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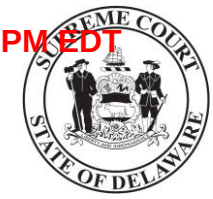

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAI'YANN WHARTON, Defendant Below, Appellant. v. STATE OF DELAWARE Plaintiff Below, Appellee.	:	No. 548, 2019 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE I.D. NO. 1705016524 A&B

APPELLANT'S OPENING BRIEF

FILING ID 65667131

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Dated: June 1, 2020

TABLE OF CONTENTS

TABLE OF CITATIONS

Caselaw

Delaware Rules

NATURE OF PROCEEDINGS

On May 30, 2017, Dai'yann Wharton was indicted on Murder in the First Degree, Gang Participation, and firearm-related offenses in connection with the March 28, 2017 shooting of Yaseem Powell.[1] Mr. Wharton was named, along with co-defendants Benjamin Smith, Isaiah Baird, and Therion Reese, as being members of a gang known as "Shoot to Kill" ("STK").[2] The State's theory of the case was that Yaseem Powell, a member of a rival gang known as "Only My Brothers" ("OMB"), was targeted because of an ongoing feud with STK.[3] Although each defendant was charged with Gang Participation, only Mr. Wharton and Mr. Smith were implicated in the murder of Mr. Powell.[4]

Initially, the State sought to try the defendants in pairs.[5] However, the State later agreed to sever the defendants and grant each a separate trial.[6] With the consent of the State, Mr. Wharton waived his right to a jury and elected for a bench trial.[7] The Honorable Jan R. Jurden presided over Mr. Wharton's trial, which began on June 19, 2019 and concluded on June 24, 2019.[8] The following day, the Court

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[1] A1 (Dkt. at 1).
[2] A1 (Dkt. at 2); A24–A38; A233; A238.
[3] A76–A78.
[4] A30 (Count XII); A35 (Count XXIII).
[5] A67–A71; A84–A86
[6] A10 (Dkt. at 51)
[7] A12 (Dkt. at 60, 68).
[8] A13 (Dkt. at 69).

returned its verdict.[9] Mr. Wharton was found guilty of Murder in the First Degree, Possession of a Firearm During Commission of a Felony, Conspiracy in the First Degree, Possession of a Firearm By a Prohibited Juvenile, and Carrying a Concealed Deadly Weapon.[10]

Because he was a juvenile at the time of the offense, Mr. Wharton did not face a mandatory life sentence.[11] Instead, on December 5, 2019, the Court sentenced Mr. Wharton to 23-years of unsuspended Level 5 time, followed by decreasing levels of supervision.[12]

This is his Opening Brief.

[9] A13 (Dkt. at 69); A296–A299.
[10] A297–A298.
[11] A306–A307.
[12] A17–A23; A326–A329.

SUMMARY OF THE ARGUMENT

I. The Superior Court abused its discretion by allowing the State to introduce into evidence messages hidden within a co-defendant's cell phone extraction, the contents of which amounted to a confession by Mr. Wharton. Although the State disclosed this particular evidence through the normal course of discovery, due to the sheer volume of data dumped on defense counsel, the prosecutor pledged—one year prior to trial—to specifically delineate the relevant cell phone evidence. The State failed to identify those highly incriminating messages until the eve of trial and further misrepresented that it would not use the cell phone evidence at trial. The admission of these messages substantially prejudiced Mr. Wharton's right to a fair trial.

STATEMENT OF FACTS

On March 28, 2017, the Wilmington Police Department responded to reports of shots fired in the area of 2300 North Claymont Street.[13] When Officer Brenda Merced arrived on scene, she discovered Yaseem Powell laying on the ground and immediately began chest compressions after detecting a "faint pulse".[14] As she rolled him over, a cell phone fell out of Mr. Powell's pocket.[15] Despite Officer Merced's life-saving efforts, Mr. Powell could not be revived; an autopsy later determined the cause of death to be a gunshot wound to the head.[16]

