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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARTH HEALD,	)	
	)	
Defendant Below,	)	
Appellant,	)	Case No. 108, 2020
	)	
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE OF DELAWARE'S ANSWERING BRIEF

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DATE: November 2, 2020

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NATURE AND STAGE OF THE PROCEEDINGS

On March 4, 2019, a New Castle County grand jury indicted Appellant Darth Heald ("Heald") with Sexual Abuse of a Child by a Person in a Position of Trust, Authority, or Supervision in the Second Degree ("Sexual Abuse of a Child"); Dangerous Crime Against a Child; Unlawful Sexual Contact First Degree ("USC"); and Unlawful Imprisonment Second Degree. A001, 008-010. Trial began on September 10, 2019 and lasted three days. A005. At the close of the State's case, Heald made a motion for judgment of acquittal as to the Sexual Abuse of a Child and dangerous crime against a child counts. B11-12. The Superior Court denied the motion. B12.

On September 13, 2019, the jury convicted Heald on all counts. A005. The Superior Court ordered a presentence investigation, and sentenced Heald on March 6, 2020 to an aggregate sentence of 13 years of Level V incarceration (with credit for 45 days served), suspended after two years for decreasing levels of supervision. A006; Ex. B to Op. Br. Heald appealed and filed his opening brief. This is the State's Answering Brief.

SUMMARY OF THE ARGUMENT

I. Appellant's first claim is DENIED. The Superior Court did not abuse its discretion in permitting testimony that the victim had spoken about the sexual assault to her father, mother, grandmother, and therapist, nor in admitting the victim's statement to her father under the excited utterance hearsay exception. In addition, the court did not plainly err in permitting the victim's parents to testify about the victim's demeanor when she came home after the assault. The parents' testimony was relevant and admissible and did not amount to improper bolstering, and, to the extent it involved opinions, it was admissible under Delaware Rule of Evidence 701. Nor did testimony that the victim had spoken with others amount to improper bolstering. Moreover, the court correctly determined the victim's statement to her father was admissible as an excited utterance, as the State laid the proper foundation through the victim's father's testimony.

II. Appellant's second claim is DENIED. The Superior Court did not commit plain error when it permitted the forensic interviewer to briefly testify about her training, experience, and interview techniques prior to the admission of the victim's CAC interview under 11 *Del. C.* § 3507. The interviewer did not give an opinion about the victim's, or any child's, truthfulness, and her testimony provided context for the victim's interview.

III. Appellant's fourth claim is DENIED. Comments the prosecutor made during her opening and closing arguments did not amount to prosecutorial misconduct. The prosecutor did not improperly bolster the victim's credibility by referring to her nervous nature in the opening statement. She expressed no opinion on the victim's credibility and her comments were supported by testimony of the witnesses. The prosecutor did not improperly vouch for the victim's and her parent's actions, because her comments that their actions were "right" were based on legitimate inferences from the evidence and were made in response to Heald's closing argument. The prosecutor's statements that the victim told several people about the sexual assault were not improper. They were based on a correct statement of the facts. The prosecutor did not improperly ask the jury to sympathize with the jury, because the comment was made within the context of asking the jury to consider the witness's, including the victim's, biases in testifying. The prosecutor did not improperly extend a bias argument or try to inflame the passions of the jury because she was appropriately opining on why Heald's family members' testimony in support of Heald might be biased. Even if any of the prosecutor's statements were improper, reversal is not required as Heald has not established plain error.

IV. Heald's fourth claim is DENIED. Heald was not prejudiced by cumulative error because he is not entitled to relief on any of his individual claims.

STATEMENT OF FACTS

Around 7 p.m. on September 9, 2018, a Sunday, Ann[1] ran home to her parents' house, extremely upset. A020. According to her father, Ryan Smith, Ann was crying and appeared very scared and upset. *Id.* She stumbled over her words as she tried to explain what had happened. *Id.* Ann, who was nine at the time, had been playing at her friends', Brian's and Ashley's, house, which was within walking distance of her own home. B2-3. Ann told her father that her friends' uncle had touched her inappropriately, but she was reluctant to tell him more. A021-22. Smith asked his mother-in-law, Deborah Pintoff, (who passed away before trial) to speak with Ann. A017, 021. Pintoff called her daughter, Ann's mother Samantha Houghton, who was at work. A017. Ann was on speakerphone with Pintoff but was reluctant to go into detail about what had happened. *Id.* Houghton felt Ann was "kind of embarrassed," and waited until she got home from work to ask more about what had happened. *Id.*

After speaking with Pintoff, Houghton left work and called the State police, but only to ask what she should do if she decided she needed to call someone after speaking with Ann. A018. When she did speak with her: "[Houghton] could tell that [Ann] had been very upset, that she was crying for a while. Her eyes were red

[1] In conformity with Supreme Court Rule 7(d), the State refers to the victim and the other child witnesses by the pseudonyms given to them by the Appellant in his Opening Brief.

and puffy. She wouldn't look me in the face when she was talking to me. She kept her head down. Just very nervous." A019. Houghton had a difficult time getting the details from Ann; "[i]t was kind of like unraveling a onion a little bit at a time." *Id.*

Ultimately, Houghton did not immediately report what her daughter told her, but instead scheduled Ann for an appointment with her therapist on Tuesday, September 11th. A018. According to Houghton, Ann generally saw the therapist for anxiety related to school. *Id.* After the appointment, the therapist told Houghton law enforcement would need to be contacted. *Id.*

