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Case Number 372,2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KARIEEM J. HOWELL,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 372, 2020
	)	
STATE OF DELAWARE,	)	On Appeal from the
	)	Superior Court of the
Plaintiff Below,	)	State of Delaware
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

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NATURE AND STAGE OF THE PROCEEDINGS

Police arrested Karieem Howell ("Howell") on February 21, 2018. (D.I. 1 at A2).[1] Howell, his mother, Sharon Howell ("Sharon"), his brother, Malique Howell ("Malique"), and Harrison Dorsey ("Dorsey"), were indicted together for multiple counts of Drug Dealing, Possession of a Firearm During the Commission of a Felony ("PFDCF"), Conspiracy, Possession of a Weapon with an Obliterated Serial Number, and various misdemeanor drug charges.[2] The indictment stemmed from joint investigations by Delaware State Police ("DSP") and New Castle County Police ("NCCPD") in January and February 2018 at two residences: 12 Bradbury Drive in New Castle ("Bradbury") and 23 Aldershot Drive in Newark ("Aldershot").[3]

Prior to trial, Malique pled guilty to Drug Dealing and PFDCF;[4] Sharon pled guilty to Drug Dealing and Second-Degree Conspiracy (B11); and Dorsey pled guilty to Third-Degree Conspiracy (B1). As to Howell, the Superior Court held a five-day jury trial, commencing on March 12, 2019. (D.I. 50, 73 at A8-9). At the conclusion of the State's case-in-chief, Howell moved for judgment of acquittal on

[1] "D.I." refers to Superior Court docket items in *State v. Howell*, ID No. 1802010652. A1-16.

[2] *State v. Howell*, 2020 WL 1492787, at *1 (Del. Super. Ct. Mar. 23, 2020).

[3] *Id.*

[4] *Id.*

the five PFDCF charges. (D.I. 50 at A8-9). The court granted Howell's motion on four of the charges, relating to four firearms found in Aldershot's backyard, and denied Howell's motion as to the fifth PFDCF charge, relating to a handgun found in Aldershot's basement. (*Id.*). The jury found Howell guilty of two counts of Drug Dealing, Second-Degree Conspiracy, Possession of a Weapon with an Obliterated Serial Number, and Possession of Drug Paraphernalia. (*Id.*). The jury found Howell not guilty of PFDCF. (*Id.*).

On March 21, 2019, Howell moved for judgment of acquittal as to his convictions for two counts of Drug Dealing and Possession of a Firearm with an Obliterated Serial Number, arguing the State's evidence was not sufficient to sustain a guilty verdict. (D.I. 55 at A10; B264-80). On March 23, 2020, the Superior Court denied Howell's motion.[5] (D.I. 80 at A14).

On October 9, 2020, the Superior Court sentenced Howell to thirty years at Level V, suspended after five years, for decreasing levels of supervision. (D.I. 88 at A15; B281-85).

Howell has appealed and filed an opening brief. This is the State's Answering Brief.

[5] *Howell*, 2020 WL 1492787.

SUMMARY OF THE ARGUMENT

I. **DENIED.** The Superior Court did not abuse its discretion in denying Howell's request for a further two-week continuance after jury selection. On the day before, the court had granted defense counsel's request to delay the start of trial, other than jury selection, until the next morning so counsel could review the late production of a working DVD containing materials extracted from the cooperating witness's cell phone, and counsel was given the opportunity to further review the materials that evening because the cooperating witness was not called to testify until the next day. The judge's ruling was not unreasonable or capricious. Defense counsel failed to show any substantial prejudice with respect to the late production. A further continuance would have caused substantial prejudice to the State because the State had agreed to lift a protective order the prior day because counsel had only requested to delay trial until the next morning.

II. **DENIED.** The judge's denial of Howell's request to change courtrooms did not violate his constitutional rights. Howell was physically present at every stage of trial, and neither his nor the jury's view of witnesses was impeded.

III. **DENIED.** While the limiting instruction provided during the cooperating witness's testimony was erroneous, it did not amount to plain error.

IV. **DENIED.** The Superior Court conducted a proper *Getz* analysis and correctly admitted evidence under D.R.E. 404(b) of Howell's prior, uncharged

marijuana sales and offer to sell Caldwell a firearm with an obliterated serial number.

V. **DENIED.** The Superior Court did not err in instructing the jury on the elements of Possession of a Weapon with an Obliterated Serial Number.

VI. **DENIED.** The Superior Court properly denied Howell's motion for judgment of acquittal. The evidence was sufficient for a rational trier of fact to find Howell guilty of Possessing a Firearm with an Obliterated Serial Number.

VII. **DENIED.** The Superior Court properly denied Howell's motion for judgment of acquittal. The evidence was sufficient for a rational trier of fact to find that the marijuana Howell possessed weighed at least 4,000 grams.

VIII. **DENIED.** A cumulative error analysis is not warranted because there were not multiple errors and none of Howell's claims resulted in prejudicial error.

STATEMENT OF FACTS[6]

The State presented compelling evidence linking Howell to drug dealing activity at both [Bradbury] and [Aldershot]. The evidence permitted the jury to conclude that [Bradbury,] which was Sharon's home, was "the spot" where large quantities of marijuana were stored. When [DSP] executed a search warrant at [Bradbury] on February 16, 2018, they seized substantial evidence of drug dealing. During the search, in … the basement, police found a picnic table with a vacuum sealing machine, digital scale, numerous large plastic "vacuum sealer" bags, and visible marijuana "shake," which the police officers testified is the term for marijuana pieces that fall off when marijuana is packaged or repackaged. The police officers collected approximately 100 vacuum sealer bags, all of which had been used and contained marijuana residue or shake. The State's witnesses testified those bags commonly are used to mask the smell of marijuana and to store anywhere from a quarter pound to a pound of marijuana. Police also found ammunition within the unfinished area of the basement. Located approximately ten feet away, in a finished area of the basement, was a bedroom with the name "Reem" in letters on the wall. Testimony established that "Reem" is Defendant's nickname. Elsewhere in the residence, police found two firearms and approximately $2,400 in cash.

[6] Except where specifically noted, these facts are quoted from the Superior Court's opinion denying Howell's post-trial motion for judgment of acquittal. *Howell*, 2020 WL 1492787, at *1-4.

In addition to finding his name on the basement bedroom wall, police found a Delmarva Power bill in Howell's name for the residence. During their surveillance of [Bradbury] in the weeks before the search warrant was executed, police saw Howell visit the residence at least two times.

[DSP] also simultaneously executed a search warrant at [Aldershot,] a residence Howell owned and where Howell and Malique then were living. [Aldershot] was a split level home located approximately 50 yards from an elementary school. In the basement of that residence, police found 28 grams of marijuana in a clear plastic bag, a cigar blunt, and $1,300 in cash, along with a 9 millimeter handgun. The handgun had an extended magazine and an obliterated serial number. The part of the gun where the serial number was removed was visibly discolored and "clearly ... altered." In the basement bedroom, police found a digital scale, a grinder with marijuana residue, $2,300 in cash, 57 grams of marijuana, and a box of ammunition containing various brands of 9 millimeter ammunition. Police found Malique's passport in a drawer in that basement bedroom. The basement bedroom closet also contained several vacuum sealer bags that were empty but appeared to have been used.