From the crime scene, police collected Mr. Powell's cellphone and seven (7) 9-millimeter shell casings, which were discovered about 175 feet north of Mr. Powell's body.[17] The contents of Mr. Powell's cell phone were extracted, revealing text messages he sent to another OMB gang member minutes before the shooting occurred.[18] In one of those messages, Mr. Powell communicates that he is "walking

[13] A154–A156.
[14] A155.
[15] A155.
[16] A167.
[17] A177–179.
[18] A167.

behind the ops."[19] But video surveillance showed that Mr. Powell was, in fact, the one being followed.[20]

Cameras positioned on various buildings in the area of the shooting capture two individuals following Mr. Powell for several blocks before he is shot.[21] At trial, the undisputed evidence established that Mr. Wharton and his co-defendant, Benjamin Smith, were the two individuals following Mr. Powell.[22] Although the shooting was recorded on a camera owned by the Cathedral of Fresh Fire, the video quality was so poor that the identity of the shooter cannot be discerned.[23] Whether Mr. Smith or Mr. Wharton pulled the trigger would become one of the central issues at trial.

The second issue—witness credibility—was inextricably intertwined with the first, as Mr. Smith took the stand and declared Mr. Wharton the shooter.[24] Mr. Smith ultimately agreed to cooperate with the prosecution and, in exchange, the State

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[19] A220. At trial, the State called their Chief Investigating Officer, Detective Robert Fox, to establish that "ops" is short for the opposition, meaning a rival gang or rival gang member.
[20] A230–A231.
[21] A167–A173; A230–A231.
[22] A240–A241 (Mr. Smith identifies himself and Mr. Wharton on the video surveillance); A290 ("there is not an argument that's being made here that Mr. Wharton was not present at the time of the shooting").
[23] A171–A172; A288 [State's Closing Argument]; A289 [Defense Closing Argument]).
[24] A240–A241; A245.

dropped the charge of Murder in First Degree against him.[25] After avoiding a mandatory life sentence, Mr. Smith received a far more favorable 5-year prison sentence for Manslaughter and Conspiracy.[26]

At trial, Mr. Wharton painted Mr. Smith as a self-interested witness who retaliated against the victim because the victim belonged to a rival gang whose members had shot Mr. Smith and also killed a member of Mr. Smith's gang in his presence.[27] In fact, the 9-millimeter shell casings found near the victim's body matched a Smith & Wesson handgun found on Heald Street the morning after the shooting.[28] Mr. Smith claimed ownership of that gun on the witness stand.[29] Yet he testified that he gave the gun to Mr. Wharton before the shooting and then Mr. Wharton gave it back to him shortly thereafter.[30] Mr. Smith denied that he pulled the trigger, despite being in possession of the gun used to kill Mr. Powell a mere 10 hours later.[31]

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[25] A243–A244.
[26] A245.
[27] A247; A290–A292.
[28] A45; A173; A216–A218.
[29] A239; A241; A243. Although he admitted ownership, Mr. Smith claimed that another member of STK, Andrew Ervin ("Twin"), dropped the handgun on Heald Street when three unknown individuals began shooting at them. Twin sustained a bullet wound to his foot, but Mr. Smith escaped the shooting on Heald Street unharmed (A242–A244).
[30] A239.
[31] A239; A256–A257.

Besides the testimony of Mr. Smith, certain messages extracted from a cellphone belonging to co-defendant Isaiah Baird played a vital role at trial.[32] In these messages, Mr. Wharton expressed concern about the gun found on Heald Street.[33] Police had responded to shots fired on Heald Street around 2:00 in the morning on March 29, 2017.[34] A few hours later, Mr. Wharton and Mr. Baird discussed what happened on Heald Street through Facebook Messenger:

Baird:	Bro they shot twin
Wharton:	**I know**
Baird:	It's on now
**********	**********
Wharton:	**How 12 get the pole** [35]
Baird:	Twin [Andrew Ervin] dropped it
Wharton:	**Omg**
Wharton:	**How and it's already a body on it tf** [36]
Baird:	idk bro facts [37]
Wharton:	**I'm scar dawg**
Baird:	bro just be cool you going be straight
Wharton:	**U think it cus I hit there folks ??** [38]
Baird:	idk fr I think it's because Ben was out there[39]