New Castle County Police Department Detective Kevin Mackie was assigned to the case after it was reported to the Division of Family Services. B6. He arranged for Ann to be interviewed at the Child Advocacy Center ("CAC"). A025. During that interview, Ann told forensic interviewer, Amy Kendall, that she had been playing at her friends', Ashley's and Brian's, house when something had happened. Ct. Ex. 4. The three of them and another friend, Cole, were playing hide and seek. *Id.* She was upstairs with Brian hiding from Ashley's and Brian's Uncle, Heald, who had been hunting for them as part of the game. *Id.* They locked the door, but he got it open and tickled them on their bellies, backs, and under their armpits. *Id.* Heald then went to open a window and Brian ran out. *Id.* When Ann tried to leave too, Heald blocked the door. *Id.* Ann laid down on Ashley's bed with her feet

hanging off. *Id.* Heald came close to her and she could smell alcohol. *Id.* Heald touched her stomach and moved his hand down and touched her private area outside of her clothes. *Id.* Ann felt uncomfortable and scared; she wanted to cry, but she kept it in. *Id.* She got up and Heald asked her if she wanted to be his partner since she had gotten tagged. *Id.* Ann said yes and went downstairs. *Id.* The other children were hiding in the bathroom and Brian's and Ashley's parents were sitting on the couch. *Id.* Ann said she had to leave and ran home, where she talked to her dad and her "Mommom" about what had happened. *Id.*

Detective Mackie interviewed Brian's and Ashley's parents, Brandon ("Brandon") and Christina ("Christina") Heald, and arranged for CAC interviews for the children. A026-27. Christina confirmed that Ann had been playing at her house and that Heald was playing with the children and had been tickling them. Ct. Ex. 3. The children were hiding upstairs and downstairs, and Ashley's bedroom was one of their hiding spots. *Id.* Ann, who Christina said was a high-anxiety child, had left abruptly, which Christina found concerning. *Id.* Christina then separated the children and asked them what had happened. *Id.* They told her Ann had said she was uncomfortable because of the way Heald was roughhousing. *Id.*

Brian, who was eight at the time, told the CAC interviewer that his uncle had been tickling them when Ann left because she felt uncomfortable.[2] When asked if someone else was there when Ann said she was uncomfortable, Brian said no, because they were all downstairs and his parents were upstairs talking.

At trial, Heald testified that he had been living part-time at his brother's house in September 2019. A051. On the 9th, he was watching football, drinking beers, and playing a game with the children, called "Monster." *Id.* The children would hide in Ashley's bedroom or in the downstairs bathroom and he would chase them. *Id.* Once he caught them in the bedroom, he would throw them on the bed and tickle them on their stomach and ribs. *Id.* Ann was acting shy because she had never played it before. *Id.* She gave him permission to tickle her, but when he did, she said she was uncomfortable and all of the children went downstairs. A052, 054. The other three children went to the bathroom to hide, but Ann went to the kitchen. *Id.* Heald testified that he was never alone with Ann and that he did not touch her in an inappropriate manner. A052-53.

Christina and Ashley testified for the State at trial. Both testified that Heald was playing the "Monster" game with the children just before Ann left suddenly. A028, 048. Both indicated that they never saw Ann alone with Heald. A033, 048;

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[2] Although Brian's statement was played for the jury under 11 *Del. C.* § 3507, it does not appear that it was entered into the record as a court exhibit. *See* B7.

B9. Ashley also testified that Heald did not tickle Ann because she asked him not to, and that Ann had anxiety; it was rare for her to stay overnight because she would get anxious and leave early. A028, 030. Christina pointed out that Ann had left suddenly before, that she has issues with anxiety, and that Ann was not crying when she left on September 9, 2018. A047, 049; B9.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION OR OTHERWISE ERR IN ALLOWING THE VICTIM'S PARENTS TO TESTIFY ABOUT HER DEMEANOR AND ABOUT OTHERS WITH WHOM SHE SPOKE, AND IN ADMITTING HER HEARSAY STATEMENT UNDER THE EXCITED UTTERANCE EXCEPTION.

Question Presented

Whether the Superior Court plainly erred in permitting the victim's parents to testify about her demeanor when she came home after being sexually assaulted.

Whether the Superior Court abused its discretion in permitting testimony that the victim had spoken about the incident to her father, mother, grandmother, and therapist.

Whether the Superior Court abused its discretion in admitting the victim's statement to her father under the excited utterance hearsay exception.

Standard and Scope of Review

This Court reviews the Superior Court's rulings on the admissibility of evidence for an abuse of discretion.[3] "'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."[4] Where a

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[3] *Brown v. State*, 117 A.3d 568, 579 (Del. 2015) (citing *McNair v. State,* 990 A.2d 398, 401 (Del. 2010); *Stickel v. State,* 975 A.2d 780, 782 (Del. 2009)).

[4] *Urquhart v. State*, 2016 WL 768268, at *2 (Del. Feb. 26, 2016) (quoting *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (additional quotation omitted)).

defendant does not object to an evidentiary issue, this Court reviews it for plain error.[5]

Merits of the Argument

In his opening statement, Heald's attorney repeatedly told the jury this was a "he said, she said" case, telling them "this is one person's word against another's" and cautioning them to pay very close attention to what each of the children involved have to say, because "what these people have to say matters and the details can matter." A016. Thus, from the inception of the trial, Heald's defense was that he did not sexually assault Ann. And in order to prevail in that defense, he was going to have to demonstrate to the jury that Ann's version of events was not credible.