In the upstairs bedroom of [Aldershot], police found a passport and vehicle title belonging to Howell. In a hallway closet adjacent to that bedroom, police located $24,000 in cash and a blue backpack containing Howell's driver's license,

social security card, and medical cards, along with a box containing 9 millimeter, .40 caliber, .45 caliber, and .223 caliber ammunition. A money counter also was found in that closet. Outside [Aldershot], behind a shed in the backyard, the police found four firearms, including two shotguns, a .223 caliber rifle, and a .22 caliber rifle.

In addition to the physical evidence collected at each residence, the State presented the testimony of Brian Caldwell, who testified that he regularly purchased one to two pounds of marijuana from Howell and then sold that marijuana to consumers. Caldwell was arrested for drug dealing on February 22, 2018 and agreed to cooperate with the State by testifying at trial. When he was arrested and his home was searched, police found 340 grams of marijuana, $11,400 in cash, and used plastic vacuum sealer bags with markings similar to those on the bags found at [Bradbury]. Caldwell testified he had been purchasing marijuana from Howell for more than two years, and he purchased approximately two pounds of marijuana at a time every week or two. Caldwell testified that Howell confided that he sold marijuana to others, including two specific individuals to whom Howell sold at least 15-20 pounds of marijuana.

When Caldwell wanted to purchase marijuana, he made arrangements with Howell directly, although at times he gave the money to Sharon when Howell was not home. Caldwell testified that on February 13, 2018, he retrieved marijuana from

[Bradbury] after arranging to do so with Howell and after giving the money for the purchase to Sharon. Caldwell's phone log showed regular communications between Caldwell's and Howell's phones in January and February 2018, including several communications on February 13th. Older text messages between the two contained references to money Caldwell owed Howell at various times, which Caldwell testified were amounts he owed Howell for marijuana. Caldwell also testified that Howell at one point offered to sell Caldwell a gun without a serial number.

In addition to Caldwell, the State also called Malique during its case-in-chief. Through Malique's testimony, the State introduced various text messages recovered from his phone, including text messages dated January 23, 2018, in which Malique asked the individual, "Yo bro Reem said how long till the rest," and the recipient responded "when I get everybody money tomorrow." Although Malique pled guilty to drug dealing, Malique claimed he was not a drug dealer. (B56-57).

The State also offered the expert testimony of Detective Trevor Riccobon of the [NCCPD]. The detective testified that marijuana typically sells for $1,500 to $3,000 a pound and can be sold in various quantities from an ounce to multiple pounds. According to the detective, it is common for members of a drug dealing organization to utilize more than one location for their operations. It also is common for drug suppliers to "front" product to lower-level dealers with the understanding that the dealer will pay for the product once the drugs are sold to consumers.

Detective Riccobon testified that the text messages recovered from Malique's phone were indicative of drug dealing, including … references to quantities sold and monies owed, as well as other common drug "lingo." In examining text messages between Caldwell and Howell, Detective Riccobon testified the conversations reflected a sale of multiple pounds of marijuana.

Detective Riccobon opined based on his training and experience that the evidence found at both [Bradbury] and [Aldershot] indicated the residents were selling large quantities of marijuana. That evidence included the sheer quantity of used vacuum sealer bags with marijuana residue and "shake," the large amounts of cash, the text messages, and the presence of firearms.

At trial, Howell admitted dealing drugs in the past and knowing Malique had a gun, but denied dealing drugs in January and February 2018, owning guns, and having knowledge of Malique's activities. (B231-37; B240-43).

ARGUMENT

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY DENYING HOWELL'S CONTINUANCE REQUEST AFTER JURY SELECTION.

Question Presented

Whether the Superior Court abused its discretion when it denied trial counsel's continuance request after jury selection.

Standard and Scope of Review

This Court reviews a trial court's denial of a continuance request for an abuse of discretion.[7] "Requests for continuances are left to the discretion of a trial judge whose ruling will not be disturbed on appeal unless that ruling is clearly unreasonable or capricious."[8]

Merits of the Argument

On appeal, Howell claims the Superior Court abused its discretion by denying his March 13, 2019 continuance request, resulting in reversible error because he was denied his right to a fair trial and effective assistance of counsel. (Op. Br. at 8-12). His arguments are unavailing.

"There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the

[7] *Secrest v. State*, 679 A.2d 58, 64 (Del. 1996).

[8] *Id.*

circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied."[9] Ultimately, "trial judges enjoy wide discretion to decide requests for a continuance."[10] This Court has set forth clear standards for assessing a continuance request:

> First, the party seeking the continuance has the burden of establishing a clear record of the relevant facts relating to the criteria for a continuance, including the length of the requested continuance. Second, the party seeking the continuance must show:
>
> (a) that it was diligent in preparing for the presentation of the testimony;
>
> (b) that the continuance will be likely to satisfy the need to present the testimony; and
>
> (c) that the inconvenience to the Court, opposing parties, witnesses and jurors is insubstantial in relation to the likely prejudice which would result from the denial of the continuance.[11]

Here, the trial judge acted well within her discretion in denying Howell's continuance request.

In January 2019, the court rescheduled the original January 23, 2019 trial, at Howell's request, until March 12, 2019 to allow him time to investigate sources that could provide impeachment information regarding Caldwell, who had become a cooperating witness for the State in January 2019. (D.I. 33-34 at A6-7; B14-19).

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 66.

Then, on March 12, 2019, before jury selection, the defense requested a second continuance, asking to either select a jury without swearing them in, and start trial the following day, or to continue trial altogether, as a result of the State's late production the prior evening of materials downloaded from Caldwell's cell phone, to allow counsel an opportunity to review those materials. (A18-25). The court granted Howell's request to select the jury only and not begin trial until the next morning to give him time to review the cell phone documents. (A33). On the understanding that trial was beginning the next day, that evening, the State agreed to lift the protective order prohibiting counsel from disclosing Caldwell's identity to Howell. (B22-23; A43).

At the start of trial the next day, March 13, 2019, defense counsel requested that the case be continued for two weeks, stating he was not blaming the State but he was not prepared for trial because he needed more time to review the cell phone documents. (A34-41). The State objected, explaining a further continuance "put[] [the State] in a difficult posture" because the protective order had been lifted. (A41-44). After hearing further from counsel, the trial court denied the further continuance request:

> First of all, there is no showing to me of any substantial prejudice to the defendant with respect to this late production. You had all afternoon yesterday. We delayed the start of trial yesterday so you would have an opportunity to review these materials. I doubt now, given that it's already 10:00, that we will get to the complaining witness' testimony today. I will consider, even if we technically could get to the

> complaining witnesses testimony today, stopping trial early, if necessary, so that you have the rest of the evening to continue to review the materials so that you can cross-examine the cooperating witness.
>
> But there is substantial prejudice to the State given that the State agreed to lift the protective order on the premise that trial was beginning tomorrow, and did so. The Court lifted the protective order and we are going to proceed to trial today.

