messages (A-244), defense counsel at trial waived any objection to the

evidence. A waived claim may not be reviewed on appeal even for plain error. Even if not waived, the text messages were sufficiently authenticated and their admission as State's Exhibit # 25 at the bench trial (A-244) was proper. The conclusory assertion of a State Constitutional violation also results in a waiver of that claim.

III. DENIED. Bordley has demonstrated no plain error in the trial judge's consideration of four defense exhibits admitted over the prosecution's objection. (A-371-74). In his final verdict the trial judge said that he considered all the evidence in reaching his decision. (A-400). Bordley has presented no evidence that this was not the case. It was disputed whether Zhyhee Harmon even wrote the four prison notes (A-134-37, 365-71), and Harmon's incriminatory testimony that Bordley fatally shot the victim (A-90) was supported by the trial testimony of eyewitness Chelsea Braunskill. (A-231-32).

STATEMENT OF FACTS

Chelsea Braunskill and Daiquan T. Bordley were students at Delaware State University in Dover who were also partners in a marijuana sale business. (A-222-23, 339, 346). Zhyhee Harmon was a marijuana customer of Bordley (A-74), and Harmon knew that Bordley and Braunskill sold marijuana together. (A-76). Sometimes Braunskill was present when Harmon purchased marijuana from Bordley. (A-77).

In March 2016 Bordley asked Harmon to get him a gun for Braunskill. (A-75-76). Braunskill, who was 5' 2" (A-329) had previously been robbed. (A-113-14). Harmon sold Bordley a .380 Cobra handgun (State's Exhibit # 22). (A-76, 78). After the gun sale, Harmon saw the weapon in Bordley's car. (A-79).

Alexis Golden was a college roommate of Chelsea Braunskill. (A-139). Golden knew that Braunskill sold marijuana and that her roommate kept the drugs in a book bag. (A-165). At the August 2018 Kent Superior Court nonjury trial, Golden testified that the defendant Daiquan Bordley was a fellow student in her college math class. (A-139)

On March 29, 2016, Braunskill was sitting in Bordley's car at the Persimmon Tree Apartments in Dover. (A-225). The two were smoking marijuana and discussing setting up a robbery. (A-225). Previously, Braunskill had purchased marijuana from Dontray Hendricks in high school and when she first started

college. (A-223-24). In February 2016 Braunskill sold Hendricks an ounce of marijuana, but Hendricks complained about the poor quality of the product and that it was a gram short. (A-224).

While sitting in Bordley's car on March 29, 2016, Braunskill and Bordley saw a picture of Hendricks in possession of marijuana and money on Snapchat. (A-226). Hendricks' marijuana appeared to be of good quality, and Bordley said that is the individual they would rob. (A-226).

According to Braunskill, the original plan was that she, Bordley, and Hendricks would travel together to Port Mahon to smoke marijuana on March 29, and later Zhyhee Harmon and another man would appear and pretend to rob the three visitors. (A-225). As Braunskill was telephone texting with Hendricks during the day on March 29, 2016, the robbery plan changed. (A-227).

In the new plan Braunskill asked to purchase marijuana from Hendricks and said that she wanted to smoke the contraband with Hendricks that evening. (A-227). Hendricks was to pick Braunskill up at her college dormitory that evening and after the two smoked marijuana together they would go to Applebee's restaurant to eat. (A-227-28). Before leaving the college campus on the evening of March 29, 2016, Chelsea Braunskill invited her roommate Alexis Golden to come along to smoke marijuana. (A-140, 229). The two college coeds left campus about 10:30 to 11 P.M. on March 29. (A-229). While travelling in Hendricks' car to Port

Mahon to smoke marijuana that evening, Braunskill was telephone texting to Bordley and asking where Hendricks should park his car. (A-229-30). Alexis Golden was sitting in the back seat of Hendricks' car during the trip to Port Mahon. (A-142).

After arriving at the Port Mahon pier on the Delaware Bay (A-26-27), the three individuals initially sat in Hendricks' car rolling blunts to smoke the marijuana. (A-230). Although it was chilly and windy that evening, the three travelers exited Hendricks' car and went up on the fishing pier to smoke marijuana. (A-143, 231).

