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Case Number 75,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

A.J. McMULLEN,	§	
	§	No. 75, 2020
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE OF PROCEEDINGS

On October 8, 2018, a Superior Court grand jury indicted A.J. McMullen for murder in the first degree, possession of a firearm during the commission of a felony ("PFDCF"), and possession of a deadly weapon by a person prohibited ("PDWBPP").[1] McMullen moved to sever the PDWBPP charge for a separate trial, which the court granted.[2]

On December 9, 2019, McMullen's case proceeded to a bench trial on the murder and PFDCF charges.[3] After the State rested, McMullen moved for judgment of acquittal.[4] The Superior Court reserved decision on the motion.[5] After McMullen rested, the court also reserved decision on the trial itself.[6]

On January 3, 2020, the Superior Court issued a written opinion denying the motion for judgment of acquittal and finding McMullen guilty of both charges.[7]

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[1] A001, at D.I. 1, A013. "D.I. __" refers to item numbers on the Superior Court Criminal Docket in S*tate v. McMullen*, ID No. 1810004048A, included in the Appendix to Appellant's Opening Brief at A001–12.

[2] A008, at D.I. 68.

[3] A008, at D.I. 64. McMullen waived his right to a jury trial. A008, at D.I. 60.

[4] A008, at D.I. 64.

[5] A008, at D.I. 64.

[6] A008, at D.I. 64.

[7] *State v. McMullen*, 2020 WL 58529, at *12 (Del. Super. Ct. Jan. 3, 2020).

On February 21, 2020, the court sentenced McMullen: (i) for murder in the first degree, to life in prison; and (ii) for PFDCF, to 25 years in prison.[8]

McMullen filed a timely notice of appeal. He filed an opening brief on October 5, 2020. This is the State's answering brief.

[8] Opening Br. Ex. C, at 1.

SUMMARY OF ARGUMENT

I. The Appellant's argument is denied. Keshawn Gibbs' and Shernell Perry's prior out-of-court statements, admitted under 11 *Del. C.* § 3507, were not cumulative of their in-court testimony. Keshawn Gibbs' in-court testimony contradicted his § 3507 statement in several material ways, including whether McMullen was present for the conversation that supplied the motive to murder Darrin Gibbs. Shernell Perry had previously stated that McMullen confessed to Darrin Gibbs' murder, but in court, she evaded the prosecutor's questions and refused to say that McMullen made an express admission. Shernell Perry's § 3507 statement clarified her confusing in-court testimony. Accordingly, the Superior Court did not abuse its discretion by admitting these statements. Regardless, any error was harmless because the substantial other evidence supported McMullen's convictions.

II. The Appellant's argument is denied. The State presented sufficient evidence to prove McMullen's guilt beyond a reasonable doubt. The Superior Court heard evidence of McMullen's motive, opportunity, and means to kill Darrin Gibbs. Plus, McMullen confessed to multiple witnesses on different occasions that he murdered Darrin Gibbs. The Superior Court properly denied McMullen's motion for judgment of acquittal.

STATEMENT OF FACTS

On November 16, 2016, Keshawn Gibbs ("Keshawn") visited Kenton Williams at the Old Landing Apartments in Millsboro, Delaware, to purchase heroin.[9] McMullen was also there.[10] Keshawn discussed with them a rumor that Darrin Gibbs ("Darrin")—Keshawn's cousin and Williams' friend—robbed a drug dealer of drugs and money.[11] But Williams and McMullen had committed the robbery.[12] Keshawn said that Darrin intended to correct the story by informing the drug dealer who was actually responsible for robbing him.[13] After McMullen heard that, he stayed quiet.[14] Then, after Keshawn left, McMullen said to Williams, referring to Darrin: "He got to go."[15]

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[9] A116, A124, A129–30, A139, A253.

[10] A254.

[11] *State v. McMullen*, 2020 WL 58529, at *8 (Del. Super. Ct. Jan. 3, 2020); A114, A123–24, A251, A255–56.

[12] *McMullen*, 2020 WL 58529, at *8; A123, A255–56.

[13] *McMullen*, 2020 WL 58529, at *8; A123–24; A255–56.

[14] A257. During his in-court testimony, Keshawn denied that McMullen was present for this conversation, A135–36, but in a prior statement to the police, he told the detective that McMullen was there, A123. Williams testified that McMullen was present when Keshawn relayed Darrin's intentions. A255–56.