(A45).

In denying Howell's third continuance request, the court did not abuse its discretion in finding that Howell failed to show any substantial prejudice from the late production given the additional time granted to review the materials. In contrast, as the State noted below, Howell's request for a further two-week continuance put the State in a difficult position because it had not opposed Howell's motion to lift the protective order the day before, thereby allowing Howell to learn Caldwell's identity, based upon counsel's representation that a *one-day* delay would provide him with sufficient time to review the Caldwell phone materials. Because the State and court agreed to lift the protective order on March 12, 2019, expecting trial to begin the following day, the court did not abuse its discretion in finding that the inconvenience to the court, the State, witnesses, and jurors far outweighed the speculative prejudice to Howell.

Although Howell claims "the State was solely responsible for any prior delay [in moving trial until March 2019]" (Op. Br. at 9), Howell is mistaken. The record reflects that it was trial counsel who requested a continuance in January 2019

because the defense needed more time following the entry of the stipulated protective order. (D.I. 33 at A6; B14-19). The State did not object, and the court granted counsel's request and moved trial until March 12, 2019. (D.I. 34 at A6-7).

The record also does not support Howell's claim that counsel only asked to delay trial until March 13th because the trial judge was predisposed to deny a continuance request. (Op. Br. at 10). Howell relies on the following exchange with the judge on March 12th:

> [Defense counsel]: Have you been advised that there is a request for a scheduling or partial rescheduling?
>
> The Court: No, we are not rescheduling this trial.

(A-33d). This remark does not establish that the judge was unreasonable or capricious. After this remark, the court permitted counsel to present his oral continuance request and granted counsel's request to pick the jury that day and swear them and start trial the next morning in order to give counsel time to review the cell phone documents. (A18-25, A12-15, A33).

Nor does the record reflect that the trial court had a "negative attitude." While remarking that it did not see why some of Howell's last-minute pre-trial motions could not have been filed earlier, the court still fully considered the motions, stating, "It's not as though I am not considering the motions simply because they were filed yesterday. So I don't think that is an issue." (B26).

Howell's reliance upon *Carlson v. Jess*[12] and *United States v. Sellers*[13] is misplaced. In those cases, the Seventh Circuit of Appeals found Sixth Amendment violations when a trial court arbitrarily denied a pretrial continuance, effectively denying defendant any opportunity to obtain new counsel. Such is not the case here. Here, the trial court's statements and rulings on Howell's continuance requests do not evidence that any delay would have been unacceptable. Unlike in *Jess* and *Sellers*, Howell was not seeking a continuance to obtain new counsel, and the court did not "insist upon expeditiousness." Rather, the court granted counsel's initial request to delay trial. And, when faced with counsel's further request, the court properly considered and weighed rescheduling the trial against the substantial prejudice to the State given that the court had granted Howell's request to lift the protective order.

Howell also claims his request for a continuance was "based upon a Rule 16 dereliction on the part of the State." (Op. Br. at 8). Howell failed to make this argument below (*see* A18-25). Thus, this argument is waived on appeal, unless Howell can show plain error.[14] He cannot. Further, even if Howell had not waived this issue, Howell's argument fails.

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[12] 526 F.3d 1018 (7th Cir. 2008).

[13] 645 F.3d 830 (7th Cir. 2011).

[14] Supr. Ct. R. 8; *Gordon v. State*, 604 A.2d 1367, 1368 (Del. 1992).

Howell's assertion of any discovery violation is contradictory to his claims below, as he appears to acknowledge in his "sketch of the pertinent facts." Specifically, when requesting the initial and subsequent continuances at trial, Howell stated numerous times that he was not "blaming" the State for the technological issue, the late provided information did not involve bad faith, and the State went well above and beyond its Rule 16 discovery obligations. (A18-25, A34-41). Howell did not contend, and the court did not explicitly find, that the late production of the working DVD of Caldwell's cellphone extraction the evening before trial was a discovery violation. (A45; A33).

Even if this Court finds a discovery violation, Howell cannot prevail under this Court's framework for reversal of his convictions based on a discovery violation. When reviewing a disclosure violation, this Court applies a three-part test: "(1) the centrality of the error to the case, (2) the closeness of the case, and (3) the steps taken by the court to mitigate the results of the error."[15] A conviction will only be reversed if the alleged violation prejudiced the defendant's substantial rights.[16]

Here, significant evidence existed independent of the alleged violation to support a conclusion that Howell was guilty of the crimes. The State presented overwhelming evidence showing that Howell and Malique were involved in selling

[15] *Secrest*, 679 A.2d at 64.

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

large quantities of marijuana and were working together in a conspiracy to do so. The State presented both physical and eyewitness testimony, including from Caldwell implicating Howell in drug dealing, and text messages from Malique indicating Howell possessed and/or intended to deliver those drugs.

While the court did not find the State committed a discovery violation, it mitigated any claimed prejudice by granting defense counsel's original request to delay starting trial until the next day (March 13), to afford counsel the opportunity to continue his review of Caldwell's cellphone materials. In addition, Howell had an opportunity to review the materials for an additional day because the cooperating witness did not testify until the following day (March 14). The State also assisted counsel before trial by identifying messages from the extraction between Caldwell and Howell. (A38-39). And, the court lifted the protective order, at counsel's request, to allow him to disclose Caldwell's identity and discuss the extracted text messages with Howell the evening before the delayed trial started. (D.I. 50 at A8; B22-23; B25-26).

Howell also fails to establish he was prejudiced. Caldwell did not dispute that he: (a) considered himself a drug dealer when he was arrested in February 2018; (b) had dealings with drug dealers other than Howell; (c) often had bought drugs to redistribute; and (d) entered into a favorable plea deal to resolve unrelated charges and agreed to testify at Howell's trial. (B100-16; B145; B149-56; B189; B194-95;

see also B51). Counsel extensively cross-examined and attempted to impeach Caldwell regarding his prior inconsistent and admittedly "dishonest" statements and motivations for testifying against Howell, including his favorable plea deal and cooperation agreement with the State. (B130-93). Howell's conclusory and speculative claim that "only God knows" what other potential impeachment evidence was present and could not be located by counsel because of the court's "arbitrary" denial of the two-week continuance (Op. Br. at 11), is insufficient to establish prejudice.

II. THE TRIAL COURT'S DENIAL OF HOWELL'S REQUEST TO CHANGE COURTROOMS DID NOT VIOLATE HIS RIGHT TO A FAIR TRIAL.

Question Presented

Whether the trial court deprived Howell of a fair trial by denying his request to change courtrooms because a podium obstructed Howell and the jury from openly viewing one another.