Heald argues the Superior Court improperly admitted into evidence: (1) comments Ann's parents made about her demeanor when she came home on September 9, 2018 and when she told them about what had happened, (2) testimony that Ann talked to her mother, father, grandmother, and therapist about the incident, and (3) Ann's hearsay statement to her father that her friends' uncle had touched her inappropriately. Op. Br. at 8-16. He contends that the parents' statements insinuated that "Ann made multiple consistent statements to her mother, grandmother, therapist and law enforcement," and provided "multiple opinions on Ann's feelings and

[5] *Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016) (citing Supr. Ct. R. 8; D.R.E. 103(d); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

demeanor," which served no proper purpose. *Id.* at 8-9. Although Heald objected to the hearsay statement at trial and also argued that allowing testimony about the people with whom Ann talked about the incident amounted to improper bolstering (Ex. A to Op. Br.), he made no objections to either parents' statements about Ann's demeanor (*See id.*; B4 (defense counsel acknowledging there was no objection to the mother's testimony)). Thus, the first two issues should be reviewed for abuse of discretion, while the issue of the parents' comments on Ann's demeanor should be reviewed for plain error. Heald's claims are unavailing.

As a preliminary matter, a witness's testimony about a victim's demeanor is not inappropriate, nor does it constitute "improper bolstering." Corroborations of a victim's version of events with factual observations of demeanor, such as the fact that she was crying, "her eyes were red and puffy," "[s]he wouldn't look me in the face when she was talking to me," "[s]he kept her head down" (A019) and she "stumbled over her words" (A020) are relevant and admissible. Furthermore, while this Court has held that "a witness may not bolster or vouch for the credibility of another witness by testifying that the other witness is telling the truth,"[6] neither parent did that here. Other than the brief hearsay statement admitted through Smith, none of the people with whom Ann spoke testified to the details of what she told

[6] *Capano v. State*, 781 A.2d 556, 595 (Del. 2001).

them, nor did they comment, either explicitly or implicitly, about whether they believed she was telling the truth.[7] No one except Ann testified about what happened to her. The fact that Ann spoke to others was part of the facts of the case; it was how the investigation unfolded.

To the extent that the parents' testimony involved opinions about Ann's apparent state of mind when she came home, such testimony is permitted under Delaware Rule of Evidence ("D.R.E.") 701, which provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

As such, the parents' statements about their perceptions of how Ann was acting just after the incident – "[s]he was extremely upset," "I've never seen her act that way before," "[j]ust very scared," "[j]ust very upset" (A020), "she was kind of embarrassed," and "just very nervous" (A019) – and that her being that upset made Smith think "[s]omething really bad had happened" (A020), were all rationally based on Smith's and Houghton's own perceptions and fell squarely within permissible lay

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[7] *Id.* (noting that "improper vouching includes testimony that *directly or indirectly* provides an opinion on the veracity of a particular witness" (emphasis in original)).

opinion testimony.[8] Such testimony was relevant to corroborate Ann's demeanor in the face of Heald's defense that Ann's version of events was not credible, and to explain why Houghton did not immediately report the incident to the authorities. For example, when asked why Houghton did not call the police after speaking with Ann, she replied: "I didn't want to frighten her by having people come to our house. She was already pretty mortified, so I figured I wanted to talk to her counselor and, you know, speak in a free environment and go from there." A019.

Such testimony was also helpful to the jury because Ann herself seemed very uncomfortable describing what had happened to her. During the CAC interview, when asked what happened after Heald blocked her way out of the room, a long period of silence ensued. Ct. Ex. 4. It was only after Kendall had Ann write down what had happened, that Ann began to provide some details, and she appeared visibly uncomfortable doing so. *Id.* At trial, Ann first stated she did not remember if the

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[8] *See Washington v. State*, 2008 WL 697591, at *2 (Del. Mar. 17, 2008) (noting officer's testimony that victim "was scared because she was 'hunched in like a ball,' failed to make eye contact and spoke softly, 'like she was really upset," "clearly falls within [the D.R.E. 701] parameters"); *Wilmer v. State*, 1998 WL 123200, at *2 (Del. Mar. 6, 1998) (finding witness's testimony appropriate under D.R.E. 701 and noting "[n]either [witness] could 'readily, and with equal accuracy and adequacy, communicate what [they] perceived' during their respective interviews with the complaining witness to the jury without testifying in terms of inferences or opinions").

Monster game involved a touch, and she was only able to say that Heald touched her private parts after her memory was refreshed with her CAC interview. A039, 041.

In sum, Houghton's and Smith's comments about Ann's demeanor were not improper,[9] and the Superior Court did not commit plain error in failing to exclude them. Nor did the court abuse its discretion in rejecting Heald's argument that testimony about the others with whom Ann had spoken constituted improper bolstering.

The Superior Court also correctly determined that Ann's statement to Smith was admissible as an exited utterance. Pursuant to D.R.E. 802, hearsay is inadmissible unless otherwise provided in the Rules.[10] "A hearsay declaration is admissible, usually under a specific exception, only where the declaration has some theoretical basis making it inherently trustworthy."[11] Under the excited utterance exception to the hearsay rule, a proponent may admit "[a] statement relating to a startling event or condition made while the declarant was under the stress of

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[9] *Cf. Green v. State*, 2020 WL 4745392, at *14 (Del. Aug. 17, 2020) (finding Trooper's testimony that victim's sister said victim was "very upset about what . . . [the victim] had told her" along with other testimony regarding the victim's demeanor did not fall within the definition of vouching that this Court has condemned).

[10] D.R.E. 802.