[15] *McMullen*, 2020 WL 58529, at *8; A257.

Ashley Donaway later picked up Williams at the Old Landing Apartments.[16] They drove to the Classic Motel in Georgetown and arrived as it was getting dark.[17] They were together until about 10:00 p.m., when Williams took a shower and Donaway left to pick up McDonald's and alcohol.[18] She was gone for about 15 to 20 minutes, and when she returned, Williams was still in the shower.[19]

Meanwhile, Darrin arrived at the Millsboro Village Apartments around 10:30 p.m.[20] He met McMullen outside the home of Shernell Perry ("Shernell"), McMullen's girlfriend.[21] Albert Green, a neighbor who lived two doors down, was also there.[22] At one point, Shernell opened her door and saw all three of them together in her breezeway.[23] Surveillance video captured McMullen, Darrin, and Green leaving the apartment complex together at 11:37 p.m.[24] Darrin was "going

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[16] *McMullen*, 2020 WL 58529, at *6; A146.

[17] *McMullen*, 2020 WL 58529, at *6; A146–47, A258–59.

[18] *McMullen*, 2020 WL 58529, at *6; A147, A150–51.

[19] *McMullen*, 2020 WL 58529, at *6; A147, A150–51.

[20] *McMullen*, 2020 WL 58529, at *4; A337.

[21] *McMullen*, 2020 WL 58529, at *4; A337.

[22] *McMullen*, 2020 WL 58529, at *4; A337, A344–45.

[23] *McMullen*, 2020 WL 58529, at *4; A496.

[24] *McMullen*, 2020 WL 58529, at *4, *11; A241. From the witness stand, both Green and Williams identified the three people in the video as McMullen, Darrin, and Green. *McMullen*, 2020 WL 58529, at *4; A286, A340–42.

to his people's house";[25] Green was going to purchase marijuana and split off from Darrin and McMullen at the Brandywine Village Apartments.[26] On his way back to Millsboro Village, Green ran into McMullen, who was alone.[27] Surveillance video showed them returning together to Millsboro Village at 11:55 p.m.[28]

Around this time, Michelle Wolf was driving home from work when, at the intersection of West Monroe Street and Houston Street in Millsboro, she saw a person lying in the road.[29] The person, later identified as Darrin, was laying on his stomach with his hands still in his pants pockets.[30] He appeared to have been shot in the back of the head, and he was bleeding from his head, ears, mouth, and nose.[31] He was unresponsive and not breathing.[32] Wolf called 911 at 11:50 p.m.[33] The police arrived and processed the scene.[34] They recovered: (i) one live 9mm

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[25] A343.

[26] *McMullen*, 2020 WL 58529, at *5; A342, A349.

[27] *McMullen*, 2020 WL 58529, at *5; A342–43.

[28] *McMullen*, 2020 WL 58529, at *4, *11; A241, A286, A340–42.

[29] *McMullen*, 2020 WL 58529, at *1; A027–28, A042–43.

[30] *McMullen*, 2020 WL 58529, at *4; A029–31, A048–50.

[31] A029–31, A037. The medical examiner would later determine that the cause of Darrin's death was a gunshot wound to the back of his head and that the manner was homicide. *McMullen*, 2020 WL 58529, at *4.

[32] A031.

[33] *McMullen*, 2020 WL 58529, at *5; A029, A059.

[34] *See* A087–105.

round, about 15 feet from Darrin's body; (ii) one spent Hornady 9mm shell casing, about 5 feet from his body; (iii) a Gatorade bottle, about 55 feet away; and (iv) a black cap with a hole in it, under Darrin's head.[35] The police would recover no fingerprints or DNA from the live round or the spent shell casing.[36]

When McMullen arrived home, he and Shernell fought about him having people over so late and "partying."[37] At some point that night, McMullen asked Shernell to drive him out of state (but she did not).[38]

McMullen, panting, called Williams and asked Williams to come get him.[39] McMullen called Williams two more times, first to say "never mind" and then to tell him to come to Millsboro after all.[40] Williams told Donaway they needed to go to Millsboro Village to pick up a bag of clothes from McMullen.[41] They left

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[35] *McMullen*, 2020 WL 58529, at *4; A087–88, A091–93, A096, A109.

[36] *McMullen*, 2020 WL 58529, at *4; A063, A104–05.

[37] *McMullen*, 2020 WL 58529, at *3; A498.