That same evening Zhyhee Harmon and his brother-in-law, Christopher Gartner-Hunter, travelled in Daiquan Bordley's car to Port Mahon. (A-82-83). During the trip Bordley, the driver, was phone texting Chelsea Braunskill. (A-82-84).

At Bordley's 2018 bench trial, Braunskill testified that after she, Golden and Hendricks had been on the Port Mahon pier 10 or 15 minutes a second car pulled up and parked near Hendricks' vehicle. (A-231). According to Harmon, Bordley exited his car and approached the Port Mahon pier. (A-86). Both Golden (A-143-44), and Braunskill (A-231) heard footsteps approaching the pier that evening. Golden said three other people came onto the pier. (A-144-45). Braunskill stated

that Bordley walked straight toward Hendricks (A-231-32), and Harmon saw Bordley and Hendricks wrestling. (A-87).

According to three of the eyewitnesses who testified at Daiquan Bordley's murder trial (Harmon, Golden and Braunskill), Bordley shot Hendricks. (A-90, 150-55, 232). At Bordley's trial, Chelsea Braunskill testified: "He walked straight up to him and shot him." (A-232). Following the shooting, Harmon said that he, Golden and Braunskill ran off the pier. (A-91). Harmon stated that his brother-in-law Christopher Gartner-Hunter threw Hendricks' car keys to the two women (A-91, 146, 235), and took Hendricks' sneakers. (A-91, 206).

Braunskill testified that she and Golden walked back on the pier after the 3 men drove away. (A-235). Next, Bordley telephoned Braunskill and instructed her to drive Hendricks' car away before the cops came. (A-235). Following Bordley's telephone instructions (A-92-93, 147, 235), Braunskill drove Hendricks' car to Persimmon Tree Apartments and left the car keys in the vehicle. (A-236). After leaving Hendricks' car, Braunskill and Golden got in Bordley's car with the other two men. (A-93, 148, 236).

Harmon threw Hendricks' sneakers in the trash, and the next day Bordley wanted Harmon to sell the gun used to shoot Hendricks. (A-94-95, 240). By this time Bordley had learned that Hendricks was dead. (A-95).

In the afternoon of March 30, 2016, the Delaware State Police found Hendricks' body face down on the Port Mahon fishing pier. (A-27-28). Hendricks had $460 currency in his hand. (A-44). He was fatally shot in the center of his chest. (A-67). Hendricks' 2010 Hyundai Sonata was subsequently located at the Persimmon Tree Apartments. (A-48-49). The State Police utilized a search warrant to seize Braunskill's cell phone (A-315), and the police interviewed both Braunskill (A-315-16) and Golden (A-318-19) about the Hendricks' murder. Golden also accompanied the State Police to the Port Mahon pier and pointed out the position of the various people. (A-319-20).

Testifying in his own defense at his 2018 nonjury murder trial, Daiquan Bordley admitted that he sold marijuana (A-339), but denied having a gun or shooting Hendricks. (A-349). According to Bordley, Zhyhee Harmon asked Bordley to drive him to Port Mahon to make a marijuana sale. (A-353). Once at Port Mahon, Harmon and Gartner-Hunter left Bordley's car. (A-356-57). Bordley testified that if he had known there was going to be a robbery, he would not have been involved. (A-359-60). When his two passengers returned to his car, Bordley claimed that Harmon had a pair of shoes. (A-358).

I. INFORMING THE JUDGE IN A BENCH TRIAL THAT A DEFENSE WITNESS MAY WISH TO CONSULT INDEPENDENT LEGAL COUNSEL BEFORE TESTIFYING IS NOT PROSECUTORIAL MISCONDUCT

QUESTION PRESENTED

Did the prosecutor's reminding the presiding judge in a nonjury trial to advise the defense witness that he may wish to consult independent legal counsel before testifying because the witness was still a potential suspect in the murder prosecution (A-332) constitute prosecutorial misconduct?

STANDARD AND SCOPE OF REVIEW

In the absence of any defense trial objection that the State engaged in prosecutorial misconduct by attempting to intimidate defense witness Christopher Gartner-Hunter (A-331-37), the belated contention may now only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; Morales v. State, 133 A.3d 527, 529 (Del. 2016); Spence v. State, 129 A.3d 212, 218 (Del. 2015); Benson v. State, 105 A.3d 979, 983 (Del. 2014); Baker v. State, 906 A.2d 139, 150 (Del. 2006).