Standard and Scope of Review

This Court reviews claims arising from alleged constitutional violations *de novo*.[17]

Merits of the Argument

Howell asserts that the court erred in denying his request to change courtrooms so that Howell and the jury could have "open views" of each other. (Op. Br. at 13-16). Before the jury was sworn on March 13, 2019, defense counsel informed the court that he "ha[d] a problem with the set up where [his] client is invisible to six members of the jury [because they could not] see him due to a fixed podium." (A47). When asked "[w]hat would you like to do," counsel requested to change courtrooms, claiming that seeing each other was "part and parcel to the jury's evaluation of credibility." (A47-48). The judge considered the request, stating "[t]he jury will be able to see your client if he testifies. If you would like him to

[17] *Id*.

stand up when you give your opening statements so they can see him at that time, you're welcome to." (A48). Counsel responded he would like Howell to be seen by the jury, stating "jurors from time to time will look over at the defendant and if only six of them can see him and are doing that as part of their evaluation and his responses, and the other six aren't, they're not getting the same picture." (*Id.*). The judge ultimately denied the request to change courtrooms, stating "[t]his is the available courtroom and we are ready to proceed." (*Id.*).

Relying on *Bustamante v. Eyman*,[18] *Crosby v. United States*,[19] and *Bradshaw v. State*,[20] Howell argues he was denied a fair trial because his "presence" in the courtroom was blocked by the podium.[21] (Op. Br. at 13-16). Howell's reliance on these cases is misplaced, and he is otherwise mistaken. None of these cases involved the accused's "presence" being blocked from view by the jury, but instead addressed a defendant's right to be personally present in the courtroom at every stage of his trial.[22] Here, it is uncontroverted that Howell was physically present at every stage

[18] 456 F.2d 269 (9th Cir. 1972).

[19] 506 U.S. 255 (1993).

[20] 806 A.2d 131 (Del. 2002).

[21] Because Howell failed to adequately brief any state constitutional claim, they are waived. *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008).

[22] *Bustamante*, 456 F.2d 269 (holding defendant had constitutional right of "presence" in courtroom during replay of recorded jury instructions); *Crosby*, 506 U.S. 255 (noting defendant has right under Federal Rule of Criminal Procedure 43 to be present in his own person at every "stage of the trial"); *Bradshaw*, 806 A.2d at

of his trial, and that neither his view nor the jury's view of the witnesses against Howell was impeded so as to infringe upon his confrontation rights.[23]

Howell also claims the courtroom arrangement prevented "the jury [from] … view[ing] the defendant's demeanor as the testimony unfold[ed]." (Op. Br. at 14-15). Howell's claim is unavailing. This Court has noted that a defendant's courtroom demeanor is irrelevant.[24] Indeed, as the trial court remarked in *Norwood v. State*, "all evidence comes from the witness stand."[25]

The record does not support Howell's claim that the podium was "mobile" and "on wheels" (*id.*). (A47-49). While counsel asked "the record reflect … that the large lectern is situated so that the first six jurors as they're sitting in their seats cannot see my client at all," he made no mention about the podium's mobility, and even if it was mobile, Howell did not request to move it. (*Id.*).

132-33 (holding defendant has right to be present at any court conference concerning whether to give *Allen* charge and when *Allen* charge given).

[23] *Coy v. Iowa*, 487 U.S. 1012 (1988) (emphasizing confrontation right "guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact"); *Norwood*, 2010 WL 703107, at *2-3 (finding no plain error where court did not rearrange courtroom to permit juror to view defendant in his seat); *Hancock v. State*, 596 S.E.2d 127, 131 (Ga. 2004) (holding defendant not entitled to new trial because fixed podium obscured view of entire jury box).

[24] *Ayers v. State*, 2021 WL 1572719, at *4 (Del. Apr. 22, 2021) (citing *Hughes v. State*, 437 A.2d 559, 572 (Del. 1981)).

[25] *Norwood v. State*, 2010 WL 703107, at *2 (Del. Mar. 1, 2010).

Finally, Howell is mistaken that the court's denial of his request was a "structural error," requiring automatic reversal. (Op. Br. at 14). This Court has recognized an error as structural only in cases where there is a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of a grand jury, denial of self-representation at trial, denial of a public trial, and a defective reasonable doubt instruction.[26] Each of these types of structural error is inapplicable here.

This Court's decision in *Norwood* also does not support Howell's structural defect argument. In *Norwood*, a juror complained that a podium obscured her view of Norwood and requested that Norwood move his chair or the podium be moved.[27] While the court stated that Norwood could move his seat back, the court declined to rearrange the courtroom or require Norwood to move his seat.[28] On appeal, Norwood argued that he was denied a fair trial where what could be deemed the ultimate factual issue in the case, the comparison of his features to those shown in the grainy videotape, could not be determined by the jury because of the layout of

[26] *Brice v. State*, 815 A.2d 314, 324-25 (Del. 2003), *overruled on other grounds by Rauf v. State*, 145 A.3d 430 (Del. 2016); *compare Rushen v. Spain*, 464 U.S. 114 (1983) (denial of defendant's right to be present at trial subject to harmless error analysis).

[27] *Norwood*, 2010 WL 703107, at *2-3. Here, no juror complained to the trial court about any inability to see Howell.

[28] *Id.*

the courtroom.[29] This Court found no plain error, however.[30] Implicit in *Norwood's* finding of no plain error is the finding that a trial judge's failure to take additional measures to ensure that all of the jurors can see the defendant during the entire trial did not amount to structural error.

[29] *Id.*

[30] *Id.*

III. WHILE THE LIMITING INSTRUCTION PROVIDED DURING THE COOPERATING WITNESS'S TESTIMONY WAS ERRONEOUS, IT DID NOT AMOUNT TO PLAIN ERROR.

QUESTION PRESENTED

Whether the Superior Court committed plain error in giving a limiting instruction during the cooperating witness's testimony.

Standard of Review

When a defendant fails to raise an objection to jury instructions at trial, this Court reviews for plain error.[31] Under the plain error standard of review, the Court "must determine whether the instructions to the … jury were erroneous as a matter of law and, if so, whether those errors so affected [the defendant's] substantial rights that the failure to object at trial is excused."[32]

Merits of Argument

It appears that the Superior Court erroneously, without objection, instructed the jury that they could *not* consider Caldwell's cooperation agreement in weighing the witness's credibility. (B99-101). Although the trial court's instruction was inaccurate, that error does not automatically amount to plain error requiring reversal.[33]

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[31] *Swan v. State*, 820 A.2d 342, 357 (Del. 2003); Supr. Ct. R. 8.

[32] *Probst v. State*, 547 A.2d 114, 119 (Del. 1988).

[33] *Sanders v. State*, 1995 WL 264532, at *2 (Del. 1995); *Sheehan v. Oblates*, 15 A.3d 1247, 1255-56 (Del. 2011).