[38] A499. Shernell and A.J. later drove to North Carolina for Thanksgiving and returned after the holiday. A504–05.

[39] *McMullen*, 2020 WL 58529, at *6; A261. Williams recalled that McMullen first called sometime after Donaway returned from McDonald's and the liquor store. A261.

[40] *McMullen*, 2020 WL 58529, at *6; A261–62.

[41] *McMullen*, 2020 WL 58529, at *6; A150. When speaking with Donaway, Williams referred to McMullen as "Little Bro." *See* A150, A261.

together around 11:30 p.m.[42] When they arrived, Williams got out of the car, walked behind the apartment complex, and returned ten minutes later carrying a blue duffel bag with red handles.[43] They drove back to the Classic Motel, and Williams put the duffel bag in the corner of the room.[44]

McMullen called Williams again.[45] After the call, Williams told Donaway they needed to go back to Millsboro Village to get McMullen.[46] After picking him up, McMullen apologized for his girlfriend "tripping," and they all went back to the Classic Motel together.[47] McMullen went into the bathroom and stayed there for 45 minutes.[48] Williams was mostly in the bathroom with him.[49] McMullen confessed to Williams that he killed Darrin, saying that "he had to do it" and that it "was for both of [them]."[50] McMullen said they could cry about it later.[51]

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[42] A153.

[43] *McMullen*, 2020 WL 58529, at *6; A152, A262. Green also witnessed McMullen give Williams a duffel bag. A346.

[44] *McMullen*, 2020 WL 58529, at *6; A154, A264.

[45] *McMullen*, 2020 WL 58529, at *7; A265.

[46] A155.

[47] *McMullen*, 2020 WL 58529, at *7; A157.

[48] A157; *see also McMullen*, 2020 WL 58529, at *7.

[49] A157; *see also McMullen*, 2020 WL 58529, at *7.

[50] A266, A292; *see also McMullen*, 2020 WL 58529, at *7.

[51] A266.

McMullen also discussed fleeing the state.[52] Donaway overheard McMullen say, "Why are they looking for me?"[53]

On November 17, Williams and McMullen drove to Seaford, where Williams hid the blue and red duffel bag in a shed on a property.[54] As they drove over a bridge spanning Williams Pond, McMullen threw a black bag over the side of the bridge.[55] McMullen told Williams the bag contained a gun.[56] McMullen then asked Williams whether he had touched any of the shells because he thought he had dropped one.[57]

Later that day, Shernell notified McMullen and Williams that the police were looking for them.[58] Williams contacted Donaway and asked her to provide alibis for him and McMullen.[59] Donaway said that she would only account for their time actually together.[60] Williams and McMullen then went to the Millsboro

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[52] A292–93.

[53] A159.

[54] *McMullen*, 2020 WL 58529, at *7; A269–70.

[55] *McMullen*, 2020 WL 58529, at *7; A270–71; A408.

[56] *McMullen*, 2020 WL 58529, at *7; A270–71.

[57] *McMullen*, 2020 WL 58529, at *7; A271.

[58] A272–73.

[59] A161–62.

[60] A161–62.

Police Department, where the police conducted separate interviews.[61] McMullen admitted seeing Darrin the day before but claimed it was no later than noon.[62] Williams did not provide much information.[63]

Shernell picked up McMullen from the police station.[64] At some point, McMullen told Shernell, "I killed him," and, "I did it to that boy."[65] McMullen also told Shernell, a couple days later, that Williams would drive him home to North Carolina and that, if he did, Williams "wasn't coming back."[66] "Shernell . . . took this to mean that [McMullen] would harm . . . Williams. . . . Williams knew that [McMullen] had murdered Darrin."[67]

On November 18, Williams asked Donaway to drive him to a residence in Seaford so he could get the blue and red duffel bag for McMullen.[68] Williams went into a shed and recovered the duffel bag.[69] Inside the duffel bag, they saw

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[61] *McMullen*, 2020 WL 58529, at *7; A272–73.

[62] *McMullen*, 2020 WL 58529, at *7.

[63] A274, A280.

[64] A504.

[65] *McMullen*, 2020 WL 58529, at *9, *12.

[66] *McMullen*, 2020 WL 58529, at *9; A503, A517.

[67] *McMullen*, 2020 WL 58529, at *9.

[68] *Id.* at *1; A165–66, A275–76.