[11] *Smith v. State*, 647 A.2d 1083 (Del. 1994) (citations omitted).

excitement caused by the event or condition," even if the declarant is available.[12] "Statements qualifying as excited utterances are deemed reliable because the person making the statement under these conditions 'is not in a position to fabricate and will exclaim the truth.'"[13]

Here, before testifying to the hearsay statement, Smith stated that when Ann came home: "She was extremely upset. I've never seen her act like that before. Crying. Just very scared. Just very upset." A020. Heald objected, but the court correctly found that Smith's testimony provided the proper foundation for an excited utterance exception.[14] A020-21. Heald also argues that the court erred because it did not first conduct a hearing outside the presence of the jury to determine whether the statement constituted an admissible excited utterance. Op. Br. at 13-14. He is mistaken. The court made that determination outside the presence of the jury (A020-

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[12] D.R.E. 803(2).

[13] *Culp v. State*, 766 A.2d 486, 490 (Del. 2001).

[14] *See Pressey v. State*, 25 A.3d 756, 759 (Del. 2011) (noting that the three foundational requirements for admission of a statement under the excited utterance exception are: "(1) the excitement of the declarant must have been precipitated by an event; (2) the statement being offered as evidence must have been made during the time period while the excitement of the event was continuing; and (3) the statement must be related to the startling event," and finding testimony that, *inter alia*, the declarant was "scared," "still crying," and "slouched down" and that he "didn't want to get out of the car" when he identified Pressey as one of the robbers satisfied those foundational requirements).

21), and, as discussed above, Heald's comments about Ann's demeanor were otherwise relevant and admissible.

II. THE SUPERIOR COURT DID NOT COMMIT PLAIN ERROR WHEN IT PERMITTED THE FORENSIC INTERVIEWER TO BRIEFLY TESTIFY ABOUT HER TRAINING, EXPERIENCE, AND INTERVIEW TECHNIQUES PRIOR TO THE ADMISSION OF THE VICTIM'S CAC INTERVIEW UNDER 11 *DEL. C.* § 3507.

Question Presented

Whether the Superior Court committed plain error in permitting the forensic interviewer to testify briefly about her training, experience, and interview techniques prior to the admission of Ann's CAC interview under 11 *Del. C.* § 3507.

Scope of Review

"Absent an objection at trial, this Court reviews an evidentiary issue only if the ruling constitutes plain error affecting substantial rights."[15]

Merits of the Argument

At trial, the State presented Ann's CAC interview under 11 *Del. C.* § 3507 through the forensic interviewer, Amy Kendall. In doing so, the prosecutor asked Kendall some questions about the process as follows:

> Q. Could you please tell the jury where you currently work.
>
> A. I work at the Children's Advocacy Center of Delaware.
>
> Q. And they've already heard a little bit about the Children's Advocacy Center, but could you please tell us the idea behind the Child Advocacy Center?

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[15] *Stevenson v. State*, 149 A.3d 505, 509 (Del. 2016) (citing Supr. Ct. R. 8; D.RE. 103(d); *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

A. At the Children's Advocacy Center we conduct interviews with victims or witnesses of a crime.

Q. And how long have you been working with the Child Advocacy Center?

A. Since 2016.

Q. And what is your official title? What do you do?

A. Forensic Interviewer.

Q. And as a forensic interviewer, do you receive special training?

A. Yes.

Q. What kind of training is that?

A. So I've completed training at Corner House in Minnesota. It's forensic interviewer training, reviewing how to conduct these different interviews.

Q. What is the goal behind conducting these types of interviews?

A. The interviews are in a child friendly environment. All of the questions are open ended and non-leading, and that enables the child to provide information from their perspective.

Q. At some point during some of the interviews, do children have a difficult time opening up about things that might be embarrassing or difficult to talk about?

A. At times, yes.

Q. And when that happens do you have different techniques that you can employ to help make them more comfortable or easier for them to talk about those things?

A. Yes.

Q. Can you explain some of that to the jury?

A. Sure. I tend to build rapport with the child, just help talk about something that might make them more comfortable in the room. Sometimes if a child doesn't want to say something out loud, I give them the opportunity to write it down or draw a picture about it.

Q. At any point do you also introduce either anatomical drawings of a child, like a photograph of a child or anatomical dolls if need be?

A. Yes. At times we have anatomical drawings. It's a drawing that looks like a person but not a photograph. And we do also have anatomical dolls that can be used to help show what has happened.

Q. . . . How many interviews have you conducted?

A. Over 750.

Q. Were you the interviewer for [Ann]?

A. Yes.

Q. And what date was that interview conducted, if you recall?

A. I believe it was October 10th of 2018.

A042. Heald did not object to Kendall's testimony. *Id.*

After Ann's CAC interview was played for the jury, the prosecutor continued to question Kendall about two specific techniques the jury saw her use with Ann, having her write something down and using a diagram to show where certain body parts are. A042. The prosecutor then showed Kendall the diagram, which was marked as a Court Exhibit and displayed for the jury, and asked her to identify it and

explain the markings on it. A043. The diagram showed that Ann had pointed on an anatomical drawing to where her belly and her private area was, and Kendall had marked those places on the diagram. *Id.*

Heald claims the Superior Court committed plain error when it permitted Kendall to testify about her training, experience, and interview techniques. Op. Br. at 17-22. In support of his argument, Heald cites to *Richardson v. State*, in which this Court reversed Richardson's convictions because the CAC interviewer testified about her background, training, and interview techniques in a manner that the Court determined vouched for the victim's credibility.[16] But Heald's case is distinguishable from *Richardson*.