MERITS OF THE ARGUMENT

When Bordley's trial counsel called Christopher Gartner-Hunter as the second defense witness at the 2018 Superior Court bench trial (A-330), the prosecutor stated: "Your Honor, before we begin testimony with this witness, I believe it would be appropriate for the Court to do a colloquy with him. He is still a

suspect in this case, and he has not been arrested at this time." (A-332). Although defense counsel wanted to limit the perspective witness' testimony to what happened after Dontray Hendricks was fatally shot, Bordley's trial counsel did concede that Gartner-Hunter ". . . was involved in this." (A-334).

The Superior Court Judge then asked Gartner-Hunter, "Have you consulted with counsel concerning any matters which you may be called to testify today?" (A-335). The witness replied: "At one point in time I did." (A-336). The judge in this nonjury proceeding then informed Gartner-Hunter, ". . . I don't know what your involvement would be. But if there is a risk you are involved and there is a possibility that based on your testimony that you could be charged. Do you understand that?" (A-336). Gartner-Hunter replied that he did wish to consult independent legal counsel, and he did not testify at Daiquan Bordley's murder trial. (A-336).

On direct appeal new counsel for Bordley claims that the unobjected to in court exchange involving potential witness Gartner-Hunter amounted to prosecutorial misconduct in three respects: (1) the timing of the prosecutor's request that the trial judge conduct a colloquy with the potential witness; (2) the prosecutor's statement that Gartner-Hunter "is still a suspect in this case" occurred in the presence of the witness; and (3) the prosecutor's statement that Gartner-Hunter was still a suspect in the March 30, 2016 murder "seems far-fetched."

(April 15, 2019 Opening Brief at 23-24).

There was no prosecutorial misconduct in this nonjury trial. To the extent trial defense counsel did not raise any of these claims in the Superior Court, Bordley on appeal can demonstrate no plain. To be plain the error "must have affected the outcome of the trial." Morales v. State, 133 A.3d 527, 532 (Del. 2016) (quoting Keyser v. State, 893 A.2d 956, 959 (Del. 2006). Since Gartner-Hunter never testified there is no record of what favorable post-shooting evidence the witness could have offered. At trial defense counsel represented that he intended to limit his questioning of Gartner-Hunter ". . . to just the ride back from the pier that evening . . . ." (A-334). The "ride back from the pier" is conduct after Hendricks had been fatally shot at the Port Mahon pier and would not contradict the other trial evidence that Bordley shot Hendricks. To the extent a plain error review applies to some or all of the three claims of prosecutorial misconduct, Bordley has the burden of persuasion in demonstrating plain error. See Brown v. State, 897 A.2d 748, 753 (Del. 2006); Stevenson v. State, 709 A.2d 619, 633 (Del. 1998).

Even if reviewed de novo, as Bordley argues on appeal, the murder defendant cannot establish prosecutorial misconduct entitling him to a new trial because one potential witness about events following the fatal shooting after being warned of the potential risk by the trial judge (A-336) elected to consult with independent counsel before deciding whether or not to testify. (A-336). Applying the multiple factor

test devised by this Court in Hughes v. State, 437 A.2d 559, 571 (Del. 1981), and Hunter v . State, 815 A.2d 730, 738 (Del. 2002), Bordley's new counsel on direct appeal cannot establish any prosecutorial misconduct concerning witness Gartner-Hunter.

First, it was not improper to request that the trial judge conduct a colloquy with the potential defense witness. (A-332). This was entirely appropriate under the circumstances where Gartner-Hunter did accompany the defendant Bordley to the homicide scene and was present when Hendricks was fatally shot.