[69] *McMullen*, 2020 WL 58529, at *7; A165–66.

clothes, drugs, an assault rifle, and ammunition.[70] They threw away the clothes and returned the bag to McMullen.[71]

On June 4, 2018, the police interviewed Williams again.[72] On this occasion, Williams' provided more information to the police—including about the gun that McMullen tossed over the bridge.[73] The police scheduled a dive with the scuba team three days later.[74] At the bottom of Williams Pond, an officer found a black plastic bag containing a Hi-Point 9mm handgun.[75] A subsequent ballistics examination determined that the spent shell casing recovered from the scene was fired from the handgun recovered from Williams Pond.[76]

[70] *McMullen*, 2020 WL 58529, at *7; A165–66; A275–76.

[71] *McMullen*, 2020 WL 58529, at *7; A276–77.

[72] A055.

[73] A278–79, A362–63.

[74] *McMullen*, 2020 WL 58529, at *4; A362–63.

[75] *McMullen*, 2020 WL 58529, at *4; A410–11.

[76] *McMullen*, 2020 WL 58529, at *4–5; A434. The firearms examiner could not make a determination as to whether the recovered unfired bullet was associated with the handgun. A438.

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING TWO OUT-OF-COURT PRIOR STATEMENTS UNDER 11 *DEL. C.* § 3507.

Question Presented

Whether the Superior Court abused its discretion by admitting two § 3507 statements over objections that they were cumulative.

Standard and Scope of Review

This Court reviews the admission of an out-of-court statement for abuse of discretion.[77] The trial court abuses its discretion when it exceeds the bounds of reason under the circumstances or ignores recognized rules of law or practice in a way that produces injustice.[78]

Merits of Argument

Keshawn and Shernell gave prior statements to the police about Darrin's murder. The State introduced those prior statements at trial under 11 *Del. C.* § 3507. McMullen argues that the § 3507 statements were merely cumulative of the in-court testimony and impermissibly doubled the impact of that evidence.[79]

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[77] *Turner v. State*, 5 A.3d 612, 615–16 (Del. 2010).

[78] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994).

[79] Opening Br. 12–13.

But on the witness stand, concerning subjects that tended to incriminate McMullen, Keshawn and Shernell either contradicted their prior statements or avoided addressing those subjects directly. Consequently, the Superior Court did not abuse its discretion by admitting the statements.

Section 3507(a) allows for the admission of a "voluntary out-of-court prior statement of a witness who is present and subject to cross-examination . . . as affirmative evidence with substantive independent testimonial value." The prior out-of-court statement may be admitted whether or not it is consistent with the witness's in-court testimony.[80]

The party offering an out-of-court prior statement under § 3507 must establish a proper foundation before presenting it to the jury.[81] The offering party must tender the § 3507 statement during the declarant's direct examination.[82] The declarant must first testify about both the events he perceived and the out-of-court statement itself.[83] The offering party must establish that the declarant made the prior statement voluntarily and must also ask the declarant about its truthfulness.[84] Generally speaking, if the offering party satisfies these foundational requirements,

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[80] § 3507(b).

[81] *State v. Flowers*, 150 A.3d 276, 279–81 (Del. 2016).

[82] *Id.* at 279–80 (citing *Woodlin v. State*, 3 A.3d 1084, 1087 (Del. 2010)).

[83] *Id.* at 280.

[84] *Id.*

it may interrupt the declarant's direct examination to present the out-of-court statement to the jury.[85]

But establishing a proper foundation not the only consideration a court makes when admitting a statement under § 3507.[86] Section 3507 "does not trump all other rules of admissibility."[87] If the witness "has full recall of the relevant events, and is not contradicting the out-of-court statement," then the out-of-court statement simply buttresses the in-court testimony and is subject to being excluded as cumulative.[88] Under D.R.E. 403, the Superior Court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence."

A. The Superior Court did not err by admitting Keshawn's out-of-court prior statement, which contradicted his in-court testimony in several material ways.

Keshawn's § 3507 statement was not cumulative of his in-court testimony. On the witness stand, Keshawn testified that he spoke to Darrin about a rumor falsely implicating Darrin in the robbery of a drug dealer.[89] Darrin did not commit

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[85] *Woodlin*, 3 A.3d at 1088.

[86] *Richardson v. State*, 43 A.3d 906, 909 (Del. 2012).

[87] *Id.*

[88] *Id.*; *see also Stevenson v. State*, 149 A.3d 505, 510 (Del. 2016).