The crux of the problem in *Richardson* was not the forensic interviewer's testimony about her background and experiences, rather it was that she testified that the purpose of the process was to obtain truthful answers, and that it was apparent when a child was being truthful.[17] The Court found her testimony objectionable because it amounted to improper vouching, i.e., she was directly or indirectly

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[16] 43 A.3d 906, 909-11 (Del. 2012).

[17] *Id.* at 910. *See Russell v. State*, 2013 WL 3961195, at *1 (Del. Jul. 30, 2013) ("In *Richardson,* this Court held that the CAC interviewer impermissibly vouched for the veracity of the child victim by stating that her interviewing protocol made it 'very obvious when [the children] are being truthful.'").

providing an opinion on the veracity of the witness.[18] In this case, no vouching occurred.[19]

Kendall made no comments about a child's truthfulness; she simply talked about techniques she used to get a child reluctant to talk to open up. Such testimony was relevant and helpful to the jury because it provided context to the interview. When Ann was reluctant to talk about what had happened, the jurors would see Kendall use two of those techniques on the video, asking Ann to write down what happened to get her to provide more detail and having her point to an anatomical diagram. Kendall's testimony also helped to lay the foundation for the introduction of that anatomical diagram as a Court Exhibit. A042-43; Ct. Ex. 4. Kendall offered no opinion, either directly or indirectly, on the veracity or trustworthiness of Ann's statement. Heald cannot show that the inclusion of Kendall's testimony amounted to plain error.[20]

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[18] *Id.* (citing *Capano v. State*, , 781 A.2d 556, 595 (Del. 2001)).

[19] *Compare Green v. State*, 2016 WL 4699156, at *2 (Del. Sept. 7, 2016) (noting that forensic nurse's statement that she believed what the victim told her about the rape amounted to improper vouching for the victim's credibility) *with State v. Hicks*, 768 S.E.2d 373, 377–78 (N.C. App. 2015) (finding psychologist's statement that victim had come in because she had been molested by her cousin was not vouching because she was merely referring to why the victim had sought treatment, and not expressing an opinion as to the truth of the allegations or the victim's credibility).

[20] *See Wainwright*, 504 A.2d at 1100 ("Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.").

III. COMMENTS BY THE PROSECUTOR MADE DURING OPENING AND CLOSING STATEMENTS DID NOT AMOUNT TO PROSECUTORIAL MISCONDUCT.

Question Presented

Whether comments made by the prosecutor during her opening and closing statements amounted to prosecutorial misconduct.

Whether any statements that might have amounted to prosecutorial misconduct were so unduly prejudicial as to warrant reversal.

Scope of Review

The Court reviews *de novo* a claim that a prosecutor's conduct was improper.[21] When a claim of prosecutorial misconduct was not fairly presented in the court below, the Court reviews the conduct for plain error.[22]

Merits of the Argument

Heald identifies statements made by the prosecutor in the State's opening and closing arguments, claiming they amount to prosecutorial misconduct, and that, cumulatively, they are so prejudicial as to require reversal of his convictions. Op. Br. at 23-37. Heald did not object to any of the statements he now complains of, therefore, they are reviewed for plain error. His claims are unavailing.

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[21] *Kurzmann v. State*, 903 A.2d 702, 708 (Del. 2006) (citation omitted).

[22] *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012) (citation omitted).

A prosecutor may not misstate evidence or mislead the jury as to the inferences it can draw.[23] Similarly, a prosecutor may not "intentionally refer to or argue on the basis of facts outside the record unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice."[24] A prosecutor is, however, "allowed to argue all legitimate inferences of the defendant's guilt that follow from the evidence."[25]

A. Improper Bolstering During the Opening Statement

Heald argues the prosecutor improperly bolstered Ann's credibility in her opening statement when she referred to Ann as a "nervous Nellie," said she "had some anxiety issues," described how the CAC interview process works to put children at ease, to not traumatize them, and stated, "[s]o the good thing in this case is as nervous as Ann may be, there is that recorded statement." Op. Br. at 26-28. The prosecutor made those statements within the context of informing the jury that Ann's mother and others were going to testify that Ann had anxiety issues and that

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[23] *Hughes v. State*, 437 A.2d 559, 567 (Del. 1981) (quoting ABA Standards for Criminal Justice: Prosecution and Defense Functions, § 5.8(a) (Approved Draft, 1971)). *See also Flonnory v. State*, 893 A.2d 507, 540 (Del. 2006) ("[P]rosecutors may not misrepresent the evidence presented at trial.").

[24] *Hughes*, 437 A.2d at 567 (quoting ABA Standards for Criminal Justice: Prosecution and Defense Functions, § 5.9 (Approved Draft, 1971)).

[25] *Burns v. State*, 76 A.3d 780, 789 (Del. 2013) (citations omitted). *See also Hooks v. State*, 416 A.2d 189, 204 (Del. 1980) ("The prosecutor in his final summation should not be confined to a repetition of the evidence presented at trial.").

it was not unusual for her to leave early from the Heald house, but that September 9, 2018 was different. A015. The prosecutor also said she expected that Ann would be nervous when she took the stand to testify, but that the jury would have an opportunity to also see Ann's recorded interview, which had occurred in a "soft setting," more conducive to putting children at ease. *Id.* The prosecutor also described the circumstances under which that interview occurred. *Id.*

Contrary to Heald's argument however, the prosecutor's statements do not amount to improper bolstering. The Sixth Circuit has noted that "[b]olstering and vouching are much alike" and that "[b]olstering occurs when the prosecutor implies that the witness's testimony is corroborated by evidence known to the government but not known to the jury."[26] This court appears to use bolstering and vouching interchangeably, and has said that "improper vouching occurs when the prosecutor implies personal superior knowledge, beyond what is logically inferred from the evidence at trial."[27] "Prosecutors are prohibited from vouching for the credibility of a witness by stating or implying personal knowledge of the truth of the testimony, beyond that which can be logically deduced from the witness' trial testimony."[28]

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[26] *United States v. Francis*, 170 F.3d 546, 551 (6th Cir. 1999).