Second, whether Gartner-Hunter was or was not present in the courtroom when the prosecutor said "He is still a suspect in this case." (A-332) is of no consequence because Gartner-Hunter was subsequently advised by the trial judge of the same information ["But if there is a risk you are involved and there is a possibility that based on your testimony that you could be charged." (A-336)] Even if the witness had been removed from the courtroom during the colloquy application, Gartner-Hunter was ultimately going to receive the same information when the trial judge informed him why he may wish to consult with counsel before testifying. (A-336). Even before Bordley's 2018 trial, Gartner-Hunter was concerned enough about his criminal involvement in the Hendricks murder to have consulted legal counsel. (A-335-36). The possibility that he was a suspect in the Port Mahon criminal case was no surprise to Gartner-Hunter.

Finally, while the prosecutor is being accused of being disingenuous in saying Gartner-Hunter is still a suspect, there is no proof of this. Two other nonshooters in the case had already been charged and had entered into plea bargains. The prosecutor's focus in the case was not solely upon defendant Bordley.

Bordley can establish no plain error or even any prejudice because it is unknown what Gartner-Hunter may have said on the witness stand. All that is known is defense counsel's trial representation that he intended to limit his questioning of witness Gartner-Hunter "to just the ride back from the pier that evening . . . . (A-334). That limited testimony did not involve the central issue in the murder prosecution (whether Bordley was the one who shot Hendricks), and it is not otherwise apparent how evidence about post-shooting conduct would benefit Bordley.

Accusing a prosecutor of misconduct "has potentially serious implications." Kurzmann v. State, 903 A.2d 702, 714 (Del. 2006). Here, the defense accusation is unwarranted and is unsupported by any evidence. Bordley's new counsel does not explain why if Gartner-Hunter accompanied Bordley and Zhyhee Harmon, Gartner-Hunter's brother-in-law, to the isolated pier and was present when Bordley and Hendricks struggled (A-88-89), Gartner-Hunter would not be a potential suspect. Harmon testified at trial that Gartner-Hunter did throw Hendricks' car keys to

Braunskill and Alexis Golden after Hendricks was shot. (A-91).

Zhyhee Harmon pled guilty to possession of a firearm by a person prohibited (PFBPP) and second degree conspiracy in this case. (A-99). Chelsea Braunskill pled guilty to second degree murder and second degree conspiracy in the Hendricks homicide. (A-240). Gartner-Hunter was present at the March 30, 2016 fatal shooting of Hendricks, and it was not far-fetched to think that Gartner-Hunter was still a potential suspect in August 2018. Gartner-Hunter accompanied Bordley to the homicide scene and obtained Hendricks' car keys after the victim was fatally shot.

This was not a close case. Both Zhyhee Harmon (A-90), and Chelsea Braunskill (A-232) testified at trial that Bordley shot Hendricks. While less definite in her trial testimony (A-152-54), witness Alexis Golden in her prior statement to the police did identify Bordley as the shooter. (A-150-51). The trial judge in announcing his verdict pointed to the same incriminatory evidence and noted ". . . that three of the participants at the pier testified that the defendant pulled the trigger in close quarters after a struggle or tussle on the pier in the staged robbery." (A-402).

Second, the omission of Gartner-Hunter's testimony about what happened after the five individuals left the pier following the fatal shooting of Hendricks is not a central issue in the case. The important question in the case was who shot

Hendricks, not what happened to Hendricks' car keys and sneakers after the murder.

Third, there were no steps taken by the trial judge because there was no prosecutorial misconduct to be remedied. Suggesting a colloquy with the witness about the need to consult independent counsel before testifying (A-332-33) was entirely proper. Thereafter, the trial judge's colloquy with Gartner-Hunter (A-335-36) was appropriate. Any reasonable independent defense counsel would advise Gartner-Hunter to avoid giving incriminating evidence against himself and to decline to testify in Bordley's defense. Thus, the result of Gartner-Hunter not testifying is hardly unexpected.

Finally, the prosecutor did not engage in any repetitive improper conduct in this case. Accordingly, Bordley has established none of the four factors evaluated by this court in Hughes v. State, 437 A.2d 559, 571 (Del 1981), and Hunter v. State, 815 A.2d 730, 738 (Del. 2002) for determining possible prosecutorial misconduct. See Kurzmann v. State, 903 A.2d 702, 708-09 (Del. 2006). See also Kirkley v. State, 41 A.3d 372, 376 (Del. 2012). As this court has noted, "The phrase 'prosecutorial misconduct' is not a talismanic incantation, the mere invocation of which will automatically lead to a reversal." Kurzmann, 903 A.2d at 713.