[89] *See* A115–16.

the robbery—McMullen and Williams did.[90] Keshawn further testified that, days before Darrin's murder, he met Williams and McMullen at the Old Landing Apartments.[91] Keshawn testified that he spoke to Williams—and only Williams—about the rumor involving Darrin:

> Q Did you ever have a conversation with [Williams] and [McMullen] about this rumor?
>
> A With [Williams].
>
> . . . .
>
> Q Okay. And what was the nature of that conversation that you had with [Williams]?
>
> A Just of like the rumor that was flying around about what I spoke about a while ago about them doing something. I guessing a robbery or something, and you know because Darrin was like basically, man, they got his name was coming up in it, and he was just like, you know, he don't know why his name is coming up in it because he didn't really have no involvement in it.
>
> Q Did Darrin tell you who did have involvement in it?
>
> A No, not necessarily. It was basically just a rumor.[92]

[90] A255–56.

[91] A115–17.

[92] A116–17.

At this point, the State sought to present Keshawn's prior statement to Delaware State Police Detective Mark Csapo under § 3507.[93] McMullen objected to the statement as cumulative.[94] But the Superior Court indicated that it had not been able to glean much from Keshawn's in-court testimony: "Well, I didn't hear much about what allegedly happened. . . . I listened and didn't really hear anything."[95] The prosecutor represented to the court that Keshawn's in-court testimony was inconsistent with his prior statement to Detective Csapo.[96] The court then allowed the State to present Keshawn's prior statement under § 3507.[97]

The prosecutor's representation proved to be true. In contrast to his in-court testimony, Keshawn previously told Detective Csapo that he spoke to *both* Williams and McMullen about the rumor involving Darrin.[98] While testifying, Keshawn also omitted that he told Williams and McMullen that Darrin intended to inform the robbery victim who was actually responsible.[99] Keshawn further testified the conversation happened days before the shooting, but he told Detective

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[93] A117–19.

[94] A119.

[95] A119–20.

[96] A120.

[97] A120–21.

[98] A123–24.

[99] *See* A123.

Csapo that it occurred just the day before Darrin was found murdered in the street.[100]

Keshawn's § 3507 statement contained the most crucial parts of his testimony. He identified the motive for Darrin's murder, and he connected McMullen to that motive by establishing he was present for the conversation. He also drew a closer temporal connection between the when the motive arose and when the murder occurred. Manifestly, the risk of needlessly presenting cumulative evidence did not substantially outweigh the probative value of Keshawn's § 3507 statement. The Superior Court did not exceed the bounds of reason by admitting it.

B. The Superior Court did not err by admitting Shernell's out-of-court prior statement, which clarified material portions of her in-court testimony.

Shernell's § 3507 statement was not cumulative of her in-court testimony, either. Shernell saw McMullen with Darrin the night he was murdered.[101] The following day, Shernell learned that Darrin was killed, and at the same time, the police told Shernell that they wanted to speak to McMullen.[102] Shernell picked up

[100] A124.

[101] A496.

[102] A503.

McMullen from the Millsboro Police Department after his police interview.[103] She asked McMullen why the police wanted to talk to him.[104] When asked if, at some point, McMullen told her what happened to Darrin, Shernell responded: "No. I started questioning him, but, no, he didn't voluntarily tell me anything in that nature."[105] The prosecutor pressed Shernell whether she told Detective Csapo that McMullen confessed to her.[106] Shernell did not give a direct answer and instead described an ambiguous exchange with McMullen.[107] She testified that, in an emotional argument with McMullen, McMullen stated only that "yes," he understood that people were alleging he murdered Darrin.[108] She claimed that her account was incorrectly twisted into McMullen stating that "yes," he shot Darrin:

> What I said was that [McMullen] and I were arguing and I was asking him a lot of questions all in one, because I was tired of everybody saying things, just popping up, people just, you know, coming to me or whatever. So I let Detective Csapo know that, you know, everything was just piling up in one and I was arguing with [McMullen], saying, you know, they're saying you're robbing people, they're saying you're doing this. Now they're saying that

[103] A504.

[104] A504.

[105] A505.

[106] A507.

[107] A507–08.

[108] A507–08.