[27] *Kirkley*, 41 A.3d at 377 (citation omitted).

[28] *Robinson v. State*, 2013 WL 1944197, at *3 (Del. May 10, 2013) (citing *Caldwell v. State*, 770 A.2d 522, 530 (Del.2001); *Weber v. State*, 547 A.2d 948, 960 (Del.1988)).

Here, no vouching or bolstering occurred because the prosecutor was not expressing a personal opinion about Ann's truthfulness or implying personal knowledge of the truth of Ann's testimony. Nor did the prosecutor's statements imply that Ann's testimony was corroborated by evidence known to the government but not known to the jury. She was merely informing the jury that Ann gets nervous, which statement was supported by the testimony of several witnesses, including Ann's mother, Christina, and Ashley. Telling the jury that Ann might have trouble testifying because of her nerves was something that could be logically deduced from other witness's trial testimony and from Ann's obvious discomfort talking about the incident during the CAC interview.[29] In so doing, however, the prosecutor gave no opinion, either explicitly or implicitly, about the truthfulness of what Ann was going to say.[30]

B. Vouching for Ann's and her Parent's Actions

Heald argues the prosecutor's statements that Ann and her parents "did everything right" and "did the right thing," and that "the system worked," amounted to improper vouching because they were improper commentary on the justness of

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[29] *Cf. Morris v. State*, 795 A.2d 653, 658 (Del. 2002) (finding prosecutor's statement in summation was not improper when it was an inference supported by the record).

[30] *Cf. Robinson*, 2013 WL 1944197, at *3 (finding no improper vouching because the prosecutor expressed no opinion on the witness's truthfulness and she neither implied nor offered testimony that would imply she had some personal knowledge of the witness's truthfulness).

the cause in general. Op. Br. at 28-29. In *Whittle v. State*, this Court noted that there is an extreme risk when prosecutors refer to witness's testimony in absolute terms such as "right" or "correct" as "[a]ny broader implications drawn from characterizing a witness' testimony as 'right'—beyond those implications that can be logically inferred from the record evidence—more closely resemble impermissible personal opinions of the prosecutor."[31] The Court went on to analyze whether the prosecutor's comments that particular witnesses' assertions were "right" could be supported by the evidence and found the statements "implied conclusions beyond those that could be logically inferred from the record evidence," and therefore amounted to improper vouching.[32] Similarly, although this Court has generally frowned upon a prosecutor referring to a statement as a "lie," it has found that she may do so "(1) if one may legitimately infer from the evidence that the statement is a lie and (2) if the 'prosecutor relates his argument to specific evidence which tends to show that the testimony or statement is a lie.'"[33] Moreover, this Court has more recently distinguished *Whittle* from situations in which the prosecutor has used an absolute term like "right" or "lie" in response to a defense assertion.[34]

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[31] *Whittle v. State*, 77 A.3d 239, 246 (Del. 2013).

[32] *Id.* at 247.

[33] *Clayton v. State*, 765 A.2d 940, 942-43 (Del. 2001) (quotation omitted).

[34] *See Rasin v. State*, 2018 WL 2355941, at *3 (Del. May 23, 2018) ("While the State used the word lie in the instant case, it was in response to the defense's assertions that the witnesses were lying. The State merely asked the jury to consider why

Here, the prosecutor's statements were made on rebuttal. In his closing argument, counsel for Heald argued that Ann's version of events was not credible because her family did not immediately report the incident, asserting:

> After talking with her, her parents never called the police, and they never asked what happened. They never confronted anybody. . . . I think an important question is to why? Why, after talking with [Ann], and why after hearing what she had to say, did they choose not to call the police. . . ? There's no reason not to.

B16. *See also* B17.

In response to that argument, the prosecutor argued:

> [Ann] did everything right. She got the touch. She knew it wasn't right. She got out of there. And she told her parents, and she told her therapist. And to judge her parents, everybody responds to trauma differently, and her parents did the right thing. They reached the therapist because their priority was not law enforcement, was not reporting a crime, not the defendant. In that moment their priority was their daughter, and they took care of their daughter. And the system actually worked. It got reported through the therapist. And when it got reported, the system worked, the interview at the Child Advocacy Center.

A057. In this case, the prosecutor's use of the term "right," and her comment that the "system worked" did not amount to improper vouching. As in *Rasin v. State*, the prosecutor's comments did not suggest personal knowledge of the witness's

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would the witnesses would lie in light of the evidence presented. Unlike *Whittle*, the State's comments were not based 'entirely on the impermissible inferences that the prosecutor himself had created,' but were based on inferences logically drawn from the evidence.").

credibility, "but simply provided facts from the record showing why the witnesses should be believed."[35] The prosecutor was responding to Heald's argument that Ann should not be believed because her parents did not immediately go to the police. The prosecutor's arguments were supported by facts and inferences from the record. Even though Ann's parents did not immediately go to the police, Houghton testified that she did not do so because she was concerned for Ann's wellbeing, so she contacted the therapist instead. A019. And even though Houghton chose that avenue, the "right" result still happened, "the system worked," i.e., the police were contacted as a direct result of Houghton's actions.