Prior to trial, defense counsel requested that the court provide the following limiting instruction when Caldwell testified:

> [Y]ou are about to hear testimony of a witness who has entered into an agreement with the State to provide testimony, in this trial, and which cooperation may be considered by the State in making a final sentence recommendation to the sentencing judge whenever this witness is sentenced.
>
> The fact that this agreement has been made must not be considered by you as implying that the credibility of this witness is enhanced by it.
>
> You will determine the credibility of this witness, as you do all witnesses in this matter, subject to the instructions that I will give you at the conclusion of the trial.

(B20-21; B25). Counsel stated:

> What I am saying is the state of the law. This is an appropriate instruction, and the jurors should be told that.

(B25). The State agreed with the defense, and the court agreed to give the instruction. (B25). Subsequently, the court provided a limiting instruction immediately after the State admitted the cooperation agreement (State Exhibit 66) during Caldwell's direct testimony:

> [Y]ou are about to hear testimony of a witness who has entered into an agreement with the State to provide testimony in this trial. The agreement provides something to the effect that the State will consider the witness' cooperation when the State makes a final sentencing recommendation to the judge who will ultimately sentence this witness. You may not consider this agreement in weighing the witness' credibility.

(B101). Howell did not object.

During cross-examination, Howell was given broad latitude to probe and cast doubt on Caldwell's credibility and brought factors to the jury's attention that suggested Caldwell was motivated to lie, including the fact that he was not initially truthful with police and entered a favorable plea and agreement with the State to provide testimony in Howell's trial, and that the State would consider Caldwell's cooperation when it made a final sentence recommendation to Caldwell's sentencing judge. (B130-93). Howell expounded upon that bias in the context of "getting a deal" in closing argument, stating that Caldwell has not yet been sentenced because "he [first] has to be judged" on his trial "performance" by the prosecutors, and Caldwell "knows his future is on the line and he wants to dance to that jig." (B246-55).

Although the Superior Court misspoke in its limiting instruction, it was not plain error under the circumstances. Under the plain error standard of review, the error "must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process. Furthermore, the doctrine of plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[34]

[34] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

Here, Howell was not clearly deprived of a substantial right and there is not manifest injustice in the verdict despite the incorrect statement of the law. While the jury was wrongly instructed, the evidence against Howell, inclusive and independent of Caldwell's testimony, was strong, as Howell concedes (Op. Br. at 28-32). Apart from Caldwell's testimony, the State introduced physical evidence of drug dealing and a firearm with an obliterated serial number found at residences linked to Howell and text messages from December 2017 through March 2018 between Howell and Malique evidencing Howell's active participation in drug dealing operations. (B29-50; B53-55; B197-210; State Exhibits 6, 7, 11, 19, 24, 26, 42-43, 51, 60, 62-64). And, the State introduced text messages that supported Caldwell's testimony that Malique and Howell were conspiring to deal drugs and that Howell was regularly selling as little as a quarter pound of marijuana up to multiple pounds. (B117-21; B202-04; State Exhibits 51, 55). Because Howell cannot establish that the result would have been any different absent the error, he is therefore not entitled to reversal.[35]

[35] *Fink v. State*, 817 A.2d 781 (Del. 2003) (finding jury instruction not plain error where overwhelming evidence of defendant's guilt); *Allen v. State*, 1990 WL 254350 (Del. Dec. 14, 1990) (finding prosecutorial misconduct not plain error because any actual prejudice was harmless given strength of State's case).

Finally, the limiting instruction's language does not constitute plain error when read in context with the entirety of the jury instructions.[36] In its final jury instructions, the Superior Court gave extensive, accurate instructions concerning the credibility of witnesses, including the witnesses' interest in the outcome of the case and any possible biases, prejudices, or motives that may have affected their testimony. (B260-63). The court's instructions were sufficient to encompass Caldwell's alleged potential bias and unreliability.

To the extent Howell contends that the jury should have been instructed to consider the cooperating witness's testimony the same way it would an interested accomplice witness-with a certain degree of caution and scrutiny, he is wrong. (Op. Br. at 17-19). Indeed, *Purnell v. State*,[37] upon which he relies, is inapposite. *Purnell* addressed trial counsel's failure to request an accomplice credibility instruction for the defendant's co-defendant—a so-called *Bland* instruction.[38] In *Bland*, this Court recognized the "inherent weaknesses" of accomplice testimony, "being testimony of a confessed criminal and fraught with dangers of motives such as malice toward the accused, fear, threats, promises or hopes of leniency, or benefits from the

[36] *Sheehan*, 15 A.3d at 1255-56.

[37] 106 A.3d 337 (Del. 2014).

[38] *Id.*

prosecution, which must always be taken into consideration."[39] The accomplice instruction is inapplicable here, as the record does not support any argument that Caldwell was an accomplice to the crimes Howell was charged with.[40] Nor is there any basis under Delaware law to expand the use of the accomplice testimony instruction to cooperating witnesses.[41]

[39] *Bland v. State*, 263 A.2d 286, 288-89 (Del. 1970).

[40] 11 *Del. C.* § 271(2)b); *McCoy v. State*, 112 A.3d 239, 268-69 (Del. 2015); *Guy v. State*, 913 A.2d 558, 563 (Del. 2006).

[41] *Guy v. State*, 82 A.3d 710, 714 (Del. 2013) (declining to expand "accomplice" statutory definition).

IV. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ALLOWING THE STATE TO INTRODUCE EVIDENCE OF HOWELL'S PRIOR BAD ACTS UNDER D.R.E. 404(b).

QUESTION PRESENTED

Whether the Superior Court abused its discretion by permitting the State to present evidence under D.R.E. 404(b) of Howell's prior, uncharged marijuana sales and offer to sell Caldwell a firearm with an obliterated serial number.

STANDARD OF REVIEW

A trial judge's evidentiary rulings are reviewed for abuse of discretion.[42]

MERITS

Howell argues that the Superior Court erred by admitting evidence under D.R.E. 404(b) of: (1) Howell's prior, uncharged marijuana sales to Caldwell ("course of conduct evidence") and (2) Howell's offer to sell Caldwell a firearm with an obliterated serial number ("firearm evidence"). (Op. Br. at 20-33). Howell alleges the course of conduct evidence: (1) was not material; (2) was not offered for a proper purpose; (3) was too remote; and (4) its probative value was substantially outweighed by its prejudicial effect. (*Id.* at 27). Howell contends that the court wrongly found the firearm evidence relevant, material, and not too remote. (*Id.* at 33). Howell's claims are unavailing. The evidence was properly admitted by the court after conducting a *Getz* analysis. (B60-95).

[42] *Vanderhoff v. State*, 684 A.2d 1232, 1233 (Del. 1996).