> you murdered this young man, and, you know, it wasn't right, it wasn't fair.
>
> And I asked him did he understand, you know, what I was saying. And he answered, yes. And then after, you know, continuous questioning, I believe I did say that, you know -- and I was nervous, I was scared. And I did say -- well, he answered yes. So was it yes to, did he shoot Mr. Gibbs. And I agreed.[109]

Upon further questioning, she would not directly confirm, and in fact downplayed, whether McMullen looked her in the eye and confessed to killing Darrin.[110] When asked whether McMullen told her that he "shot Poor Boy," Shernell only agreed that McMullen had used the phrase "Poor Boy."[111]

The State then moved to admit her prior statement to Detective Csapo under § 3507. McMullen objected. The court found that Shernell's statement was confusing and welcomed any clarification that could be offered:

> I will say that [Shernell's] testimony on this particular point is confusing, hard to get a handle on, and certainly far from clear. If she made a prior statement that may bring some clarity to this, then that would be worth hearing.
>
> I can certainly compare the two the best I can and make some judgments about that. So we will entertain the statements she made to the officer under 3507.

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[109] A507–08.

[110] A509.

[111] A509.

. . . .

> . . . . [H]er testimony is hard to understand. It's confusing. It's kind of, I think, going around the point. She has been asked some fairly straightforward questions and then we get a fairly long answer that never really gets to it and includes an explanation of what the context was of her discussion with the defendant and then we never really get, in my view or to my satisfaction, much of an answer. So if she has answered at some other time in a manner that may be more clear, I would like to hear that.[112]

The Superior Court did not exceed the bounds of reason by admitting evidence that could clarify confusing, oblique testimony. And the statement did just that. It revealed that McMullen told Shernell, in reference to Darrin, "I killed him," and "I did it to that boy."[113] In its judgment, the court recounted: "At trial [Shernell's] testimony was much less clear than the recorded statement she had given to Detective Csapo before trial."[114] Given how material these statements were, and the value the court found in hearing them, the risk of needlessly presenting cumulative evidence did not substantially outweigh the probative value of Shernell's § 3507 statement.

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[112] A511, A513.

[113] *McMullen*, 2020 WL 58529, at *3, *12.

[114] *McMullen*, 2020 WL 58529, at *10. The court attributed the discrepancies between the in-court and out-of-court statements to Shernell being "a very reluctant witness against [McMullen]." *Id.* She "obviously did not want her testimony to harm [McMullen] any more than necessary." *Id.*

C. Even if the Superior Court erred by admitting either § 3507 statement or both, the error was harmless.

Even if this Court finds that the Superior Court abused its discretion by admitting one or both of the § 3507 statements, the error was harmless. Trial court decisions to admit evidence are subject to a harmless-error analysis.[115] An error in admitting evidence is harmless "where the evidence admitted at trial, other than the improperly admitted evidence, is sufficient to sustain the defendant's conviction."[116] If the evidentiary error "is of a constitutional magnitude, the convictions may be sustained if the error is harmless beyond a reasonable doubt."[117] This Court does not reverse convictions for harmless errors.[118]

Exclusive of the challenged § 3507 statements, the State offered substantial evidence of McMullen's guilt, sufficient to sustain his convictions beyond a reasonable doubt. The medical examiner concluded that a gunshot to the back of Darrin's head cause his death and the manner of death was homicide.[119] Darrin was shot before 11:50 p.m., evidenced by the time of the 911 call.[120] Video

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[115] *E.g.*, *Guilfoil v. State*, 2016 WL 943760, at *5 (Del. Mar. 11, 2016).

[116] *Miller v. State*, 1993 WL 445476, at *3 (Del. Nov. 1, 1993).

[117] *Nelson v. State*, 628 A.2d 69, 77 (Del. 1993) (internal quotation marks omitted).

[118] *Id.*

[119] *McMullen*, 2020 WL 58529, at *11.

[120] *Id.*

surveillance showed him alive with McMullen and Green just 13 minutes earlier, at 11:37 p.m., walking away from the Millsboro Village Apartments.[121] Green's testimony put McMullen even closer to the murder scene in terms of time and proximity.[122] After passing the surveillance camera, Green continued walking with McMullen and Darrin until he split off to buy marijuana at the Brandywine Village Apartments—which are near the murder scene.[123]

Williams' testimony also put McMullen at the murder scene—and the murder weapon in his hands. McMullen told Williams he dropped a bullet, and the police found an unfired bullet at the scene.[124] Williams witnessed McMullen throw a black bag over a bridge into Williams Pond, and McMullen told Williams the bag contained a gun.[125] The police later recovered a black bag containing a handgun from the bottom of Williams Pond.[126] A ballistics examination determined this handgun fired the spent shell casing recovered from the scene, a few feet from Darrin's dead body.[127]