There was no prosecutorial misconduct concerning possible defense witness Christopher Gartner-Hunter whether this claim is evaluated under the de novo or

plain error standard of review.

II. THE DEFENSE WAIVED ANY OBJECTION TO THE TELEPHONE TEXT MESSAGES

QUESTION PRESENTED

Did the defense waive any objection to the authentication of telephone text messages between the accused and a co-defendant by not objecting to their admission? (A-244).

STANDARD AND SCOPE OF REVIEW

Whether defense counsel's statement that he had no objection to admission of telephone text messages between a prosecution witness and the accused (A-244) constitutes a waiver is a question of law subject to de novo appellate review. See Redden v. State, 150 A.3d 768, 772 (Del. 2016); Hoskins v. State, 102 A.3d 724, 728 (Del. 2014); Ploof v. State, 75 A.3d 811, 820 (Del. 2013); Burrell v. State, 953 A.2d 957, 960 (Del. 2008).

MERITS OF ARGUMENT

On the second day of Daiquan Bordley's Kent County Superior Court nonjury murder trial (August 8, 2018), the State called Chelsea Braunskill as a prosecution witness. (A-221-312). Braunskill was a student at Delaware State University (A-222), who had previously pled guilty to second degree murder and second degree conspiracy in the March 30, 2016 fatal shooting of Dontray

Hendricks. (A-240). Braunskill was serving a 20 year sentence at the time of co-defendant Bordley's 2018 bench trial. (A-240).

During witness Braunskill's direct examination the State offered as evidence a series of telephone text messages between Braunskill and defendant Bordley. (A-244). Defense counsel for Bordley stated: "Your Honor, we have no opposition to a list of text messages between Ms. Chelsea Braunskill and someone else." (A-244). Without defense objection the telephone text messages were admitted into evidence as State's Exhibit # 25. (A-244). Thereafter, Braunskill identified the Exhibit as "It's text messages between the defendant and I [sic]." (A-246).

In this direct appeal new counsel for Bordley argues that the telephone text messages identified by witness Braunskill were never properly authenticated under D.R.E. 901, and that their admission as State's Exhibit # 25 violated Bordley's Federal and State Constitutional rights. (April 15, 2019 Opening Brief at 27-30). Bordley concedes that this issue was "not presented at trial," but the authentication contention should, nonetheless, be reviewed on appeal for plain error. (Opening Brief at 27). See Del. Supr. Ct. R. 8.

Bordley is incorrect. Any belated claim that the telephone text messages were never properly authenticated and their admission into evidence at the bench trial violated the accused's Constitutional rights has been waived by trial defense

counsel who affirmatively stated that "we have no opposition" to the evidence and may not now be reviewed on direct appeal even for plain error.

The reason for this appellate procedural posture is that there is a difference between waiver and plain error review. Bullock v. State, 775 A.2d 1043, 1061 (Del. 2001) (Walsh, J., dissent) ("There is a conceptual difference between reviewing a forfeited error and an error that has been waived. . . . the plain error standard is intended to correct errors that are forfeited, not those that are waived . . .") (quoting United States v. Olano, 507 U.S. 725, 733-34 (1993)). "Plain error 'assumes oversight,' resulting in error jeopardizing the fairness of the trial. [citations omitted] A claim of plain error does not lie by a party to salvage a trial tactic that has backfied." Judkins v. State, 1990 WL 38263, at * 1 (Del. Feb. 26, 1990).

This distinction between waiver based upon forfeiture and plain error premised on counsel's oversight has repeatedly been recognized by this court in deciding whether or not an appellate claim may be reviewed for plain error. See e.g., Williams v. State, 34 A.3d 1096, 1098 (Del. 2011); Robinson v. State, 3 A.3d 257, 261 (Del. 2010) ("Plain error assumes oversight."); Owens v. State, 2010 WL 2977938, at * 2 (Del. July 29, 2010); Stevens v. State, 3 A.3d 1070, 1076-77 (Del. 2010); McCullough v. State, 2010 WL 2696534, at * 2 (Del. July 8, 2010); Adkins v. State, 2010 WL 922765, at * 2, n. 15 (Del. Mar. 15, 2010); Johnson v. State, 983

A.2d 904, 923-925 (Del. 2009); Wright v. State, 980 A.2d 1020, 1023 (Del. 2009); Czech v. State, 945 A.2d 1088, 1097-98 (Del. 2008).