C. Urging the Jury to Believe Ann Because she Told a Consistent Story Multiple Times

Heald claims the prosecutor "improperly urged the jury to believe Ann because she told a consistent story multiple times." Op. Br. at 30. He first asserts it was improper for her to state that "[Ann] told a number of adults, trusted adults, who could help her." A056. But this statement was not improper, because it was a correct statement of the facts. Ann did talk to her father, her grandmother, her mother, her therapist, and the CAC interviewer about what happened to her.

Heald also asserts it was improper for the prosecutor to imply that Ann told the same story multiple times. Op. Br. at 30. Heald is correct that the record only

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[35] 2018 WL 2355941, at *3.

reveals what Ann told her father and Kendall and we do not know what she said to others to whom she talked. But whether a comment constitutes prosecutorial misconduct, turns on the nuances of the language and the context in which the statements were made.[36] Here, the prosecutor made the statement in rebuttal in response to Heald's argument that this was a "he said, she said case" and Ann's story was not credible because "[t]he reality is that no witness, with the exception of [Ann], has said that's what happened." B16.

In context, the prosecutor's full statement was that, in determining whether there is sufficient evidence in a "he said, she said" case:

> You start with the person that's alleging the crime. Do you find them believable? What do their bias and interest seem by coming into this courtroom, by telling what happened to them multiple times, and saying the same thing? You start with that person. Do you believe them?
>
> And then you look at other things there are to offer. What other evidence is there that kind of makes sense, as you listen to the rest of the testimony?

A057. In that context, the prosecutor's statement was not improper. Although we do not know what Ann told everyone she spoke with, the record revealed that she

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[36] *Kirkley*, 41 A.3d at 377. *See also Flonnory*, 893 A.2d at 539 ("The statements, read in context, were not improper expression of personal beliefs about the credibility of the witnesses, but rather were possible explanations for why several witnesses in the case took the stand and failed to remember their earlier statements.").

told three consistent stories – to her father, during the CAC interview, and on the stand – that Heald touched her inappropriately, and that he touched her private parts.

D. Expression of the Prosecutor's Subjective Observation to Elicit Sympathy

Heald claims the prosecutor improperly appealed to the jury's sympathy in her closing argument when she stated, "It looked like this was probably one of the more painful things this ten-year-old had ever had to have done in her life up to this point." Op. Br. at 31-32 (citing A056). Heald is correct that it is improper for an attorney to ask the jury to sympathize with a victim,[37] but that is not what the prosecutor did here. In context, she stated:

> You should also consider any bias or interest any of these witnesses may have concerning the outcome of the case, and the Court's going to instruct you as to that, as well. What bias or what interest does [Ann] have? Does this look like, when she walked into this courtroom and got on the stand, that this was something fun for her? Does this look like an opportunity for us to all kind of laugh and joke along with her about any portions of her testimony? And it was not that case. It looked like this was probably one of the more painful things this ten-year-old had ever had to have done in her life up to this point.
>
> . . .
>
> But when you think about bias and interest of these witnesses, most important of all, there is no one in this entire case that has more interest than the defendant himself. So you should consider that when you look at his testimony, and give it the proper weight that it deserves.

[37] *Jones v. State*, 2016 WL 7103407, at *4 (Del. Dec. 5, 2016).

A056; B13. Thus, the prosecutor was not improperly calling on the jurors to sympathize with Ann, but rather was asking them to contemplate what each of the witnesses' biases might be.[38]

Even if this Court were to find the statement improper, it does not warrant reversal. Not every improper prosecutorial remark requires reversal, only those that "prejudicially affect the 'substantial rights' of the accused compromise the integrity of the verdict and the fairness of the trial."[39]

E. Improperly Basing an Argument on Facts Not Supported by the Record

Heald argues that the prosecutor improperly extended a proper bias argument beyond reasonable inference when she commented on why Heald's family members might have testified in his favor. Op. Br. at 32-35. He also asserts the prosecutor tried to inflame the passions of they jury through an improper characterization of his charges when she said:

> When it comes to family members, no one wants to think or believe that a family member could ever do something as heinous as what we are

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[38] *Cf. Derose v. State*, 840 A.2d 615, 620 (Del. 2003) (finding prosecutor's comment about doctor's diagnosis of child's injuries that "[h]e doesn't have a dog in this fight" was not improper because: "This statement simply suggests to the jury that the doctor was not biased when he diagnosed the child. . . . It does not show that the prosecutor endorsed the doctor's credibility."). *See Weber*, 457 A.2d at 680 ("It is well settled that the bias of a witness is subject to exploration at trial and is always relevant as discrediting the witness and affecting the weight of his testimony." (internal quotations and citations omitted)).

[39] *Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004).

> alleging here. It's something that family may choose to never believe it ever happened, unless they saw it with their own eyes.

A056. Although a prosecutor is prohibited from "attempt[ing] to inflame the prejudices of the jury by name-calling or other pejorative language," this statement does not rise to that level. "[I]n a closing argument, prosecutors are 'allowed and expected' to make and explain inferences from the evidence that support the prosecution's theory that the defendant is guilty."[40] Here, the prosecutor was appropriately opining on why Heald's family members' testimony favorable to Heald might be biased.[41] Moreover, her use of the word "heinous," although some might consider it hyperbole, was not improper.[42]

The second statement Heald takes issue with was made in rebuttal in response to Heald's argument that Ann's story lacked credibility, because Ashley and Brian testified that Ann was never alone in Ashley's room without them (B15-17]), and "when this allegedly happened, the people who were there dispute [Ann's] version of this" (B17). He also argued:

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[40] *Mills v. State*, 2007 WL 4245464, at *3 (Del. Dec. 3, 2007).