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[121] *Id.*

[122] *See id.*

[123] *Id.*

[124] *Id.*

[125] *See id.*

[126] *See id.*

[127] *Id.*

McMullen had motive to kill Darrin.[128] McMullen and Williams had robbed a drug dealer, but Darrin was rumored to be the culprit.[129] To dispel this rumor, Darrin intended to inform the drug dealer who actually robbed him, and Keshawn relayed Darrin's intentions to McMullen and Williams.[130] This information did not merely come from Keshawn's § 3507 statement—Williams independently testified about their conversation, too.[131] Williams added that, after Keshawn left, McMullen told him that Darrin "has gotta go."[132] McMullen wanted to keep Darrin quiet about the robbery.[133]

Shernell was not the only person to whom McMullen confessed—McMullen also admitted to Williams that he killed Darrin.[134] He told Williams that "he had to do it" and that it "was for both of [them]."[135]

To establish that McMullen committed murder in the first degree, the State had to prove that he caused Darrin's death and did so intentionally.[136] As the

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[128] *Id.* at *12.

[129] *Id.*

[130] *Id.*

[131] *Id.* at *2.

[132] *Id.* at *12.

[133] *Id.*

[134] *Id.*

[135] A266, A292; *accord McMullen*, 2020 WL 58529, at *12.

[136] *See* 11 *Del. C.* § 636; A013.

Superior Court found, McMullen wanted to keep Darrin quiet about the robbery, was at the murder scene, possessed the murder weapon, and admitted to killing Darrin after the fact.[137] This evidence was sufficient to conclude that McMullen caused Darrin's death by shooting him.[138] And, as the Superior Court also concluded, "If you shoot someone in the back of the head with a high-powered handgun, then the only conclusion that can be drawn is that you intended to kill them."[139] McMullen's motive to stop Darren from revealing his role in a robbery further established his intent to kill Darren.[140]

To establish that McMullen committed PFDCF, the State had to prove that he possessed a firearm during the murder.[141] "[T]he only logical conclusion - and finding - is that it was the Defendant who possessed the handgun that fired the bullet that killed Darrin."[142]

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[137] *McMullen*, 2020 WL 58529, at *11–12.

[138] *Id.*

[139] *Id.* at *12.

[140] *See id.*

[141] *See* 11 *Del. C.* § 1448; A013.

[142] *McMullen*, 2020 WL 58529, at *12.

II. THE STATE PRESENTED SUFFICIENT EVIDENCE AT TRIAL TO SUPPORT A FINDING OF GUILT.

Question Presented

Whether the Superior Court properly denied McMullen's motion for judgment of acquittal for charges of murder in the first degree and PFDCF where the State presented evidence that McMullen had motive to kill Darrin, was with Darrin just before he was shot, confessed to multiple people that he killed Darrin, and discarded the murder weapon.

Standard and Scope of Review

This Court reviews an appeal from the denial of a motion for judgment of acquittal *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of the crime.[143] In this inquiry, the Court does not distinguish between direct and circumstantial evidence.[144]

Merits of Argument

As described in Part I.C above, there was sufficient evidence to convict McMullen of murder in the first degree and PFDCF beyond a reasonable doubt

[143] *Ways v. State*, 199 A.3d 101, 106–07 (Del. 2018).

[144] *Id.*

even without Keshawn's and Shernell's § 3507 statements. Those § 3507 statements, when also considered, further solidify McMullen's culpability for Darrin's murder. Keshawn's § 3507 statement corroborated McMullen's motive—to keep Darren quiet about the robbery he previously committed. Shernell's § 3507 statement recounted an additional confession. McMullen claims the State relied "exclusively on the tenuous connection of uncorroborated witness testimony."[145] McMullen ignores the surveillance video, ballistics evidence, and how the testimony of the various witnesses substantially corroborated each other. When the evidence is viewed in the light most favorable to the State, a rational trier of fact could have found—and did, in fact, find—McMullen guilty of murder in the first degree and PFDCF beyond a reasonable doubt.

McMullen makes the additional argument that the Superior Court should discredit Williams testimony.[146] He describes Williams as an "alleged accomplice" who admitted to destroying evidence and lying to the police during the investigation.[147] He also points out that Williams "received immunity and a lesser sentence avoiding incarceration" in exchange for his testimony.[148] McMullen

[145] Opening Br. 15.