Even if not waived (A-244), Bordley cannot carry his burden of proof to establish plain error in the admission of the telephone text messages. The Delaware State Police used a search warrant to retrieve the text messages from Braunskill's cell phone. (A-18). In court Braunskill was able to identify the phone text messages. (A-246). This evidence is sufficient to satisfy the authentication requirement of D.R.E. 901 that the matter in question is what its proponent claims. See Griffith v. State, 2003 WL 1987915, at * 3 (Del. Apr. 28, 2003).

"The burden of authentication is easily met. The State must establish a rational basis from which the [trier of fact] could conclude that the evidence is connected with the defendant. The link need not be conclusive. An inconclusive link diminishes the weight of the evidence but does not render it inadmissible." Cabrerea v. State, 840 A.2d 1256, 1264-65 (Del. 2004). Witness Braunskill testified that the exhibit was text messages between Braunskill and defendant Bordley. (A-246). This was sufficient evidence authentication under D.R.E. 901.

Lastly, the appellate claim of a violation of Del. Const. Art. I, § 7 is merely conclusory and is insufficient to establish a State Constitutional violation. See Ortiz v. State, 869 A.2d 285, 290-91 * n. 4 (Del. 2005); Sykes v. State, 953 A.2d 261, 266 n. 5 (Del. 2008) ("Sykes's conclusory assertion that his rights under the

Delaware Constitution have been violated results in his waiving the State constitutional law aspect of this argument."); Jackson v. State, 990 A.2d 1281, 1288 (Del. 2009).

III. THERE IS NO EVIDENCE THAT THE JUDGE IN THIS NONJURY TRIAL DID NOT CONSIDER ALL THE EVIDENCE

QUESTION PRESENTED

Is the nonmention of notes that the alleged author denied writing (A-135-37) in the trial judge's verdict (A-398-404) prove the trial judge did not consider the evidence?

STANDARD AND SCOPE OF REVIEW

In the absence of any trial court objection, a claim that notes the defense offered as impeachment evidence were not considered by the trial judge in his verdict is waived and the contention may now only be reviewed on appeal for plain error. Del. Supr. Ct. R. 8; Whittle v. State, 77 A.3d 239, 243 (Del. 2013); Damiani-Melendez v. State, 55 A.3d 357, 359 (Del. 2012); Dougherty v. State, 21 A.3d 1, 3 (Del. 2011).

MERITS OF ARGUMENT

On the first day of this Superior Court nonjury murder trial, Zhyhee Harmon appeared as the second prosecution witness. (A-73-137). Harmon testified that Daiquan Bordley shot the victim Dontray Hendricks. (A-90). During defense cross-examination of Harmon the witness testified that he did not recall passing notes to defendant Daiquan Bordley when the two were incarcerated. (A-134-37).

When the accused Daiquan Bordley testified in his own defense on the fourth

day of the bench trial, the defense attempted to admit 4 notes that Bordley claimed he received in prison from Harmon. (A-365-71). The State objected to the 4 notes on the basis of hearsay. (A-371). Following a discussion with counsel (A-371-74), the Superior Court Judge admitted the 4 notes as Defense Exhibits # 13-16, after the defense agreed that it was "not offering these notes for the truth." (A-373-74).

Even though the disputed notes were admitted into evidence as Defense Exhibits # 13-16 (A-374), Bordley complains on appeal that the August 15, 2018 Superior Court verdict (A-398-404) makes no mention of the 4 notes. (Opening Brief at 36). This contention was never raised in the Superior Court; thus, the argument may now only be reviewed for plain error. Del. Supr. Ct. R. 8.

