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IN THE SUPREME COURT OF THE STATE OF DELAWARE

KEVIN MILLER, Defendant Below-Appellant, v. STATE OF DELAWARE, Plaintiff Below-Appellee.	)	No. 37, 2021 ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE ID No. 1611008842A&B

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

REPLY BRIEF

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Appellant Kevin Miller, through the undersigned counsel, replies to the State's Answering Brief as follows:

ARGUMENT

I. THE STATE COMMITTED MISCONDUCT BY INTRODUCING FALSE CONTRADICTORY ALIBI EVIDENCE, RESULTING IN A DEPRIVATION OF MR. MILLER'S SUBSTANTIAL RIGHTS.

The State played prison phone calls regarding Mr. Miller's discussions regarding a second murder for which he was a suspect. Although at sidebar, the prosecutor claimed not to know that some of the calls pertained to a second murder, and if Mr. Miller wanted to explain that, he could just take the witness stand and do so.[1] But the prosecutor knew. The prosecutor told the judge that if Mr. Miller testified, they were ready to go with evidence that Mr. Miller was the "prime suspect" in a separate murder case involving a decedent nicknamed "200."[2] Moreover, Mr. Miller's purported motive for killing 200 would be revealed: 200, like the victim in the current case, was a former paramour of Mr. Miller's girlfriend, Krystle Bivings.[3]

On appeal, the State now claims that was an innocent or unknowing mistake, and as such, the prosecutor committed no misconduct at all.[4] That assertion is

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[1] A353.
[2] A640.
[3] *Id.*
[4] Answering Br. at 16.

clearly refuted by the record. As discussed in the Opening Brief, it is clear that the calls refer to two different statements of alibi, most notably that Mr. Miller told the same person – Wheeler – that he was in two different places.[5] More importantly, the prosecutor clearly knew all about the second investigation, as is obvious from his comments to the judge. The record establishes this was not some innocent mistake by the prosecutor; it was a calculated effort to portray Mr. Miller as a liar, and one that the prosecutor continued to leverage all the way through to closing arguments. The pertinence of the Smyrna alibi to the 200 murder was well known to the prosecutor before closing arguments, yet the prosecutor continued to make his three-alibis-Miller-is-lying argument to the jury. That undermines the State's current argument that the mistake was innocent.

Similarly, the prosecutor's argument that Mr. Miller adopted a *third* alibi was not an innocent mistake. What Mr. Miller actually said – that he was "all the way down there *by* f***ing Elkton, Maryland" – is consistent with his statement to others that he was at his home in Frenchtown Woods.[6] Frenchtown Woods is adjacent to the state line and only a few miles from Elkton. But that did not stop the prosecutor from arguing to the jury, "which is it? Is he at Elkton, Smyrna, and at home, or is he in the circle killing Farmer, like Gene and Bocker said he was."[7]

[5] *See*, Opening Br. at 33.
[6] A351.
[7] A809.

As such, the State's argument that "it was reasonable to believe that three different expressions of his whereabouts were three different stories"[8] should be rejected by this Court.

Next, the State argues that Mr. Miller's substantial rights were not affected because "references to the other murder investigation were nondescript and relatively brief in the context of the two-week trial."[9] Moreover, the State now argues that "there was no reasonable likelihood that the Smyrna-alibi evidence affected the judgment of the jury."[10]

It is difficult to see how evidence pertaining to Mr. Miller's status as a suspect in a second murder could be termed as nondescript. The imagination strains to find more prejudicial evidence, especially in that it was admitted without any instruction from the judge. Moreover, it was the State that pressed the issue in its cross-examination of Dashanna Jones. All the defense attorney elicited from her is that Mr. Miller never told her he was in Smyrna when Farmer was murdered.[11] It was the State that elected to cross-examine Jones. The State specifically asked her what Mr. Miller meant when referencing the liquor store in Smyrna, and Jones testified, "um, it was about another guy that was murdered."[12]

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[8] Answering Br. at 21.
[9] *Id.* at 24.
[10] *Id.* at 23.
[11] A685, A688.
[12] A689.

All of this raises the obvious question: if the evidence of the 200 murder and the false claim of three separate alibis is so unimportant, why did the State so assiduously pursue them at trial? It is true that there was other evidence tending to support Mr. Miller's guilt. It is also true that Mr. Miller engaged in activities from prison in hopes of improving his chances at trial. But the evidence of Mr. Miller being a suspect in a separate murder and the State's false claim that Mr. Miller adopted three alibis were not as trivial as the State now argues.