D.R.E. 404(b) forbids the State from offering evidence of a defendant's other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[43] In *Getz*,[44] this Court set forth six factors to consider when admitting evidence subject to D.R.E. 404(b): The evidence must be: (1) material to an issue or ultimate fact in dispute; (2) introduced for a proper purpose; (3) proved by "plain, clear, and conclusive" evidence; (4) not too remote in time from the charged offense; (5) not unfairly prejudicial as required by D.R.E. 403; and (6) admitted for a limited purpose with instruction.[45]

Evidence of Caldwell's prior marijuana purchases from Howell, continuing for at least a year before the timespan of the charged offenses (B105-12; B119-22; B189), was material to Howell's knowing possession of marijuana and his intent to deliver and also tended to make it more probable that Howell possessed and/or supplied large amounts of marijuana.[46] This evidence was also material under *Getz* to an ultimate issue in dispute in this case: whether Howell was part of a common

[43] D.R.E. 404(b).

[44] *Getz v. State*, 538 A.2d 726 (Del. 1988).

[45] *Id.* at 734.

[46] *Andreavich v. State*, 2018 WL 3045599 (Del. June 19, 2018); *Torres v. State*, 979 A.2d 1087 (Del. 2009); *State v. Hynson*, 1992 WL 53419 (Del. Feb. 24, 1992).

scheme or plan to deal in marijuana.[47] Knowledge, intent, and common plan and scheme are exceptions to the admission of other crimes evidence under D.R.E. 404(b). Howell concedes that the evidence was proved through plain, clear, and convincing evidence.

In addition, the evidence of prior marijuana transactions, which Howell concedes occurred within a 468-days timespan of the instant offenses, (Op. Br. Ex. B), was not too remote in time from the charged drug-related offenses to run afoul of *Getz*. Evidence is too remote in time "only where there is no visible, plain, or necessary connection between it and the proposition eventually to be proved."[48] This Court normally uses 10 years as the standard for deciding whether a prior crime is too remote; however, that is not a bright line rule.[49] "Rather, a trial court should consider the nature of the proposition that the evidence is intended to prove or disprove in determining whether a particular piece of evidence is too temporally remote from the charged crime."[50] Here, not only did the prior acts demonstrating a

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[47] *Torres*, 979 A.2d at 1098-99 (upholding admission of prior drug transaction evidence to show common scheme or plan); *Campbell v. State*, 974 A.2d 156, 160-61 (Del. May 27, 2009) (finding planned drug sale evidence material and admissible under D.R.E. 404(b) where defendant's involvement in sale or delivery of drugs at issue).

[48] *Lloyd v. State*, 1991 WL 247737, at *3 (Del. Nov. 6, 1991).

[49] *Trump v. State*, 753 A.2d 963, 972 (Del. 2000).

[50] *Taylor v. State*, 777 A.2d 759, 769 (Del. 2001); *Allen v. State*, 644 A.2d 982, 988 (Del. 1994) (noting temporal remoteness depreciates or reduces probative value of

continuing series of drug-related transactions by Howell occur close in time to the charged crime, but they also were directly relevant to establishing elements of the charge at issue. Although the timespan was much shorter in the cases cited by the court, *Andreavich v. State*,[51] *Torres v. State*,[52] and *State v. Hynson*,[53] Delaware courts have recognized that evidence of continuing drug-related transactions within time spans longer than the 468-days at issue here are not too remote to be admissible.[54]

And, while the court did not specifically address the *Deshields v. State*[55] factors, it considered Howell's claim of unfair prejudice and concluded that the probative value of the other acts evidence was not substantially outweighed by any prejudice therefrom.[56] (B60-95). Furthermore, the danger of any misuse was

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evidence).

[51] *Andreavich v. State*, 2018 WL 3045599 (Del. June 19, 2018).

[52] 979 A.2d 1087.

[53] 1992 WL 53419.

[54] *Kornbluth v. State*, 580 A.2d 556 (Del. 1990) (unbroken series of drug transactions beginning four years before instant offense); *Jacoby v. State*, 1989 WL 160443 (Del. Dec. 27, 1989) (unbroken series of drug transactions beginning eighteen months before instant offense).

[55] 706 A.2d 502 (Del. 1988).

[56] *See Ward v. State*, 2020 WL 5785338, at *6 (Del. Sept. 28, 2020) (finding no plain error where court did not address *Deshields* factors); *Torres*, 979 A.2d at 1099-1100 (noting evidence of uncharged misconduct inherently carries danger of being used improperly).

properly dealt with by the immediate limiting instruction and the final instruction.[57] (B107-08; B257-58).

Finally, the court properly found the firearm evidence relevant, material, and not too remote. As the Superior Court found, evidence that Howell offered to sell Caldwell a firearm with an obliterated serial number was material, as it provided evidence that Howell constructively possessed the firearm with an obliterated serial number that was recovered from his home and evidenced Howell's knowledge and intent to possess that particular firearm. Nor was it too remote. Although Caldwell did not provide a specific timeframe for the conversation (B129), he indicated he had only known Howell as an adult for four or five years (B105), and there was a necessary connection between this evidence and Howell's knowledge and intent.

Because the Superior Court properly complied with the six-step analytical framework suggested in *Getz*, there was no abuse of discretion in admitting the course of conduct and firearm evidence.

[57] *Watson v. State*, 2015 WL 1279958, at *4 (Del. Mar. 19, 2015); *Smith v. State*, 669 A.2d 1, 5 (Del. 1995); *Taylor*, 777 A.2d at 771.

V. THE POSSESSION OF A FIREARM WITH AN OBLITERATED SERIAL NUMBER JURY INSTRUCTION WAS SUFFICIENT FOR THE JURY TO FIND HOWELL GUILTY OF THAT CHARGE.

Question Presented

Whether the jury instruction for Possession of a Firearm with an Obliterated Serial Number was adequate for the jury to be able to intelligently perform its duty in returning a verdict.

Standard and Scope of Review

The State incorporates the standard of review set forth in Argument III herein.

Merits of the Argument

For the first time on appeal, Howell argues that the trial court's instruction regarding the element of "knowingly" for Possession of a Weapon with an Obliterated Serial Number was "flawed" and constitutes plain error. (Op. Br. at 34-35). Although Howell concedes that "[t]he court stated the elements correctly," he claims the court "did not explain knowing in the context of this Statute, but simply said the word had been used somewhere earlier in the proceeding." (*Id.*). Howell also contends the earlier definition "fails to take into account the compound nature of the knowledge vis-à-vis knowledge of the missing serial number." (*Id.*). Citing the jury's verdict acquitting him of PFDCF, Howell claims the jury's finding that he was guilty of possession of a firearm with an obliterated serial number is "inconsistency at its finest" because "[h]e could not be guilty of possessing the

firearm and not guilty of possessing the firearm at the same time and same place under the law." (*Id.*). Howell is wrong.

To find Howell guilty, the jury was required to find Howell knowingly possessed a firearm with an obliterated serial number and knew the serial number was removed.[58] Here, the jury was instructed:

> In order to find the defendant guilty of possession of a weapon with a removed, obliterated or altered serial number, you must find the State has proved the following three elements beyond a reasonable doubt: First, the defendant possessed a firearm; second, the serial number of the firearm had been removed or obliterated in a manner that disguised or concealed the identity or origin of the weapon; and third, the defendant acted knowingly.
>
> "Possession," "firearm" and "knowingly" previously have been defined for you.
>
> If, after considering all the evidence, you find the State has established beyond a reasonable doubt that the defendant acted in a way that satisfies all the elements that I stated, at or about the date and place stated in the indictment, you should find the defendant guilty of possession of a weapon with a removed, altered or obliterated serial number. If you do not so find, or if you have reasonable doubt as to any element of this offense, you must find the defendant not guilty of Count V.