[41] *See Caldwell*, 770 A.2d at 530 (noting a prosecutor can argue a witness is biased provided there is evidence to support that inference).

[42] *Cf. Flonnory*, 893 A.2d at 540 (finding prosecutor's use of hyperbole to make a point was not misrepresentation of the evidence); *Kurzmann*, 903 A.2d at 713 ("The prosecutor's comments might be hyperbolic argument, in which the prosecutor made legitimate inferences from the evidence at the VOP hearing, but they are supported by the record, are not misstatements, and, in context, are not improper in any way.").

> [T]he heart of this case and the State's story to you from the beginning was that this was [Ann] and [Brian] in that room, and then it was [Ann] and [Heald]. One person in this trial has said that, and that was [Ann]. [Ashley] and [Brian] said that's not true. Christina Heald, their mother, testified and said, I went up, and they were all there.

B16-17. On rebuttal the prosecutor stated:

> [T]he State is not suggesting in any way that the witnesses that we presented from the Heald family . . . are in any way intentionally being deceptive.
>
> But I will say . . . that you have to consider it is the defendant's family. It is their uncle. They love their uncle. . . . Pay attention to their demeanor. . . .
>
> I'm not saying they were being intentionally deceptive, but they are under the influence. . . They love their uncle. They have clearly seen their uncle since all of this. They live in the family. . . . And no one, like I said, no one wants to believe a family member could do something like this.

A057.

Heald claims the comments that "no one wants to believe a family member could do something like this" and that certain witnesses were under Heald's influence went beyond an acceptable bias argument and were not reasonable inferences to be made from the record. Op. Br. at 33-34. Heald is mistaken. Neither comment was an impermissible argument about bias,[43] and the prosecutor's

[43] *Cf. Caldwell*, 770 A.2d at 530 (finding the prosecutor's suggestion that "bias would 'cloud [Caldwell's aunt's] memory and her perception of what went on' and [implication] that she 'tried to keep him out of trouble,' does not alone constitute an impermissible suggestion that she lied under oath").

statement that Heald's family members were under his "influence" was reasonably inferred from the record evidence. Ashley testified that she knew Ann was in the kitchen (and not with Heald) when she, Brian, and Cole were hiding in the bathroom because "my parents were there the whole time, and *they* know that she was in the kitchen" (A029); Brian indicated in his CAC interview that Ann had been alone with Heald, but testified at trial to facts inconsistent with that statement (A037-38); the prosecutor noted in introducing Christina's 3507 statement that "her demeanor and the details provided closer in time to the event" were different than what she was representing on the stand (B8); and Ashley testified that she had spent time with Heald that summer during a family vacation, and when asked if they had talked as a family about what happened responded, "No. But if we did, it was rare" (A032).

F. Even if the Some of the Prosecutor's Statements Were Improper, Reversal is Not Required.

If the Court finds prosecutorial misconduct exists, where the defense did not object to the conduct, the Court applies a plain error analysis.[44] "Under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[45] Plain error is described as basic, serious and fundamental material defects, which are apparent on the face of the record and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice.[46] If the Court concludes that reversal is not warranted under the plain error standard, it then proceeds to apply the test articulated in *Hunter v. State*, which considers "whether the prosecutor's statements are repetitive errors that require reversal because they cast doubt on the integrity of the judicial process.'"[47]

Here, any improper statements the prosecutor might have made were not so unduly prejudicial that they deprived Heald of a substantial right or clearly showed

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[44] *Baker v. State*, 906 A.2d 139, 150 (Del. 2006).

[45] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing *Dutton v. State*, 452 A.2d 127, 146 (Del. 1982)).

[46] *Wainwright*, 504 A.2d at 1100 (citing *Bromwell v. State*, 427 A.2d 884, 893 n.12 (Del. 1981)).

[47] *Spence v. State*, 129 A.3d 212, 226 (Del. 2015) (quoting *Hunter v. State*, 815 A.2d 730, 738 (Del. 2002)).

manifest injustice, nor were they so repetitive as to cast doubt on the integrity of the judicial process.

IV. HEALD WAS NOT PREJUDICED BY CUMULATIVE ERROR.

Question Presented

Whether cumulative errors deprived Heald of a fair trial.

Scope of Review

"[W]here there are several errors in a trial, a reviewing court must also weigh the cumulative impact to determine whether there was plain error from an overall perspective."[48]

Merits of the Argument

Heald claims the cumulative impact of the errors he has alleged on appeal denied him a fair trial. Op. Br. at 36-37. Heald is wrong. "Cumulative error must derive from multiple errors that caused 'actual prejudice.'"[49] Because Heald is not entitled to relief on any of his individual claims, he is not entitled to relief for cumulative error.

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[48] *Michael v. State*, 529 A.2d 752, 764 (Del. 1987) (citing *Wright v. State,* 405 A.2d 685, 690 (Del. 1979)).

[49] *Michaels v. State*, 970 A.2d 223, 231–32 (Del. 2009).

CONCLUSION

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

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DATED: November 2, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DARTH HEALD, Defendant Below- Appellant	)	
v.	)	No. 108, 2020
STATE OF DELAWARE, Plaintiff Below- Appellee	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 8,434 words, which were counted by Microsoft Word 2016.

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CERTIFICATION OF MAILING/SERVICE

The undersigned certifies that on November 2, 2020, she caused the attached *State's Answering Brief* and *Appendix to State's Answering Brief* to be delivered to the following persons in the form and manner indicated:

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