To be plain, the error must affect substantial rights, generally meaning that it must have affected the outcome of the trial. United States v. Olano, 507 U.S. 725, 732-34 (1993); Wainwright v. State, 504 A.2d 1096, 1100 (Del.), cert. denied, 479 U.S. 869 (1986). An unobjected to error amounts to plain error when it is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process." Damiani-Melendez v. State, 55 A.3d 357, 359 (Del. 2012) (quoting Wainwright, 504 A.2d at 1100). See also Dougherty v. State, 21 A.3d 1, 3 (Del. 2011). "Such error occurs where there are material defects apparent on the face of the record that (1) are basic, serious and fundamental in their character, and (2) clearly deprive an accused of a substantial right or show manifest injustice."

Sudler v. State, 2013 WL 6858417 (Del. Dec. 26, 2013) at * 1. In demonstrating that a forfeited error is prejudicial, the burden of persuasion is on the defendant. Olano, 507 U.S. at 734; Brown v. State, 897 A.2d 748, 753 (Del. 2006); Stevenson v. State, 709 A.2d 619, 633 (Del. 1998).

Bordley has not carried his burden of persuasion in demonstrating any plain error in the trial court's consideration of the evidence or the final verdict. (A-398-404). Although the trial judge specifically stated in announcing his verdict, "I have considered all direct and circumstantial evidence and drew the necessary and reasonable inferences from the evidence." (A-400), Bordley chooses to disbelieve this statement because the verdict in this bench trial makes no mention of the disputed Harmon notes. (A-398-404).

Bordley has not demonstrated how the Harmon notes which were admitted into evidence (A-374) reasonably affected the outcome of the trial. While Harmon did testify that Bordley shot Hendricks (A-90), later prosecution witness Chelsea Braunskill offered similar incriminatory trial testimony that Bordley was the shooter. (A-231-32). Even if Harmon's testimony was completely disregarded, there was still sufficient other evidence to convict Bordley of the murder. Under these circumstances, the defense has demonstrated no plain error in the trial judge's consideration of the 4 alleged Harmon notes.

The context of this decision in a bench trial is also important. Bordley is

asking this court to speculate that the trial judge did not consider evidence he admitted (A-374) because the 4 prison notes are not specifically mentioned in the verdict. (A-398-404). In a bench trial the judge is presumed to have based his verdict only on the admissible evidence. See Burke v. State, 1997 WL 139813, at * 2 (Del. Mar. 19, 1997); Kurzmann v. State, 903 A.2d 702, 709 (Del. 2006). Whether mentioned or not in a nonjury verdict, the trial judge is presumed to have based his decision upon the admissible evidence.

CONCLUSION

The judgment of the Superior Court should be affirmed.

John Williams (#365)
JohnR.Williams@delaware.gov
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
(302) 739-4211, ext. 3285

Dated: June 20, 2019

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAIQUAN BORDLEY,	)	
	)	
Defendant Below-	)	**No. 564, 2018**
Appellant,	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below-	)	
Appellee.	)	

AFFIDAVIT OF SERVICE

BE IT REMEMBERED that on this 20th day of June 2019, personally appeared before me, a Notary Public, in and for the County and State aforesaid, Mary T. Corkell, known to me personally to be such, who after being duly sworn did depose and state:

(1) That she is employed as a legal secretary in the Department of Justice, 102 West Water Street, Dover, Delaware.

(2) That on June 20, 2019, she did serve electronically the attached State's Answering Brief properly addressed to:

Julianne E. Murray, Esquire
Law Offices of Murray, Phillips & Gay
215 East Bedford Street
Georgetown, DE 19947

Mary T. Corkell

Mary T. Corkell

SWORN TO and subscribed
Before me the day aforesaid.

Devera B Scott
Notary Public

Devera B. Scott, Esquire
NOTARIAL OFFICER
Pursuant to 29 Del.C. § 4323(a)(3)

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAIQUAN BORDLEY,	)	
	)	
Defendant Below-	)	**No. 564, 2018**
Appellant,	)	
v.	)	
	)	
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 Roman 14-point typeface using Micrsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 4802 words, which were counted by Microsoft Word 2016.

John Williams

John Williams (#365)
JohnR.Williams@delaware.gov
Deputy Attorney General
Delaware Department of Justice
102 West Water Street
Dover, Delaware 19904-6750
(302) 739-4211, ext. 3285

Dated: June 20, 2019