(B256-256a). Howell did not object.[59]

Jury instructions do not need to be perfect.[60] "[S]ome inaccuracies and

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[58] 11 *Del. C.* § 1459.

[59] The record indicates that counsel thoroughly reviewed and expressed satisfaction with the jury instructions. (*See, e.g.*, B245).

[60] *Whalen v. State*, 492 A.2d 552, 559 (Del. 1985).

inaptness in statement are to be expected."[61] Jury instructions are adequate if they allow a jury to "intelligently perform its duty in returning a verdict."[62] "A trial [judge's] charge to the jury will not serve as grounds for reversible error if it is reasonably informative and not misleading, judged by common practices and standards of verbal communication."[63] This Court looks at the jury instructions as a whole to make this evaluation.[64]

Here, Howell cannot establish plain error because he concedes the court "stated the elements correctly." Although the judge referred the jury back to its prior definition of "knowingly," Howell does not contend that this definition was incorrect. Finally, although the earlier instruction did not specifically define knowledge in terms of the missing serial number, his PFDCF acquittal does not evidence jury confusion. As the court noted in denying Howell's motion for judgment of acquittal, "[p]ossession of purposes of this count is much broader than it is with [PFDCF]. Possession for this charge ma[y] be either actual or constructive possession and may be either sole or joint." (B229-30).

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[61] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1983).

[62] *Anderson v. State*, 2016 WL 618840, at *4 (Del. Feb. 15, 2016).

[63] *Probst v. State*, 547 A.2d 114, 119 (Del. 1988).

[64] *Flamer*, 490 A.2d at 128.

VI. THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO CONVICT HOWELL OF POSSESSING A WEAPON WITH AN OBLITERATED SERIAL NUMBER.

Question Presented

Whether there was sufficient evidence of Possession of a Weapon with an Obliterated Serial Number, when viewed in the light most favorable to the State, for any rational trier of fact to have been able to find Howell guilty beyond a reasonable doubt.

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion for judgment of acquittal *de novo* to determine whether a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential elements, beyond a reasonable doubt.[65] In making this inquiry, this Court does not distinguish between direct and circumstantial evidence.[66]

Merits of the Argument

Howell contends there was insufficient evidence that he possessed the firearm found in the basement living area of his Aldershot residence or that he knew its serial number was obliterated to support his conviction for Possession of a Firearm with an Obliterated Number. He is mistaken. The Superior Court, applying the correct

[65] *Robinson v. State*, 953 A.2d 169, 173 (Del. 2008).

[66] *Id.*

standard, appropriately found sufficient evidence and denied Howell's motions for judgment of acquittal at the conclusion of the State's case-in-chief (B215-30) and post-trial.[67] In its post-trial opinion, the court stated:

> The firearm in question was found in the basement living area of Howell's residence. Although Malique and Howell testified that area exclusively was Malique's, the jury was free to weigh their credibility and their motivations for that testimony. Even if the jury accepted that testimony, other evidence the State presented was sufficient to support the jury's conclusion that Howell constructively possessed the firearm and was aware that the serial number was removed or obliterated. Howell's backpack contained 9 millimeter ammunition, which was the same caliber as the firearm at issue. No other 9 millimeter firearm was found in the residence. The obliteration of the serial number on the firearm was visible to the naked eye. Finally, Caldwell testified that Howell previously offered to sell him a "dirty" weapon, which Caldwell explained was a firearm without a serial number. That evidence and testimony was enough to allow the jury to find Howell guilty of Count V.[68]

As the court explained, to prove Howell guilty, the jury was required to find that he knowingly possessed a firearm with a removed or obliterated serial number, and that Howell knew the serial number was removed.[69] Possession in the context of this charge included both actual and constructive possession.[70] To establish constructive possession, the State was required to prove that Howell: (1) knew the

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[67] *Howell*, 2020 WL 1492787, at *6.

[68] *Id.*

[69] 11 *Del. C.* § 1459.

[70] *State v. Newman*, 2018 WL 4692446, at *4 (Del. Super. Ct. Sept. 26, 2018).

gun's location; (2) had the ability to exercise dominion and control over the gun; and (3) intended to exercise dominion or control over the gun.[71] Constructive possession could be proved by circumstantial evidence, and the State was not required to prove that Howell was in possession of the weapon at the time of his arrest.[72] In addition, a "defendant's intention … knowledge or belief at the time of the offense for which the defendant is charged may be inferred by the jury from the circumstances surrounding the act the defendant is alleged to have done."[73]

The State presented evidence that a 9-millimeter handgun with an obliterated serial number was found by the couch in the basement living room of the Aldershot residence, which Howell owned and where Howell and Malique were then living. (B28-31). Howell admitted knowing his brother owned a gun (B232), and Howell's aunt testified Malique and Howell had an agreement whereby Malique could bring his personal handgun when the brothers moved out of Bradbury and into Aldershot. (B230a). The State also introduced evidence connecting Malique to the Aldershot basement. (B37). Upstairs, within Howell's living space, Detectives found a backpack containing Howell's identification and assorted rounds of ammunition, including 9-mm ammunition. (B41-42). No other 9-mm firearm was found in the

[71] *Id.*; *Elmore v. State*, 2015 WL 3613557, at *2-3 (Del. June 9, 2015).

[72] *Id.*

[73] 11 *Del. C.* § 307; *Plass v. State,* 457 A.2d 362, 365 (Del. 1983).

residence. The State also presented photographs and testimony that the part of the gun where the serial number was removed was visibly discolored and "clearly … altered." (B32-33). Finally, the State presented evidence that Howell had previously offered to sell Caldwell a gun with no serial number. (B129). The Superior Court properly found this evidence was sufficient to support the jury's guilty verdict, including the offense's state of mind elements.

VII. SUFFICIENT EVIDENCE WAS PRESENTED TO FIND THAT THE MARIJUANA HOWELL POSSESSED WEIGHED 4,000 GRAMS OR MORE.

Question Presented

Whether sufficient evidence supported the jury's finding that the marijuana Howell possessed weighed 4,000 grams or more.

Standard and Scope of Review

The State incorporates the standard of review set forth in Argument VI herein.

Merits

Howell argues that there was insufficient evidence for the jury to find beyond a reasonable doubt that the marijuana he possessed and/or delivered relating to Bradbury (Count III) weighed 4,000 grams or more. (Op. Br. at 39-40). Post-trial, the Superior Court denied Howell's motion for a judgment of acquittal on this Drug Dealing charge.[74] On appeal, Howell only challenges the sufficiency of evidence adduced to support the weight of the drugs Howell allegedly possessed. Therefore, any sufficiency claim Howell may make related to the other elements is waived. Because the State presented sufficient evidence to establish that Howell did, in fact, possess and/or deliver 4,000 grams or more of marijuana between approximately January 17 and February 16, 2018, he is not entitled to relief.