[32] A318 ("and then we found those text messages which I read as confessions. Straight up. No ambiguity . . . his own words where he did it an not Benjamin Smith.")
[33] A217–A218.
[34] A184.
[35] '12' is slang for police; 'pole' is slang for a firearm (A217).
[36] 'Body' is slang for murder; 'tf' is an abbreviation of the phrase "the fuck" (A217).
[37] 'Idk' is an abbreviation of the phrase "I don't know"; 'facts' is slang for "speaking the truth" (A217–A218).
[38] 'Hit' is slang for "shoot", but it can mean "a few different things" (A218).
[39] 'Idk fr' is an abbreviation of the phrase "I don't know for real" (A218).

These messages were discovered within one of Mr. Baird's four cell phone dumps, which comprised 14,467 pages worth of data in total.[40] Through the normal course of discovery, the State turned over "mountains of evidence,"[41] including multiple cell phone extractions for each defendant.[42] Due to the sheer volume of that discovery dump, Mr. Wharton filed a Motion to Identify Evidence so he would not be made to "guess as to which portions of these items the State intends to use in their case-in-chief.[43]

At an Office Conference held the following week, the prosecutor explained that "85 percent of what I've provided is not going to be a part of the State's case-in-chief. I can identify all of that stuff versus what will be a State's case-in-chief."[44] To further "limit the universe" of discovery, the prosecutor represented that he would "point to what I found on the cell phones that I intend to use."[45] That pledge was also reflected on the docket:

> OFFICE CONFERENCE PROCEEDING HELD BEFORE PRESIDENT JUDGE JURDEN. THE STATE IS TO MEET WITH EACH DEFENSE COUNSEL AND GO OVER WHAT SPECIFIC EVIDENCE IS GOING TO BE USED FOR EACH OF THEIR CASE, SUCH AS CELL PHONE EVIDENCE AND GANG PARTICIPATION EVIDENCE.[46]

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[40] A140.
[41] A54; A57.
[42] A7 (provided with two flash drives); A39–A45; A140.
[43] A47–A51.
[44] A58.
[45] A80.
[46] A7 (Dkt. at 37).

In the months leading up to trial, the prosecution and counsel for Mr. Wharton met on several occasions to designate which evidence was relevant and admissible.[47] During these meetings, the State did not point to any relevant evidence from Mr. Baird's cell phones. In fact, the State was unaware that the incriminating messages existed until about two weeks prior to trial.[48]

Not only did the State fail to identify the messages on Mr. Baird's phone, but on May 15, 2019, the State indicated in writing that it would not use "the cellular extractions of Defendants' phones . . . during the Powell case."[49] This second representation, in combination with the absence of any delineation of relevant evidence from Mr. Baird's phone, led defense counsel to believe that no data from the co-defendants' four phone extractions would be used at trial.[50] With erroneous assurances from the State, defense counsel instead focused their resources elsewhere in preparation for trial.

But on June 5, 2019, the State informed defense counsel that it found the messages in which Mr. Wharton discusses the Heald Street shooting and intended to

[47] A143 (prosecutor remarks, "we've had so many meetings and discussions, I can't even count"); A144.
[48] A114 ("the State first discovered the conversations between the Defendant and Baird the day before it was brought to the attention of Defense counsel").
[49] A97.
[50] A141.

introduce those messages at trial.[51] On June 13, 2019, the parties met again for an evidence review.[52] At that time, the State notified defense counsel that it found additional messages—more incriminating messages—dating back to March 31, 2017 on Mr. Baird's phone:

Wharton:	**And Aubrey telling niggas I killed buol**[53]
Baird:	fuck wrong wit orb. Why you tell that nigga anyway
Wharton:	**I didn't tell him shit . . . He seen it on DE online**
Baird:	Why he keep saying you did it then
Wharton:	**Cause he know nigga *before I did it* we was all out in front of Twin [Andrew Ervin] crib.**[54]