The State points out that the prosecutor's recitation of evidence it would seek to admit should Mr. Miller take the stand is not in itself improper.[13] The State also notes that the proffered evidence presumably would be subject to judicial rulings.[14] But these obvious facts miss the point. The argument is that the State introduced phone calls that improperly led to a false claim of a second alibi, which the State knew pertained to a different investigation. Then when the defense objected, the State argued that Mr. Miller would have to take the stand if he wanted to clear up the error. Finally, the State then argued that if Mr. Miller *did* testify, it would seek to admit evidence of the very subject that Mr. Miller was trying to avoid. In other words. the State warned that if Mr. Miller took the stand to assert that the Smyrna alibi did not pertain to this case, then from the State's perspective

[13] Answering Br. at 29.
[14] Answering Br. at 30.

he would have opened the door for the State to cross-examine him about being the prime suspect in the murder of 200.

Because these issues permeated the entire trial, they clearly jeopardized the fairness and integrity of the trial process within the meaning of *Wainwright*.[15] Finally, the State is correct that *Hunter v. State*,[16] as clarified by *Saavedra v. State*,[17] requires a showing that the misconduct complained of has been noted by this Court over the course of multiple trials. Due to the unique nature of the misconduct here, the *Hunter-Saavedra* standard does not apply. *Wainwright* provides ample grounds for reversal, however.

[15] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[16] 815 A.2d 730, 733 (Del. 2002).
[17] 225 A.3d 364, 382-383 (Del. 2020).

II. THE TRIAL JUDGE ERRED IN ADMITTING TONY PRUITT'S PRIOR STATEMENT TO POLICE ON THE BASIS OF FORFEITURE BY WRONGDOING.

By admitting into evidence Tony Pruitt's prior recorded statement under the forfeiture by wrongdoing exception to the hearsay rule,[18] the trial judge deprived Mr. Miller of his right to confrontation. The ruling was error because there was no evidence that Mr. Miller procured Pruitt's unavailability. Although Mr. Miller certainly tried to influence witnesses and did intimidate at least one – Tony Mude – no evidence existed that Mr. Miller had anything to do with Pruitt's decision not to appear in court. Certainly, there was evidence that *someone* was trying to dissuade Pruitt from appearing. There was just no evidence it was Mr. Miller.

The judge erroneously applied an aggregation technique to this Court's holding that (1) that the defendant engaged or acquiesced in wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability.[19] The judge ruled that evidence of other wrongdoing can "carry over" to the admissibility of a different witness's statement: "the wrongdoing is wrongdoing which would carry over to anybody who has been affected by it or may be affected by it. From that standpoint, unless you have something else, I will allow [Pruitt's statement] to come in."[20]

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[18] D.R.E. 804(b)(6).
[19] *Phillips v. State*, 154 A.3d 1130, 1143 (Del. 2017).
[20] A454.

In its Answering Brief, the State essentially adopts the reasoning of the trial court: that the State was not required to prove Mr. Miller's wrongdoing by direct evidence and that acquiescence is sufficient to establish the exception.[21] The case cited by the State for these legal precepts, *United States v. Stewart*,[22] provides stark contrast from Mr. Miller's case as to what constitutes evidence of wrongdoing. Ample evidence existed in the form of prison calls from Stewart to Dixon, the killer of the witness, as well as other three-way calls arranged by Stewart's girlfriend.[23] Witness testimony established that Stewart had called Dixon to establish that the witness should not testify.[24]

None of those indicia of wrongdoing are extant in Mr. Miller's case. In fact, the prosecutor candidly admitted that in all the calls and affidavits he had reviewed, Mr. Miller did not mention Pruitt at all.[25] As such, the forfeiture by wrongdoing standard was not met; the judge's error deprived Mr. Miller the right of confrontation. The State's cataloguing of Mr. Miller's activities regarding other acts committed by Mr. Miller as to other witnesses[26] are irrelevant to the question of whether Pruitt's statement was admissible.

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[21] Answering Br. at 36-37.
[22] 485 F.3d 666 (2d Cir. 2007).
[23] *Id.* at 671.
[24] *Id.*
[25] A453.
[26] Answering Br. at 37-41.

The State next argues that the error was harmless as there was plenty of other evidence to convict Mr. Miller.[27] That assertion raises the question of why the State at trial tried so hard to admit Pruitt's statement if it was unimportant. It was important. Mr. Miller's alleged statement to Pruitt, "tell your boy Halloween is coming early,"[28] is a dramatic corroboration of identity and premeditation. After all, the killer put on a wolf mask before approaching and shooting the victim. Only now on appeal does the State seek to diminish the importance of the statement. Moreover, since the statement was not subject to cross-examination, it was left unrebutted before the jury.

The only relevant question is whether the erroneous admission of Pruitt's statement denied Mr. Miller of a fair trial. It did. There is no way to confidently conclude that Pruitt's statement did not resonate with the jury. Pruitt's statement could have easily been the one evidentiary item that permitted a jury finding of proof beyond a reasonable doubt. As such, the admission of Pruitt's statement and deprivation of Mr. Miller's right to confrontation justifies reversal by this Court.

[27] Answering Br. at 41-43.
[28] A451.

CONCLUSION

For the foregoing reasons, as well as those stated in the Opening Brief, Appellant Kevin Miller respectfully requests that this Court reverse the judgment of the Superior Court.

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