[146] Opening Br. 15–16.

[147] Opening Br. 15.

[148] Opening Br. 15.

claims that Williams' testimony was uncorroborated and fraught with dangers of motives such as malice, fear, threats, hopes or leniency, or benefits from the prosecution.[149]

Williams was not an "accomplice" to Darrin's murder. An accomplice is someone who is complicit in the crime itself—for example, by aiding in the planning or commission of the offense.[150] Delaware law does not impose liability for conduct that occurred after the crime was completed. What Williams admitted to being was not an "accomplice," but an "accessory after the fact"—a common law status Delaware discarded in 1972.[151] "Under Delaware law, [an accessory after the fact] cannot be convicted as a principal or accomplice of a completed crime."[152]

If a witness was not involved in the subject crimes and is not subject to liability for them, there is not the same risk that his testimony is borne out of malice or personal interest. But even if the testimony of an accessory after the fact deserves some heightened level of skepticism, the Superior Court appropriately

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[149] Opening Br. 16.

[150] *See* 11 *Del. C.* § 271; *Allen v. State*, 970 A.2d 203, 210 (Del. 2009) ("[T]itle 11, section 271 provides generally, that a person is guilty of an offense committed by another person if an appropriate degree of complicity in the offense can be proved.").

[151] *Harper v. State*, 121 A.3d 24, 30 & n.51 (Del. 2015).

[152] *Id.* at 30.

scrutinized Williams' testimony here. The court recognized the potential issues with Williams' credibility. It noted that Williams spoke to the police multiple times before ultimately incriminating McMullen, that he had convictions involving crimes of dishonesty, and that he received benefits in exchange for his testimony.[153] "Nevertheless, [the court] found [Williams] to be credible for a number of reasons."[154] Williams was one of McMullen's "few close friends in Delaware" and "had no reason to want to harm" him.[155] At the same time, Williams was afraid of McMullen's violent past and "came forward once he was satisfied that [McMullen] was no longer a threat to him."[156] And, importantly, Williams' testimony was "consistent with . . . the testimony of other witnesses and the forensic evidence."[157]

Indeed, contrary to McMullen's assertions on appeal, Williams' testimony was substantially corroborated by the other evidence in the case. Williams testified about the conversation between him, Keshawn and McMullen that gave rise to the motive to murder Darrin—which Keshawn's § 3507 statement corroborated.[158]

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[153] *McMullen*, 2020 WL 58529, at *10.

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] A123–24, A253–57.

Williams testified about his trips from the Classic Motel to Millsboro Village, including one to pick up McMullen's duffel bag—which Donaway, Greene, and Shernell all corroborated to varying degrees.[159] Both Williams and Donaway testified about McMullen holing up in the motel bathroom and making statements implicating him in the murder.[160] Both Williams and Donaway testified about the contents of the duffel bag and Williams' efforts to hide its contents for McMullen.[161] McMullen told Williams that Green was at the scene, and both surveillance footage and Green confirmed that he left Millsboro Village Apartments with McMullen and Darrin.[162] McMullen told Williams he dropped a bullet, and the police found an unfired bullet at the scene.[163] Williams testified that McMullen threw a handgun over a bridge—then the police found it and determined that it was the murder weapon.[164]

[159] *See*, *e.g.*, A150–53, A261–62, A346.

[160] A157–59, A266, A292–93.

[161] A165–66, A275–76.

[162] A241, A274, A340–42.

[163] A088, A271.

[164] A270–71, A408–11; A434.

This Court's decision in *Bland v. State*,[165] upon which McMullen relies, directs that even uncorroborated accomplice testimony is not automatically discarded, but instead viewed with an appropriate level of skepticism. Williams was not an accomplice, and his testimony was largely corroborated by other sources. The Superior Court weighed factors that might cast doubt upon the veracity of his testimony and determined that his testimony was credible. Viewing all of the evidence in the light most favorable to the State, that determination was reasonable and certainly a conclusion that a rational factfinder could have drawn. The Superior Court did not err by denying the motion for judgment of acquittal.

[165] 263 A.2d 286, 288 (1970). *Cf. Washington v. State*, 4 A.3d 375, 378 (Del. 2010) (directing that uncorroborated accomplice testimony precludes a conviction when there is an "irreconcilable conflict in the State's evidence").

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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Date: December 7, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

A.J. MCMULLEN,	§	
	§	No. 75, 2020
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

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Date: December 7, 2020

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