This conversation, in effect, amounted to an admission to murder.[55] On the eve of trial, Mr. Wharton filed a motion seeking to exclude the messages hidden within Mr. Baird's cell phone.[56] After hearing argument, the Court briefly postponed trial to allow Mr. Wharton an opportunity to investigate further, but ultimately denied his request to exclude the messages from evidence.[57] Trial resumed the next morning and continued into the following week.[58]

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[51] A103; A114.
[52] A115.
[53] 'Boul' is slang for a dude or guy (A218).
[54] A214–A218 (emphasis added).
[55] A152.
[56] A12 (Dkt. at 60); A99–A113.
[57] A147–A148.
[58] A13 (Dkt. at 67); A150.

At the conclusion of the case and after a brief period of deliberation, the Superior Court found Mr. Wharton guilty of all charges.[59] A few days later, the State entered a *nolle prosequi* on the Gang Participation charge, which had been severed prior to trial.[60]

[59] A13 (Dkt. at 69); A296–A299.
[60] A153; A300.

I. THE SUPERIOR COURT ABUSED ITS DISCRETION BY ALLOWING THE STATE TO INTRODUCE CELL PHONE EVIDENCE THAT THE PROSECUTOR FAILED TO DELINEATE, DESPITE PROMISING TO IDENTIFY SUCH EVIDENCE, AND MISREPRESENTED TO THE DEFENSE THAT THAT IT WOULD NOT BE USED AT TRIAL.

A. Question Presented

Does a court abuse its discretion by allowing the State to introduce cell phone evidence where the prosecutor pledged to delineate such evidence, failed to do so, and then misrepresented to the defense that it would not seek to admit such evidence at trial? This issue was properly preserved, as it was raised in Defendant's Motion to Exclude.[61]

B. Standard and Scope of Review

We review Superior Court's rulings on the admission of evidence for abuse of discretion.[62] An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized law or practice so as to produce injustice.[63] If this Court finds an abuse of discretion, the final inquiry is whether the error caused Mr. Wharton significant prejudice.[64]

C. Argument

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[61] Issue preserved at A99–A113; A140–A149.
[62] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).
[63] *Id.* (citations and internal quotations omitted).
[64] *Seward v. State*, 723 A.2d 365, 372 (Del. 1999) (citations omitted).

Delaware Rule of Criminal Procedure 16 governs the disclosure of evidence by the State. Under Rule 16 (a)(1)(A), the State must, upon request:

> disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant or a codefendant (whether or not charged as a principal, accomplice or accessory in the same or in a separate proceeding), or copies thereof, within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the attorney general . . ."

The Rule also provides four remedies where a discovery rule is violated. The Court may: (i) order prompt compliance with the discovery rule; (ii) grant a continuance; (iii) prohibit the party from introducing in evidence material not previously disclosed; or (iv) issue such other order that the Court deems just under the circumstances.[65]

In this case, the State produced a voluminous amount of discovery. All four defendants received the same dump of information, even though only a small portion of it would be relevant to their respective charges. In fairness and to avoid surprise at trial, the State pledged to "meet with each defense counsel and go over what specific evidence is going to be used for each of their cases, such as **cell phone evidence** and gang participation evidence."[66] In the months leading up to trial, the attorneys for State and for the defense met on numerous occasions to identify and

[65] Superior Court Criminal Rule 16(d)(2).
[66] A7 (Dkt. at 37).

reach consensus about the evidence admissible at trial. Until June 5, 2019, the messages contained within Mr. Baird's phone were neither contemplated nor discussed. In fact, prior to June of 2019, the prosecution was unaware that the messages even existed.

The record reveals that the State never intended to use the contents of Mr. Baird's cell phone against Mr. Wharton, as it did not appear to contain relevant, admissible evidence. Stated more simply, the State could not have intended to use evidence that it did not know exists. Its failure to diligently review the cell phone evidence before agreeing to specifically delineate that evidence for the defense is inexplicable. The prosecutor assured the trial judge that "the relevant cell phone text messages and calls" were "[a]ll identified in the PowerPoint."[67] The parties understood that without guidance from the State, Mr. Wharton could not properly defend against the admission of prejudicial evidence.[68] The prosecutor even recognized that specifically delineating the cell phone evidence would "seriously limit the universe" of reviewable discovery.[69] When asked how soon the State could accomplish that, the prosecutor responded, "ASAP."[70]

[67] A91.
[68] A71; A80.
[69] A79–A80.
[70] A80.