[74] *Howell*, 2020 WL 1492787, at *6.

In finding that the State carried its burden of proving the weight of the marijuana Howell possessed, the court correctly stated:

> [T]he State's evidence was circumstantial but nevertheless was sufficient to sustain the jury's verdict. The State charged Howell with dealing 4,000 or more grams of marijuana between January 17 and February 16, 2018. 4,000 grams equates to approximately 8.82 pounds of marijuana. Although no significant quantity of marijuana actually was seized at [Bradbury], there was $2,400 in cash located at the residence. Detective Riccobon testified a pound of marijuana sells for between $1,500-$3,000 a pound. Caldwell testified he regularly purchased two pounds of marijuana from Howell, most recently on February 13, 2018. Caldwell further testified that he knew that Howell sold substantial quantities of marijuana to other acquaintances. The text messages the State introduced supported Caldwell's testimony, namely that Malique and Howell were conspiring to deal drugs and that Malique regularly was selling as little as a quarter pound of marijuana up to multiple pounds. Moreover, Detective Riccobon testified the usual vacuum sealer bags that the police seized during the search, which contained marijuana "shake" and residue, typically are used to store a quarter pound to one pound of marijuana. There were approximately 100 such bags admitted into evidence. That evidence, taken as a whole, was sufficient to allow a jury to conclude beyond a reasonable doubt that Howell possessed at least 4,000 grams of marijuana within the time frame alleged in the indictment.[75]

Howell now argues that the State's evidence was insufficient because it was "based solely on Caldwell's guessing at the total number of bags he saw in pile [when he was at Howell's residence] and the police admitted [it] was a guess," and evidence that "[a]t some time from the birth of [Howell] until February 22, 2018 [Howell] dealt as much as 25 pounds of Marijuana to Abdul and Nick Nasty." (Op.

[75] *Id.*

Br. at 39-40). Howell argues that it is not sufficient to rely on "Caldwell's 'Guessing game' [and] … the imprecision of the 'where and when' aspect of the 'Nasty' dealing." (*Id.*). Howell's argument is unavailing.

Caldwell's testimony that he observed that Howell had "well over a hundred pounds" of marijuana when he last saw him before his February 22, 2018 arrest, was not the State's "sole" evidence that Howell possessed at least 4,000 grams of marijuana. Indeed, the Superior Court did not even reference such testimony in discussing the evidence that was sufficient to allow the jury to find Howell guilty and instead only mentioned Caldwell's testimony that: (1) "he regularly purchased two pounds of marijuana from Howell, most recently on February 13, 2018," and (2) "he knew that Howell sold substantial quantities of marijuana to other acquaintances."[76] (B109; B126). In addition to Caldwell's testimony, Detective Riccobon's expert testimony regarding the sheer number of used vacuum sealer bags with marijuana residue and "shake," the amounts of cash, and the text messages between Howell and Malique (State Exhibits 26, 60), also provided evidence as to the weight of marijuana possessed. (B197-214). As the court recognized, even without Caldwell's testimony about seeing over 100 pounds of marijuana at Bradbury, the evidence, taken as a whole, was sufficient to allow a jury to conclude

[76] *Id.*; B109.

beyond a reasonable doubt that Howell possessed at least 4,000 grams of marijuana within the time frame alleged in the indictment.

Howell is also wrong that the jury could not rely upon Caldwell's testimony that he saw over 100 pounds of marijuana at Bradbury in March 2018. This Court rejected a similar argument in *Torres*, holding that the evidence was sufficient to support a conviction for trafficking cocaine over 100 grams where a witness testified that he was a drug dealer who dealt in large quantities of cocaine, that defendant was his supplier, and he received 500 grams of cocaine from defendant on the day in question.[77] This Court held this lay testimony alone was sufficient to establish that the substance was cocaine and that it weighed over 100 grams.[78] The same reasoning applies here.

Caldwell testified that he was a marijuana drug dealer who dealt in multi-pound quantities of marijuana and Howell was his supplier. (B100; B105-09). On cross, Caldwell testified, consistent with his prior statement (Court Exhibit 3; B166-67), that he observed that Howell had "well over a hundred pounds" of marijuana at Bradbury in February 2018. (B164-68). When asked "[w]here did you get [that] number," Caldwell stated "[b]ecause I was counting them downstairs when I was waiting for him to come downstairs." (B166). As in *Torres*, Caldwell's lay opinion

[77] *Torres*, 979 A.2d 1087.

[78] *Id.*

was based on his own perception of and personal experience with the substance, and provided further evidence that Howell possessed at least 4,000 grams of marijuana.

Finally, although no time frame was mentioned when Caldwell testified that Howell told him that he sold at least 15-20 pounds of marijuana to Nasty and Duly, Howell conceded those sales were admissible under D.R.E. 404(b). Furthermore, the State introduced January 31, 2018 text messages between Howell and Malique, including one stating "Nasty and duly should have 37," and Detective Riccobon testified the messages appeared to contain references to quantities sold and monies owed, as well as other common drug "lingo." (State Exhibit 26; B207-09).

Viewing the evidence in the light most favorable to the State, the evidence presented at trial was more than sufficient for a rational juror to find that Howell possessed and/or delivered at least 4,000 grams of marijuana.

VIII. A CUMULATIVE ERROR ANALYSIS IS NOT WARRANTED.

QUESTION PRESENTED

Whether several errors cumulatively resulted in an unfair trial.

STANDARD OF REVIEW

This Court reviews a claim that errors cumulatively resulted in an unfair trial for plain error.[79]

MERITS

Howell argues that the cumulative impact of errors deprived him of a fair trial. (Op. Br. at 41-42). He is mistaken.

"Cumulative error must derive from multiple errors that caused 'actual prejudice.'"[80] "[A] claim of cumulative error, in order to succeed, must involve 'matters determined to be error, not the cumulative effect of non-errors.'"[81] The "cumulative error doctrine" is inapplicable here. Although the trial court misspoke in a limiting instruction, Howell has not established any other errors. Additionally, Howell cannot prevail because none of his claims resulted in prejudicial error.

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[79] *Wright v. State*, 405 A.2d 685, 690 (Del. 1979).

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

[81] *State v. Sykes*, 2014 WL 619503, at *38 (Del. Super. Ct. Jan. 21, 2014).

CONCLUSION

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

DEPARTMENT OF JUSTICE

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Dated: May 7, 2021

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KARIEEM J. HOWELL,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 372, 2020
	)	
STATE OF DELAWARE,	)	On Appeal from the
	)	Superior Court of the
Plaintiff Below,	)	State of Delaware
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

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

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 9,996 words, which were counted by Microsoft Word.

Dated: May 7, 2021 /s/ *Carolyn S. Hake*