Compounding that error, Mr. Wharton also relied on the prosecution's erroneous representation that "[i]nformation obtained during extraction of defendants' phones will not be used during the Powell case."[71] This lulled him into a false sense of complacency and convinced him to abandon analysis of the cell phone evidence five weeks prior to trial. Nevertheless, the State minimized its May 15th misrepresentation by characterizing it as a "typo." According to the prosecutor, the apostrophe following the word "defendants" was "in the wrong place."[72] When questioned how defense counsel could possibly know that, the State conceded, "[t]hey wouldn't." Despite that acknowledgement, the State still was not held to account for its actions. On the contrary, the Superior Court rewarded the State by admitting the messages into evidence.

To allow the State to benefit from its erroneous representation exceeds all bounds of reason. This Court has held that when the prosecutor "provides a casual reply in answer to specific defense demands, the State is to be held accountable for any inaccuracies in its general reply."[73] Similarly, "the State cannot evade its discovery obligations through ignorance."[74] But that is exactly what the prosecution

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[71] A97.

[72] The apostrophe should have preceded, rather than follow after, the "s" in defendants. In other words, the State claims it intended to convey that it would not introduce Mr. Wharton's cell phone; the State did *not* intend to convey that his co-defendant's cell phones also would not be introduced.

[73] *Johnson v. State*, 550 A.2d 903, 911 (Del. 1988).

[74] *Valentin v. State*, 74 A.3d 645, 651 (Del. 2013).

did here. After pledging to narrow the scope of discovery, the State responded carelessly and incompletely.

The Superior Court's decision to admit the messages betrays the spirit of the Superior Court Criminal Rules, which seek to provide for the 'just determination of every criminal proceeding' and to secure 'fairness in administration.' "[75] It is fundamentally unfair for the State to mislead Mr. Wharton about its' intention to introduce certain evidence, yet still be permitted to admit that evidence over Mr. Wharton's objection and to his detriment. The prosecutor has a special duty not to mislead.[76] Regardless of intent, the State must bear responsibility for its material misrepresentation.

The prejudice to Mr. Wharton is palpable. The State admitted that the messages were a "game changer."[77] Applying the three-factor test, the incriminating phone messages spoke directly to the centrals issue at trial. The messages not only resolved the question of who pulled the trigger, but also corroborated Mr. Smith's testimony, thereby bolstering his credibility. Turning to the second factor, this was a close case. Without the text messages, the State had no confession and no independent evidence to support Mr. Smith's version of events. The trial court even

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[75] *Id.* at 650–51 (Del. 2013) (citing *Johnson*, supra).
[76] *United States v. Universita,* 298 F.2d 365, 367 (2d Cir.), *cert. denied,* 370 U.S. 950, 82 S.Ct. 1598, 8 L.Ed.2d 816 (1962).
[77] A144.

asked the prosecutor at sentencing "how certain" he felt confident that Mr. Wharton was the shooter.[78]

Finally, as for steps taken to mitigate the results of the error, the Superior Court did grant a brief recess. However, that brief recess did not cure the substantial prejudice to Mr. Wharton. As defense counsel noted at argument, by that point, Mr. Wharton could not alter his trial strategy.[79] He could not properly prepare a defense against the devastating nature of his communications with Mr. Baird in such a short timeframe. In fairness to Mr. Wharton, the highly incriminating messages should not have been admitted as evidence. The Superior Court abused its discretion in ruling otherwise.

[78] A317.
[79] A141–A142.

CONCLUSION

For these reasons, Appellant Dai'yann Wharton respectfully requests that this Court reverse the Superior Court's judgement and grant him a new trial.

Respectfully submitted,

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